

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARTHUR MONTOUR, a/k/a "SUGAR
MONTOUR," PETER MONTOUR,
KENNETH HILL, and NATIVE
WHOLESALE SUPPLY,

Defendants.

No. CR 09-00214 MJP

MOTION TO DISMISS CHARGES
AGAINST KENNETH HILL AND
PETER MONTOUR BECAUSE
THEY ARE NOT AMONG THE
CLASS OF THOSE LIABLE FOR
FAILURE TO NOTIFY

NOTE ON MOTION CALENDAR:
Friday, March 12, 2010

ORAL ARGUMENT REQUESTED

The definition of "contraband" in the CCTA, and hence the existence of federal criminal liability under the CCTA, depends totally on the predicate state law violation upon which the federal charge is based. If the state law predicate upon which this CCTA prosecution is based is inapplicable to these defendants, then all of the CCTA charges against them must be dismissed.¹

¹ *United States v. Gord*, 77 F.3d 1192, 1193 (9th Cir. 1996) (Because the CCTA defines contraband cigarettes by reference to state law, "[a] violation of the state cigarette tax law is a predicate to a CCTA violation."); *United States v. Smiskin*, 487 F.3d 1260, 1263 (9th Cir. 2007) ("whether [defendants] transported contraband cigarettes under the CCTA turns on Washington State law").

1 One of the state law predicates upon which this CCTA prosecution is based is Wash.
2 Rev. Code 82.24.250(1). It provides: “(1) No person other than: (a) A licensed wholesaler
3 in the wholesaler’s own vehicle; or (b) a person who has given notice to the board in advance
4 of the commencement of transportation shall transport or cause to be transported in this state
5 cigarettes not having the stamps affixed to the packages or containers.”

6
7 This pre-notification statute cannot be applied against these defendants. By its terms,
8 it places the duty to notify the Washington State Liquor Control Board upon the one who
9 “shall transport or cause to be transported in this state” the unstamped cigarettes.

10 This statute thus places the duty to pre-notify only on the direct transporter or the one
11 who directly caused him or her to transport. This impliedly excludes other classes of
12 defendants from bearing such an obligation. There are several rules that prompt this
13 conclusion.
14

15 First, Wash. Rev. Code 82.24.250(1) lists only “transport[er]s” in the class of people
16 having the duty to notify. The express inclusion of this group impliedly excludes all other
17 groups from bearing such an obligation. *See, e.g., United States v. Vonn*, 535 U.S. 55, 65
18 (2002) (*expressio unius est exclusion alterius* rule); *Botany Worsted Mills v. United States*,
19 278 U.S. 282, 289 (1929) (maxim, “*expressio unius est exclusio alterius*” means that,
20 “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of
21 any other mode”); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir.), *cert. denied*, 522 U.S. 1008
22 (1997) (“an express declaration as to one item requires the exclusion of others”).
23

24 If the Washington Legislature intended to exclude from liability for failure to pre-
25 notify all but the transporters, the government cannot charge others as aiders and abettors in
26 order to avoid that Congressional limitation. It is true that, in general, one can be charged as

1 an aider and abettor even though he or she is not specifically included among the class of
2 people that Congress subjected to criminal liability. *United States v. Standefer*, 447 U.S. 10,
3 18 n.11 (1980).

4 There are, however, exceptions. For example, accomplice liability will not be
5 imposed where “the legislature, by specifying the kind of individual who is to be found
6 guilty when participating in a transaction necessarily involving one or more other persons,
7 must not have intended to include the participation by others in the offense as a crime ... even
8 though the statute was not intended to protect the other participants.” *United States v.*
9 *Southard*, 700 F.2d 1, 19-20 (1st Cir), *cert. denied*, 464 U.S. 823 (1983). Following this rule,
10 the Fifth Circuit declined to hold a construction company superintendent liable for the
11 company’s OSHA violations, because the detailed OSHA scheme specifically allocated
12 liability to different entities and this employee was not among those on whom such liability
13 fell. *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (defendant-construction company
14 superintendent not an “employer” who could be held criminally liable for the company’s
15 OSHA violations; the statute under which the superintendent was charged clearly defines
16 “employer” and “employee,” clearly states their duties, and clearly distinguishes the
17 subjects of liability in different sections as “[a]ny person,” “[w]hoever,” or, in the section at
18 issue, “any employer,” showing an intent to subject employers but not employees to
19 liability). Critically, that Circuit Court of Appeals continued that the supervisor – Shear –
20 could not be convicted as an aider and abettor of the employer in this situation, either, to get
21 around those statute explicitly allocating responsibility and liability.

22 Washington’s cigarette regulation statutes are just as incredibly detailed as OSHA.
23 They also allocate responsibilities for taxes, regulations, and reporting specifically to
24

1 different people in a large chapter, Wash. Rev. Code 82.24 and accompanying regulations.
2 Given such a complex and detailed set of statutes and regulations allocating responsibility
3 and liability, the natural inference is that the state legislature intended that statute to be the
4 exclusive means of allocating such responsibilities and liabilities. *See Shear*, 962 F.2d at 494
5 (“the structure of OSHA evidences an affirmative legislative policy to leave unpunished
6 those employees who, in their capacity as such, merely aid and abet their employer’s
7 violations of [OSHA] ... by committing ... the acts or conduct constituting the employer’s
8 violation.”). *Accord Gebardi v. United States*, 287 U.S. 112 (1932) (“we perceive in the
9 failure of the Mann Act to condemn the woman’s participation in those transportations which
10 are effected with her mere consent, evidence of an affirmative legislative policy to leave her
11 acquiescence unpunished”).
12

13
14 Thus, the more detailed the regulatory scheme, the less likely Congress intended that
15 unnamed groups should be charged with the listed violations and the more likely that
16 Congress intended liability to fall only on those specifically listed in its detailed laws. *See*
17 *Atlantic & Gulf Stevedores, Inc. v. Occupational, Safety & Health Review Comm’n*, 534
18 F.2d 541 (3d Cir. 1976). Thus, in the *Shear* decision above, the court explained that the
19 OSHA enforcement scheme is directed against employers so employees cannot be sanctioned
20 for disregarding safety standards and commission orders as follows: “If we allow aider and
21 abettor liability to be imposed in these circumstances would effectively rewrite the statute so
22 that ‘employer’ reads ‘employer or employee’ or ‘whoever’ or ‘any person.’ This we refuse
23 to do.” *Shear*, 962 F.2d 488, 495. *See also United States v. Amen*, 831 F.2d 373, 381-82 (2d
24 Cir. 1987) (“Congress assigns guilt to only one type of participant in a transaction, it intends
25 to leave the other unpunished for the offense”; hence, no accomplice liability under 21
26

1 U.S.C. § 848 for the kingpin's employees or for others who aid the kingpin, but are not
2 among the five employees supervised, managed or organized).

3 The indictment alleges that Mr. Hill is a shareholder and chief marketing officer of
4 entity A, and that he received some share of NWS operating profits. (Indictment at page 3.)
5 While the government also alleges that "on or about 2003" Mr. Hill brought an unspecified
6 number of "boxes" of unstamped cigarettes to Blue Stilly for sale to the public (Indictment at
7 page 7-8), all of the CCTA charges allege transactions occurring after September 1, 2004.
8 Mr. Hill was far up the vertical chain of distribution and was not the transporter of the
9 cigarettes into Washington. Nor did he directly "cause" such transport. Hence, he is not
10 among the class of transporters upon whom the statute places the responsibility to report.
11

12 Nor did Peter Montour "transport cigarettes" as defined by the CCTA. According to
13 the indictment, Peter Montour's involvement with the alleged scheme was limited to the fact
14 that he: (1) instructed NWS employees to operate out of the Bosque Farms, New Mexico
15 warehouse that previously had been used by Turtle Island (Indictment at 8); (2) opened a
16 bank account in New Mexico on behalf of NWS (Indictment at 8); and (3) met with Mona
17 Robley in Canada to discuss her serving as the NWS distributor operating the Bosque Farms
18 warehouse (Indictment at 8). Even assuming, arguendo, those allegations are true, the
19 Indictment fails to allege any duty that would obligate Peter Montour to report cigarette
20 shipments to Washington regulators.
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1 Therefore, all of the CCTA charges against Kenneth Hill and Peter Montour should
2 be dismissed.

3 DATED this 8th day of February, 2010.

4 Respectfully submitted,

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12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on February 8, 2010, I electronically filed the foregoing with the
14 Clerk of the Court using the CM/ECF system, which will send notification of such filing to
15 Mary K. Dimke, J. Tate London, and Richard E. Cohen, Assistant United States Attorneys,
16 and all other parties and counsel of record using the CM/ECF system.
17

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