In The
United States Court of Appeals

No. 71-1176
No. 71-1177
Criminal

UNITED STATES OF AMERICA, APPELLE

Vs.

FRANCIS X. KRONCKE and
MICHAEL D. THERRIAULT, APPELLANTS

BRIEF OF APPELLEE

Appeal from the United States District Court
District of Minnesota

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Appellee,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The court's instructions to the jury were proper as they dealt with all aspects of the defense and in particular as they dealt with necessity.

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2. There is no reversible error with respect to Rule 30, F. R. Cr. P.

Steinberg v, United States (5th Cir. 1947), 162 F.2d 120, cert. den. 332 U.S. 808, 68 S.Ct. 108.

Walker v. *United States (D.C.* Cir. 1969), 418 F.2d 1116.

STATEMENT OF FACTS

The functions of the Federal Selective Service System in Minnesota are performed by local boards. (T. Vol. II, p. 149). In Little Falls, Minnesota, Selective Service Local Board #73 has offices on the second floor of a building located at Second Street and East Broadway. (T. Vol. II, p. 63). The local board occupies two adjoining rooms on that floor. Both room have doors leading to a center hall and there is a door connecting the two rooms. (T. Vol. II, pp. 65-66) .

On July 10, 1970, six agents of the FBI had traveled to Little Falls and arrived about six in the evening. (T. Vol. p. 61). About 9 :00 P.M. the agents proceeded to the building where the local board was located and positioned themselves in and around it. Some located themselves in a private business office adjacent to the local board and others positioned themselves outside the building. Those agents in the building conducted a survey of the local board offices prior to entering the business adjacent thereto. Both doors to the hallway from the local board offices were locked as was the door between the two rooms. The window was closed and screen was intact. When agents left the local board offices at that

time the doors were relocked (T. Vol. II, pp. 66-69). The agents remaining in the building waited in the adjoining real estate office for about two hours. (T. Vol. II, p. 69). About 11:30 P.M. the agents in the street informed those inside by radio that the silhouette of a person was seen on the roof of the adjoining building. That building's roof adjoined and was even with the closed screened window referred to above. (T. Vol. II, p. 70). Shortly after the receipt of the information, the agents in the building heard sounds: first a zinging sound of something being torn, then sounds of persons in the building, then sounds of metal on metal were heard, as if someone was forcing open a cabinet. These sounds came from the direction of the selective service office and lasted 12-15 minutes. (T. Vol. II, pp. 70-71).

The FBI agents then proceeded to the local board offices, and some entered each of the two rooms. As to the room with the window overlooking the adjacent building, no-one was found but the window was now open and the screen had been cut. A shelf across the window with flowers on it had been moved. (T. Vol. II, p. 74).

In the other room two individuals, the defendants in this fiction, were found. (T. Vol. II, p. 75). Various file drawers were open and certain files were in plastic garbage sacks. Tools of various kinds were found. Various photographs were taken and they, along with the tools found and sacks containing files, were introduced as exhibits at trial. The plastic bags have holes in them, and one of the defendants in his testimony stated they had planned to drop them into the Mississippi River. (T. Vol. V, p. 24). Defendants were wearing gloves. (T. Vol. II, p. 110). The tools included vice grips, pliers, strapping tape, and charcoal lighter. (T. Vol. II, p. 115).

The defendants admit the essential of the crime, that is the desire to remove and destroy records. (T. Vol. IV, p. 141). In the car defendants used letters were found addressed to various news media which in effect stated that they intended to destroy the files and hinder the operation of the local board. (Exs. 37, 38, 39, 40). Col. Robert Knight, State Selective Service Director, testified that the duty of a local board is to register, classify and, if eligible, induct registrants. (T. Vol. II, pp. 150-151).

He further testified that if a 1A file is removed the registrant cannot either be drafted or reclassified until the file is replaced. (T. Vol. II, p. 157). He further testified that if the records of a local board are missing the board cannot operate properly. (T. Vol. II, p. 160).

At the trial the defendants admitted the substance of the accusations from opening argument on. Defendants offered testimony covering their beliefs, political and religious, as to the draft and the Viet Nam conflict. They offered testimony as to the alleged horrors of the conflict itself. They offered testimony that certain citizens were frustrated that American elections did not send to office persons of defendants' persuasion. The government was granted a standing objection to this type of testimony although it was provisionally allowed as an offer of proof. Prior to final arguments a conference was held in chambers in regard to instructions. A reporter was not present. Counsel Tilsen states at page 38 of his brief no indication was given as to whether defendants' proposed instructions were granted or denied. This writer was present, and recalls the matter differently. The trial judge informed defendants that their instruction would not be given. This recollection is confirmed by the court file in the matter which has defendants' proposed instructions in it with the endorsement of the judge

that they were denied. Furthermore, the court indicated in the transcript (T. Vol. VI, p. 162) that he had gone over the instructions with Mr. Tilsen and that they were then denied. The court did not say exactly what instructions *would* be given. No objection was made by defendants on the records that Rule 30 was not complied with.

ARGUMENT

1. THE COURT'S INSTRUCTIONS TO THE JURY WERE PROPER AS THEY DEALT WITH ALL ASPECTS OF THE DEFENSE AND iN PARTICULAR AS THEY RELATED TO NECESSITY.

Defendants in their brief outline the law (and there is cry little law) of necessity in the light most favorable to them; and their crime as proven in this case still does not fall within their own cited authority. Defendant's cases all involve unseaworthy ships, people being thrown off overloaded lifeboats, medical operations in dire circumstances and situations where there was an *immediate* and pressing need to act in a certain way to prevent the death or injury to a person near at hand, and where no other option seemed open. This is a far cry from the facts proven here. This was hot an act committed in the panic of the moment to save life or limb when no other course was open. On cross examination, defendant Therriault admitted the raid had been in the planning stage for some months (T. Vol. V, p. 25). There were elaborate preparations to prevent discovery and capture, and again, Therriault admitted he, did not wish to be caught (T. Vol. V, p. 26). Mr. Therriault's statement in response to a question by his lawyer on the bottom of page 35 and top of page 36 of Transcript Vol. V gives a more specific motivation for his action. He states that if the government no longer protects rights he considers important

he can overthrow it. No case cited by defendant extends the doctrine of compulsion or necessity to destruction of government records, or hampering the government in the execution of constitutional laws.

The power of Congress to draft has been upheld too often to require citation. In our country citizens have free speech, the right to assemble and a virtually universal franchise. The laws and policies complained of by defendants are passed and promulgated by people who survive this political process. What defendants seek to do is use the necessity doctrine to justify a personal act of defiance to a law passed by Congress and enforced by the President. They admit they have failed to persuade the government to their point of view by legitimate means, so they break a law that in their minds is bad. They cite a government policy they find repulsive as a justification.

Corpus Juris Secundum does not discuss at length "necessity" as such, but refers the reader to the similar defense of "compulsion". See 22 C.J.S. 185-186. Under "compulsion" C.J.S. emphasizes that the defense applies only when the compulsive situation is eminent and impending and there must be no reasonable alternative to the action taken. 22 C.J.S. 135-136.

Actually, the defendants here set forth a defense usually characterized in language other than the defense of necessity. U. S. District Judge Northrup was confronted with virtually an identical defense in *United States* v. *Berrigan* (D. Maryland 1968), 283 F. Supp. 336. The posture of the case when the opinion there reported was written was an application by the defendant (who was charged with a similar offense) to make an opening statement and present a defense identical in substance to the defense offered in the

case at bar.

Judge Northrup dealt with the crux of our problem here. He first stated :

> "Initially it must be pointed out that in law once the commission of a crime is established—the doing of the prohibited act with necessary intent—proof of good motive will not save the accused from conviction." 283 Fed. Supp. at 338.

In support of that proposition *Baxley v. United States* (4th Cir. 1943), 134 F.2d 937, was cited. That case stands for the proposition that one is criminally responsible for a prohibited act even though the act is committed under a deep and sincere religious belief that the doing of the act was not only his right but his duty.

In *Nation* v. *District of Columbia,* 34 App. D.C. 453 (1910), a defendant had destroyed liquor bottles, which he claimed were illegally possessed by their owner, on the grounds their existence was a public nuisance and there was no other remedy. The court made short shrift of the argument and pointed out that mob law can have no recognition in our system and must be repressed from its inception.

Judge Northrup mentioned several other issues which really are present in the case at bar, but which are hard to identify as such because the defense is inaccurately clothed in the apparel of "necessity".

Of particular application is the fact that neither defendant was a registrant of local board 73 and neither had been ordered to Viet Nam. These defendants do not have standing to raise the validity of the war because the rights of parties not before the court are violated. *Yazoo and M. V. R. Co. v. Jackson Vinegar* Co., 226 U.S. 217, 218, 33 S.Ct. 40, 41 (1912).

It is also important to note that destruction of the files will not achieve the results thought necessary by defendants. If a local board's records are destroyed, the draft call is simply spread over the remaining boards. (T. Vol. III, p. 51). So the acts of defendants, had they succeeded, would have simply resulted in people elsewhere in the state being drafted ahead of schedule and suffering the resultant disruption of their personal lives.

2. THERE IS NO REVERSIBLE ERROR WITH RESPECT TO RULE 30, F. R. Cr. P.

The defendants argue that since the court failed to advise defense of its ruling on proposed instructions prior to final argument a new trial must be ordered.

There are three problems with defendants' argument.

Firstly, the court did inform the defendants of his ruling on their proposed instruction in chambers. The court's notation on the written proposal would so indicate. This writer specifically remembers it. Judicial statements in the transcript cited in the statement of facts corroborates it.

Secondly, defendants did not object before or after final argument to a failure to inform them of the ruling. This failure renders any error harmless error. *Steinberg* v. *United States* (5th Cir. 1947), 162 F.2d 120, cert. denied 332 U.S. 808, 68 S.Ct. 108.

Thirdly, it is harmless error unless it would appear the final argument of defendants could be different. *Walker v. United States (D.C.* Cir. 1969), 418 F.2d 1116. There is no claim in defendants' brief it would have been different and in reading the argument it is hard to see how it could have been different. Defendants argued the evidence they presented. Mr. Tilsen also argued newspaper articles he had read and experiences of his law partner's brother, both

items not in evidence. About the only alternative to the arguments they made would be no argument at all, which is hard to imagine. As a matter of law, the case they presented is not a defense, so one argument about it is about as good as another. Counsel seemed to contemplate the instructions when he intimated to the jury they could ignore them. (T. Vol. VI, pp. 112413).

CONCLUSION

The government prays this Court for an order affirming the judgment of conviction in the trial court below. If a new trial is ordered, the government prays that this Court direct the trial court not to permit the jury to hear any evidence as to either a necessity defense or in connection with religious, ethical or political justification or motivation.

Respectfully submitted,

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