UNITED STATES v. ESPINOZA, 406 F.2d 733 (2nd Cir. 1969)

UNITED STATES of America, Appellee, v. Pedro ESPINOZA, Defendant-Appellant.

No. 240, Docket 30742.United States Court of Appeals, Second Circuit.Argued December 16, 1968.
Decided January 9, 1969.

Thomas D. Edwards, New York City, for appellant.

Leonard M. Marks, Asst. U.S. Atty., Southern District of New York (Robert M. Morgenthau, U.S. Atty., and Stephen F. Williams, Asst. U.S. Atty., Southern District of New York, on the brief), for appellee.

Before KAUFMAN, ANDERSON and FEINBERG, Circuit Judges.

ANDERSON, Circuit Judge:

Pedro Espinoza appeals from judgments of conviction on both counts of an indictment, entered on jury verdicts of guilty, on July 18, 1966. The first count of the indictment charged that on March 1, 1966 appellant Espinoza and co-defendants Jose Gonzalez-Perez, Francisco Rivas and Helio Hernandez illegally imported, received, concealed and facilitated the transportation and concealment of approximately 50 pounds of marihuana, in violation of 21 U.S.C. § 176a[1] ; and the second count charged that the appellant and the same co-defendants conspired between January 1, and March 18, 1966 to commit the foregoing substantive offense. The case against the co-defendant Hernandez was severed and he testified as a Government witness. On July 18, 1966 Espinoza was sentenced to a term of five years on each count, the sentences to run concurrently. He is presently on parole after serving approximately one and one-half years in prison.

Appellant's central argument is that the court below committed error in denying him the opportunity to prove that the marihuana was not illegally imported. The Government does not contest the relevancy of an inquiry into the origin of the marihuana; rather, it insists that Espinoza never sought, and therefore was not denied, an opportunity to prove that the marihuana was not illegally imported. The record, however, discloses that defense counsel was prevented from pursuing that issue and we reverse and remand.

There was evidence from which the jury could have found that undercover agent Scott of the Federal Narcotics Bureau made an arrangement with Gonzalez-Perez and Rivas to purchase 50 pounds of marihuana on March 1, 1966; that at an appointed time and place Hernandez and Espinoza drove up in a car which was parked directly behind one in which Scott, Gonzalez-Perez and Rivas were waiting; that, after Hernandez got out and spoke to Gonzalez-Perez, Espinoza also got out of the car and he and Hernandez walked away; that Gonzalez-Perez told Scott that the marihuana was there, and they then took it from the back seat of the car in which Hernandez and Espinoza had arrived. There was also evidence to prove that Espinoza was the connection between Gonzalez-Perez and Hernandez, who had the "pot," and that Hernandez had received it from someone who had bought it from Hernandez' nephew in California; that on the evening of March 1, 1966 Espinoza had told Hernandez that someone wanted to buy the marihuana on particular terms and that they then got it from the basement of the building in which Hernandez lived and drove with it to the place where Agent Scott and Gonzalez-Perez took it from the car.

Counsel for co-defendant Gonzalez-Perez was permitted on cross-examination of Hernandez to ask the nephew's name, but the trial court sustained a Government objection to a question seeking to establish the nephew's address. At that time counsel for appellant said, "Maybe we would want to call him

as a witness." The Government argues that this remark "fails to make clear that this suggestion was based on a claim that the nephew's testimony would be relevant on the issue of Hernandez' credibility, not on the question of the possible domestic origin of the marijuana." This might have been so if the relevancy of the possibility of domestic origin had not later been twice brought to the court's attention. Thus, at the close of the Government's case, appellant's attorney specifically objected to the admission in evidence of the marihuana on the ground that the evidence showed that the source was in California.[2]

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There was sufficient to apprise the court of the question raised and of the relevancy of the inquiry into the origin of the marihuana, and its refusal to permit defense counsel to pursue the line of cross-examination designed to rebut the presumption of illegal importation and to explain possession was error.[3]

The judgment of the district court is reversed and the case is remanded for a new trial.

[1] 21 U.S.C. § 176a provides, in pertinent part:

> *"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 * * *.*

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[2] The following colloquy, which occurred on the day after the court's denial of the request for the address of Hernandez' nephew, indicates that the Assistant United States Attorney, Mr. Hawke, understood clearly the thrust of the domestic origin argument:

Mr. van Leer (attorney for co-defendant Gonzalez-Perez):
The U.S. Attorney is going to ask you to charge the jury on certain aspects of the origin of this box, and you have prevented me from examining and you have prevented the cross-examiner now [attorney for co-defendant Rivas] from going into the origin of the box.
The District Attorney [sic] in his proposed requests to charge is going to go into that or ask you to go into that, where the origin is of this box.
The Court: You've got the origin of the box?
Mr. van Leer: No, we haven't.
The Court: Yes, you have. He told you he got it from his nephew.
Mr. van Leer: You limited us as to name only, not as to place.
The Court: I don't recall that.
Mr. van Leer: You limited the place. There was a big discussion on this yesterday.
Mr. Hawke: The government's proof of the illegal importation and knowledge by the defendants of the illegal importation is based upon the inference in Section 176a. The inference derives from the fact that the box was in the possession of the defendants.
We are not attempting to prove beyond that by actual proof that this box came in from Mexico or any other place.

[3] The Government relies strongly on the fact that, as it stated in its brief:

> *"Espinoza's own counsel in his extensive cross-examination of Hernandez, which was limited to an attack on Hernandez' credibility, did not ask a single question concerning Hernandez' nephew, his location, the origin of the marijuana, or any subject that bore even remotely on the issue of illegal importation."*

But under the circumstances, this fact is not determinative because the court below had firmly rejected the earlier attempts by counsel for the co-defendants to pursue this line of questioning. The issue was clearly in the hands of the court, all three defendants would have benefited equally from a successful pursuit of the origin question and all three had a right to have it explored.