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Customs Searches of International In-Transit Cargo *United States v. Feld*

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RECENT CASES

CUSTOMS SEARCHES OF INTERNATIONAL IN-TRANSIT CARGO

United States v. Feld

514 F.Supp. 283 (E.D.N.Y. 1981)

The United States of America indicted four¹ alleged cocaine traffickers, charging violations of federal narcotics laws arising out of the seizure of more than seventeen pounds of cocaine at John F. Kennedy Airport on December 10, 1980. The defendants were charged with conspiracy to violate 21 U.S.C. § 841(a)(1)² by conspiring to import "into the United States from places outside" and to distribute, cocaine. Three of the defendants were additionally charged with: (1) possession of cocaine at Kennedy Airport with intent to distribute; (2) importation of a controlled substance into the United States from Bolivia, South America; and (3) possessing cocaine on board an aircraft, in violation of 21 U.S.C. § 955.³ Defendants moved to dismiss the indictment. As international in-transit passengers, they asserted that the suitcases containing the cocaine were not subject to the clearance regulations of United States Customs and in fact were not presented to customs. At issue were two questions: (1) whether this circumstance of non-presentment rendered the district court without jurisdiction to proceed on the indictment; and (2) whether the indictment failed to charge a violation of the laws of the United States. The United States District Court for the Eastern District of New York denied defendants' motion to dismiss the indictment. *United States v. Feld*, 514 F.Supp. 283 (1981).

In November 1980, agents of the Drug Enforcement Agency (hereinafter "DEA") received an anonymous tip that defendants were planning to smuggle a large quantity of cocaine from La Paz, Bolivia to Munich, Germany via Kennedy Airport, in New York. Two of the defendants were to board the plane in La Paz with the cocaine concealed in suitcases and two other defendants were to board in New York. On the New York to Munich leg of the flight, the luggage claim checks were to be switched so that when the luggage was presented to German customs, it would appear that the cocaine-bearing suitcases

1. Miciala Evans, one of five individuals originally charged, was deceased at the time of the hearing.

2. Psychotropic Substances Act of 1975, 21 U.S.C. § 841 (a)(1) (1978).

3. Controlled Substances Import and Export Act, 21 U.S.C. § 955 (1970).

belonged to passengers coming from New York and not from Bolivia, a known source-country for cocaine. After the flight landed in New York, passengers were escorted to a nearby in-transit lounge. They were not permitted to leave the lounge area and were not required to pass through United States Customs prior to continuation of their international flight. Meanwhile, Customs inspectors removed the in-transit luggage from the airplane and, after a search, found the cocaine. The two defendants in the in-transit lounge were then arrested, as were the two defendants waiting to board the plane.

The district court first considered whether it had jurisdiction over the subject matter where the offense, in its entirety, did not occur within United States boundaries. The court declared that, contrary to defendants' assertions, it was not necessary that the entire offense charged be committed within the court's jurisdiction for it to be able to adjudicate the matter; a sovereign has jurisdiction to prosecute an offense where only part of the offense is committed within its boundaries. The court cited *United States v. Busic*,⁴ in which defendants were charged under the Antihijacking Act of 1974⁵ with the aggravated offense of aircraft piracy resulting in the death of another person. The *Busic* court held that only the underlying offense of aircraft piracy need have occurred within the statutorily created area of federal jurisdiction; once that had been established, the court would then have jurisdiction to try defendants for a death resulting from the air piracy, regardless of where the death occurred. In the instant case, since at least one part of each charged offense—formation of the conspiracy as well as overt acts in furtherance of it, at Kennedy Airport, constructive possession of a controlled substance at the airport, and, importation of cocaine—was committed within the territorial limits of the United States, the court had jurisdiction to proceed over the charges.

The court next addressed the question of whether defendants could be charged with possession of cocaine on board an aircraft within the United States where the cocaine was loaded on the airplane in Bolivia, and, according to defendants' plan, would have remained in the "sterile" in-transit baggage area, without being presented to United States Customs. Defendants would only regain actual possession of the cocaine in Germany. The court determined that defendants had constructive possession of the cocaine under the test formulated in *United States v. Boney*.⁶ The *Boney* test provided that a

4. 592 F.2d 13 (2d Cir. 1978).

5. Antihijacking Act of 1974, 49 U.S.C. § 1472(i)(3) (1974).

6. 572 F.2d 397 (2d Cir. 1978).

person with actual possession of goods, who thereafter shipped them to a purchaser on a carrier of his choice via a bill of lading, retained constructive possession of the shipped goods until their delivery to the purchaser. By analogy, in the instant case, defendants retained constructive possession of the cocaine by placing it in luggage to be shipped on Lufthansa Airlines, with claim checks to be used to retrieve the bags at the destination point. The *Feld* court concluded that the fact government agents removed the luggage from the plane to the airline baggage room did not impair defendants' constructive possession of the cocaine-bearing suitcases. Concluding its discussion of jurisdiction, the court found it had jurisdiction over the persons of the defendants where the defendants were arrested during the progress of the crimes alleged, where these crimes took place within the territorial limits of the United States.

The court next considered whether the indictment failed to state crimes against the United States. Defendants first argued that there was no "importation" as a matter of law under 21 U.S.C. § 952(a).⁷ This statute provides in pertinent part:

It shall be unlawful to import into the customs territory of the United States . . . from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance . . . or narcotic drug . . .⁸

The court defined "customs territory of the United States" by referring to the Tariff Schedules of the United States⁹ which provide that "customs territory" includes only "the States, the District of Columbia, and Puerto Rico."¹⁰ Since it was uncontested that Kennedy Airport is within the territorial limits of New York State and of the United States, defendants made no claim that the search and seizure was illegal because conducted in some area expressly excluded by 19 U.S.C. § 1202. Rather, defendants argued that the cocaine could not be deemed to be "imported" within the meaning of 21 U.S.C. § 952(a) because, given the circumstances, it was highly improbable the cocaine would remain in "customs territory" of the United States.

7. Controlled Substances Import and Export Act, 21 U.S.C. § 952(a)(1970).

8. *Id.*

9. Tariff Schedules Technical Amendments Act of 1965, 19 U.S.C. § 1202 (1965).

10. *Cf. Hawaiian Independent Refinery v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978) (Customs territory of the United States does not encompass statutorily excluded "free trade zone").

Defendants additionally argued that the “imported” term in 21 U.S.C. § 952(a) should not be construed to include their activity because the cocaine was concealed in and remained in the luggage of a “true in-transit [international] passenger.” Defendants in the instant case fit squarely into the “true in-transit” category established in *United States v. Pentapati*:¹¹ they never sought to nor were they required to clear through United States Customs before continuing their journey. The court brushed aside defendants’ assertions, stating that defendants had not cited nor had the court found, any case applying what the defendants termed the “*Pentapati* exception.” Rather, the court held that there was no requirement that a controlled substance actually clear customs in order to be deemed illegally “imported.” This was so, stated the court, because under 21 U.S.C. § 952(a), it was the *fact* of bringing a controlled substance into United States territory which constituted “importation,” and not what the importer intended to subsequently do with the drug. Additionally, the court noted, even if defendants had neither the intention nor the capability of remaining in the United States with the drug, since under applicable air commerce regulations, international air traffic must receive clearance from United States Customs to both land at and depart from Kennedy Airport, it would be difficult to say that the on-board luggage was never brought under the control of customs authorities.

The court next considered defendants’ contention that no intention to distribute narcotics *within* the United States had been demonstrated. Citing *United States v. Waller*,¹² the court stated that this issue should not be determined by the court on a motion to dismiss. The *Waller* court, in affirming a conviction for distribution of heroin, referred to 21 U.S.C. § 802 (8) and (11)¹³ which define distribution as the delivery of a controlled substance via “actual, constructive, or attempted transfer of the substance.”¹⁴ Accordingly, a constructive transfer of a controlled substance constitutes distribution under 21 U.S.C. § 841(a)(1). Since the facts of the case at bar permitted the inference that such a constructive transfer might have taken place within United States airspace, the question of whether defendants intended to distribute the cocaine within the United States was better left to a jury. In any event the plain language of 21 U.S.C. § 841(a)(1)

11. 484 F.2d 450, 451 (5th Cir. 1973).

12. 503 F.2d 1014 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975).

13. Psychotropic Substances Act of 1975, 21 U.S.C. §§ 802 (8), (11) (1978).

14. *Id.*

imposed no additional requirement of "intent" to distribute narcotics within the United States.¹⁵ The statute simply provides, in relevant part: ". . . it shall be unlawful for any person knowingly or intentionally . . . (1) to . . . distribute . . . a controlled substance. . . ."

Finally, the court noted that the United States is a party to the Single Convention on Narcotic Drugs,¹⁶ which provides a multinational framework to fight international narcotics traffic, including the distribution of cocaine. The Single Convention must be implemented through the constitutions and statutes of party nations. The court stated that congressional enactments such as 21 U.S.C. §§ 841, 952, and 955 were among those penal statutes through which Congress sought to fulfill United States treaty obligations under the Single Convention.¹⁷ In light of this clear legislative intent, the court stated that adopting defendants' interpretation of the requisite "intent to distribute" and their construction of "importation" would thwart a clear congressional purpose and allow American nationals to make a sham of United States narcotics laws by using United States territory as a way-station in the international transportation of dangerous drugs.

This case is significant because it is a case of first impression. The one significant difference in this case from others in which these penal statutes have been held to apply is that these defendants were "in-transit passengers" in the pure sense and their cargo was on United States territory only through the happenstance of an airline refuelling stop. In other cases in which these statutes have been applied, the parties affirmatively sought to enter the United States and presented themselves and their cargo to United States Customs for that purpose. A broad construction of these statutes opens the door to United States Customs search and seizure of all in-transit luggage and cargo as well as to that cargo specifically destined for the United States. There is nothing in the court's opinion which limits customs officials to search only for contraband substances. Thus, an expansion of this United

15. The court cited *United States v. Culbert*, 435 U.S. 371, 380 (1978) for the proposition that where Congress has conveyed its purpose clearly in a statute, the court should construe it according to its plain language and decline to manufacture ambiguity where none exists.

16. Single Convention on Narcotic Drugs, March 30, 1961, *ratified by United States* 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298.

17. *United States v. La Froschia*, 354 F. Supp. 1338, 1341 (S.D.N.Y.), *aff'd*, 485 F.2d 457 (2d Cir. 1973) (*per curiam*); *United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir.), *cert. denied*, 410 U.S. 985 (1972).

States customs policy, endorsed by American courts, could have a marked impact on the flow of foreign-made goods which are presently routed through United States territory in transit to a final foreign destination.

SARA R. ROBINSON

THE ENFORCEABILITY OF THE MARIJUANA
ON THE HIGH SEAS ACT

United States v. James—Robinson et al.
515 F.Supp. 1340 (S.D. Fla. 1981)

The United States indicted the foreign crewmen of a stateless vessel for the alleged violation of 21 U.S.C. § 955(a), popularly known as the "Marijuana on the High Seas Act."¹ The statute makes it unlawful for any person on board a vessel on the high seas subject to the jurisdiction of the United States to possess a controlled substance with the intent to distribute the substance.²

Defendants moved to dismiss the indictment on the grounds that the United States District Court lacked subject matter jurisdiction under the international law of jurisdiction. Defendants also argued that the statute was unconstitutionally vague. At the hearing on the motion to dismiss, the United States and the defendants stipulated to the facts to be used for the purposes of the hearing. It was agreed that the defendants were citizens of Colombia, and that the ship on which they were arrested was a vessel without nationality.³ It was also

1. *United States v. James-Robinson, et al.*, 515 F. Supp. 1340 (S.D. Fla. 1981).

2. 21 U.S.C. § 955(a) was intended to improve the Coast Guard's ability to enforce laws aimed at stopping illegal drug trafficking on the high seas. It provides criminal penalties for possession of controlled substances on the high seas, and fills that statutory void created when the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, 21 U.S.C. § 846, inadvertently repealed the criminal provisions under which drug smugglers apprehended on the high seas had been prosecuted. Until the enactment of 21 U.S.C. § 955, prosecutors were forced to charge violators with either attempted unlawful importation or conspiracy, and the evidence necessary to support a conviction on these charges was frequently impossible to obtain. S. REP. NO. 96-855, 96th Cong., 2nd Sess. 2, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2785-86.

3. The United States can claim jurisdiction over a stateless vessel in accordance with the Convention on the High Seas, Apr. 29, 1958, art. 6, para. 2, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, which provides that a ship sailing under the flag of two or more states, according to convenience, may not claim any of the nationalities with respect to any other state, and may be treated as a ship without a nationality.