

UNITED STATES v. W.F. BRINKLEY & SON CONST. CO.

Cite as 783 F.2d 1157 (4th Cir. 1986)

1157

claim without prior evidentiary hearings. This, however, is not such a case and we decline to review this issue on direct appeal. This determination however, does not affect Grandison's right to apply for relief in a § 2255 proceeding should he elect to do so.

AFFIRMED.



UNITED STATES of America, Appellee,

v.

W.F. BRINKLEY & SON CONSTRUCTION COMPANY, INC. and William F. Brinkley, Jr., Appellants.

No. 84-5355.

United States Court of Appeals,
Fourth Circuit.

Argued Aug. 2, 1985.

Decided Feb. 21, 1986.

Construction contracting company and its president were convicted in the United States District for the Eastern District of North Carolina, Terrence William Boyle, J., of conspiring to rig bids on construction project. Defendants appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) by agreeing to give remaining competitor amount to bid, low bidder gained knowledge that competitor would not actually be competing for contract, affording low bidder opportunity to inflate bid, and such conduct constituted "bid rigging" in violation of antitrust laws, and (2) trial court did not err in instruction defining "bid rigging" or in its instructions concerning requisite intent in cases involving per se violation of antitrust law.

Affirmed.

1. Monopolies §12(2)

By agreeing to give remaining competitor amount to bid, low bidder gained knowledge that competitor would not actually be competing for contract, affording low bidder opportunity to inflate bid, while competitor preserved appearance of being legitimate competitor for contract, and such conduct constituted "bid rigging" in violation of antitrust laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2. Federal Courts §638

Issue of whether trial court erred in its instruction defining "bid rigging" was not properly preserved for appeal, where objection to that portion of instructions was withdrawn.

See publication Words and Phrases for other judicial constructions and definitions.

3. Monopolies §12(2)

Where two or more persons agree that one will submit bid for project higher or lower than others or that one will not submit bid at all, "bid rigging" has occurred, and there has been unreasonable restraint of trade which violates Sherman Anti-Trust Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4. Monopolies §29

Holding that intent element in criminal antitrust actions must be proved and cannot be presumed does not apply in same manner in cases involving per se violation, as it does in rule of reason cases.

5. Monopolies §29, 31(2.4)

In prosecution for conspiracy to rig bids on construction project, Government had to prove beyond reasonable doubt that defendants either participated in combination or in conspiracy for purpose of producing of anticompetitive effects or that defendants participated in combination or conspiracy with knowledge that would produce anticompetitive effects and that effects were produced, and element of intent would be established if defendant's act, knowingly done, resulted in agreement of type forbidden by Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

N. Carlton Tilley, Jr. (William L. Osteen, Osteen, Adams, Tilley & Walker, Greensboro, N.C., on brief), for appellants.

Robert B. Nicholson (John P. Fonte, Charles P. Rule, Acting Asst. Atty. Gen., Washington, D.C., Carl W. Mullis, III, Atlanta, Ga., Bargery G. Williams, on brief), for appellee.

Before PHILLIPS and SNEEDEN, Circuit Judges, and JONES, United States District Judge for the Western District of North Carolina, sitting by designation.

SNEEDEN, Circuit Judge:

The defendants, William F. Brinkley, Jr. and W.F. Brinkley & Son Construction Company ("Brinkley & Son"), appeal their convictions of one count of conspiring to rig bids on a construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Brinkley, president of Brinkley & Son was sentenced to 30 days incarceration and fined \$25,000. The company was fined \$100,000.

The appellants contend that the trial court erred by denying their motion for judgment of acquittal and by improperly instructing the jury on the definition of bid rigging and on the requisite intent to violate Section 1 of the Sherman Act. Finding no error below, we affirm their convictions.

I.

This case concerns the 1979 bidding process for a portion of the Pasquotank River Supply Project undertaken by Elizabeth City, North Carolina. For several years Elizabeth City considered the need to supplement its raw water supply, finally concluding that obtaining water from the adjacent Pasquotank River was the best alternative. The overall project was divided into several subprojects, each of which was

to be awarded through a competitive bidding process. Contract 12, at issue in this case, involved constructing a pumping station at the river and laying a pipeline system to carry the water to a treatment plant.

Contract 12, along with several other subprojects, was first let for bidding in 1977. The city received bids from Brinkley & Son; Dickerson, Inc. ("Dickerson"); Crain & Denbo, Inc. ("Crain & Denbo"); and Dellinger, Inc.¹ Brinkley & Son was the low bidder with a bid of \$653,000. Contract 12 was not awarded in 1977, however, because bids on other projects were significantly higher than expected and the city decided not to award any of the contracts.

In the summer of 1979, Elizabeth City again offered Contract 12 for bidding. Brinkley & Son, Dickerson, and Crain & Denbo submitted bids. Brinkley & Son was again the low bidder—this time with a significantly higher bid of \$995,000—and was awarded the contract.

At trial, representatives of both Dickerson and Crain & Denbo testified as immunized witnesses for the government concerning events which preceded the 1979 bidding. Frank Carpenter, the Utility Division manager for Dickerson, testified that he spoke with William Brinkley prior to the bidding and told him that they should try to get the contract together again² and that Dickerson would "honor" Brinkley's low bid from 1977. Joint Appendix at 59-60 and 103. Carpenter stated that Brinkley indicated his agreement with that suggestion. Joint Appendix at 60. While Carpenter could not recall the specific wording of his conversation with Brinkley—a point on which he was vigorously cross-examined by defense counsel—he remembered that the substance of the conversation was that

1. Prior to the bidding, Brinkley & Son and Dickerson entered into an agreement whereby each company agreed to give the other a subcontract estimate for a portion of Contract 12. Brinkley, which specializes in plant work, gave Dickerson a subcontract price for the pumping station construction; and Dickerson, which specializes in pipeline work, gave Brinkley a price for the

pipeline work. While both companies submitted a competitive prime contractor bid on Contract 12, each agreed that if it won the contract it would subcontract the relevant portion to the other company.

2. See *supra* note 1.

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Dickerson would intentionally submit a high or "complementary" bid to ensure that Brinkley would again be the low bidder. Joint Appendix at 79. Carpenter further testified that, to the best of his recollection, the amount which Dickerson bid in 1979 for Contract 12 was given to him by Brinkley. Joint Appendix at 73.

Harold Crain, Jr., and Edward Denbo, Jr., of Crain & Denbo, the third company to submit a bid in 1979, also testified. Both Crain and Denbo stated that, on the morning of the day that bids were to be submitted, they telephoned William Brinkley and asked that he give them a "safe" number to bid on Contract 12. Joint Appendix at 165. Both further testified that Brinkley agreed to give them an amount to bid on the project. Joint Appendix at 129-130 and 165. Crain and Denbo indicated that they had originally intended to submit a competitive bid but were unable to complete the bid when a subcontractor failed to give them a price for the pipeline work. Joint Appendix at 145 and 167. Thus, their options at that point were to submit no bid, to guess on an amount, or to obtain a safe number from another contractor. Joint Appendix at 156. They testified that they rejected the alternative of failing to submit a bid because they did not want to offend the project engineer. Joint Appendix at 147. Fearing a costly mistake if they simply guessed on a bid amount, they decided to contact William Brinkley for a safe number to bid.³ Joint Appendix at 149. Both Crain and Denbo stated during cross-exam-

ination that they decided not to submit a competitive bid prior to discussions with Brinkley. Joint Appendix at 146 and 181.

Gene Greer, an employee of Crain & Denbo, then testified that he went to Brinkley's motel shortly before noon on the day of the bidding and was given an amount to bid by Brinkley. Greer stated that he then filled out a bid, placed it in a sealed envelope, and gave it to Brinkley to turn in for him. Joint Appendix at 185-187. Greer further testified that Brinkley appeared to be working on Brinkley & Son's bid, which was due at 2:00 p.m. that afternoon. Joint Appendix at 185-186.

II.

The appellants first argue that the district court erred in denying their motion for judgment of acquittal, both at the conclusion of the government's case and at the close of all the evidence, because there was insufficient evidence of an agreement between Crain & Denbo and appellants to rig bids.⁴ Pointing out that unilateral action cannot violate Section 1 of the Sherman Act, the appellants argue that there was no agreement to rig bids because Crain and Denbo⁵ had decided not to compete for Contract 12 *before* contacting Brinkley.⁶ Appellants maintain that Crain & Denbo's decision was thus the result of unilateral action and not the result of a conspiracy involving the appellants. Under the appellants' view, one could never be convicted of bid rigging for simply giving a competitor a safe number to bid once that competitor

cient. Without commenting on this contention by the appellants, we address the issue of whether the evidence regarding the conduct of Crain, Denbo and Brinkley is sufficient to support appellants' convictions of bid rigging.

3. Crain and Denbo also testified that, prior to the bidding in 1977, Brinkley contacted them for safe numbers to bid on Contracts 7 and 8 of the Pasquotank River Supply Project. They further testified that they supplied him with those numbers. Joint Appendix at 136 and 170.
4. The appellants contend that the general nature of the jury's verdict makes it impossible to tell whether the jury looked to the alleged agreement between Carpenter and Brinkley, the alleged agreement between Crain & Denbo and Brinkley, or both, to support its verdict. The possibility that the jury relied only on the agreement between Crain & Denbo and Brinkley—one which they claim did not exist—gives rise to their argument that the evidence was insuffi-

5. Of course, a corporation acts through its officers or agents. The use of the conjunctive "and" instead of the ampersand indicates actions by the individuals on behalf of the corporation.

6. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The necessity of concerted action is apparent on the face of the statute.

done, resulted in an agreement ... to rig bids." Joint Appendix at 220. They contend that this statement essentially nullified the earlier portion of the court's instruction that the Government must prove the appellants' knowledge or purpose concerning the anti-competitive effects of the conspiracy and thereby removed from the jury the duty to find that appellants intended to produce such effects. They argue, therefore, that the district court's instructions contravene the decision of the Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), which holds that the intent element in criminal antitrust actions must be proved and cannot be presumed. We reject this argument, as we are required to do by prior decisions of this circuit.

[4] In *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir.1979), cert. denied, 449 U.S. 1078, 101 S.Ct. 859, 66 L.Ed.2d 801 (1981), this court declined to apply *Gypsum* in a case in which the defendant's conduct constituted a *per se* violation of the Sherman Act. In his opinion for the court, Judge Field explained that the conduct in *Gypsum* concerned price verification, a practice not regarded as a *per se* antitrust violation. "Since in a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendant's illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" *United States v. Society of Independent Gasoline Marketers*, 624 F.2d at 465 (citations omitted). Thus, the

10. Other circuits have considered the application of *Gypsum* in *per se* cases and have reached the same conclusion as this circuit. See *United States v. Koppers Co., Inc.*, 652 F.2d 290, 295-96, n. 6 (2nd Cir.), cert. denied, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981) ("Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se*

holding in *Gypsum* concerning proof of intent does not apply in the same manner in cases involving a *per se* violation, as it does in rule of reason cases.

In *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527 (4th Cir.), cert. denied sub nom., *Dellinger, Inc. v. United States*, — U.S. —, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985), this court recently reaffirmed its position concerning the intent that must be shown in *per se* cases. The defendants in *Smith* were charged, as were the defendants in the present case, with bid rigging in violation of Section 1 of the Sherman Act. Rejecting a challenge to an instruction similar to the instruction given in this case, we held that "this circuit recognizes *per se* antitrust violations. Therefore, the trial court correctly instructed the jury that the government must prove the defendants' intentional participation in the conspiracy to rig bids. The government did not have to prove the defendants' specific intent to unreasonably restrain trade." *Id.* at 533.¹⁰

V.

[5] We find that the trial court's instructions in this case constituted an accurate statement of the law concerning the requisite intent in cases involving *per se* violations of antitrust law. We therefore find no error on the part of the district court.

The convictions of the appellants are AFFIRMED.



rule is designed to avoid."); and *United States v. Brighton Building and Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979) ("We do not read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement which is unlawful *per se*, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce.").

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