

Appendix A

FILED
JUN 20 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.
DARREN K. BYLER,
Defendant-Appellant.

No. 17-30014
D.C. No.
3:15-cr-00008-SLG-2

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, District Judge, Presiding
Submitted June 13, 2018**
Anchorage, Alaska

Before: THOMAS, Chief Judge, and CALLAHAN and BEA, Circuit Judges.

Darren Byler appeals from his convictions for violating the Refuse Act, 33 U.S.C. §§ 407, 411, and making a false statement during the course of the investigation, 18 U.S.C. § 1001. We have jurisdiction, and we affirm.

Byler does not contest that sewage from his vessel, the *Wild Alaskan*, was

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

discharged directly into Kodiak Harbor or that he provided false statements to government officials about the dumping. Instead, Byler challenges his convictions by arguing that (1) the Refuse Act does not criminalize the dumping of "sewage"; (2) the Refuse Act permits "de minimis" deposits; and (3) his prosecution was the result of selective enforcement as he was targeted for exercising his First Amendment right of freedom of expression in operating a strip club. Because Byler raises these arguments for the first time on appeal, they are subject to plain error review. See *United States v. Olano*, 507 U.S. 725, 731 (1993) ("Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court.").

The Refuse Act broadly prohibits "deposit[ing]" into navigable waters "any refuse matter of any kind or description" "other than that flowing from streets and sewers and passing therefrom in a liquid state." 33 U.S.C. § 407; see also *United States v. Standard Oil Co.*, 384 U.S. 224, 229 (1966) ("More comprehensive language would be difficult to select."). Citing *United States v. Republic Steel Corp.*, 362 U.S. 482, 490–91 (1960), Byler interprets the exception as permitting his dumping of human waste from the *Wild Alaskan* into the harbor. We disagree. The defendant in *Republic Steel Corp.* operated mills on a riverbank and deposited "industrial waste containing various solids" into the river to raise the

riverbed by several feet. 362 U.S. at 483. The Court rejected the defendant's argument that the exception applied because the industrial waste was deposited through sewers: "Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'" *Id.* at 490. The Court thus declined "the invitation to broaden the exception," limiting the "sewers" exception to sewage *flowing from sewers*. *Id.* Byler's conduct in dumping human waste directly from the *Wild Alaskan* into the harbor is not permitted under the Refuse Act.

Byler's "de minimis" argument fails for at least three reasons. First, the Refuse Act contains no exception for de minimis deposits. See 33 U.S.C. § 407. Second, because Byler failed to raise this argument at trial, he should prevail only if the asserted error was so obvious that the district court should have raised the issue *sua sponte*. See *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) ("[T]he error must be plain—that is to say, clear or obvious."). It is not obvious that de minimis discharges are exempted. Third, substantial evidence supports a conclusion that Byler discharged thousands of gallons of raw sewage into the harbor. That amount is not de minimis under any standard. The prosecution presented evidence—from Byler's own documentation—that the *Wild Alaskan* generated thousands of gallons of sewage during its operation as well as evidence from which the jury could have concluded that all such sewage was unlawfully discharged. Contrary to Byler's suggestion, the discharge of thousands

of gallons of sewage is not rendered de minimis simply because the sewage may have been discharged one flush at a time. (At least one toilet on the vessel was plumbed to send sewage directly overboard.)

Byler's argument that he was targeted for exercising his First Amendment rights fails to meet the "demanding" standard for proving discriminatory effect and motive. See *Lacey v. Maricopa Cty.*, 693 F.3d 896, 920 (9th Cir. 2012) (en banc).

Byler identified no instance of another vessel dumping raw sewage into the harbor without being prosecuted. Besides speculation and a list of rhetorical questions, the only support Byler offered for his First Amendment argument is his mischaracterization of a conversation between himself and a prosecution witness from the Harbormaster's office. The witness testified that, in his conversation with Byler, Byler suggested that "he was being investigated for a sewage discharge, but this is something that happens all the time in the harbor, basically. Other boats do it. And that if he's being investigated, everybody else in the harbor should be investigated." By recounting Byler's suggestion that "other boats do it," the witness did not adopt or otherwise legitimize Byler's unsubstantiated view. The most obvious explanation for any scrutiny Byler received was that he was operating the only business in the harbor with a steady flow of patrons aboard the vessel at a time when city officials were particularly concerned about sewage overflowing into the harbor.

AFFIRMED.

5

APPENDIX B

FILED JUL 26 2018 MOLLY C. DWYER, CLERK U.S. COURT OF APPEAL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee, v

DARREN K. BYLER,
Defendant-Appellant.

No. 17-30014

DC No.

3:15-cr-00008-SLG-2

District of Alaska

Anchorage

ORDER

Before: THOMAS, Chief Judge, and CALLAHAN and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX C

UNITED STATES DISTRICT COURT

_____ District of ALASKA

UNITED STATES OF AMERICA

)))))))))

JUDGMENT IN A CRIMINAL CASE

v.

DARREN K. BYLER

Case Number: 3:15-cr-00008-02-SLG

USM Number: 17836-006

THE DEFENDANT:

Defendant's Attorney John P. Cashion

___pleaded guilty to count(s)

___ pleaded nolo contendere to count(s)

which was accepted by the court.

X was found guilty on count(s) 1 and 3 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section Nature of Offense Offense Ended Count

33 U.S.C. §§ 407 and 411 The Refuse Act 12/09/2014 1

18 U.S.C. § 1001 False Statements 07/15/2014 3

The defendant is sentenced as provided in pages 2 through 6 of this judgment.

The sentence is imposed pursuant to
the Sentencing Reform Act of 1984.

___The defendant has been found not guilty on count(s)

Count(s)G is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this
district within 30 days of any change of name, residence,
or mailing address until all fines, restitution, costs, and special assessments
imposed by this judgment are fully paid. If ordered to pay restitution,
the defendant must notify the court and United States attorney of material
changes in economic circumstances.

JANUARY 23, 2017

Date of Imposition of Judgment

Signature of Judge

SHARON L. GLEASON, U.S. DISTRICT JUDGE

Name and Title of Judge

Date

.....

.....

PROBATION

You are hereby sentenced to probation for a term of : 5 Years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
 2. You must not unlawfully possess a controlled substance.
 3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.
X The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
 4. X You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
 5. ___ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
 6. ___ You must participate in an approved program for domestic violence. *(check if applicable)*
 7. ___ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
 8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
 9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
 10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DARREN K. BYLER

CASE NUMBER: 3:15-cr-00008-02-SLG

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature Date

AO 245B (Rev. 11/16) Judgment in a Criminal Case

Sheet 4B — Probation

Judgment—Page 4 of 6

DEFENDANT: DARREN K. BYLER

CASE NUMBER: 3:15-cr-00008-02-SLG

ADDITIONAL PROBATION TERMS

1. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a Federal probation or pretrial services officer or other law enforcement officer, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation of supervision.

2. The defendant shall provide the probation officer access to any requested financial information, including authorization to conduct credit checks, and shall not incur any new debts or apply for credit without the prior approval of the probation officer, until such time as the fine is paid in full.
////////////////////////////////////

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties
Judgment — Page 5 of 6
DEFENDANT: DARREN K. BYLER
CASE NUMBER: 3:16-cr-00008-02-SLG

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Assessment JVTa Assessment* Fine Restitution

TOTALS \$ 125.00 \$ \$ 10,000.00 \$

\$25.00 on Count 1 and \$100.00 on Count 3 \$5,000.00 on Count 1 and \$5,000.00 on Count 3

___ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

___ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee Total Loss Restitution Ordered Priority or Percentage**

TOTALS \$ \$

___ Restitution amount ordered pursuant to plea agreement \$

___ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

G The court determined that the defendant does not have the ability to pay interest and it is ordered that:

___ the interest requirement is waived for the G fine G restitution.

___ the interest requirement for the G fine G restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110,

110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/16) Judgment in a Criminal Case

Sheet 6 — Schedule of Payments

Judgment — Page 6 of 6

DEFENDANT: DARREN K. BYLER

CASE NUMBER: 3:15-cr-00008-02-SLG

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of \$ 10,125.00 due immediately, balance due
___ not later than , or

X in accordance with G C, G D, G E, or X F below; or

B ___ Payment to begin immediately (may be combined with GC, G D, or G F below); or

C ___ Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ over a period of
(e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ___ Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ over a period of
(e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ___ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties: Any unpaid amount is to be paid during the period of probation of no less than \$2,000.00 per calendar year. Interest shall be waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

G Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount,

and corresponding payee, if appropriate.

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court cost(s):

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTa assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.