



FEDERAL EVIDENCE REVIEW

HIGHLIGHTING RECENT FEDERAL EVIDENCE CASES & DEVELOPMENTS

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Lead Story: Admitting Flight And Other Forms Of Consciousness Of Guilt Evidence

Flight is considered “an admission by conduct” and is normally relevant to show consciousness of guilt. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978). It can also be highly prejudicial when the inferences from the flight are misconstrued. For example, what might initially appear to be flight to avoid apprehension or prosecution may be explained by other facts or circumstances. Consciousness of guilt evidence can take several forms other than flight. For example, in this issue, the Sixth Circuit in United States v. Cody, held that suicidal ideations and/or attempts may be admitted as relevant evidence of consciousness of guilt if not unfairly prejudicial under FRE 403. In reaching this result, the circuit considered the four-part standard to admit flight evidence that has been applied in other cases. This Lead Story reviews the circumstances and hurdles for admitting flight and related evidence to show consciousness of guilt at trial.



Spain and “it would be a safe haven for a period of time and that there were a lot of people from all over the world there that could not be extradited.” Another victim testifies that he tried unsuccessfully to telephone the defendant in Spain. When the victim ultimately pretended to be a family member, he made contact on the telephone with the defendant who responded, “You devil, you got me.” This conduct illustrated that the defendant, by

relocating to Spain, “sought by his flight to avoid contact with his victims.” [84]

Is this flight evidence, as the securities fraud scheme began to fail, admissible to infer consciousness of guilt? The First Circuit answered this question in the affirmative. See *United States v. Zanghi*, 189 F.3d 71, 83 (1st Cir. 1999) (“These factual predicates made it sufficiently clear that Zanghi’s departure to Spain was in fact flight indicative of a guilty conscience, and not normal travel.”), *cert. denied*, 528 U.S. 1097 (2000).

Second Scenario:

The defendant, suspected of engaging in unlawful currency transactions, has a valid Egyptian passport. He is aware for about six months that the government is surveilling him and has seized some of his currency. The government learns that the defendant’s wife attempts to obtain a U.S. passport and airline ticket but this “evidence failed to connect” directly to the defendant. The government believes the wife may be conspiring with her husband but is unable to establish this connection. The defendant is arrested one hour before his plane is scheduled to leave. The government is unable to show that the defendant had packed his bags or was en route to the airport with an airline ticket.

Should this evidence be admitted to infer consciousness of guilt? The Second Circuit concluded the trial court erred in admitting this flight evidence, because the government failed to provide “more than an opportunity for mere ‘conjecture and speculation’.” [424 (citation omitted)]. Nonetheless, the error was harmless in light of the

I. Overview

Two factual scenarios, with two different outcomes, highlight the consideration of flight evidence at trial:

First Scenario:

Assume the defendant is involved in a motorcycle business venture. The defendant obtains funds from a number of investors and operates the business in Springfield. He receives more than one million dollars from the venture yet files no income tax returns. He ultimately moves to North Carolina for one year. As the business venture unravels, he suddenly vacates the premises before the lease expires and moves to Spain. The defendant is charged with securities fraud, tax evasion, and money laundering based on his role in the business venture. At trial, the government calls the landlord who testifies that the defendant telephoned from Spain and said he left abruptly due to “problems” in the United States. The defendant stated that there is no extradition treaty with



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