



United States Court of Appeals, Second Circuit.

UNITED STATES v. LaSPINA

UNITED STATES of America, Appellee, v. Lawrence LaSPINA, Defendant, Robert St. Germain, Defendant-Appellant.

Docket No. 01-1219.

Argued: March 25, 2002. -- July 30, 2002

Before OAKES and SACK, Circuit Judges, and BRIGHT, Circuit Judge.*

John M. Thompson, Springfield, MA (Peter L. Maroulis, Poughkeepsie, NY, of counsel), for Defendant-Appellant. Diane Gujarati, Assistant United States Attorney for the Southern District of New York, New York, N.Y. (Mary Jo White, United States Attorney, Barbara Guss and Celeste L. Koeleveld, Assistant United States Attorneys, of counsel), for Appellee.

On December 13, 2000, after a two-week bench trial, Robert St. Germain was convicted in the United States District Court for the Southern District of New York, Colleen McMahon, Judge, of conspiring to engage in monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957(a) and filing false federal income tax returns for the calendar years 1992 and 1993 in violation of 26 U.S.C. § 7206(1). St. Germain now appeals on several grounds: (1) that the conspiracy count was insufficient to give the district court subject matter jurisdiction; (2) that the conspiracy count was time-barred; (3) that the tax counts are time-barred; (4) that the evidence against him was constitutionally insufficient to support the conspiracy conviction; (5) that the evidence at trial constructively amended the conspiracy count and created prejudicial variances between the facts alleged and those proved; and (6) that the government presented false and misleading evidence and arguments in violation of his right to due process.

We affirm the judgment of conviction. We write primarily to address St. Germain's second argument: that the conspiracy charge was barred by the statute of limitations.

BACKGROUND

The conspiracy charge in this case arose from a scheme to launder money made in kickbacks from business that St. Germain steered to Cerplex, Inc. (“Cerplex”).¹ From mid-1990 until July 1993, St. Germain managed the Reutilization Department for International Business Machines Corporation (“IBM”) in Poughkeepsie, New York. The Reutilization Department was responsible for the sale, recycling, dismantling, and repair of surplus computers and computer parts. During the time St. Germain managed the Reutilization Department, IBM relied on external plants of manufacture (“EPOM”) to store, repair, and refurbish old surplus products economically. As manager of the Reutilization Department, St. Germain influenced the award of EPOM contracts.

In September 1990, IBM entered into an EPOM contract with the Jennifer-Ashley Company, Inc. (“JACO”), a company formed in the summer of 1990. The founder of JACO, Linda Schultz, was a former IBM employee whom St. Germain first met in 1985 when Schultz was working as a secretary for IBM in Tucson, Arizona. Schultz testified that, although she was married, their relationship became intimate in early 1991.

JACO secured a permanent EPOM contract with the IBM Reutilization Department to sell surplus computer equipment. The contract provided that proceeds of the sales would be split between JACO and IBM. JACO did not have to submit a competitive bid for the contract, and IBM was JACO's only supplier.

In early 1991, St. Germain asked Schultz to introduce him to her brother, Darrell Elkins, an attorney in Arizona. A few months later, St. Germain, Schultz, and Elkins met in Tucson, Arizona. During the meeting, St. Germain proposed the Cerplex kickback scheme. He suggested that Schultz secure a position as a sales representative at Cerplex, a company that IBM had previously contracted with for the repair of an eight-inch disk drive product. As a Cerplex sales representative, Schultz would collect commissions that resulted from her sales of Cerplex proposals to IBM. St. Germain would sign the future Cerplex contracts at IBM, ensuring that Schultz's proposals would result in contracts and thus in commissions. Elkins would provide legal services to Cerplex on the IBM contracts. Any commissions that Schultz collected from the Cerplex contracts with IBM would then be split between Schultz, Elkins, and St. Germain. Any money that Elkins received from Cerplex for his legal work would be split between Elkins and St. Germain.

In late 1991, St. Germain instructed Schultz to contact Richard Davis, the chief executive officer at Cerplex, and William Klein, an investor in Cerplex who had previously worked for IBM. Schultz met with Davis and, with no resumé or sales pitch, was offered a position as a Cerplex sales representative. Schultz testified that she had the impression the job was handed to her.

Once Schultz was working at Cerplex, the amount of IBM business awarded to Cerplex from the Reutilization Department increased significantly and included risky and costly arrangements for IBM. David Akers, a contract administrator in the Reutilization Department at the time, testified that St. Germain had a significant amount of control over the Cerplex contracts, and that the contracts were awarded even when Akers and the IBM legal department objected to them.

Evidence at trial indicated that, in addition to steering IBM business to Cerplex, St. Germain helped ensure that Cerplex paid the kickbacks in the form of commissions to Schultz and Elkins on time. In late February 1992, St. Germain sent an electronic message to Davis at Cerplex asking, "Rick, where's the bacon?" On March 3, 1992, Davis responded in an electronic message saying, "The bacon's at the store but the money is in your bank account [.] Have a good day[.]" On the date Davis sent his response, the money was in Elkins's bank account.

Schultz testified that, despite her title of sales representative, she did very little work for Cerplex. Still, between 1992 and 1993, Schultz received over \$650,000 in commissions from Cerplex. She transferred a substantial portion of this money to Elkins and deposited some of it into a bank account in the name of Ajack Enterprises, an acronym derived from the first letters of her children's names and the names of St. Germain's children.

During the same time period, Elkins received approximately \$1 million from Cerplex. The money was deposited directly into a bank account in the name of Elkins Enterprises, Inc. Half of this amount went to St. Germain, some in cash and some, in order to be inconspicuous, through a real estate investment in Papago Place, a commercial property in Phoenix, Arizona.

Elkins arranged for the \$1.1 million purchase of Papago Place in May 1992, with a \$450,000 down payment and a \$650,000 mortgage from Citibank. Elkins used part of his share and part of St. Germain's share of the Cerplex kickbacks to make the purchase and converted future Cerplex payments into mortgage payments. Although St. Germain's money was used to purchase Papago Place, he was not identified as an owner of the property at the time of purchase.

In July 1992, Schultz began sending Elkins money to purchase an interest in Papago Place. In December 1992, Schultz advised her accountant that the division in ownership of the property would be 45% for Schultz and her husband, 10% for Elkins, and 45% for a "partner of her brother." After St. Germain left IBM in July 1993, Schultz identified St. Germain as her brother's "partner."

On July 6, 1994, Elkins sold his share of Papago Place to St. Germain. St. Germain took legal title to half of Papago Place and Schultz and her husband took legal title to the other half through a limited liability company known as Papago Place L.L.C. The money St. Germain paid for his share of the property was significantly less than its value, indicating that Elkins had previously used part of St. Germain's portion of the Cerplex money to purchase the property and make mortgage payments, and that Elkins's "share" of the property was in name only.

In the fall of 1998, St. Germain, Schultz, and Schultz's husband sold Papago Place. At the time of the sale, St. Germain and Schultz and her husband held the same interests in the property through Papago Place L.L.C. Approximately \$1.7 million in proceeds from the 1998 sale was wired to a Papago Place L.L.C. operating account in New York.

In addition to the Papago Place purchase, St. Germain arranged to receive part of his share of the kickback scheme by purporting to be Schultz's "agent" for the purpose of collecting commissions due to her from Cerplex. Using several shell companies and a sham collection agreement between himself and Schultz, St. Germain collected approximately \$2.8 million in commissions due to Schultz and kept approximately \$1.6 million of that for himself.

Schultz testified that St. Germain instructed her to lie if she was asked about how St. Germain became a partner in Papago Place. In addition, St. Germain asked Schultz to help him manufacture evidence to support his supposed purchase of Papago Place and to distance himself from record ownership of the property. Finally, St. Germain directed Schultz to create back-dated documents that would make the collection agreement seem legitimate.

During the course of the Cerplex scheme, large amounts of money were deposited into St. Germain's bank accounts that he did not report on his income tax returns. St. Germain did not report as income his share of the Cerplex kickbacks that Elkins paid him as cash or that was invested in Papago Place on St. Germain's behalf. In addition, St. Germain failed to report his share of the down payment and mortgage payments on Papago Place paid with his share of the Cerplex proceeds in 1992 and 1993.

On April 7, 1999, St. Germain was indicted for his involvement in a bribery scheme unrelated to the Cerplex scheme. On July 26, 2000, the government filed a superseding indictment charging St. Germain in four counts. Count One was dismissed on the government's request. Count Two charged St. Germain with conspiracy under 18 U.S.C. § 1956(h) to engage in monetary transactions with criminally derived property in violation of 18 U.S.C. § 1957(a). Specifically, Count Two charged St. Germain with conspiring to launder the proceeds of the bribery scheme described in the initial indictment as well as the proceeds of the Cerplex scheme. Counts Three and Four charged St. Germain with filing false federal income tax returns for the calendar years 1992 and 1993, in violation of 26 U.S.C. § 7206(1). Finally, pursuant to 18 U.S.C. § 982, the superseding indictment contained a money laundering forfeiture allegation, which pertained to the charges in Count Two.

St. Germain made a motion to dismiss Count Two as time-barred. The district court denied the motion before trial and when it was renewed at the close of the government's evidence.

St. Germain requested, and the government consented to, a bench trial on the superseding indictment. The trial court convicted St. Germain on all counts as they related to the Cerplex scheme. He was sentenced to concurrent terms of imprisonment of 63 months on the conspiracy count, 36 months on the 1992 tax count, and 36 months on the 1993 tax count, to be followed by a term of two years' supervised release. In addition, St. Germain was ordered to pay a \$15,000 fine and a \$300 special assessment and, based on a forfeiture allegation pertaining to the conspiracy charge, to forfeit \$1,227,000.

Following his conviction, St. Germain moved to set aside the verdict pursuant to Fed.R.Crim.P. 29 or for an arrest of judgment pursuant to Fed.R.Crim.P. 34. St. Germain argued: 1) the district court lacked jurisdiction over Count Two because the Grand Jury was not presented with evidence that St. Germain steered business to Cerplex in exchange for payment; 2) Count Two was insufficient because it failed to set forth the specified unlawful activity that gave rise to the money laundering transactions; 3) the government impermissibly shifted the burden of proof; 4) Counts Three and Four varied impermissibly from the original indictment and were thus time-barred; and 5) the evidence as to all counts was insufficient to support a conviction. The district court denied the motion on all grounds. This appeal followed.

DISCUSSION

We discuss separately each of St. Germain's claims of error, turning first to the claim that the conspiracy charge was barred by the statute of limitations.

I. Statute of Limitations Over Conspiracy Count

Count Two charged St. Germain with conspiring to engage in monetary transactions of criminally derived property in violation of 18 U.S.C. § 1956(h)(2001). The statute of limitations for actions brought under § 1956(h) is five years. 18 U.S.C. § 3282 (2000).

In order for the conspiracy charge alleged in Count Two to fall within the statute of limitations, (1) the “conspiracy must still have been ongoing within the five year period preceding the indictment, and (2) ‘at least one overt act in furtherance of the conspiratorial agreement [must have been] performed within that period.’” *United States v. Ben Zvi*, 242 F.3d 89, 97 (2d Cir.2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 396-97, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957)) (alteration in original).² In this case, the superseding indictment was returned on July 26, 2000. Therefore, for the conspiracy charge in Count Two to have fallen within the statute of limitations, the conspiracy must have continued until at least July 26, 1995.

“[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.” *Grunewald*, 353 U.S. at 397, 77 S.Ct. 963. St. Germain argues that the scope of the conspiracy was limited to putting St. Germain's share of the Cerplex proceeds into his control. Therefore, according to St. Germain, the conspiracy was complete and the last possible overt act committed on July 6, 1994, when Elkins sold his last share of Papago Place to Papago Place L.L.C., a company controlled by St. Germain.

The government argues that the conspiracy continued into 1998 when St. Germain sold Papago Place. According to the government, the scope of the conspiracy included any monetary transactions made by the conspirators with the Cerplex money. Thus, the government argues that two acts alleged in the indictment—St. Germain's withdrawal of