NO.: 11-60431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff, Appellee

v.

KEITH M. KENNEDY;
J. LARRY KENNEDY;
MARK J. CALHOUN,
Defendants, Appellants

Appeal from the United States District Court
for the Southern District of Mississippi
Cause No: 3:08cr77-DPJ-FKB

REPLY BRIEF FOR APPELLANT KEITH M. KENNEDY

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I. A. IN RESPONSE TO APPELLEE'S RESPONSE TO GOVERNMENT'S STATEMENT OF THE FACTS

The Government's Brief concerns itself in the statement of the facts, almost entirely with the actions of Defendant Mark Calhoun. With respect to the Kennedys it gives only conclusive phrases such as: "in combination with the Kennedy's" and "with the help of the Kennedy's". Appellee's Brief p. 6 and 7. The Kennedys did notarize signatures of persons who did not sign in their presence on occupancy affidavits. Appellee's Brief at p. 11. However this was only rarely done, in comparison to the large number of closings by LCT'S shown by the voluminous exhibits and the hundreds of loans closed in 2007 alone. Appellant's Brief p. 9.

The Government's Brief states, as a predicate that: [D] espite [the Kennedys] having reason to know Calhoun was behind the "shell" companies..., Appellee's Brief p.18. However the Government does not give a sufficient reason the Kennedys should have known, and ignores the fact as, stated in Keith Kennedy's Appellant Brief p.8, that Barbara Allday, a Hinds County Clerk and former employee of LCT's, indicated that a construction lien can exist, whether filed of record or not. USCA 918,919.

The Government, in its statement of the facts indicates Jason Ellis confronted Calhoun and stated he did not want to see "Fast Start distributions" on any HUD 1's again. Then twenty minutes later he talked to Larry Kennedy. However we have no idea presented (in evidence) what was said. To say he said the same thing to Larry Kennedy as he said to Mark Calhoun is sheer speculation.

The Defendant Keith Kennedy incorporates the Statement of Facts found in his Appellant's Brief, which counter many of the Appellee's allegations, as it pertains to Keith Kennedy.

I. B. IN RESPONSE TO APPELLEE'S WHETHER THERE WAS AMPLE EVIDENCE TO SUPPORT JURY'S GUILTY VERDICTS

B. 1 MONEY FRAUD CONSPIRACY

The Government states in its Brief, in reference to the "sufficiency issue" that Keith Kennedy "devotes" just over a page of his brief on it. However, this is not quite correct. At the end of Keith Kennedy's Brief on the sufficiency argument he adds: "The Defendant Keith Kennedy, adopts by reference his arguments relating to the deliberate ignorance instruction as these facts are of similar application here." Keith Kennedy Brief, p. 23.

The basis of the Defendant, Keith Kennedy's defense, is that he was not aware of Mr. Calhoun's actions. Appellants counsel did not see the benefit of repeating, in some places verbatim, the cases and their facts in his sufficiency of the evidence argument, when they are already in his brief on the due diligence instruction. Appellant Keith Kennedy's Brief, p. 12-21.

The arguments on the due diligence instruction in Appellant's Brief discuss, in many places, that the "prongs" relating to inclusion of the instruction is whether there is evidence that there was: (1) the supportive awareness of the high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct. US v Nguyen, 493 F.3d 617 (5th Cir. 2007).

The Government repeatedly states that the defendants, including Keith and Larry Kennedy, did not "devote much effort challenging the evidence support for wire fraud and money laundering. However, the basis of the Keith Kennedy's defense is lack of knowledge to the alleged wrongful acts of Mr. Calhoun. The evidence against Mr. Calhoun is difficult to contest but Keith Kennedy was not privy to the activities of Calhoun nor did the Government show that he was aware of Calhoun's

actions. However, Keith Kennedy adequately briefed the issues raised on appeal by this lack of evidence of knowledge on his part, actual or constructive, and by his discussion of the applicability of the "due diligence" instruction.

I. C. IN RESPONSE TO APPELLEE'S STANDARD OF REVIEW ON JUROR-CONTEST ISSUE

The Defendant, Keith Kennedy, admits the applicable standard of review is for "abuse of discretion" and not de novo. This was an error made by bringing the standard of review on one issue over to the present issue. Government Brief p. 42.

Keith Kennedy takes the position that his original brief adequately covers this issue, The jurors (except one) heard the juror ask the bailiff: "What do I do about somebody speaking to me"?.... "Well, Mr. Calhoun spoke to me out front. "Mr. Allen (the bailiff) responded "Well, I'll tell the Judge about it". USCA 5, 3079. This, by implication (to tell the Judge) indicates something was wrong. The testimony of the juror in question was weaker, but her conversation with the bailiff is what the jury heard. The jury must also have been aware that this was a serious issue in that each of them had to come into the court room to be questioned by the Judge.

I. D. RESPONSE TO APPELLEE'S DISCUSSION OF DELIBERATE IGNORANCE INSTRUCTION

The Appellant and Appellee are mostly in agreement about principles of law as to when the deliberate ignorance instruction should be given. US v Nguyen 493 F.3d 613 (5th Cir. 2007), with the exception of Keith Kennedy's argument that the allegations of the indictment are inconsistent with the due diligence instruction. Keith Kennedy also disagrees as to the instructions applicability under the facts of this case as well as the applicable law.

The Government mentions several items, such as travel closings, faulty notarizations,

conduct between Jason Ellis and Larry Kennedy (with no statement of any type of conversation details), and Jones stating that he wanted to "pull money out of the loans". However the argument is mostly silent on Keith Kennedy, with the exception that it asserts Keith Kennedy disbursed the loans and improperly filled out the HUD-1'S. Brief at 65-66.

Keith Kennedy specially takes issue with the citation of US v Bieganowski, 313 F.3d 264 p. 290 (5th Cir. 2003). Appellee's Brief at p. 65. This case does not stand for the proposition that if the deliberate ignorance instruction was warranted for one defendant, it should be allowed in against the other defendants. Appellee's Brief at p. 65.Bieganowski asserted he was improperly singled out. The case is valuable for its analysis but it is more nuanced than stated in the Government's Brief.

The defendant in Bieganowski admitted, while testifying, that he was aware of billing errors and that there was a television expose on his business. When his consultant on fraud found errors, the Defendant, said to "fix them" and took no other action. This was held to be enough to apply the instruction to him. The evidence on our case is much less. The Court citing US vs Reissig, 186 F.3d 617 (5th Cir. 1999) held that when using the instruction and there are multiple defendants, it should be added in the instruction that "the instruction may not apply to all Defendants".

This is not harmless error as alleged by the Government because the test in US v Woffard, 560 F.3d 354 (5th Cir. 2009) addressing whether that the granting of the instruction was harmless error, held it was harmless where there is substantial evidence of actual knowledge.That is not the case of Keith Kennedy's involvement. There was no evidence substantial or otherwise of his actual knowledge.

Another case cited by the Government, US v Conner, 537 F.3d 480 (5th Cir. 2008) also does not support the Governments assertions. In Conner the Court stated the instruction should rarely be

given. In Conner the Defendant admitted there was actual knowledge of evidence of fraud. The Defendant testified that the facts "seemed fishy", "some sort of scam" and "rip off deal" and he initially thought it was a pyramid scheme. That is certainly not the case with Keith Kennedy. None of these implicating descriptions, or similar statements were in evidence.

The due diligence instruction is hardly harmless error as it, at least in this case, puts Keith Kennedy's criminal guilt or innocence resting upon his lack of due diligence and/or negligence.

CONCLUSION

For the reasons given in Appellant, Keith M. Kennedy's Brief and Reply Brief the case should be reversed.

CERTIFICATE OF SERVICE

I, Michael L. Knapp, certify that today, July 12, 2012, a copy of the Reply Brief of Appellant, was served upon Gaines Cleveland, Assistant United States Attorney, via United States Mail, postage prepaid to the Office of the U. S. Attorney, 1575 20th Avenue, Gulfport, Mississippi. Also, a copy of the Reply Brief of Appellant was delivered via United States, postage prepaid to Keith M. Kennedy-#09724-43, Federal Prison Camp Wing 2, Room 211, Post Office Box 9300, Texarkana, Texas 75505.

S/ *Michael L. Knapp*
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ATTORNEY FOR KEITH M. KENNEDY

CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

Certificate of Compliance with Type-Volume Limitations,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 12 point font size and Times New Roman type style.

S/ Michael L. Knapp
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