

United States v. Duffer

Defendant Duffer came to Clemens Erdahl for representation about three weeks before trial. The trial involved a conspiracy to sell 10,000 pounds of marijuana. Two of the defendants had been arrested in possession of 1100 pounds of marijuana in Arizona. It was claimed that Duffer was part of the operation which sold the marijuana in Iowa. After a two-week trial in which four of the six defendants were convicted on all counts and one defendant was convicted on one of two counts, Duffer was acquitted. The closing argument from that case is included herein.

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF IOWA
3 EASTERN DIVISION

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 vs.)

6 LARRY EDWARD HIVELEY, SCOTT)

7 EDWARD HIVELEY, GARY PAUL)

8 HUBER, ANSIL EZRA HENRY,)

9 ROBERT DUAINÉ DUEFFER, and)

10 MARK EUGENE APPLGATE,)

11 Defendants.)

CR 93-3026

Partial Transcript
of Jury Trial

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15 JURY TRIAL HELD BEFORE THE HONORABLE

16 MICHAEL J. MELLOY

17 at the Federal Building, 101 First Street Southeast,
18 Cedar Rapids, Iowa, on the 29th of July, 1994,
19 commencing at 9:00 a.m. reported by Kellee R.
20 Schaben, a Certified Shorthand Reporter in and for
21 the State of Iowa, pursuant to agreement of the
22 parties in the above-entitled action.

23
24 CARROLL & ASSOCIATES
25 Suite 210, Paramount Building
Cedar Rapids, Iowa 52401
(319) 362-0538

FILED

United States District Court

CEDAR RAPIDS HOCTRS OFFICE
NORTHERN DISTRICT OF IOWA

NORTHERN DISTRICT OF IOWA

AUG 4 1994

9:30
WILLIAM J. KANAK - Clerk

W. J. Kanak
Clerk

UNITED STATES OF AMERICA

JUDGMENT OF ACQUITTAL

V.

ROBERT DUAINÉ DUFFER

CASE NUMBER: CR 93-3026

The Defendant was found not guilty. IT IS ORDERED that the Defendant is acquitted, discharged, and any bond exonerated.

Michael J. Melloy

Signature of Judicial Officer

Michael J. Melloy, Chief Judge
Name and Title of Judicial Officer

Aug 4, 1994

Date

Copies mailed on 8-4-94
to counsel of record or pro se
parties as shown on the docket
sheet.

W. J. Kanak
Clerk

US Marshal
US Probation

APPEARANCES:

ASSISTANT UNITED STATES ATTORNEY PATRICK J. REINERT, United States Attorney's Office, 425 Second Street Southeast, Suite 950, Cedar Rapids, Iowa 52404, appeared on behalf of the United States of America.

ASSISTANT UNITED STATES ATTORNEY RICHARD L. MURPHY, United States Attorney's Office, 425 Second Street Southeast, Suite 950, Cedar Rapids, Iowa 52404, appeared on behalf of the United States of America.

ATTORNEY E. DANIEL O'BRIEN, of the firm of Fisher, Ehrhart, McCright & Turner, 425 Second Street Southeast, Suite 1010, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Larry Edward Hiveley.

ATTORNEY R. L. SOLE, of the firm of Glasson, Grove, Sole & McManus, 118 Third Avenue Southeast, Suite 206, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Scott Edward Hiveley.

ATTORNEY ALERED E. WILLETT, of the firm of Irvine & Robbins, 417 First Avenue Southeast, P.O. Box 2819, Cedar Rapids, Iowa 52406-2819, appeared on behalf of the Defendant Gary Paul Huber.

ATTORNEY THOMAS O'FLAHERTY, of the O'Flaherty Law Firm, 116 Third Avenue Southeast, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant Ansil Ezra Henry.

ATTORNEY CLEMENS ERDAHL, Iowa State Bank Building, Suite 311, Iowa City, Iowa 52240, appeared on behalf of the Defendant Robert Duaine Duffer.

ATTORNEY MONTY L. FISHER, 200 Snell Building, P.O. Box 1560, Fort Dodge, Iowa 50501, appeared on behalf of the Defendant Mark Eugene Applegate.

1 MR. ERDAHL: Your Honor; well, at least. I'm
2 not going last. Folks, it's been a long trial,
3 and for those of us who drive from out of town,
4 it probably seems a little bit longer, and -- but
5 I can't think of anything in the way that would
6 be tougher than having to listen to seven
7 arguments by attorneys in the course of a day.
8 At least we got one of the arguments done
9 yesterday, and I'm not going to belabor it, but I
10 really do want to thank you for your time and
11 attention, and the lawyers can tell when a jury
12 is paying attention, particularly during a long
13 trial. It's a difficult task. In fact, there
14 were long periods of time where I felt I wasn't
15 paying attention.

16 There hasn't been a lot of time spent on Bob
17 Duffer's case, not a lot of testimony about him
18 during this two-week trial, but I think there's
19 been a little more comment during argument and
20 there may well be more said about Bob Duffer
21 proportionately than some of the other defendants
22 in the government's rebuttal because it's the
23 hardest case they're ever going to try to prove.
24 They've got the least credible evidence against
25 him, and as I'm going to point out, they're

1 grasping at things to convince you.

2 Now, in Instruction No. 10, the Judge tells
3 you, "Remember to give separate consideration to
4 the evidence about each defendant. Each
5 defendant is entitled to be treated separately,
6 and you must return a separate verdict for each,"
7 so, you know, you probably got as tired of
8 listening to it as we got of saying it, but when
9 we all go around the room and join in an
10 objection, it doesn't mean we're joining in with
11 the other defendants. Someone had mentioned
12 being cocounsel, but really, we're not cocounsel.
13 Each of us separately represent a separate
14 defendant, and you must consider each of their
15 cases separately. In arguments, really, there's
16 -- it may seem a little unfair, for the
17 government gets to go first and then gets to go
18 last, but it's balanced out.

19 First of all, they have the burden of proof,
20 but also, as a defense attorney, I'm now making
21 two arguments: I am making a rebuttal argument
22 to things that Mr. Reinert said, and I am making
23 a summation in anticipation of what Mr. Murphy
24 might say. I am not going to be able to predict
25 everything that might be said in response to what

1 I'm going to tell you, but I do want to let you
2 know that sometimes on rebuttal evidence, things
3 will be said that I wish I could respond to, and
4 I want you to think if Mr. Murphy starts to
5 comment on the evidence about Robert Duffer or
6 perhaps compliments part of the argument, mine or
7 someone else's, to think what I might be saying
8 with respect to that.

9 I'm going to tell you what I think the
10 witnesses did and didn't say. That's what I
11 think, that's what I remember, but what's
12 important is what you remember. It's not
13 evidence, and then I want to talk about what a
14 conspiracy is and what a conspiracy is not, and
15 throughout it, I want to discuss some of the
16 instructions that are given.

17 Now, you are the judges of the facts, and
18 you will have to remember what evidence was put
19 in front of you, but there are a couple of things
20 Mr. Reinert said that I take exception to. Tom
21 Burns did not say anything about Robert Duffer,
22 calling him about payments or being paid
23 anything. There was an implication to that in
24 trying to explain why a phone call of Bob's was
25 important on the summary of phone calls sheet.

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All the government could manage to get Tom Burns to say was maybe Bob picked up 50 pounds one time, and I thought Ansil said something about Bob storing a couple loads, not very strong or convincing evidence, even if you believe Tom Burns.

Mr. Reinert in his summation interpreted a couple of phone calls in light of that testimony, and I think it's very important to know that there wasn't any testimony by Tom Burns about Bob Duffer talking about or making payments. There's another thing he said. He said that on the tape when Bob Duffer was talking to Tom Burns, he said, "I ain't been doing nothing with Ansil for two or three years." Now, that wasn't what was on the tape. It wasn't what was on the transcript, but what's important is that it wasn't on the tape. What he said, as I recall it, was, "I don't even have it out there at the house. I haven't been doing nothing, as far as I know, for two and a half to three years, doing nothing." Doing nothing, smoking marijuana, selling an eighth of an ounce of marijuana, or something entirely different. We don't know, but he didn't say "doing nothing with Ansil Henry."

1 Now, Mr. Reinert, Mr. Murphy, they weren't
 2 there. They weren't listening on the phone.
 3 They don't know what was said in those phone
 4 calls, and I want to talk about that exhibit
 5 right away. Exhibit 51A shows a summary of Ansil
 6 Henry's phone calls, and you will have that
 7 summary, and if -- you know, when they take out
 8 these six or seven phone calls of Robert Duffer's
 9 or calls from Ansil Henry's residence to Dan and
 10 Bob's auto repair, calls from Ansil Henry's
 11 residence to Robert Duffer's residence, calls
 12 from Robert Duffer's residence to Ansil Henry's
 13 residence, take those six or seven phone calls
 14 and only put those in their summary that are
 15 close to some other flurry of phone calls or
 16 activity, it looks like there's a pattern there,
 17 and -- but if you look at the larger pattern --
 18 and you do have all the records.

19 You don't have to go through the boxes of
 20 records, although you have those too, but you
 21 have some summaries that will show you the phone
 22 calls made by Ansil Henry to -- or from his
 23 residence to those places; and you'll find that
 24 there's a pattern there, a larger pattern, and
 25 that is that there are phone calls in the spring

1 and there are phone calls in the fall, and there
2 particularly are phone calls in March and April
3 and November and December, and there was evidence
4 presented by independent witness about what those
5 phone calls were about totally unattached to any
6 of the activities that were in the demonstrative
7 exhibit that was put up before you on the screen.

8 Now, there's one cross examination I asked
9 Mr. O'Keefe about that first phone call that's on
10 their sheet, April 3rd. That wasn't brought up;
11 April 11th wasn't brought up. The only phone
12 call that was brought up was the May 3rd phone
13 call. Why didn't they talk about that phone call
14 a month earlier? Well, it doesn't fit the
15 pattern that they are trying to present. Phone
16 calls in April do fit the pattern of getting the
17 straw, the horse manure, and other things from
18 Ansil Henry.

19 November follows going out to Brushy Creek
20 and going hunting, bow hunting, pheasant hunting,
21 and really, when you look at those phone records,
22 that really explains those phone calls. There
23 are a few phone calls in the summer, but not just
24 in the summer they want to refer to, but in the
25 previous summer and then in the next summer there

1 aren't phone records, so don't let that glimpse
2 or selective use of evidence fool you into
3 thinking that there's some circumstantial
4 evidence that's there. That's not circumstantial
5 evidence. That's coincidental evidence, and it
6 can be summarized: straw, hunting, horse manure.

7 Now, you're going to get an instruction on
8 credibility, and it's your job to apply that
9 instruction. In part, you'll apply that
10 instruction to the different witnesses that have
11 testified in the case. With respect to Butch
12 White, every single thing in the instruction
13 applies to him. You're supposed to consider the
14 witness's intelligence, the witness's memory.
15 His memory is vague. His manner, his demeanor;
16 his manner seemed like he was joking around on
17 the stand, acting like it was a game.

18 His motives are very clear and had been
19 discussed by other counsel. If he said something
20 different at an earlier date than what he's
21 saying now, that happened several times. Any
22 addictive drug or alcohol use. It's an
23 understatement that he admitted he was a problem
24 drinker, and whether his evidence is consistent
25 with other evidence. More importantly, it says

1 if that evidence is about an important fact.

2 Now, this cocaine testimony, which doesn't
3 apply, really, to Robert Duffer's case, but
4 that's an important fact because it was a
5 question of whether there was knowledge before or
6 after the trip, and he has different evidence
7 about that, and then about this trip that he says
8 he made with Bob Duffer, it was 1987, 1988, 1990;
9 it was in the spring of 1990, it was the summer
10 of 1988. It was between March and November of
11 1988. How can someone come up and confront or
12 explain where they were from 1987 to 1990 in
13 three different seasons of the year during
14 eight-month periods? That's how inconsistent his
15 testimony is.

16 Instruction 18 says, in part, "A person who
17 has no knowledge of a conspiracy but who happens
18 to act in a way which advances some purpose does
19 not thereby become a member." They have to prove
20 that Bob Duffer joined and became a member.
21 That's one of the things that happens here.

22 Now, the prosecutor puts a great importance
23 on the testimony of Tom Lowe and Mike Archibald.
24 He says, "This proves that Robert Duffer was out
25 there doing what was consistent with the

1 conspiracy, selling marijuana," and this fits the
2 prosecutor's scenario, but even if you believe
3 it, it really doesn't fit. It's like trying to
4 put a foot that's too large into a slipper
5 because the conspiracy charge is from 1986 to
6 1993. The involvement by Bob Duffer that Tom
7 Burns and Butch White are talking about is in
8 '88, '89, '90, '91; at best, '88 to '91, but
9 you've got Mike Archibald talking about Bob
10 Duffer selling him an ounce before 1986.

11 Now, one time it might have been '87. It's
12 not consistent with what they're trying to say,
13 and you've got Tom Lowe, if you can believe him
14 at all, saying that my client sold an eighth of
15 an ounce of marijuana, an eighth of an ounce in a
16 conspiracy of a thousand or 10,000 pounds in
17 1993.

18 As far as Tom Lowe, Tom Lowe and Butch White
19 both have a reputation for dishonesty among
20 people who testified here from Fort Dodge, and
21 you saw those people, Bob Duffer's witnesses.
22 They weren't criminals; they weren't liars; they
23 weren't drug users, drug dealers. They weren't
24 laughing on the stand. Their personalities
25 didn't change on the stand or over the weekend.

1 They haven't had head injuries or mental
2 problems. They were folks like you know,
3 neighbor, owner of a neighboring business,
4 business partner, owner of a restaurant down the
5 street.

6 Tom Lowe has a reputation as a liar. Butch
7 White as a reputation as a liar even with his own
8 girlfriend. He can't even really, frankly, look
9 you in the eye and comment about whether he has a
10 reputation about it or whether he lies or tells
11 the truth or has problems with honesty. He's
12 told two different stories, and Tom Lowe's told
13 two different stories too. He says the first
14 time he talked about Bob Duffer selling this
15 eighth of an ounce of marijuana to his
16 father-in-law. He said that he -- that Tom Lowe
17 was present. Later on, he just said he heard
18 about it, and he says it took place in a blue van
19 at Bob's shop, which hasn't even been there in
20 over a year.

21 Now, let's look at Butch White's testimony.
22 Even if you believe Bob made this trip, he says
23 he was with a guy from Omaha, but Butch doesn't
24 remember the guy's name, but he says that Bob and
25 his friend were off doing something else. They

1 were not with Ansil and Butch.

2 Butch also says that he got \$2,000. He said
3 the guy from Omaha got a pound of pot, but there
4 was no testimony at all about Bob getting
5 anything. He heard -- and you heard him talk
6 about when he drove with Kyrene (phonetic). He
7 just assumed everybody knew what was going on,
8 but he didn't even testify that he thought that
9 Bob knew what was being transported, so there's
10 no evidence even if this trip took place that my
11 client knew what was in that truck when it was
12 driven across or that he got anything from
13 driving across, but also, Butch White contradicts
14 Tom Burns because Tom Burns says that Bob came
15 and picked something up. Maybe he picked up the
16 marijuana one time in a pickup, not part of a
17 delivery. Tom Burns and Butch White didn't get
18 their stories straight.

19 Now, I want to talk to you about what a
20 conspiracy is and what a conspiracy is not a
21 little bit. The Judge has given you an
22 instruction, and, you know, I'm a trial lawyer.
23 I try civil cases too, but I don't do a lot of
24 business law. What I know about business law and
25 contracts is what I learned in law school.

1 Before I got to law school, I thought a contract
2 was a written document, but we learned there that
3 a contract is the meeting of minds, the agreement
4 between two people. The reason it's put or
5 committed to writing is so that there will be
6 better proof of what was agreed upon, but the
7 contract does not have to be written to be a
8 contract.

9 Now, that's similar to Instruction 18 that
10 the Judge will give you. This doesn't have to be
11 a formal agreement. It doesn't have to be a
12 written agreement, but folks, it has to be an
13 agreement. What the government has to prove,
14 however they seek to prove it, even by inference
15 or circumstantial evidence, has to be an
16 agreement, and Instruction 21 talks about
17 becoming a member of the conspiracy. Instruction
18 18 talks about a person becoming a member of a
19 conspiracy.

20 Now, Mr. Reinert told you this is not a
21 corporation with articles of corporation, but
22 there is a requirement of membership. We are not
23 just here for you to say, "They were all there in
24 court together or some of them knew each other or
25 they called each other or they did things

