

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: April 11, 2006

Decided: May 8, 2009)

Docket No. 05-4401-cr

UNITED STATES OF AMERICA,

Appellee,

v.

SAMUEL NESS,

Defendant-Appellant.

B e f o r e: WINTER, CALABRESI, and POOLER, Circuit Judges.

On remand from the United States Supreme Court after it vacated our prior ruling in light of Regalado Cuellar v. United States, 128 S. Ct. 1994 (2008). We hold that a reasonable jury could not find beyond a reasonable doubt that the purpose of defendant's transportation of narcotics proceeds was to conceal their nature, location, source, ownership, or control for purposes of satisfying 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1956(a)(2)(B)(i). We further hold that the government has failed to prove that a "financial institution" was involved in order to satisfy 18 U.S.C. § 1957(a). We therefore reverse.

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16 WINTER, Circuit Judge:

17 Samuel Ness was convicted, after a jury trial, of one count
18 of conspiring to commit three money laundering offenses and one
19 substantive count of violating 18 U.S.C. § 1956(a)(1)(B)(i). On
20 appeal, Ness argued that the evidence against him was legally
21 insufficient because the applicable statutes' concealment element
22 had not been met. See United States v. Ness, 466 F.3d 79, 80 (2d
23 Cir. 2006). We affirmed the convictions, concluding that a
24 reasonable jury could find that Ness's actions were designed, at
25 least in part, to conceal the identity of the proceeds. Id. at
26 81, 82. On June 9, 2008, the United States Supreme Court vacated
27 our decision and remanded for further consideration in light of
28 Regalado Cuellar v. United States, 128 S. Ct. 1994 (2008). See
29 Ness v. United States, 128 S. Ct. 2900 (2008) (mem.). Cuellar
30 held that the concealment element of the charged crimes requires
31 a showing that the purpose of the transportation was to conceal
32 or disguise a listed attribute of the proceeds. Cuellar, 128 S.

1 Ct. at 2005. In light of Cuellar, we now reverse.

2 BACKGROUND

3 A jury convicted Ness of one count of conspiring to commit
4 three money laundering offenses and one substantive count of
5 violating 18 U.S.C. § 1956(a)(1)(B)(i) ("transaction money
6 laundering"). The three objects of the charged conspiracy were
7 violations of: (1) 18 U.S.C. § 1957(a) ("monetary transaction in
8 unlawful funds"); (2) 18 U.S.C. § 1956(a)(1)(B)(i); and (3) 18
9 U.S.C. § 1956(a)(2)(B)(i) ("transportation money laundering").
10 Following denial of his post-verdict motion for a judgment of
11 acquittal, see United States v. Ness, No. 01-cr-699, 2003 WL
12 21804973 (S.D.N.Y. Aug. 6, 2003), Ness was sentenced to fifteen
13 years' imprisonment, with three years' supervised release.

14 On appeal, Ness argued, inter alia, that the evidence
15 presented at trial was insufficient to sustain his conviction
16 with respect to the element of concealment, which included both a
17 transaction money laundering statute and transportation money
18 laundering statute. Specifically, these statutes proscribe
19 certain "financial transaction[s]" (in the case of 18 U.S.C. §
20 1956(a)(1)(B)(i)) and the "transportation, transmission, or
21 transfer" of certain funds (in the case of 18 U.S.C. §
22 1956(a)(2)(B)(i)) that are "designed in whole or in part . . . to
23 conceal or disguise the nature, the location, the source, the
24 ownership, or the control of the proceeds of specified unlawful

1 activity." The evidence showed that Ness, who ran an armored car
2 carrier business, received millions of dollars in narcotics
3 proceeds from drug traffickers, which the government argued Ness
4 and his associates transported to destinations abroad at the
5 traffickers' behest. Ness contended that the concealment element
6 of the transaction and transportation money laundering statutes
7 could be satisfied only when the transaction or transportation at
8 issue was designed to cloak the unlawful proceeds with the
9 appearance of legitimate wealth. He maintained that the
10 government showed only that he received cash from drug
11 transactions for shipment from one place to another and failed to
12 show that such actions were designed to give the appearance of
13 legitimate wealth.

14 We rejected Ness's arguments in light of our decision in
15 United States v. Gotti, 459 F.3d 296 (2d Cir. 2006). See United
16 States v. Ness, 466 F.3d 79, 81 (2d Cir. 2006) ("Ness I"). In
17 Gotti, we had upheld convictions under 18 U.S.C. §
18 1956(a)(1)(B)(i) against a sufficiency challenge with respect to
19 concealment where the evidence showed that defendants
20 participated in a system of "tribute" payments from lower to
21 higher figures in an organized crime hierarchy, with the proceeds
22 deriving from unlawful activity. Id. at 308-11, 337-38. We
23 noted that the "highly complex and surreptitious" process through
24 which the funds were transferred - involving coded language, the

1 use of intermediaries, secretive handoffs, and cash transactions
2 - sufficed to permit the inference that the deliveries "had been
3 designed in a way that would conceal the source of the moneys."
4 Id. at 337 (footnote reference omitted).

5 In Ness I, we held that the level of secrecy that attended
6 Ness's dealings with the traffickers was comparable to that noted
7 in Gotti, involving, for example, clandestine meetings to
8 transfer large sums of concealed cash, the use of coded language,
9 and the scrupulous avoidance of a paper trail. See 466 F.3d at
10 81. With respect to the 18 U.S.C. § 1957(a) offense, we declined
11 to address Ness's sufficiency challenge because his conviction
12 and sentence would still stand on the basis of the transaction
13 and transportation money laundering convictions. See id. at 82.

14 On June 9, 2008, the United States Supreme Court vacated
15 Ness I and remanded for further consideration in light of
16 Regalado Cuellar v. United States, 128 S. Ct. 1994 (2008). See
17 Ness v. United States, 128 S. Ct. 2900 (2008) (mem.).

18 DISCUSSION

19 a) Money Laundering

20 In Cuellar, the defendant had been convicted of
21 international money laundering under 18 U.S.C. § 1956(a)(2)(B)(i)
22 after police officers found \$81,000 in narcotics proceeds during
23 a search of his car. See id. at 1998. The Fifth Circuit
24 reversed the conviction after concluding that the evidence failed

1 to show that the purpose of the transportation was to conceal or
2 disguise unlawful proceeds and create the appearance of
3 legitimate wealth. See id. at 1998-99. The Fifth Circuit
4 granted rehearing en banc and affirmed the conviction. See id.
5 at 1999. The court rejected Cuellar's argument that the
6 government must prove that he attempted to create the appearance
7 of legitimate wealth. It held rather that Cuellar's extensive
8 efforts to prevent detection of the funds during transportation
9 showed that he sought to conceal or disguise the nature,
10 location, and source, ownership, or control of the funds. See
11 id. On certiorari, the Supreme Court rejected an interpretation
12 of the statute that would require the government to prove that
13 the defendant attempted to create the appearance of legitimate
14 wealth. See id. at 2000. However, the Court concluded that the
15 statute required evidence that the defendant's purpose (in whole
16 or in part) in transporting the funds was to conceal the nature,
17 location, source, ownership, or control of the funds. Id. at
18 2005.

19 Therefore, a conviction under Section 1956(a)(2)(B)(i) must
20 be based on evidence that the defendant: (i) attempted to
21 transport the funds across the United States border; (ii) knew
22 that those funds "represent[ed] the proceeds of some form of
23 unlawful activity;" and (iii) knew that such transportation was
24 designed to "conceal or disguise the nature, the location, the

1 source, the ownership, or the control" of the funds. See id. at
2 2002. With respect to this third prong, the Court held that a
3 showing that the defendant hid funds during transportation is not
4 sufficient to support a conviction under the statute, even if
5 substantial efforts have been expended to conceal the money. See
6 id. at 2003. Rather, the Court, looking to the meaning of
7 "design" in the phrase "knowing that such transportation is
8 designed . . . to conceal or disguise," concluded that because
9 "design" means purpose or plan in this context, a conviction
10 "requires proof that the purpose -- not merely effect -- of the
11 transportation was to conceal or disguise a listed attribute" of
12 the transported funds. Id. at 2003, 2005. As the Court
13 explained, "[t]here is a difference between concealing something
14 to transport it, and transporting something to conceal it; that
15 is, how one moves the money is distinct from why one moves the
16 money," and "[e]vidence of the former, standing alone, is not
17 sufficient to prove the latter." Id. at 2005 (internal quotation
18 marks and citation omitted).

19 We turn now to the application of Cuellar to the present
20 matter. Ordinarily, we might remand this issue to the district
21 court to benefit from its views. That is unnecessary, however,
22 because, subsequent to the Cuellar decision, the district court
23 stated its views in considering Ness's renewed motion for bail.
24 See United States v. Ness, No. 01-cr-699, 2008 WL 3842961

1 (S.D.N.Y. Aug. 15, 2008). The district court concluded that the
2 government had provided sufficient evidence to sustain a
3 conviction. See id. at *5. The court relied upon evidence that
4 the proceeds of the drug sales were being transported to people
5 in Europe and commingled with jewelry and other valuables that
6 Ness declared to be part of his business of transporting such
7 valuables internationally. See id. The court concluded that
8 “[t]he transportation was designed to conceal or disguise the
9 ‘nature’ of that which was being transported, or its ‘location’
10 among the valuables that Ness was allowed to transport and move
11 from one airplane to another at JFK airport, or that the ‘source’
12 of the items being transported was ecstasy distributions.” Id.

13 The government echoes this reasoning on the remand. It
14 contends that the evidence adduced at trial established two
15 purposes behind Ness’s transportation of the narcotics proceeds:
16 “(1) to ensure the concealment of the funds (including
17 concealment of their nature, location, source, ownership and
18 control); and (2) to allow the transportation of the funds to
19 other narcotics traffickers.” The government argues that Ness’s
20 actions show that the drug proceeds were delivered to his company
21 at least in part for purposes of concealment, pointing to “[his]
22 scrupulous avoidance of any paper trail, his surreptitious
23 shipment of the money by hiding it in packages of jewelry for
24 shipment, and his use of code words for delivery of the funds.”

1 The government also notes certain testimony it construes as
2 pertinent: (i) the testimony of Ness's business partner Robert
3 David that Ness stated that he "sells confidentiality"; and (ii)
4 ecstasy trafficker Guy Madmon's testimony that he "didn't want a
5 paper trail saying anything about any money that [he] dropped
6 off," which the government contends "supports the jury's
7 conclusion that one reason drug money was delivered to Ness's
8 company was because Ness would conceal its nature, location,
9 source, ownership, and control by failing to document its receipt
10 or existence."

11 We disagree. While such evidence may indicate that Ness was
12 concealing the nature, location, or source of the narcotics
13 proceeds, it does not prove that his purpose in transporting the
14 proceeds was to conceal these attributes. It evidences not "why"
15 he moved the money, but only "how" he moved it. Ness's avoidance
16 of a paper trail, hiding of the proceeds in packages of jewelry,
17 and use of code words show only that he concealed the proceeds in
18 order to transport them. Under Cuellar, such evidence is not
19 sufficient to prove transaction or transportation money
20 laundering offenses. The testimony of David and Madmon, while
21 slightly more suggestive that the purpose of Ness's business was
22 to conceal illegal proceeds, is not sufficient to support a
23 finding beyond a reasonable doubt that Ness's purpose in
24 transporting the narcotics proceeds was to conceal one or more of

1 their attributes.

2 We have reviewed the remaining evidence and conclude that it
3 shows only an intent to conceal the transportation, not an intent
4 to transport in order to conceal. Therefore, the transaction and
5 transportation money laundering convictions must be overturned.

6 b) Monetary Transaction in Unlawful Funds

7 Because we upheld the transaction and transportation money
8 laundering convictions in Ness I, we did not address Ness's
9 sufficiency challenge to his 18 U.S.C. § 1957(a) conviction.
10 Because these other convictions are now overturned, however, we
11 consider this issue. We conclude that this conviction must be
12 overturned as well.

13 To prove a violation of § 1957(a), the government must
14 present evidence that the defendant knowingly engaged or
15 attempted to engage in a monetary transaction in unlawful funds.
16 The statute defines "monetary transaction" as "the deposit,
17 withdrawal, transfer, or exchange, in or affecting interstate or
18 foreign commerce, of funds or a monetary instrument . . . by,
19 through, or to a financial institution (as defined in section
20 1956 of this title)" ¹ 18 U.S.C. § 1957(f) (emphasis
21 added). Thus, in order to sustain a § 1957(a) conviction, a
22 financial institution must have been involved. In Ness I, we

¹The government does not claim that Ness was transferring funds "to" a financial institution. Therefore, we only need address whether Ness or his armored car company were financial institutions.

1 concluded that the district court's instruction to the jury with
2 respect to the financial institution element was inaccurate, but
3 held that Ness failed to demonstrate prejudice given that his
4 conspiracy conviction would nonetheless stand under the
5 transaction money laundering offense that did not include
6 "financial institution" as an element. See 466 F.3d at 82. We
7 now conclude that the evidence concerning the involvement of a
8 financial institution was legally insufficient even if the
9 instruction was correct.

10 Section 1956 defines "financial institution" as including
11 (1) any financial institution, as defined under 31 U.S.C. §
12 5312(a)(2), or the regulations promulgated thereunder; and (2)
13 any foreign bank, as defined under 12 U.S.C. § 3101. See 18
14 U.S.C. § 1956(c)(6). Section 5312 of Title 31 of the United
15 States Code defines "financial institution" by enumerating
16 twenty-six types of institutions, including, inter alia, a
17 commercial bank, a private banker, and a currency exchange.² See

² At the time of Ness's arrest in July 2001, the twenty-six types of financial institutions listed in 31 U.S.C. § 5312(a)(2) were as follows: (A) an insured bank; (B) a commercial bank or trust company; (C) a private banker; (D) an agency or branch of a foreign bank in the United States; (E) an insured institution; (F) a thrift institution; (G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934; (H) a broker or dealer in securities or commodities; (I) an investment banker or investment company; (J) a currency exchange; (K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; (L) an operator of a credit card system; (M) an insurance company; (N) a dealer in precious metals, stones, or jewels; (O) a pawnbroker; (P) a loan or finance company; (Q) a travel agency; (R) a licensed sender of money; (S) a telegraph company; (T) a business engaged in vehicle sales; (U) persons involved in real estate closings and settlements; (V) the United States Postal Service; (W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business enumerated here; (X) certain casinos, gambling casinos, or gaming establishments with an annual gaming revenue of more than \$1,000,000; (Y) any business or agency which engages in any activity which

1 31 U.S.C. § 5312(a)(2). The government has not argued that
2 either Ness or his armored car company constitutes one or more of
3 the enumerated types of institutions in Section 5312(a)(2).
4 Therefore, we need not address whether Ness or his company
5 qualify as a financial institution under this statute.

6 The government rather rests its theory of liability on a
7 definition of "financial institution" contained in a regulation
8 promulgated under Section 5312. Turning to Section 1956(c)(6)'s
9 definition of "financial institution," which in turn looks to the
10 meaning of "financial institution" under Section 5312(a)(2) and
11 the regulations promulgated thereunder, the government relies
12 upon Section 103.11 of Title 31 of the Code of Federal
13 Regulations, which was promulgated under Section 5312. Section
14 103.11 defines "financial institution" as, inter alia, a "money
15 services business." 31 C.F.R. § 103.11(n)(3). The regulation
16 defines "money services business" to include a person doing
17 business as a "money transmitter," which in turn is defined,
18 inter alia, as any "person engaged as a business in the transfer
19 of funds." 31 C.F.R. § 103.11(uu)(5)(i)(B). Pointing to Ness's
20 involvement in transporting the narcotics proceeds, the
21 government contends that there was overwhelming evidence that
22 Ness was a "person engaged as a business in the transfer of

the Secretary of the Treasury determines, by regulation, to be an activity similar to, related to, or a substitute for any activity in which any business enumerated here is authorized to engage; or (Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

1 funds," and was, therefore, a "financial institution."

2 This theory was not presented to the jury and therefore
3 cannot support an affirmance. See Chiarella v. United States,
4 445 U.S. 222, 236 (1980); United States v. Plaza Health Labs.,
5 Inc., 3 F.3d 643, 646 (2d Cir. 1993). Even if it had been
6 presented, Ness is, as matter of law, not a "person engaged as a
7 business in the transfer of funds." Section 103.11 defines
8 "funds transfer" as a "series of transactions, beginning with the
9 originator's payment order, made for the purpose of making
10 payment to the beneficiary of the order." 31 C.F.R. § 103.11(q).

11 "Payment order," in turn, is defined as

12 [a]n instruction of a sender to a receiving
13 bank, transmitted orally, electronically, or
14 in writing, to pay, or to cause another bank
15 or foreign bank to pay, a fixed or
16 determinable amount of money to a beneficiary
17 if: (1) The instruction does not state a
18 condition to payment to the beneficiary other
19 than time of payment; (2) The receiving bank
20 is to be reimbursed by debiting an account
21 of, or otherwise receiving payment from, the
22 sender; and (3) The instruction is
23 transmitted by the sender directly to the
24 receiving bank or to an agent, funds transfer
25 system, or communication system for
26 transmittal to the receiving bank.

27
28 31 C.F.R. § 103.11(y). The government does not claim that Ness's
29 transactions involved any payment orders.

30 Moreover, "money transmitter" is, by definition, limited to
31 certain "facts and circumstances." 31 C.F.R. §
32 103.11(uu) (5) (ii). The Financial Crimes Enforcement Network

1 ("FinCEN") explained in its Federal Register notice that many
2 commenters sought clarification of the definition of money
3 transmitter and objected to any interpretation that would cause
4 businesses that simply transmit funds as part of their other
5 business activities to be categorized as money transmitters. See
6 Amendment to the Bank Secrecy Act Regulations - Definitions
7 Relating to, and Registration of, Money Services Businesses, 64
8 Fed. Reg. 45,438, 45,442 (Aug. 20, 1999) (to be codified at 31
9 C.F.R. pt. 103). FinCEN agreed that "the breadth of the
10 definition of money transmitter proposed in the Notice requires
11 limitation to avoid both unnecessary burden and the extension of
12 the Bank Secrecy Act to businesses whose money transmission
13 activities either do not involve significant intermediation or
14 are ancillary to the completion of other transactions." Id. at
15 45,442-43. The government has not presented any evidence of
16 significant intermediation here. Thus, we must overturn the 18
17 U.S.C. § 1957(a) conviction as well.

18 CONCLUSION

19 For the reasons discussed above, we reverse Ness's
20 convictions.