



July 16, 2013

Court Declines To Review Conviction For Storing Hazardous Wastes

(Evertson v. United States)

U.S. Court of Appeals for the Ninth Circuit

The U.S. Court of Appeals for the Ninth Circuit this week issued a one-sentence order declining to review the conviction of a small businessman in Idaho for alleged technical violations of the Resource Conservation and Recovery Act (RCRA), the law that governs disposal of hazardous wastes.

The decision was a setback for the Washington Legal Foundation (WLF), which for the past four years has been representing the small businessman, Krister Evertson, in his efforts to overturn his felony conviction. WLF's client was convicted and sentenced to 21-months imprisonment for storing chemicals that prosecutors deemed "hazardous wastes." The evidence at trial showed that the chemicals were not "waste" at all but rather were valuable products that the defendant was using in connection with his business.

Previously, the trial court in Idaho denied Evertson's petition for a writ of *habeas corpus*. In order to appeal from that denial, WLF was required first to obtain a Certificate of Appealability (COA) from the appeals court. The appeals court this week denied WLF's motion for a COA. WLF had argued that the trial court misinterpreted RCRA and in essence denied Evertson the opportunity to demonstrate that the chemicals were not "waste" because he had never abandoned them. Although Evertson has now served his prison sentence, WLF argued that review by the appeals court was important to ensure that other business people are not convicted under similarly dubious circumstances.

WLF is now consulting with Evertson regarding whether to pursue additional legal proceedings, including the filing of a petition for review in the U.S. Supreme Court.

"This conviction can fairly be characterized as a miscarriage of justice, particularly given the uncontested evidence that Evertson's conduct caused no harm to the environment, nor was there any imminent threat of such harm," WLF Chief Counsel Richard Samp said in response to the Ninth Circuit's ruling. "Congress intended that criminal prosecutions for violations of the environmental laws should focus on those who intentionally cut corners and abuse the environment in order to avoid the costs of compliance, not those who in good faith are doing all they can to comply with the law," Samp said.

Evertson established a business in Salmon, Idaho in 2000 for the purpose of manufacturing sodium borohydride, a chemical with numerous industrial uses. Working without salary for two

years and purchasing supplies with money borrowed from a relative, Evertson sought to develop a new and cheaper method of manufacturing the chemical. When he ran out of working capital in 2002, he left Idaho in order to earn the funds necessary to continue the business. Before leaving, he placed the hazardous chemicals his company had been using in long-lasting storage tanks at a nearby storage facility.

The Environmental Protection Agency (EPA) found out about the chemicals 22 months later. Although Evertson told EPA that he intended to return to Idaho to continue his business operations, EPA determined that the stored chemicals had been abandoned by Evertson and were thus “waste.” Because all agree that the chemicals at issue were hazardous, the “waste” determination meant that the stored chemicals were “hazardous wastes” – and EPA ordered the chemicals destroyed and disposed of. Evertson was subsequently charged with storing “hazardous wastes” without a permit – even though no one alleges that any of the chemicals had leaked out of their storage containers or caused any environmental harm.

Under RCRA, it is a complete defense to a “hazardous waste” charge to demonstrate that the materials at issue were not waste because they had never been abandoned. WLF argued in its motion for a COA, however, that the trial court prevented Evertson from raising a no-abandonment defense by instructing jurors to defer to EPA’s determination that the materials were hazardous “waste.” WLF argued that in a RCRA prosecution, it should be up to the jury, not EPA officials, to determine whether the materials at issue should be deemed “waste.”

WLF also argued that Evertson was denied effective assistance of counsel at trial because his counsel: (1) failed to object to the trial court’s jury instructions regarding “waste”; and (2) ignored Evertson’s repeated requests that he be permitted to testify in his own defense to demonstrate that it was not his intent to abandon the chemicals.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising claims that prosecutors are unfairly seeking to criminalize business practices that, even if technically a violation of some regulatory rule, are more appropriately addressed in a civil proceeding.

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.