017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 2:02-CR-21-03
	:	
DONALD CONN,	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

This case is a criminal prosecution brought by the United States against the defendant, Donald Conn. The grand jury Indictment charges the defendant in one count. You will receive a copy of the Indictment to take with you into the jury room.

The Indictment alleges that:

> On or about February 21, 2002, in the District of Vermont, MARCELL SMITH, ERIC RYLES, and DONALD CONN, the defendants, did knowingly and intentionally possess with the intent to distribute heroin, a Schedule I controlled substance.

There is also a section in the Indictment involving aiding and abetting. The government alleges that the defendant aided and abetted Marcell Smith and Eric Ryles in the knowing and

intentional possession with intent to distribute heroin.

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse the defendant of a crime preliminary to trial. An indictment is not evidence. The Indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant.

The defendant has pleaded not guilty to the count in the Indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the Indictment and the denial made by the not guilty plea of the defendant. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

I have said that the government must prove the defendant guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to

hesitate to act in a manner of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. Under your oath as jurors you are not to be swayed by sympathy; you are to be guided solely by the evidence in this case.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to find the defendant not guilty. On the other hand, if after fair and impartial consideration of all the evidence you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

As I have instructed you, the law presumes that the defendant is innocent of the charges against him. The presumption of innocence lasts throughout the trial and ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the government fail to prove the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been received in evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a

disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct evidence and circumstantial evidence, but requires that your verdict must be based on all the evidence presented. You may convict a defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all exhibits that have been received in evidence.

When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the

reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented to you in this case.

INTEREST IN OUTCOME

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

DRUG USERS: CREDIBILITY OF WITNESSES

There has been evidence introduced at the trial that the government called as witnesses persons who were using drugs when the events they observed took place. I instruct you that there

is nothing improper about calling such witnesses to testify about events within their personal knowledge.

However, testimony from such witnesses must be examined with greater scrutiny than the testimony of other witnesses. The testimony of a witness who was using drugs at that time of the events he or she is testifying about may be less believable because of the effect the drugs may have on the witness's ability to perceive or relate to the events in question.

If you decide to accept the testimony of such witnesses, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

ACCOMPLICES: CREDIBILITY OF WITNESSES

You have also heard a witness who testified that he was an accomplice, that is, he said he participated with the defendant in the commission of a crime. The testimony of accomplices must be examined and weighed by the jury with greater care than the testimony of a witness who did not claim to have participated in the commission of that crime.

You must determine whether the testimony of the accomplice has been affected by self-interest, or by an agreement he or she may have with the government, or by his or her own interest in the outcome of this case, or by any prejudice he or she may have

against the defendant.

LAW ENFORCEMENT WITNESSES

You have heard the testimony of a law enforcement official in this case. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

In evaluating the witnesses and evidence in this case, I also caution you that there are certain inferences and factors that you may not consider in reaching your decision.

DEFENDANT NOT TESTIFYING

You may have observed that the defendant did not testify in

this case. A defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. The defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining a defendant's guilt or innocence of a crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

DISPOSITION OF CO-DEFENDANTS' CASES

At this time there are a number of alleged co-defendants who are not on trial and you are not being asked to reach a verdict as to them. You are not to be concerned with these persons, nor to speculate about the reasons why they are not part of this case, and this fact should not affect or influence your verdict with respect to the defendant. You must base your verdict as to the defendant solely on the basis of the evidence or lack of evidence against him.

GOVERNMENT AS A PARTY

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality.

This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, this case is important to the defendant, who is charged with a serious crime.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the Court.

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

You may not infer that the defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

IMPERMISSIBLE TO INFER PARTICIPATION FROM MERE PRESENCE

You also may not infer that the defendant is guilty of participating in criminal conduct merely from the fact that he was present at the time the crime was being committed and had knowledge that it was being committed.

INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

ELEMENTS OF THE OFFENSE: INTRODUCTION

The Indictment charges the defendant with violating section 2(a) of Title 18 of the United States Code, which makes it a crime to "aid or abet" the commission of an offense against the United States. Specifically, the defendant is charged with

aiding and abetting Eric Ryles and Marcell Smith in the knowing and intentional possession with intent to distribute heroin.

AIDING AND ABETTING (18 U.S.C. § 2(a))

Under the aiding and abetting statute, it is not necessary for the government to show that the defendant himself physically committed the crime with which he is charged in order for you to find him guilty.

A person who aids or abets another in committing an offense is just as guilty of that offense as if he or she committed it himself or herself.

Accordingly, you may find the defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged, that is possession with intent to distribute heroin. I will discuss the elements of the offense of possession with intent to distribute in detail below.

Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the

other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if such action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of the defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether the defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he

wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense.

If your answer to any of these questions is "no," then the defendant is not an aider and abettor, and you must find him not guilty as such.

ELEMENTS OF THE OFFENSE: POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1)).

Defendant is charged with aiding and abetting Eric Ryles and Marcell Smith in their possession with intent to distribute heroin. In order to prove this charge against the defendant, the government must establish beyond a reasonable doubt that either Eric Ryles or Marcell Smith knowingly and intentionally possessed with the intent to distribute heroin. To do so the government must prove the following three elements beyond a reasonable doubt:

(1) That either Eric Ryles or Marcell Smith possessed narcotic drugs;

(2) That either Eric Ryles or Marcell Smith knew that he

possessed narcotic drugs; and

(3) That either Eric Ryles or Marcell Smith possessed the narcotic drugs with the intent to distribute them;

To find the defendant guilty of aiding and abetting, you must find that the government has proven all three of these elements with regard to either Eric Ryles or Marcell Smith. In other words, the government need not prove that both Eric Ryles and Marcell Smith committed the crime of possession with the intent to distribute heroin. You may find the defendant guilty if the government proves the three elements with regard to only one of these two individuals.

POSSESSION OF NARCOTICS

The first element the government must prove beyond a reasonable doubt is that either Eric Ryles or Marcell Smith possessed heroin.

That is, the government must prove that the material that these individuals were charged with possessing is, in fact, heroin. The government may prove this either through direct evidence or through circumstantial evidence. An example of direct evidence is the testimony of a chemist who has done a chemical analysis of the material. Circumstantial evidence would be evidence from which you could infer that the material was heroin, such as testimony concerning the names used by the

defendant to refer to the material or testimony about the material's appearance. Whether the government relies on direct or circumstantial evidence to prove that the material in issue was heroin, it must prove so beyond a reasonable doubt.

DEFINITION OF POSSESSION

As I have instructed you, the government must prove beyond reasonable doubt that either Eric Ryles or Marcell Smith "possessed" the drugs. The legal concept of possession may differ from the everyday usage of the term, so I will explain it in some detail.

Actual possession is what most of us think of as possession; that is, having physical custody or control of an object. For example, if you find that either Eric Ryles or Marcell Smith had the drugs on his person, you may find that he had possession of the drugs. However, a person need not have actual physical custody of an object in order to be in legal possession of it. If a person has the ability and intent to exercise substantial control over an object that he or she does not have in his or her physical custody, then you may find that person in possession of that item. An example of this from everyday experience would be a person's possession of items he or she keeps in the safe deposit box of his or her bank. Although the person does not have physical custody of those

items, he or she exercises substantial control over them and so has legal possession of them.

Possession of drugs cannot be found solely on the ground that a person was near or close to the drugs. Nor can it be found simply because the person was present at a scene where drugs were involved, or solely because that person associated with an individual who did control the drugs or the property where they were found. However, these factors may be considered by you, in connection with all the other evidence, in making your decision as to whether either Eric Ryles or Marcell Smith possessed drugs.

KNOWLEDGE THAT THE DRUGS WERE NARCOTICS

The second element the government must prove beyond a reasonable doubt is that either Eric Ryles or Marcell Smith knew that he possessed narcotics.

To establish this element, the government must prove that either Eric Ryles or Marcell Smith knew that he possessed narcotics, and that his possession was not due to carelessness, negligence, or mistake. If you find that he did not know that he had narcotics in his possession, or that he did not know that what he possessed was, in fact, narcotics, then you must find the defendant not guilty of aiding and abetting a crime.

Although the government must prove that either Eric Ryles

or Marcell Smith knew that he possessed narcotics, the government does not have to prove that he knew the exact nature of the drugs in his possession. It is enough that the government proves that one of these individuals knew that he possessed some kind of narcotic.

METHOD OF PROVING KNOWLEDGE

Your decision as to whether either Eric Ryles or Marcell Smith knew the materials he possessed were narcotics involves a decision about their states of mind. It is obviously impossible to prove directly the operation of someone's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in the case may enable you to infer what their state of mind was.

In our everyday affairs, we are continuously called upon to decide from the actions of others what their state of mind is. Experience has taught us that, frequently, actions speak louder and more clearly than spoken or written words. Therefore, you may well rely in part on circumstantial evidence in determining Eric Ryles' or Marcell Smith's state of mind.

For example, if a person was the sole occupant of a residence or a vehicle, it is reasonable to conclude that the person knew about items in the residence or vehicle. A person's behavior may also indicate knowledge. Nervousness in the

presence of the drugs or flight from the site at which authorities have identified drugs may indicate that a person knew what he had in his possession. These examples are neither exhaustive nor conclusive. It is up to you, based on all the evidence, to determine whether either Eric Ryles or Marcell Smith knew that he possessed narcotics.

INTENT TO DISTRIBUTE

The third element that the government must prove is that either Eric Ryles or Marcell Smith intended to distribute narcotics. In order to prove the defendant guilty, the government must prove this circumstance beyond a reasonable doubt.

To satisfy this element, the government must prove beyond a reasonable doubt that either Eric Ryles or Marcell Smith had control over the drugs with the state of mind or purpose to transfer them to another person.

The same considerations that apply to your determination of whether these two individuals knew they possessed narcotics apply to your decision concerning their intention to distribute them. Since you cannot read their minds, you must make inferences from their testimony or behavior. However, you may not convict the defendant unless these inferences convince you beyond a reasonable doubt that either Eric Ryles or Marcell

Smith intended to distribute the narcotics.

When I say that you must find that either Eric Ryles or Marcell Smith intended to distribute the narcotics, this does not mean that you must find that he intended *personally* to distribute or deliver the drugs. It is sufficient if you find that he intended to cause or assist the distribution of the narcotics.

Basically, what you are determining is whether the drugs in either Eric Ryles' or Marcell Smith's possession were for his personal use or for the purpose of distribution. Often it is possible to make this determination from the quantity of drugs found in a person's possession. (For example, it would be highly unlikely that a person with 50,000 doses of amphetamine possessed them all for consumption).

The possession of a large quantity of narcotics does not necessarily mean that a person intended to distribute them. On the other hand, a person may have intended to distribute the narcotics even if he or she did not possess large amounts of them. Other physical evidence, such as paraphernalia for the packaging or processing of drugs, can show an intent. There might also be evidence of a plan to distribute. You should make your decision as to whether either Eric Ryles or Marcell Smith intended to distribute the narcotics in his possession from all

of the evidence presented.

"ON OR ABOUT" EXPLAINED

Finally, the Indictment in this case charges that a particular offense was committed "on or about" a certain date. It is not necessary for the government to prove that the offense was committed precisely on the date charged; however, it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Indictment. For instance, if the Indictment charges that a specific crime occurred on March 5, 1992 and you find from the evidence beyond a reasonable doubt that the alleged crime occurred on March 4, 1992, a date reasonably near March 5, 1992, you should return a verdict of guilty on that charge.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you today solely from the evidence in this case. I remind you that the mere fact that this defendant has been indicted is not evidence against him. Also, the defendant is not on trial for any act or conduct or offense not alleged in the Indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a

defendant in this case.

You should know that the punishment provided by law for the offenses charged in the Indictment is a matter exclusively within the province of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your other jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

At this time, I would like to offer my sincere thanks to the alternates.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to the count contained in the Indictment, you will have your foreperson

record a verdict of guilty or not guilty as to that count. Your foreperson will then sign and date the verdict form and you will then return to the courtroom.

If, during your deliberations you should desire to communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Also, a copy this charge will go with you into the jury room for your use.

I appoint Matthew Poynter as your foreperson.

Dated at Burlington, Vermont this 25th day of November, 2002.

William K. Sessions III
Chief Judge, U.S. District Court