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Conspiracy: What Does “Knowingly” Mean?

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Jamila Malaika Carter, *Production Editor*^[1]

What does it mean to *knowingly* distribute a certain quantity of drugs, in the furtherance of a conspiracy? This question has been answered differently, in various circuits. The Sixth Circuit has attempted to answer this question, in the 2016 case *United States v. Gibson*.^[2] In 2016, Ray Gibson filed an appeal, after receiving a mandatory minimum of 10 years. He pleaded guilty, in conspiring to distribute fifty grams or more of methamphetamine.^[3] Mr. Gibson was convicted under both 28 U.S.C. § 841(b)(1)(A)(viii) and 28 U.S.C. § 846.^[4] 28 U.S.C. § 841(b)(1)(A)(viii) states it is “unlawful for any person knowingly or intentionally to ...distribute... a controlled substance” and this specific section of the statute states, the mandatory minimum sentence for anyone distributing 50 grams or more of a controlled substance is 10 years.^[5]

Mr. Gibson was also convicted under the 21 U.S.C. § 846 the federal conspiracy law which states, “Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the common of which was the object of the attempt of conspiracy.”^[6] This means that an individual is subjected to the same sentence and sanctions as a person who violates any provision under this title, which includes § 841. Thus, Mr. Gibson as a co-conspirator was subject to be sentenced in accordance to § 841(b)(1)(A)(viii), which is why he was sentenced to do 10 years.^[7]

Mr. Gibson, in his appeal stated that he should not have been sentenced for 10 years because he could not reasonably foresee that the conspiracy involved 50 or more grams of meth.^[8] The court found the he did not need to foresee a conspiracy, to distribute drugs that would involve a specific drug quantity.^[9] The court relied on *United States v. Pruitt* and *United States v. Robinson*.^[10]

In *Robinson*, the issue arose whether the defendant had the knowledge that he was selling a certain quantity or if he had direct involvement with selling a certain quantity of the drug.^[11] The defense counsel argued that knowledge was required, however the district and appellate court disagreed and stated that the jury should only determine the amount and the quantity involved in the conspiracy.^[12] Thus, the defendant anticipated in the amount that he could reasonably foresee.^[13] The court in *Robinson* found that the decision is different from *Pruitt* because *Pruitt* dealt with “whether a conspiracy compromising multiple transactions was a single violation of 21 U.S.C. § 841(a).”^[14] However, *Robinson* and *Gibson* both deal with the liability that one faces as a co-conspirator. The court in *Robinson* continued to assert that as long as the defendant was involved in the conspiracy, it only mattered if it was a specific quantity, not the amount that a defendant could have reasonably foresaw.



Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckylawjournal.org

(859) 257-1678



The court further explains there is no further mens rea requirement, and that a defendant must reasonably foresee the drug quantity, in order to be liable for conspiracy.^[15] The defendant argues that the Supreme Court in *Alleyne v. United States* created a separate element pertaining to the drug quantity that was rejected by the Sixth Circuit.^[16] The Sixth Circuit first rejected an argument in *United States v. Dado* which found that *Alleyne* did not add a new mens rea requirement to § 841(b).^[17] The Sixth Circuit also rejected the defendant's argument that under *United States v. Swiney*, there is a mens rea requirement that he reasonably foresaw the quantity of the drug.^[18]

In *United States v. Swiney*, the Government argued that all defendants should have received the same statutory minimum of twenty years, because the heroin led to the death of an individual.^[19] The *Swiney* court, analyzes the decision, by using the sentencing guideline in U.S.S.G. § 1B1.3(a)(1)(B), which used the element of foreseeability to determine if all defendants would have reasonably foreseen that someone would have died, due to the heroin.^[20] The Court in *Swiney* embraces the foreseeability requirement, while noting that various other jurisdictions also embrace the foreseeability element.^[21]

In *Gibson*, instead of embracing the decision in *Swiney* which follows the logic of most of the other circuits, the Court decided to follow *Robinson* despite juxtaposing the rest of the circuits. By the Sixth Circuit rejecting the logic of *Swiney*, this made the Sixth Circuit an outlier nationwide, when it comes to this topic of law. In the last paragraph of the 2016 *Gibson* decision, the court acknowledges the unfairness of the decision because the application does not "serve the drug statute's underlying purpose of severely punishing larger-amount drug dealers."^[22] The court notes, absent of a change in the law from the en banc court, the Supreme Court and Congress, the court was bound by precedents.^[23] The Sixth Circuit had an opportunity to change the precedent when en banc review was granted in October, 2017. The en banc court was evenly divided on the issue, which led to the 10-year sentence remaining undisturbed.^[24]

The issue of whether a defendant must have reasonably foreseen the specific quantity of the conspiracy has been debated in various circuit courts. The Fourth Circuit in *United States v. Foster* dealt with three defendants who were found guilty of conspiring to distribute 50 grams or more of crack in violation of 21 U.S.C. § 846.^[25] The defendant's appealed the district court's decision and argued that the "jury must determine the quantity that was in furtherance of the conspiracy and reasonably foreseeable to each defendant, as opposed to the conspiracy as a whole."^[26]

In a previous case, of the Fourth Circuit, *United States v. Collins*, the court concluded that a defendant involved in a conspiracy should not be subjected to the same punishment as everyone under §841, but the sentencing should be individualized penalizing the defendant for the amount that is "attributable to him."^[27] The Fourth Circuit grounds its decision in *Pinkerton v. United States* and the principles state that the jury must examine the amount attributable, by each co-conspirator.^[28]

The First Circuit also finds that a defendant must have reasonably foreseen the amount involved in the conspiracy, in order to be held liable in the decision of *Alleyne v. United States*.^[29] It is unfair for an individual who was not involved in the whole conspiracy and another who was only involved in distributing certain portions of the drug quantity, to be punished so extensively and harshly. The purpose of punishing a person in accordance to § 846 and § 841 is to punish high level drug dealers, and not punish the small dealers who happen to be involved in a larger conspiracy. By punishing all of the individuals equally, juxtaposes the idea of a fair sentence for every defendant.

The First and Fourth Circuit is a large part of the circuits, which state in order for someone to be punished under § 841, the quantity must be embraced by the drug conspiracy and be reasonably foreseen by the defendant.^[30] The Sixth Circuit should adopt this logic and the element of foreseeability that has been adopted by every other circuit, and reject the reasoning of *Robinson*. The Sixth Circuit needs to reevaluate the foreseeability element of drug conspiracy for fair and just sentencing to be given to co-conspirators.

^[1] J.D. expected in 2019.

^[2] *United States v. Gibson*, No. 15-6122, 2016 WL 6839156, (6th Cir. 2016), *aff'd en banc* 874 F.3d 544 (6th Cir. 2017).

^[3] *United States v. Gibson*, No. 15-6122, 2016 WL 6839156, *1 (6th Cir. 2016)

^[4] 21 U.S.C. §§ 841(b)(1)(A)(viii), 846 (2016).

^[5] 21 U.S.C. § 841(b)(1)(A)(viii).

^[6] 21 U.S.C. § 846.

^[7] *Id.*; *Gibson*, 2016 WL, 6829156 at *1.

^[8] *Gibson*, 2016 WL, 6829156 at *1.

^[9] *Id.* at *2.

^[10] *Id.* at *2–3.

^[11] *United States v. Robinson*, 547 F.3d 632, 637–40 (6th Cir. 2008).

^[12] *Id.* at 639–40.

^[13] *See id.* at 638–40.

^[14] *Id.* at 638; *United States v. Pruitt*, 156 F.3d 638, 644 (6th Cir. 1998).

^[15] *Gibson*, 2016 WL, 6829156 at *2–3.

^[16] *Id.* at 3.

^[17] *Id.*

^[18] *Id.*

^[19] *United States v. Swiney*, 203 F.3d 397, 399 (6th Cir. 2000).

^[20] *Id.* at 405.

^[21] *Id.*

^[22] *Gibson*, 2016 WL6829156 at *3.

^[23] *Id.*

^[24] *United States v. Gibson*, 874 F.3d 544 (6th Cir. 2017).

^[25] *United States v. Foster*, 507 F.3d 233, 237 (4th Cir. 2007).

^[26] *Id.* at 249.

^[27] *Id.* at 249–50 (quoting *United States v. Collins*, 415 F.3d 304, 312 (4th Cir. 2005)).

^[28] *Id.*

^[29] *United States v. Pizzaro*, 772 F.3d 284, 290–91 (1st Cir. 2014).

^[30] *See e.g.*, *United States v. Pico*, 2 F.3d 472(2nd Cir. 1993)(holding that the defendant was liable due to it being reasonably foreseeable that he was participating in a certain drug conspiracy); *United States v. Blackmom*, 557 F.3d 113, 121 (3rd Cir. 2009)(noting that the person must have “reasonably foreseen” the amount of drugs involved in the drug conspiracy); *United States v. German*, 486 F.3d 849 (5th Cir. 2007) (noting that one of the elements that the court must examine is whether the defendant reasonable foresaw the quantity of drugs); *United States v. Hunt*, 46 Fed. Appx. 375, 376 (7th Cir. 2002)(holding that it was reasonably foreseeable that the defendant could have foreseen the quantity of drugs); *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992); *United States v. Reed*, 575 F.3d 900, 925 (9th Cir. 2009);

United States v. Arias-Santos, 39 F.3d 1070, 1078 (10th Cir. 1994); United States v. Broadwell, 870 F.2d 594, 560 (11th Cir. 1989); United States v. Gaviria, 116 F.3d 1498, 1525–26 (D.C. Cir. 1997).

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Mark Blankenship