Fourth Circuit Holds That Defendant Can Be Guilty of Criminal Violation of Armed Export Control Act Even Without Specific Knowledge That the Exported Item Is a Regulated "Defense Article"

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BY: JOHN STAIGE DAVIS, V AND THOMAS B. MCVEY

To obtain a felony conviction under the Arms Export Control Act for ?willfully? exporting ?defense articles? without a license, must the government prove that the defendant knew the items in question were specifically subject to federal regulation?

In *United States v. Brian Bishop*, No. 13-4356 (Jan. 28, 2014), the government prosecuted a Foreign Service Officer in the U.S. State Department for attempting to ship small arms ammunition from Alabama to Amman, Jordan. Bishop, an avid hunter and sportsman, included more than 7000 rounds of 9 mm and 7.62 X 39 mm ammunition in a shipment of his personal effects to be moved overseas by a government contract carrier. While Bishop?s items were temporarily stored at a warehouse in Springfield, Virginia, the carrier discovered the ammunition and alerted the State Department?s Diplomatic Security Service, which seized the ammunition. Bishop was eventually indicted under the federal Arms Export Control Act, 22 USC § 2778, for willfully attempting to export the ammunition, which constituted ?defense articles? on the United States Munitions List, without obtaining a license from the State Department.

The U.S. Munitions List, encompassing 21 separate categories and occupying 18 pages of the Code of Federal Regulations, covers a wide array of items, including certain firearms; ammunition; explosives; protective equipment; military electronics;

lasers; chemical agents; software; and related ?technical data.? A willful violation of the AECA constitutes a felony punishable by 20 years? imprisonment and a $1 million fine.

At his trial in the Eastern District of Virginia, Bishop maintained that he lacked the requisite criminal intent. Bishop introduced evidence that (1) a supervisor who oversaw the shipment of all household effects for the State Department was confused and ?desperate? for advice following the discovery of the ammunition, and initially instructed the carrier to dispose of the ammunition with the assistance of the fire marshal before being countermanded by ?diplomatic security experts?; (2) the State Department?s firearms policy in effect in Jordan would have permitted Bishop to possess ammunition in his residence, and violations of that policy were treated as purely administrative matters; and (3) Bishop was known for being both law-abiding and skilled at understanding and following complex regulations.

The trial judge, however, rejected Bishop?s defense, and, based on several incriminating circumstances, found that it was ?clear? that Bishop ?knew what he was doing was unlawful and simply went ahead and did it.?

On appeal to the Fourth Circuit, Bishop argued that the government was required to prove, not only that he knew that exporting the ammunition was illegal ?as a general matter,? but that he knew that 9 mm and 7.62 x 39 mm ammunition were specifically listed on the U.S. Munitions List. In other words, Bishop contended that, to prove willfulness, the government was required to prove not only that he knew that his conduct *was* illegal, but ?also that he knew *why*.?

But the Fourth Circuit rejected the argument and affirmed Bishop?s conviction, holding that it was enough that Bishop believed that the exportation was illegal, ?even if unaccompanied by knowledge of the contents of the USML.? In so doing, the Court distinguished other federal criminal statutes, involving taxes and currency transactions, in which ?willfulness? requires knowledge of the specific criminal prohibition at issue. The Court observed that ?[t]he AECA does not include such highly technical requirements as might inadvertently criminalize good-faith attempts at compliance,? and that ?[u]nlike . . . complicated tax and arcane currency prohibitions . . . the export of 9 mm and AK-47 ammunition to Jordan would quickly strike someone of ordinary intelligence as potentially unlawful.?

In light of the straightforward nature of the ?defense articles? involved in the case ? small arms ammunition ? *Bishop*?s holding seems unremarkable, since most people of ?ordinary intelligence? ? let alone trained State Department employees ? have ample reason to know that exporting thousands of rounds of ammunition is illegal. But the case may have greater significance for U.S. companies engaged in exporting complex technical data or software, whose characterization as ?defense articles? on the U.S. Munitions List is by no means self-evident. Increasingly, the government uses the

AECA to fight technology transfers in addition to hard weapons shipments. As one DOJ attorney recently stated, ?Safeguarding controlled defense technology and investigating and prosecuting illegal transfers of technical data can be just as important as investigating and prosecuting the unlawful export of weapons.? After *Bishop*, when the government prosecutes a U.S. business under the AECA, e.g., for willfully disclosing technical data to a foreign company without a license, proof that no one at the U.S. business knew that the category of technical data in question was listed on the Munitions List will not necessarily prevent a conviction.

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