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Because Dozing's No Crime

Courts must make sure 'willful blindness' theories are applied properly.

By Kevin Mosley and Andrew Wise

The difference between a failure and a felony can turn on whether an executive willfully shut his or her eyes to illegal activity—or simply dozed and missed a problem.

That difference can sometimes be hard to distinguish. And that's why it's so important that courts take great care that they don't allow mistakes to be turned into crimes.

When the Supreme Court in 2005 overturned the conviction of Arthur Andersen, it observed that for offenses requiring knowledge and intent, courts must ensure federal criminal laws "reach only those with the level of culpability … we usually require in order to impose criminal liability."

That means that in white-collar cases alleging offenses such as false statements or obstruction of justice, the government must prove a defendant's culpable knowledge. For example, with Martha Stewart, the government put forth evidence that Stewart knew that statements she made to government investigators were false. To convict the recently indicted Sen. Ted Stevens (R-Alaska) of making false statements, the government will have to prove, among other things, that the senator knew his financial disclosure forms were inaccurate.

Although e-mail or other communications might contain some evidence of a defendant's knowledge and state of mind, such communications rarely reveal the inner workings of the human mind in a way direct enough to establish these elements.

To fill this gap, prosecutors often rely on the "willful blindness" or "deliberate ignorance" theory of knowledge. When applied properly, the theory allows the government to substitute evidence of a defendant's affirmative and corrupt effort to avoid gaining knowledge of relevant facts as a substitute for proof of actual knowledge of those facts.

But when applied improperly, the theory can be misused to overcome weak evidence of knowledge and intent and—as many courts have warned—create the possibility a defendant may be convicted of a specific intent crime when all that is proved is that the defendant was negligent.

So, when is a "willful blindness" theory proper, and when does its use put a defendant at risk of improper conviction because he or she "should have known" illegal acts were taking place?

Defining 'Knowledge'

Imagine a CEO charged with making false statements in a company's filing with a government agency. The government introduces e-mails (on which he is copied) from the nine months before the filing and a memorandum dated three months before the filing that the company's CFO claims to have left on the CEO's desk. The e-mails and memorandum contain facts contrary to the statements in the filing. The government argues that the e-mails and memorandum demonstrate the CEO "knew" the filing contained false assertions.

The CEO testifies that he usually reads all e-mails that come to him, though he has no present recollection of the specific e-mails introduced by the government. He also testifies that he probably read the memorandum, but denies ever discussing the issue with the CFO. In addition, the CEO concedes that in looking back on the e-mails and the memorandum, he now recognizes the significance of certain facts, and that he should have been more diligent in his review, but he testifies that when he signed off on the filing, he did not know that assertions contained in it were false.

The first question is what "knowledge" means. In this case, as in many white-collar cases involving technical or complicated subject matter, "knowledge" is more complex than being presented with relevant facts through e-mails and memoranda. The issue is not whether the CEO knew

individual and discrete facts, but whether he discerned from those facts that the statements to the government agency were false.

That is a distinction with a very significant difference. To prove its case, the government must prove not only that the defendant "knew" the facts that could form the basis of knowledge for the statements made to the government, but also that he appreciated their significance and relationship to such a degree that he "knew" the statements were false.

Eyes Closed?

Of course, another requirement for winning a conviction on a charge of false statements is proving the defendant intended to deceive by making the statements.

Our CEO defendant has denied knowing the statements in the submission to the government agency were false, despite admitting that he received the e-mails and memorandum. To convict him, the government asks the court to instruct the jury on willful blindness. It intends to argue that the CEO's testimony establishes that he deliberately ignored facts establishing the falsity of the statements. On what basis should the judge give such an instruction?

Criminal liability for deliberate ignorance must be based upon a defendant's corrupt and intentional efforts to avoid knowledge for the purpose of establishing a legal defense to a charge that requires the proof of guilty knowledge.

In *United States v. Ramos* (1994), the U.S. Court of Appeals for the 6th Circuit held that the instruction is appropriate only where evidence "shows the defendant *attempted to escape conviction* by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct" (emphasis added). Similarly, in *United States v. Restrepo-Granda* (1978), the 5th Circuit held the term deliberate ignorance "denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught." In *United States v. Lara-Velasquez* (1990), the 5th Circuit succinctly explained that deliberate ignorance is reflected in a criminal defendant's *actions* that suggest, in effect, "don't tell me, I don't want to know."

In our CEO's case, the defense has a strong argument that the jury should not be given the instruction. Our hypothetical record does not reveal evidence that the CEO intentionally contrived to avoid learning of facts relevant to the truth of the statements.

Such evidence could be direct, such as the CEO telling the CFO: "Don't tell me too much about the transaction. I don't want to know." Or it could be circumstantial, such as evidence that the CEO avoided reading his e-mails, refused to attend sessions with the CFO about issues relevant to the submission, or deliberately avoided contact with staff working on the submission. Certainly, the government is free to argue that the CEO's testimony that he failed to put two and two together when he signed off on the filing is not credible and that the jury should infer actual knowledge from his receipt of the e-mail and the memorandum.

But an actual knowledge argument, based upon the undisputed evidence of the transmission and receipt of individual facts, logically forecloses a deliberate ignorance argument. A person who acknowledges having obtained information cannot, deliberately or otherwise, be "ignorant" of that same information.

As the 10th Circuit noted in *United States v. de Francisco-Lopez* (1991), "[i]f evidence proves the defendant actually knew an operant fact, the same evidence could not also prove he was ignorant of that fact. Logic simply defies that result."

Our CEO thus argues that if the jury is given the willful blindness instruction, they will convict if they conclude he should have figured out the falsity of the statements, even if they do not conclude he in fact did.

The government responds by citing to the portion of the jury instruction (present in most of the model jury instructions on willful blindness) counseling the jury not to convict based on carelessness, negligence, or foolishness.

But that same caution appeared in the trial court's instruction in *Ramos,* and the 6th Circuit still held the instruction "should be used with caution, because of the possibility that 'juries will convict on a basis akin to a standard of negligence.' " It was included in the trial court's instruction reviewed by the 8th Circuit in *United States v. Barnhart* (1992), and the 8th Circuit still held "despite the instruction's cautionary disclaimer, there is a 'possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.' "

In cases such as our CEO's, these warnings are particularly important. The distinction between "knowing" discrete facts and "knowing" the falsity of a technical or complex statement can be lost when the willful blindness theory is improperly applied, possibly resulting in convictions based on a negligence or "should have known" finding.

So counsel must establish for the court, and for the jury, the distinction between criminally culpable willful blindness and a noncriminal failure to adequately perform one's job function. And trial courts must limit a jury's consideration of legal theories to those supported by the evidence.

Dozing may be grounds for termination, or even civil liability, but it isn't a crime.

Kevin Mosley is a senior associate and Andrew Wise is a partner at Miller & Chevalier in Washington, D.C. They may be contacted at kmosley@milchev.com and awise@milchev.com.