

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

AT CHARLESTON

UNITED STATES OF AMERICA,

v.

Criminal Case No. 2:02-00244

THOMAS RAY WHITE,

Defendant.

DEFENDANT’S MOTION TO DISMISS COUNT II OF THE INDICTMENT

Comes now defendant Thomas Ray White, by his undersigned counsel, and pursuant to Rule 12 of the Federal Rules of Criminal Procedure, moves this Court to dismiss Count II of the indictment as fatally flawed and strike those portions of Count I that refer to the facts underlying Count II of the indictment.

The Indictment

Count II of the instant indictment alleges the following:

On or about September 24, 2002, at or near Madison, Boone County, West Virginia, within the Southern District of West Virginia, a person known to the grand jury, aided and abetted by defendant Thomas White, did maliciously damage and destroy and attempt to damage and destroy, by means of fire, a vehicle used in interstate commerce and in activities affecting interstate commerce, that is, a trailer donated by the Federal Emergency Management Agency (hereinafter referred to as “FEMA”) to the West Virginia Office of Emergency Services for use as housing for victims of floods and other disasters, and for use as a FEMA command center in the event of future disasters requiring federal disaster assistance.¹

¹ The statute underlying Count II of the indictment, 18 U.S.C. §844(i), provides in relevant part, as follows:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned...fined...or both. 18 U.S.C. § 844(i) (1999).

Count II of the instant indictment is fatally flawed inasmuch as the government cannot, under any set of circumstances, prove the existence of an essential element of the crime charged, that is, that the property was “used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” *See* 18 U.S.C. § 844(i).

The Interstate Commerce Clause

This Court’s analysis of the interstate commerce element of the crime charged in Count II of this indictment is controlled by the United States Supreme Court’s decision in Jones v. United States, 529 U.S. 848 (2000). In that case, the Supreme Court held that “an owner-occupied residence not used for any commercial purpose does not qualify as property “used in” commerce or commerce affecting activity; arson of such a building, therefore, is not subject to federal prosecution under § 844(i).” Id. at 850-851. Further, the building in question must be actively employed “for commercial purposes and not merely a passive, passing or past connection to commerce.” Id. at 855. (emphasis added). *See also*, United States v. Carr, 271 F.3d 172, 177 (4th Cir. 2001).

The property referred to in Count II of the instant indictment, and in the “Overt Acts” section of Count I, is a trailer used for temporary housing. The government alleges that this trailer is used in interstate commerce. As noted above, such “use” must be active employment and not merely “a passive, passing or past connection to commerce.” Jones at 855 (emphasis added); Carr at 177.

In this case, the possession, ownership and title of the trailer at issue was transferred from the Federal Emergency Management Agency to the West Virginia Office of Emergency Services on or about December 7, 2001. See correspondence of December 7, 2001 attached hereto as Exhibit 1. Carlos N. Mitchell, Disaster Recovery Manager of the Federal Emergency

Management Agency, transferred “possession, ownership and title to the travel trailers” to multiple trailers. See, Transfer Document attached hereto as Exhibit 2. That transfer was “subject to the conditions listed in the attached cover letter.” See, Exhibit 1. The only conditions listed in the cover letter of December 7, 2001 was the requirement that the State of West Virginia comply with the provisions of § 308 of the Stafford Act² which requires non-discrimination in the provision of disaster assistance and occupancy of the travel trailer units. Further, the trailers were only to be used to provide temporary housing for disaster victims in major disasters or emergencies. Finally, the State was also required to comply with regulations regarding flood plain management and the protection of wetlands as well as certain environmental regulations.

No additional conditions were attached to the transfer of title and ownership of the trailer from FEMA to the West Virginia Office of Emergency Services. On December 7, 2001, the trailer in question became the property of the West Virginia Office of Emergency Services. See Affidavit of Lee Gray, Director of Administration, West Virginia Office of Emergency Services, attached hereto as Exhibit 3. The trailer in question is now and was at the time of the alleged crime the property of the State of West Virginia. *Id.* No agreement exists that allows FEMA to reassert any ownership interest in the trailer. *Id.* The purpose of the trailer in question was to serve as temporary residential housing for victims of natural disasters. As such, at the time of the alleged crime set forth in Count II of the indictment, the trailer in question was not actively employed in interstate commerce or activities affecting interstate commerce. The trailer’s past connection to interstate commerce or activities affecting interstate commerce, if any, is insufficient to satisfy the jurisdictional element of 18 U.S.C. § 844(i). The government’s contention that FEMA retained some conditional future interest in possession of the trailer is

² 42 U.S.C. § 5151.

wrong, and, in any event, would be insufficient to satisfy the jurisdictional element of the Federal Arson Statute. Id.

FEMA's alleged future conditional interest in possession of the trailer³ owned by the West Virginia Office of Emergency Services was dependent upon the fulfillment of a condition precedent. That condition precedent was the existence of a natural disaster requiring the need for temporary housing. At the time of the crime alleged in Count II of the instant indictment, that condition precedent remained unfulfilled. Accordingly, at the time of the alleged crime set forth in Count II of the indictment, ownership, title, and possession remained entirely with the State of West Virginia.

The vehicle referred to in Count II of the indictment was owned by the State of West Virginia. The United States government retained no interest in the vehicle. The vehicle was used for temporary residential housing. Accordingly, it was not actively employed in interstate commerce or any activity affecting interstate commerce. Its past connection with interstate commerce, if indeed there was any, is insufficient to satisfy the jurisdictional element of the Federal Arson Statute. Jones at 855; Carr at 177. To allow the government to proceed in its prosecution of defendant Thomas Ray White for the arson of the trailer referred to in Count II of the instant indictment would be to stretch the boundaries clearly set forth in Jones and Carr beyond all recognition.

WHEREFORE, defendant Thomas Ray White by and through his undersigned counsel respectfully requests that this Court enter an Order dismissing Count II of the instant indictment as fatally flawed and striking all language in the instant indictment referring to the overt acts described in Court II of the indictment.

³ The Government's contention that FEMA retained such a future conditional interest is, obviously, contested by the actual owner of the trailer, the West Virginia Office of Emergency Services. See, Exhibit 3.

THOMAS RAY WHITE

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