

10-0447-cr

United States v. Desnoyers

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: January 13, 2011 Decided: March 14, 2011)

Docket No. 10-0447-cr

UNITED STATES OF AMERICA,

Appellant,

-v.-

MARK DESNOYERS,

Defendant-Appellee.

Before:

JACOBS, *Chief Judge*, WESLEY, and CHIN, *Circuit Judges*.

A jury convicted Defendant-Appellee Mark Desnoyers on multiple counts, including one count of conspiracy to violate the Clean Air Act and to commit mail fraud in violation of 18 U.S.C. § 371. After trial, the United States District Court for the Northern District of New York (Hurd, J.) entered a judgment of acquittal on the conspiracy count citing both factual and legal insufficiency as grounds for its decision. The Government appeals the acquittal ruling. We vacate the judgment of acquittal on the conspiracy count, and remand the case to the district court with instructions to reinstate the jury verdict, enter a judgment of conviction on the conspiracy count, and resentence Desnoyers accordingly.

1 JUDGMENT VACATED IN PART AND REMANDED.
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17

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19 *Defendant-Appellee*.
20
21

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23 WESLEY, *Circuit Judge*:

24 The United States appeals from a June 19, 2009 order of
25 the United States District Court for the Northern District
26 of New York (Hurd, J.) entering a post-verdict judgment of
27 acquittal in favor of Defendant-Appellee Mark Desnoyers on
28 one count of conspiracy to violate the Clean Air Act (the
29 "CAA") and to commit mail fraud in violation of 18 U.S.C. §
30 371. The district court held that Desnoyers's conspiracy
31 conviction must be set aside because the conspiracy count
32 suffered from both factual and legal defects. We disagree.
33 We therefore VACATE the judgment of acquittal and REMAND the

1 case to the district court with instructions to reinstate
2 the jury verdict, enter a judgment of conviction on the
3 conspiracy count, and resentence Desnoyers.

4 **BACKGROUND**

5 Desnoyers was licensed in New York to conduct air
6 monitoring at asbestos abatement projects and to document
7 the results of asbestos removal work. Based on evidence
8 that Desnoyers conducted his work fraudulently and sometimes
9 not at all, the Government charged Desnoyers with (1)
10 conspiring to violate the CAA and to commit mail fraud in
11 violation of 18 U.S.C. § 371; (2) violating the CAA in
12 violation of 42 U.S.C. § 7413(c)(1); (3) mail fraud in
13 violation of 18 U.S.C. § 1341; and (4) three counts of
14 making false statements in violation of 18 U.S.C. § 1001.
15 The jury convicted Desnoyers on all counts except one count
16 of making false statements.

17 After trial, Desnoyers filed a motion pursuant to
18 Federal Rules of Criminal Procedure 29(c) and 33 challenging
19 his conspiracy conviction.¹ Desnoyers conceded below that

¹ Desnoyers challenged all counts of conviction below. On June 19, 2009, the district court denied Desnoyers's motion to set aside his convictions on the substantive CAA and mail fraud counts and on the false statements counts. Neither party challenges that ruling on appeal.

1 the Government introduced sufficient evidence at trial to
2 support the mail fraud object of the conspiracy. Desnoyers
3 argued that his conspiracy conviction is nevertheless
4 defective because the CAA object rendered the conspiracy
5 count both factually and legally defective. The district
6 court agreed that the conspiracy count was factually and
7 legally defective and on June 19, 2009, entered a judgment
8 of acquittal on the conspiracy count.²

9 The Government appeals the district court's entry of a
10 judgment of acquittal on the conspiracy count; the other
11 counts are not at issue on appeal. Accordingly, we need
12 only examine in depth the evidence relevant to the
13 conspiracy count. We pay particular attention to the CAA
14 object of the conspiracy because Desnoyers concedes that the
15 mail fraud object did not suffer from any defects.³

16 The Indictment charged Desnoyers and others with
17 conspiring to violate the CAA and the mail fraud statute
18 based on Desnoyers and his co-conspirators's asbestos

² The Government moved for reconsideration of the acquittal. On September 14, 2009, the district court denied the Government's request to reinstate the conviction.

³ Desnoyers thus concedes that he could not have challenged his conviction if the conspiracy count had alleged only a mail fraud object.

1 abatement work in eight buildings. The Government conceded
2 after trial, however, that seven of these buildings were not
3 subject to the CAA asbestos removal regulations. The CAA
4 asbestos removal regulations cover only residences with more
5 than four units and commercial buildings; additionally,
6 buildings must contain "friable" asbestos and at least 260
7 linear feet of asbestos on pipes or 160 square feet of
8 asbestos on other facility components in order to be subject
9 to the regulations. See 40 C.F.R. §§ 61.141 (defining
10 friable asbestos as "any material containing more than 1
11 percent asbestos . . . that, when dry, can be crumbled,
12 pulverized, or reduced to powder by hand pressure"),
13 61.145(a)(1)(i-ii), (4)(i-ii). When the CAA asbestos
14 regulations apply, specific work practices must be followed
15 during asbestos removal. See 40 C.F.R. § 61.145. Failure
16 to observe these practices when a building is not subject to
17 the CAA asbestos regulations does not violate the CAA.

18 The parties dispute whether one building at issue in
19 the conspiracy count – known as 69 Clinton Street – is
20 subject to the CAA asbestos regulations. Evidence at trial
21 showed that 69 Clinton Street was a commercial property
22 containing friable asbestos. No witness testified directly,

1 however, about the exact asbestos measurements at 69 Clinton
2 Street; indeed, these measurements were not taken by an EPA
3 monitor because the pipes had been removed before he visited
4 the site. The Government's evidence on asbestos quantity
5 came from the testimony of multiple witnesses that the 69
6 Clinton Street project was either "a large" or not "a
7 small." These same witnesses all testified that in the New
8 York asbestos industry, a large project is understood to be
9 a project with sufficient asbestos to fall under the CAA's
10 requirements, whereas a small project is not.⁴ Several
11 witnesses explicitly explained that "a large" is understood
12 as a project containing at least 260 linear feet of asbestos
13 on pipes or 160 square feet of asbestos on other facility
14 components – that is, a project with sufficient asbestos to
15 qualify under the quantity requirement of the CAA asbestos
16 regulations.

17 The district court concluded that the Government failed
18 to show that 69 Clinton Street was subject to the CAA's
19 asbestos regulations because no witness testified directly

⁴ The "large" and "small" designations arise because New York Code 56 regulates asbestos removal differently based on the size of a building. A "large" building under New York's legal framework is one meeting the size requirements set forth in the CAA regulations. Code 56 still covers "small" projects, but sets forth less restrictive removal requirements.

1 about the quantity of asbestos at 69 Clinton Street. The
2 district court reasoned that the testimony at trial was
3 insufficient to show that 69 Clinton Street contained at
4 least 260 linear feet of asbestos on pipes or 160 square
5 feet of asbestos because "the witnesses' opinions as to what
6 constitutes a 'large' project could obviously still fall
7 short of the rule's footage requirements."

8 Based on the foregoing, the district court concluded
9 that the jury's verdict on the conspiracy count could not
10 stand because the CAA object suffered from a factual defect.
11 Although a factual defect in one object of a multi-object
12 conspiracy does not ordinarily require a court to overturn a
13 guilty verdict, *United States v. Garcia*, 992 F.2d 409, 416
14 (2d Cir. 1993), the district court entered a judgment of
15 acquittal on the conspiracy count. In so holding, the
16 district court found that the ordinary rule for multi-object
17 conspiracies did not apply because "an overwhelming amount
18 of evidence relevant only to the unproved part of the
19 conspiracy may have prejudiced the jury." See *United States*
20 *v. Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975).

21 The district court found in the alternative that a
22 judgment of acquittal was required because the CAA object of

1 the conspiracy suffered from a legal defect. The district
2 court reasoned:

3 Here, the Clean Air Act objective
4 within Count One suffered from a
5 substantial legal defect because of the
6 inapplicability of the Act's regulatory
7 standards. Even if the evidence, viewed
8 in the light most favorable to the
9 Government, was sufficient to show that
10 the Clean Air Act applied to the 69
11 Clinton Street project, it remains
12 undisputed that it was legally impossible
13 for defendant to conspire to violate the
14 Clean Air Act with respect to the
15 remaining seven projects identified in
16 Count One. . . . [T]here were seven
17 instances in which the jury had to
18 consider a legally impossible theory of
19 guilt. Defendant's conviction under Count
20 One may very well have been based upon
21 any one of these seven legally impossible
22 theories. Accordingly, the weight of the
23 evidence admitted at trial is irrelevant,
24 and defendant's conviction cannot stand.

25
26 The court thereafter entered judgments of guilt on the
27 remaining counts and sentenced Desnoyers based on these
28 counts.⁵

29 The Government filed this timely appeal challenging the
30 district court's entry of a judgment of acquittal as to the

⁵ Notably, the court did not consider any of the eight projects at issue in the conspiracy count when assessing losses at sentencing. Additionally, likely as a result of its decision to enter a judgment of acquittal on the conspiracy count, the court did not impose an enhancement pursuant to U.S.S.G. § 2B1.1(b)(2) for an offense involving ten or more victims.

1 conspiracy count.

2 DISCUSSION

3 A. Standard of Review

4 We review a judgment of acquittal notwithstanding a
5 guilty verdict *de novo* and apply “the same standard of
6 constitutional sufficiency as the district court.” *United*
7 *States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010). A
8 defendant challenging the sufficiency of the evidence “bears
9 a heavy burden,” *United States v. Aguilar*, 585 F.3d 652, 656
10 (2d Cir. 2009), because a reviewing court must sustain the
11 jury’s guilty verdict if, “viewing the evidence in the light
12 most favorable to the prosecution, any rational trier of
13 fact could have found the essential elements of the crime
14 beyond a reasonable doubt,” *Jackson v. Virginia*, 443 U.S.
15 307, 319 (1979) (emphasis in original).

16 B. The Conspiracy Conviction Suffered Neither a Factual 17 Nor a Legal Defect

18
19 Claims of factual and legal defects both challenge the
20 sufficiency of the Government’s case, but they do so in
21 distinct ways. A factual challenge tests the sufficiency of
22 the evidence and requires a court to examine whether a

1 reasonable jury could find each element of a crime proven
2 beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. A
3 legal challenge, by contrast, questions whether a conviction
4 rests on "a mistake about the law, as opposed to a mistake
5 concerning the weight or the factual import of the
6 evidence." *Griffin v. United States*, 502 U.S. 46, 59
7 (1991). A mistake about the law occurs when a defendant is
8 charged with conduct that is not legally actionable – when,
9 for instance, the charged conduct "is protected by the
10 Constitution, is time barred, or fails to come within the
11 statutory definition of the crime." *Id.*; see also *Garcia*,
12 992 F.2d at 415-16.

13 The difference between factual and legal challenges is
14 significant because "when disjunctive theories are submitted
15 to the jury and the jury renders a general verdict of
16 guilty, appeals based on evidentiary deficiencies must be
17 treated differently than those based on legal deficiencies."
18 *Garcia*, 992 F.2d at 416. "If the challenge is evidentiary,
19 as long as there was sufficient evidence to support one of
20 the theories presented, then the verdict should be affirmed.
21 However, if the challenge is legal and any of the theories

1 was legally insufficient, then the verdict must be
2 reversed." *Id.* This distinct treatment is appropriate
3 because:

4 Jurors are not generally equipped to
5 determine whether a particular theory of
6 conviction submitted to them is contrary
7 to law When, therefore, jurors
8 have been left the option of relying upon
9 a legally inadequate theory, there is no
10 reason to think that their own
11 intelligence and expertise will save them
12 from that error. Quite the opposite is
13 true, however, when they have been left
14 the option of relying upon a factually
15 inadequate theory, since jurors *are* well
16 equipped to analyze the evidence.

17
18 *Griffin*, 502 U.S. at 59.

19 Here, Desnoyers asserts that his conspiracy conviction
20 was both factually and legally defective. He contends that
21 the Government did not – and could not – prove that 69
22 Clinton Street was subject to the CAA asbestos regulations.
23 His first challenge, examining what the Government actually
24 proved, is factual. Desnoyers contends that his second
25 challenge, questioning what the Government could prove, is
26 legal. Notably, Desnoyers does not challenge the CAA object
27 of the conspiracy count in any other respect. He raises no
28 objections regarding the mail fraud object of the conspiracy

1 count.

2 1. *Factual Sufficiency*

3 Desnoyers's factual challenge fails because he disputes
4 just one object of the multi-object conspiracy charged.

5 *Garcia*, 992 F.2d at 416.⁶ Desnoyers's concession that the
6 Government proved the mail fraud object of the conspiracy
7 fatally undermines his factual challenge. *Id.* The Supreme
8 Court has made clear that there is "no exception" to the
9 rule that "[w]hen a jury returns a guilty verdict on an
10 indictment charging several acts in the conjunctive . . .
11 the verdict stands if the evidence is sufficient with
12 respect to any one of the acts charged.'" *Griffin*, 502 U.S.
13 at 56-57 (quoting *Turner v. United States*, 396 U.S. 398, 420
14 (1970)).

15 Our Court has previously announced a "caveat" to the
16 general rule that "[w]here a conspiracy has multiple
17 objectives, a conviction will be upheld so long as evidence

⁶ We will assume that the evidence with regard to 69 Clinton Street was insufficient. That assumption is debatable given that the government is entitled to every favorable inference from the evidence it presented at trial, but for our purposes we need not decide that issue in light of the conceded sufficiency of the evidence with regard to the mail fraud object of the conspiracy count.

1 is sufficient to show that an appellant agreed to accomplish
2 at least one of the criminal objectives." *Papadakis*, 510
3 F.2d at 297. In *Papadakis*, we held that this caveat applies
4 when "an overwhelming amount of evidence relevant only to
5 the unproved part of the conspiracy may have prejudiced the
6 jury." *Id.* The Government urges us to hold that *Griffin*
7 implicitly overruled the *Papadakis* caveat. See *Griffin*, 502
8 U.S. at 57.

9 We need not determine the continuing validity of the
10 *Papadakis* caveat, however, because the caveat does not apply
11 in any event to this case. Even assuming *arguendo* that the
12 Government failed to prove the CAA object, an overwhelming
13 amount of the evidence at trial was not relevant solely to
14 the CAA object. Instead, the trial evidence related to
15 Desnoyers and his co-conspirators' abatement work and false
16 representations to clients was relevant to both the CAA
17 object and the mail fraud object. This evidence supported
18 the government's mail fraud allegation by showing that
19 Desnoyers and his co-conspirators participated in a scheme
20 to use the mail to falsely represent to clients that their
21 abatement and monitoring work complied with state law.

1 Accordingly, even if valid, the *Papadakis* caveat does not
2 support a judgment of acquittal notwithstanding the verdict
3 here.

4 2. *Legal Sufficiency*

5 Although Desnoyers labels his second argument a legal
6 challenge, he fails to actually set forth a cognizable legal
7 challenge. Desnoyers contends that the CAA object of the
8 conspiracy was legally defective because, according to
9 Desnoyers, the Government could not prove that any of the
10 eight projects charged in the conspiracy count, including 69
11 Clinton Street, were subject to the CAA asbestos
12 regulations. Desnoyers's purported legal challenge is
13 simply a restatement of his factual challenge – he contends
14 that the Government failed to prove an element of the
15 offense.

16 The Supreme Court has suggested that a legal defect
17 arises when a court instructs jurors using an incorrect
18 explanation of the law. *Griffin*, 502 U.S. at 59. Unlike
19 jurors presented with a factually deficient theory, jurors
20 presented with a mistaken view of the law cannot be presumed
21 to have discovered the legal mistake. Jurors are fact

1 finders, not lawyers or judges, and thus "are not generally
2 equipped to determine whether a particular theory of
3 conviction submitted to them . . . fails to come within the
4 statutory definition of the crime." *Id.*

5 Our Court applied this principle in *Garcia* when a
6 defendant challenged his conviction for extortion in
7 violation of the Hobbs Act on the grounds that two of the
8 three definitions of extortion provided to the jury did not
9 satisfy the Supreme Court's definition of Hobbs Act
10 extortion. *Garcia*, 992 F.2d at 415. In the intervening
11 time between the trial in *Garcia* and Garcia's challenge on
12 appeal, the Supreme Court held in *Evans v. United States*,
13 504 U.S. 255, 268 (1992), that the relevant extortion
14 statute required the Government to prove a quid pro quo:
15 "'that a public official has obtained a payment to which he
16 was not entitled, knowing that the payment was made in
17 return for official acts.'" *Garcia*, 992 F.2d at 414
18 (quoting *Evans*, 504 U.S. at 268). Because two of the
19 district court's instructions in *Garcia* did not require the
20 jury to find a quid pro quo, the jury could have convicted
21 Garcia after finding that he committed conduct described in

1 the errant instructions that was not, in fact, prohibited by
2 the Hobbs Act. *Id.* Given this possibility, our Court
3 overturned Garcia's extortion conviction on the ground of
4 legal defect.

5 Here, Desnoyers contends that his conspiracy conviction
6 suffered from a similar legal defect because the jury needed
7 to determine whether Desnoyers's conduct fell within the
8 proscriptions of the CAA. Desnoyers's view, if we accepted
9 it, would stretch *Griffin's* definition of a legal error
10 beyond recognition.⁷ Juries are always asked to determine

⁷ *Griffin* recognized that "legal error" is sometimes used in the sense Desnoyers advocates. *Griffin* explained:

In one sense "legal error" includes inadequacy of evidence – namely, when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and of appellate courts to identify and correct. In this sense "legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense – a more natural and less artful sense – the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence.

Griffin, 502 U.S. at 59. *Griffin* expressly clarified that the Court was "using 'legal error' in the latter sense" when describing the type of error that renders a multi-count

1 whether a defendant's conduct falls within the definition of
2 a crime in the sense that juries must always determine
3 whether a defendant committed every essential element of a
4 crime. See *Jackson*, 443 U.S. at 319. *Griffin's* use of
5 "fail[ed] to come within the statutory definition" of a
6 crime concerns cases where the statutory definition itself
7 is contested or unclear. *Garcia* was such a case because the
8 jury was presented with alternative definitions of
9 extortion, only one of which actually described conduct
10 within the statutory definition of extortion. See *Garcia*,
11 992 F.2d at 415.

12 Unlike *Garcia*, the present case did not involve a
13 mistake *about* the law. The jury was not instructed to apply
14 incorrect legal principles or definitions. Instead, the
15 jury was correctly instructed on the conditions under which
16 the CAA asbestos regulations apply. The jury was then
17 tasked with fact finding: in order to determine whether
18 Desnoyers conspired to violate the CAA, the jury was asked
19 to determine, among other things, whether each property in
20 the conspiracy count was (1) a commercial property or a

conviction invalid. *Id.* Desnoyers, meanwhile, is not.

1 residential property with more than four units containing
2 (2) a sufficient quantity of (3) friable asbestos. The
3 Government could prove that one of those properties, 69
4 Clinton Street, was subject to the CAA asbestos regulations
5 by introducing evidence of these three factors.

6 The fact that the Government may not have established
7 that the properties at issue in the conspiracy count were
8 subject to the CAA asbestos regulations was a factual
9 deficiency in the Government's case, not a legal one. As a
10 result, the district court erred when it characterized the
11 Government's CAA theory as "legally impossible."

12 In sum, the conspiracy count suffered neither a factual
13 nor a legal defect.

14 **CONCLUSION**

15 Based on the foregoing, the district court's decision
16 to set aside the jury verdict was in error. We therefore
17 VACATE the judgment granting the Rule 29 motion and REMAND.
18 The district court is instructed to reinstate the jury
19 verdict, enter a judgment of conviction on the conspiracy
20 count, and resentence Desnoyers accordingly.