

Case No. 08-30920

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ASIKA M. NWEKE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America, plaintiff-appellee.
2. AUSA Cristina Walker, appellate attorney for plaintiff-appellee.
3. AUSA Robert Watts Gillespie, Jr., trial attorney for plaintiff-appellee.
4. Asika M. Nweke, defendant-appellant.
5. Douglas Lee Harville, appellate attorney for defendant-appellant.
6. Mary E. Winchell, trial attorney for defendant-appellant.

7. The Honorable Tom Stagg.
8. The Honorable Mark L. Hornsby.

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REQUEST FOR ORAL ARGUMENT

The defendant-appellant, ASIKA M. NWEKE, respectfully requests oral argument. The resolution of the issues herein will be based on this Court's determination of (1) whether the district court erred in denying Nweke's motion to suppress; and (2) whether a reasonable jury would have doubted whether the evidence at trial proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke's convictions. Oral discussion of the facts related to these issues and the interplay between the facts and the applicable precedent would benefit the Court by significantly aiding the decisional process.

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Western District of Louisiana, and under 18 U.S.C. § 3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE 1: Whether the district court erred when it denied Nweke's motion to suppress?

ISSUE 2: Whether a reasonable jury would have doubted whether the evidence at trial proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke's convictions?

STATEMENT OF THE CASE

A. Proceedings below

On May 24, 2006, Asika M. Nweke was indicted in a twelve-count indictment. R. 18-23. The twelve counts charged, as modified by a March 27, 2008, superceding indictment, that:

On or about August 19, 2005, . . . [Nweke] intentionally did traffic and attempt to traffic in goods, and knowingly used counterfeit marks on and in connection with such goods, to wit, counterfeit . . . [Tommy Sport; Apple Bottoms; Baby Phat; Phat Farm; Lacoste; MFG Marithe & Francois Girbaud; Enyce; Chanel and Chanel logo; Rocawear; Akademiks; Ecko Unltd., Ecko Unlimited, Ecko Function Eckored, Mark Ecko, Rhino logo, 1972 and 72; and character images of Fat Albert and the Fat Albert and the Hey!Hey!Hey!] marked items, which counterfeit marks were identical with and substantially indistinguishable from genuine . . . [Tommy Sport; Apple Bottoms; Baby Phat; Phat Farm; Lacoste; MFG Marithe & Francois Girbaud; Enyce; Chanel and Chanel logo; Rocawear; Akademiks; Ecko Unltd., Ecko Unlimited, Ecko Function Eckored, Mark Ecko, Rhino logo, 1972 and 72; and character images of Fat Albert and the Fat Albert and the Hey!Hey!Hey!] marks in use and registered for those goods on the principal register in the United States Patent and Trademark Office, and the use of which marks was likely to cause confusion, to cause mistake and to deceive, all in

violation of Title 18, United States Code, Section 2320.

R. 18-23, 160-65.

On October 16, 2006, Nweke filed a motion to suppress “all physical evidence seized following” the unconstitutional search and seizure that occurred on August 19, 2005, where all of the goods referenced in the indictment and superceding indictment herein (hereafter referred to as “Nweke’s goods”) were seized. See R. 38-41 (motion), 42-46 (supporting memo). Specifically, Nweke alleged that the government violated his Fourth Amendment rights when its agents seized Nweke’s goods without verbal or written consent and without a warrant. Id.

The government opposed Nweke’s motion to suppress, contending that Nweke’s goods were seized after agents observed them in plain view in an area open to the general public and identified them as counterfeit goods, which under 18 U.S.C. § 2320 were contraband and evidence of a crime. R. 47-50 (gov’t response to motion), 51-58 (supporting memorandum).

On November 13, 2006, and May 1, 2007, the District Court held a hearing on Nweke’s motion. See R. 59, 106-07, transcripts from both days of the hearing. After supplemental briefing, see R. 84-94 (Nweke’s supplemental

memo), 95-110 (gov't supplemental memo), Magistrate Judge Mark L. Hornsby, on July 11, 2007, issued a Report and Recommendation (R&R), recommending that the motion to suppress be denied. R. 127-34. In pertinent part, Magistrate Judge Hornsby found that Nweke's goods were seized after the agents' plain-view observations led them to believe that Nweke's goods were contraband that was subject to seizure. R. 131-33.

On August 23, 2007, Judge Tom Stagg noted that no objections to the R&R had been filed, concurred with the findings of the R&R, and denied Nweke's motion to suppress. R. 138.

After a 2-day trial, a jury convicted Nweke of Counts One through Seven and Nine through Twelve. R. 217, 221, 250-52, 256.

The presentence investigation report (PSI) determined that Nweke's offense level was 14 and that his criminal history category was I. PSI (which is in the yellow envelope that is labeled "PSI & SOR"), ¶¶ 17-18, 22, 24, 26, 34, 50; sentencing hearing, 3, 30-32. Nweke's guideline sentencing range was 15-21 months of imprisonment. PSI, ¶ 50; sentencing hearing, 31-32.

Nweke objected to the PSI, arguing that it had incorrectly determined the amount of loss for which he was responsible, that Nweke's appropriate offense level should have been 12, and that Nweke's guideline sentencing

range should have been 10-16 months of imprisonment. See August 19, 2008, correspondence from Nweke's attorney to the United States Probation Officer, which is the envelope that contains the PSI; addendum to PSI, 1. On September 18, 2008, Judge Stagg found that (1) Nweke's offense level should have been twelve; and (2) Nweke's guideline range of imprisonment should have been 10-16 months of imprisonment. See sentencing hearing, 30-32. Judge Stagg then sentenced Nweke to 16 months of imprisonment as to each count, which sentences were to be served concurrently. R. 255, 257; sentencing hearing, 31-32.

On September 23, 2008, Nweke filed a notice of appeal. R. 262-63.

B. Statement of the facts ¹

Brad Richie, a merchant doing business in Pierre Bossier Mall, informed federal agents that counterfeit goods were being sold by a merchant who had a booth at the “Mega Liquidation” trade show, which was located within the mall area previously occupied by Service Merchandise. R. 127-28. On August 19, 2005, Agents Lee Robinson and James Podboy went to Mega Liquidation, which was open to the public on that date, to investigate the complaint. R. 128.

At Mega Liquidation, there were numerous booths or locations where merchants were selling merchandise to the general public. Id. Upon entering Classy Fashions’ booth, which had merchandise owned by, and sold on behalf of, Nweke, the agents “immediately noticed what they believed to be counterfeit trademark clothing.” Id.

At the time of the search and seizure, the agents “had received extensive instruction and on-the-job experience in identifying counterfeit trademark

¹ Nweke does not accept or adopt this statement of facts. However, given the standard of review, this Court must review the facts in the light most favorable to the Government.

² Nweke does not address the facts related to the Government’s Federal Rule of Evidence 404(b) evidence because this evidence is not relevant to the claims raised herein by Nweke.

goods.” Id. Based on this training, they noticed that “hang tags” on some products did not match the type of hang tags that should be on those products. Id. Further, “the tags were attached with staples rather than the threads that are customarily used with designer jeans.” Id. Moreover, “[t]he agents also noticed that products were manufactured in countries in which the trademark holders do not typically manufacture their products.” Id. The agents, then, exited Mega Liquidation, reentered the main portion of the law, and informed mall security that they were seizing Nweke’s goods. Id. at 128-29.

The agents, then, confirmed that Classy Fashions was the location that Richie had reported was selling counterfeit goods. Id. at 129. Further, the agents, then, called at least one trademark owner whose goods were observed in Classy Fashions to confirm the counterfeit nature of Nweke’s goods. Id.

The agents also confirmed that Nweke, who was not present at Classy Fashions when Nweke’s goods were seized, had been contacted by the Government in 1989 at Detroit and in 2003 at Shreveport and warned that he was selling counterfeit goods. Id.

SUMMARY OF THE ARGUMENT

For the reasons set forth herein:

Issue 1:

Magistrate Judge Hornsby found that Nweke's goods were seized after the agents plain-view observations led them to believe that Nweke's goods were contraband that was subject to seizure. This conclusion was based, in pertinent part, on Magistrate Judge Hornsby's findings that Nweke's goods were located in an area accessible to the general public and that the agents immediately noticed that Nweke's goods were what they believed to be counterfeit trademark clothing.

However, the evidence adduced at the suppression hearing established that, before the agents seized Nweke's goods, they—based on their extensive instruction and on-the-job experience in identifying counterfeit trademark goods— (1) examined “hang tags” on some products, noting that they did not match the type of hang tags that should be on those products and that “the tags were attached with staples rather than the threads that are customarily used with designer jeans”; and (2) noticed that products were manufactured in countries in which the trademark holders do not typically manufacture their products. Further, before the agents seized Nweke's goods, (1) they seized

Nweke's store, cordoning it off from the rest of Mega Liquidators and preventing customers from entering it; (2) they observed security devices not recognizable by ordinary customer; (3) they reviewed the serial numbers of several tags; and (4) they called at least one trademark owner whose goods were observed in Classy Fashions to confirm the counterfeit nature of Nweke's goods. Further, the agents also confirmed that Nweke, who was not present at Classy Fashions when Nweke's goods were seized, had been contacted by the Government in 1989 at Detroit and in 2003 at Shreveport and warned that he was selling counterfeit goods. Id.

That is, the agents engaged in a full-fledged inspection of Nweke's goods before they seized them. The agents were not acting as normal customers, and their seizures were not based solely on probable cause based on items in plain view as viewed by ordinary customers. Therefore, Magistrate Judge Hornsby erred to the extent that he concluded that Nweke had no reasonable expectation of privacy at Classy Fashions when Nweke's goods were seized because his booth was open to the public for business at that time and that the agents lawfully seized Nweke's goods, after the agents observed Nweke's goods were contraband and that the agents had observed Nweke's goods in plain/open view from a lawful vantage point.

Accordingly, Nweke respectfully submits that the District Court should have granted Nweke's motion to suppress and this Court should reverse the judgment and vacate the sentence based on the illegal and unconstitutional seizure of Nweke's goods.

Issue 2:

A reasonable jury would have doubted whether the evidence established at the trial proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke's convictions. At the sentencing hearing, Nweke's attorney stated that the Government's expert, Joel C. Voyles, testified at trial that most of Nweke's goods were of inferior quality and that a shopper or customer would have known or could have seen when they were looking at it that the goods were of inferior quality. Judge Stagg responded, by quoting Voyles' testimony, that there were some good counterfeit materials and some lousy counterfeit materials. Judge Stagg then noted that the Government did not meet its burden of proof at trial, i.e., that a

reasonable jury should have doubted whether the Government had proved all of the elements of each of the counts for which Nweke was convicted.

Because a reasonable jury would have doubted whether the evidence proved an essential element underlying some or all of Nweke's convictions, Nweke respectfully submits that this Court must reverse the judgment and vacate the sentence based on the jury's verdict.

ARGUMENT

ISSUE 1: The district court erred when it denied Nweke’s motion to suppress.

A. Standard of review

When reviewing the denial of a motion to suppress, the Court reviews a “district court’s findings of facts for clear error” and its conclusions of law de novo. United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

B. Legal analysis

In Lewis v. United States, 385 U.S. 206, 211 (1966) (citations omitted; emphasis added), the United States Supreme Court noted that:

The fact that the undercover agent entered petitioner’s home does not compel a different conclusion. Without question, the home is accorded the full range of Fourth Amendment protections. But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials .

. . .

Accord United States v. Shelton, 337 F.3d 529, 538 n.30 (5th Cir. 2003) (quoting Lewis, 385 U.S. at 211, for the proposition “that not every entry to premises by invitation authorizes ‘an agent . . . to conduct a general search for incriminating materials’” (ellipses in original) and Gouled v. United States, 255 U.S. 298, 306 (1921), for the proposition “that a search by a government agent who enters a home or office ‘by stealth, or through social acquaintance, or in the guise of a business call’ is prohibited by the Fourth Amendment”), cert. denied, 540 U.S. 1229 (2004).

Further, in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 328-29 (1979) (citations omitted; emphasis added), the United States Supreme Court noted that:

Perhaps anticipating our disposition of the case, the State raises a different theory from the one advanced in its opposition to the petition for certiorari and on which it had relied in the state courts. The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, . . . and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. The Town Justice viewed the films, not as a customer, but without the payment a member of the public would

be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them.

. . . . Our society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era; violations of law must be dealt with within the framework of constitutional guarantees.

Magistrate Judge Hornsby found that Nweke’s goods were seized after the agents plain-view observations led them to believe that Nweke’s goods were contraband that was subject to seizure. R. 131-33. This conclusion was based, in pertinent part, on Magistrate Judge Hornsby’s findings that Nweke’s goods were located in an area open to the general public and that the agents “immediately noticed what they believed to be counterfeit trademark clothing.” Id.

However, before the agents seized Nweke’s goods, they—based on extensive instruction and on-the-job experience in identifying counterfeit trademark goods— (1) examined “hang tags” on some products, noting that they did not match the type of hang tags that should be on those products and that “the tags were attached with staples rather than the threads that are customarily used with designer jeans”; and (2) noticed that products were

manufactured in countries in which the trademark holders do not typically manufacture their products. Id.; suppression hearing,³ 16-18, 21-22. Further, before the agents seized Nweke's goods, (1) they seized Nweke's store, cordoning it off from the rest of Mega Liquidators and preventing customers from entering it; (2) they observed security devices not recognizable by ordinary customer; (3) they reviewed the serial numbers of several tags; and (4) they called at least one trademark owner whose goods were observed in Classy Fashions to confirm the counterfeit nature of Nweke's goods. See suppression hearing, 17-18, 21, 35, 60, 86-87. Further, the agents also confirmed that Nweke, who was not present at Classy Fashions when Nweke's goods were seized, had been contacted by the Government in 1989 at Detroit and in 2003 at Shreveport and warned that he was selling counterfeit goods. Id. at 24-25, 88.

That is, the agents engaged in a full-fledged inspection of Nweke's goods before they seized them. The agents were not acting as normal customers, and their seizures were not based solely on probable cause based on items in plain view as viewed by ordinary customers. Therefore, Magistrate

³ All references to the suppression hearing are to the transcript for the first day of the suppression hearing.

Judge Hornsby erred to the extent that he concluded that Nweke had no reasonable expectation of privacy at Classy Fashions when Nweke's goods were seized because his booth was open to the public for business at that time and that the agents lawfully seized Nweke's goods, after the agents observed Nweke's goods were contraband and that the agents had observed Nweke's goods in plain/open view from a lawful vantage point.

Accordingly, Nweke respectfully submits that the District Court should have granted Nweke's motion to suppress and respectfully submits that this Court should reverse the judgment and vacate the sentence based on the illegal and unconstitutional seizure of Nweke's goods.

ISSUE 2: A reasonable jury would have doubted whether the evidence at trial proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke’s convictions.

A. Standard of review

In United States v. Sultan, 115 F.3d 321, 324-25 (5th Cir. 1997)

(internal quotation marks and citations omitted; brackets in original), this

Court noted that:

We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict. We affirm if a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. If a reasonable jury would doubt whether the evidence proves an essential element, [this court] must reverse. All credibility determinations and reasonable inferences are to be resolved in favor of the jury’s verdict. Thus, we do not concern ourselves with the correctness of the jury verdict; rather, we must determine whether the finding of guilt is reasonable under all the circumstances.

The Sultan court also recognized “that in a case . . . based wholly on circumstantial evidence—we cannot indulge unreasonable inferences to bridge gaps in the government’s case.” Id. at 325.

B. Legal analysis

The Sultan court set forth the elements necessary to establish a violation of 18 U.S.C. § 2320(a):

(1) the defendant trafficked or attempted to traffic in goods or services; (2) such trafficking, or the attempt to traffic, was intentional; (3) the defendant used a counterfeit mark on or in connection with such goods or services; and (4) the defendant knew that the mark so used was counterfeit.

Id. at 325.

Further, the Sultan court noted that:

The term “traffic” means to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer or dispose of. A “counterfeit mark” is defined as a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive.

Section 2320(a) has two mental state requirements: first, that the defendant “intends” to traffic in goods or services, and second, that he or she “knows” that the goods or services are counterfeit.

Id. (internal quotation marks, citations, and footnote omitted).

After the close of the Government’s case and at the close of the evidence, Nweke moved for a judgment of acquittal, which was denied in short order by Judge Stagg. See trial transcript, 218, 337. At the sentencing hearing, Nweke’s attorney stated that the Government’s expert, Voyles, “testified at trial that most of . . . [Nweke’s goods were] of inferior quality . . . [and] that a shopper or customer would have known or could have seen when they were looking at it” that the goods were of inferior quality. Sentencing hearing, 23-24. Judge Stagg responded, by quoting Voyles’ testimony, that there were some good counterfeit materials and some lousy counterfeit materials. Id. at 24. Judge Stagg then noted that the Government did not meet its burden of proof at trial, i.e., that a reasonable jury should have doubted whether the Government had proved all of the elements of each of the counts for which Nweke was convicted. Id.

Accordingly, it is clear that Judge Stagg, who was able to judge the credibility of Voyles, did not believe that the Government proved, and that this Court should find that the Government did not prove, each of the elements of § 2320(a) as to each of the eleven counts for which the jury convicted Nweke. Specifically, this Court should find that the Government failed to meet its burden of establishing that Nweke used a counterfeit mark because the

Government failed to establish that Nweke's goods were likely to confuse, cause mistake, or deceive. Therefore, the Government failed to establish the elements of 18 U.S.C. § 2320(e)(1)(A)(i)-(iv) as to some or all of the counts for which the jury convicted Nweke.

Because a reasonable jury would have doubted whether the evidence at trial proved an essential element underlying some or all of Nweke's convictions, Nweke respectfully submits that this Court must reverse the judgment and vacate the sentence based on the jury's verdict.

CONCLUSION

For the above reasons, the defendant-appellant, ASIKA M. NWEKE, respectfully requests that this Court (1) find that the District Court erred when it denied Nweke's motion to suppress; (2) find that a reasonable jury would have doubted whether the evidence proved an essential element, whether Nweke used a counterfeit mark—i.e., a spurious mark used in connection with trafficking that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive—on or in connection with the goods that were seized and that formed the basis of Nweke's convictions; and (3) (a) reverse the judgment and vacate the sentence based on the illegal and unconstitutional seizure of Nweke's goods and the

jury's verdict; and (b) remand this matter to the District Court for further proceedings in light of this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DOUGLAS LEE HARVILLE, certify that today, February 9, 2009, two copies of the brief for appellant, an electronic copy of the brief, a copy of the record excerpts, and an electronic copy of the records excerpts, were served upon opposing counsel:

AUSA Cristina Walker
United States Courthouse
300 Fannin Street, Suite 3201
Shreveport, Louisiana 71101-3068,

by placing a copy of same in the United States Mail, properly addressed and with adequate postage affixed thereon.

I, DOUGLAS LEE HARVILLE, further certify that the official record in this case, consisting of ONE volume of the pleadings, SIX volumes of transcripts, ONE exhibit folder, and THREE sealed envelopes of exhibits and documents, will be served upon AUSA Cristina Walker, opposing counsel, by hand-delivery to her office at United States Courthouse, 300 Fannin Street, Suite 3201, Shreveport, Louisiana 71101-3068.

Douglas Lee Harville #27235