

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued December 5, 2006 Decided August 23, 2007)

Docket No. 06-0607-cr

United States of America,

Appellee,

v.

Thomas Cullen, aka Thomas J.V. Cullen,

Defendant-Appellant.

Before:

CARDAMONE, STRAUB, Circuit Judges,
and KOELTL*, District Judge.

Defendant Thomas Cullen appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (McMahon, J.) on February 2, 2006, following a jury trial. Cullen was convicted of knowingly importing exotic birds into the United States in violation of the Wild Bird Conservation Act and of filing false applications relating to the importation with the United States Fish and Wildlife Service.

Affirmed.

* Hon. John G. Koeltl, United States District Court for the Southern District of New York, sitting by designation.

1
2
3
4
5
6
7
8
9
10
11
12

PETER R. GINSBERG, Law Office of Peter R. Ginsberg, P.C., New York, New York, for Defendant-Appellant.

JESSE M. FURMAN, Assistant United States Attorney, New York, New York (Michael J. Garcia, United States Attorney, Stephen J. Ritchin, John M. Hillebrecht, Assistant United States Attorneys, Southern District of New York, New York, New York, of counsel), for Appellee.

1 CARDAMONE, Circuit Judge:

2 We have before us a case that is unusual in several
3 respects. In the first place, defendant was prosecuted,
4 convicted and sentenced under the Wild Bird Conservation Act of
5 1992 (Wild Bird Act or Act), 16 U.S.C. § 4901 et seq., a federal
6 statute that includes civil and criminal penalties. There have
7 been very few, if any, previous prosecutions for violations of
8 the Act's criminal penalties. Second, the defendant Thomas
9 Cullen (defendant or appellant), an enigmatic and colorful
10 figure, whose home is in Goshen, New York, is an internationally
11 known professional falconer. He was hired at one time by the
12 City of New York to bring bald eagles back to Inwood Hill Park in
13 Manhattan. Yet, defendant also has a history of questionable
14 activity involving exotic birds. Third, defendant was charged
15 with illegally importing Black Sparrowhawks. Judicial opinions
16 often characterize an odd provision of the law or an ingenious
17 argument of counsel as a "rare bird" (rara avis). But in this
18 case we have before us as the subject matter literally a rara
19 avis in terris or a rare bird on the earth.

20 The rare bird which is the subject of this litigation is the
21 Black Sparrowhawk. The Black Sparrowhawk is an African bird that
22 for the most part lives in the southeastern corner of the African
23 continent. Its length ranges from 18 to 23 inches; it has a
24 black head and black upperparts, white underparts, yellow legs,
25 and a silver-grey tail. The Black Sparrowhawk eats mainly other
26 birds (mostly doves), although it has been known to devour on

1 occasion small mammals and snakes. It is usually silent and
2 unobtrusive except when it is breeding. For the most part, this
3 bird stays inside the cover of trees, only soaring sometimes in
4 the sky. See Gordon Lindsay Maclean, Roberts' Birds of Southern
5 Africa 138 (6th ed. 1993).

6 Thomas Cullen appeals from a judgment of conviction entered
7 February 2, 2006 in the United States District Court for the
8 Southern District of New York (McMahon, J.) following a jury
9 trial. Defendant was convicted of knowingly importing exotic
10 birds into the United States in violation of the Wild Bird Act
11 and of making false statements relating to such importation with
12 the United States Fish and Wildlife Service (Wildlife Service) in
13 violation of 18 U.S.C. §§ 1001 and 1002. Cullen challenges his
14 conviction on the grounds that: (1) the Wild Bird Act does not
15 apply to captive-bred birds; (2) the Act is unconstitutionally
16 vague because it does not define the term personal pet; and (3)
17 the jury instruction given by the trial court was incorrect.
18 Because those challenges are all without merit, we affirm.

19 BACKGROUND

20 A. Statutory and Regulatory Background

21 A total of 21 nations including the United States in 1973
22 signed the Convention on International Trade in Endangered
23 Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087,
24 993 U.N.T.S. 243 (CITES or Convention). The Convention's purpose
25 is to regulate the trade of endangered plants and animals. It
26 contains three appendices that list the species subject to its

1 regulations. Over the years the appendices have grown steadily
2 and more than 5,000 species of animals, including nearly 1,700
3 species of birds, are currently listed in one or another of the
4 appendices. See Discover CITES, [http://www.cites.org/eng/disc/
5 species.shtml](http://www.cites.org/eng/disc/species.shtml) (last visited July 13, 2007). Among the species of
6 birds listed are accipiter melanoleucus, the Black Sparrowhawk,
7 and falco cherrug, the Saker falcon. See Checklist of CITES
8 Species, [http://www.cites.org/common/resources/2003_CITES_
9 CheckList.pdf](http://www.cites.org/common/resources/2003_CITES_CheckList.pdf). The Black Sparrowhawk has been listed since 1979
10 and the Saker falcon has been listed since 1975.

11 To promote the conservation of exotic birds Congress passed
12 the Wild Bird Act, which prohibits the importation into the
13 United States of any exotic bird of a species listed in any of
14 CITES' three appendices. See 16 U.S.C. § 4904(c). Thus, it
15 ordinarily violates the Wild Bird Act to import Black
16 Sparrowhawks or Saker falcons into the United States. Violations
17 may carry civil or criminal penalties. 16 U.S.C. § 4912. The
18 Act provides, however, that the Secretary of the Interior may
19 authorize importation of a species listed in a CITES appendix if
20 (1) such importation is not detrimental to the survival of the
21 species, and (2) the bird is being imported exclusively for any
22 of four enumerated purposes. 16 U.S.C. § 4911. These four
23 purposes are scientific research; personally owned pets of a
24 person returning to the United States after being out of the
25 country for at least one year; zoological breeding or display
26 programs; and certain cooperative breeding programs. Id.

1 Pursuant to these provisions, the Secretary of the Interior has
2 promulgated detailed regulations that require a party seeking to
3 import an exotic bird pursuant to one of the exceptions to submit
4 an application to the Wildlife Service demonstrating compliance
5 with the statutory and regulatory requirements. 50 C.F.R.
6 §§ 15.21-.26. Once obtained a permit is neither transferrable
7 nor assignable. 50 C.F.R. § 13.25.

8 B. Defendant Cullen's Actions

9 Cullen is New York's "acknowledged expert on birds of prey"
10 and an internationally known and respected falconer. David
11 Kocieniewski, City Eagle Expert Has Past Littered with Illegal
12 Exotic Birds, N.Y. Times, Apr. 17, 2005, § 1, at 33. He claimed
13 he once owned the largest private collection of birds of prey
14 anywhere in this country and, at the time of his 2005 trial for
15 violation of the Wild Bird Act, Cullen owned 47 birds of prey
16 that he maintained at his home in Goshen, New York.

17 In 1999 there was only one living Black Sparrowhawk in
18 captivity anywhere in North America. It was not owned by
19 defendant. It seems Cullen wanted to add Black Sparrowhawks to
20 his collection of exotic birds, but he could not fit himself
21 within any of the specified exceptions to the Act's ban on their
22 importation into the United States. That is, he had not been
23 away from the United States for more than a year, so he could not
24 come within the personally owned pet exception; he was conducting
25 no scientific research, nor was he involved in zoological
26 breeding or display programs; and he was not engaging in

1 cooperative breeding programs under the auspices of "an
2 avicultural, conservation, or zoological organization." See 16
3 U.S.C. § 4911. In other words, there was no legal avenue for
4 Cullen to follow to add Black Sparrowhawks from outside the
5 United States to his collection of exotic birds.

6 Joseph and Kristen Kulak were Americans living abroad in
7 England in 1999. They had each been abroad for more than a year.
8 Were the Kulaks suddenly to decide to buy exotic birds as their
9 personally owned pets, they would each qualify for the Wild Bird
10 Act's personal pet exception. It turned out that Joseph Kulak
11 worked for Cullen's wife in a large American insurance business
12 with a branch in London. The Kulaks had no interest in Black
13 Sparrowhawks and no background training or experience in handling
14 them. Nonetheless, on October 27, 1999 Cullen mailed to the
15 Wildlife Service applications signed by Joseph and Kristen Kulak
16 indicating the Kulaks' desire to import into the United States
17 three Black Sparrowhawks as their personally owned pets.
18 Defendant also submitted to the Wildlife Service a receipt of
19 purchase indicating the three Sparrowhawks had been sold to the
20 Kulaks. According to the applications, two of the birds were
21 Joseph Kulak's pets, while the third was Kristen Kulak's pet. In
22 November 1999 the importation permits were granted.

23 Joseph Kulak's two pet Sparrowhawks (the third bird,
24 ostensibly Kristen Kulak's pet, died in transit) arrived in the
25 United States on January 6, 2000 from the United Kingdom. Cullen
26 paid the purchase price for the birds that amounted to 500

1 English pounds sterling apiece. On June 10, 1999 when the birds
2 were sold in England, 500 English pounds sterling was the
3 equivalent of \$800.10. See [http://federalreserve.gov/releases/
4 h10/19990614/](http://federalreserve.gov/releases/h10/19990614/) (exchange rate of \$1.6002/pound on June 10).
5 Defendant made and paid for all the travel arrangements for the
6 birds from England to the United States.

7 Upon the birds' arrival in this country, Cullen went to the
8 airport to pick them up. Ann Marie Holmes, the Wildlife Service
9 Inspector at JFK Airport, doubted defendant's story that he was
10 just picking up Kulak's birds on Kulak's behalf since Kulak was,
11 after all, still living in England. As a result of her doubts
12 she refused to turn the birds over to Cullen. She quarantined
13 them in a facility run by the Department of Agriculture where,
14 unfortunately, another one of the birds died. Subsequently, the
15 one living Sparrowhawk was turned over to the Wildlife Service
16 pending an investigation into whether or not the bird had been
17 legally imported into the United States.

18 Meanwhile, Joseph Kulak had submitted an affidavit to the
19 Wildlife Service reaffirming that the Sparrowhawk was his
20 personal pet. Thus, in August 2000 the Sparrowhawk was released
21 to Cullen with instructions that he return it to Kulak. Instead
22 of turning the male bird over to Kulak, Cullen loaned it to Craig
23 Culver, a breeder in California who owned North America's other
24 Black Sparrowhawk, a female. Culver and Cullen entered into two
25 "breeding loan agreements" that divvied up any future offspring.
26 Neither of these agreements acknowledged that Kulak was the owner

1 of the male Sparrowhawk. In the end, the breeding was
2 unsuccessful, and the male Sparrowhawk was returned to Cullen in
3 New York.

4 C. Prior Proceedings

5 On October 25, 2004 Cullen was charged with filing false
6 statements to the Wildlife Service relating to the Black
7 Sparrowhawks, and on January 3, 2005 a charge that he imported
8 the Black Sparrowhawks in violation of the Wild Bird Act was
9 added to the indictment. Cullen was also charged with importing
10 into the United States a number of Saker falcons in violation of
11 the Act.

12 Defendant filed a motion on February 4, 2005 to dismiss the
13 charges under the Act arguing that it only covers birds born in
14 the wild and only applies to importations for commercial
15 purposes. Defendant also claimed that the Wild Bird Act is
16 unconstitutionally vague because it provides no definition of the
17 term "personally owned pet." Finally, Cullen declared he was
18 entitled to a bill of particulars with regard to the various
19 charges against him. The district court denied all of Cullen's
20 motions.

21 Trial began in September 2005. Joseph Kulak testified for
22 the government pursuant to a non-prosecution agreement.
23 According to Kulak, Cullen had asked him if he and his wife would
24 be willing to import birds to the United States for Cullen, and
25 Kulak agreed. Kulak explained that Cullen paid all costs
26 associated with the purchase and importation of the Sparrowhawks

1 and that all Kulak did was forward documents relating to their
2 importation to certain persons as directed by Cullen. Kulak
3 testified that the Sparrowhawks were not his personally owned
4 pets, despite his signature on the Wildlife Service application
5 attesting that they were. He concluded by stating that he signed
6 the application as a personal favor to Cullen and his wife.
7 Kristen Kulak testified similarly. Defendant took the stand in
8 his own defense, and though he admitted he paid for, took care
9 of, and made all the arrangements for the birds, he insisted he
10 did this as a favor to Kulak.

11 The jury returned a guilty verdict on both counts relating
12 to the Black Sparrowhawks, but acquitted defendant of the charge
13 relating to the importation of the Saker falcons. On January 26,
14 2006 Cullen was sentenced to four months imprisonment, three
15 years supervised release, a \$1,000 fine, and a special assessment
16 of \$200. Judge McMahon refused to grant Cullen's request that
17 the sentence be stayed pending appeal. On February 1, 2006
18 Cullen timely filed a notice of appeal.

19 DISCUSSION

20 I Standard of Review

21 We review de novo challenges to the meaning and
22 constitutionality of statutes and the propriety of jury
23 instructions. United States v. Giordano, 442 F.3d 30, 38-39 (2d
24 Cir. 2006), cert. denied, 127 S. Ct. 1253 (2007).

1 II Captive-Bred Birds and the Wild Bird Conservation Act

2 The Wild Bird Act's importation ban applies to "any exotic
3 bird of a species that is listed" in an appendix to CITES. 16
4 U.S.C. § 4904(c); see also id. § 4903(2) (defining "exotic bird"
5 as "any live or dead member of the class Aves that is not
6 indigenous to the 50 States or the District of Columbia").
7 Cullen argues that the statute's title and legislative history
8 suggest that Congress was primarily interested in conserving
9 birds in the wild when it passed the Wild Bird Act, and thus the
10 Act does not prohibit the importation of captive-bred birds such
11 as the Sparrowhawks that he imported. Yet, nothing in the
12 language of the statute itself supports Cullen's assertion.
13 Quite the contrary -- the statute provides that any exotic bird
14 listed in the appendices to CITES is covered, with no limiting
15 language as to where or how an exotic bird is bred. The word
16 "any" means "without restriction or limitation." Tambe v. Bowen,
17 839 F.2d 108, 110 (2d Cir. 1988). Further, a Wild Bird Act
18 provision mandating the Secretary of the Interior to exempt
19 selected captive-bred species from the Act's prohibitions on
20 importation, see 16 U.S.C. § 4905(b), conclusively demonstrates
21 that Congress aimed to have all other captive-bred species, like
22 the Black Sparrowhawk, covered under the Act. Otherwise this
23 exemption would be meaningless.

24 When statutory language is unambiguous, as the pertinent
25 language in this Act is, we need not look to its title or history
26 to determine its meaning. See, e.g., Conn. Nat'l Bank v.

1 Germain, 503 U.S. 249, 253-54 (1992); see also Collazos v. United
2 States, 368 F.3d 190, 196 (2d Cir. 2004) ("While a title may be a
3 useful tool[] . . . for the resolution of a doubt about the
4 meaning of a statute, a title . . . cannot limit the plain
5 meaning of unambiguous text."). Like a book by its cover, this
6 statute should not be judged by its title.

7 III The Personal Pet Exception

8 Cullen also complains that the Wild Bird Act lacks a
9 definition for the term "personally owned pet." According to
10 appellant, this term is so vague that it would be unfair to
11 punish him for his actions, since he reasonably thought his
12 actions would fit within the personal pet exception. We analyze
13 this argument in more detail.

14 As the Supreme Court teaches, even if it is unlikely that a
15 person planning to violate a law will search out its text before
16 acting, "fair warning should be given to the world in language
17 that the common world will understand, of what the law intends to
18 do if a certain line is passed." McBoyle v. United States, 283
19 U.S. 25, 27 (1931) (Holmes, J.). For the warning to be fair "the
20 line should be clear." Id. The fair warning requirement appears
21 in various different legal doctrines, two of which are raised by
22 Cullen: void for vagueness and the canon of strict construction
23 of criminal laws, which resolves ambiguities under a rule of
24 lenity, so that a statute applies only to conduct clearly
25 covered. United States v. Lanier, 520 U.S. 259, 266 (1997).

1 A. Void for Vagueness

2 There are two distinct parts to any void for vagueness
3 analysis. The fair warning requirement noted earlier ensures
4 that a penal statute defines criminal conduct precisely enough
5 that ordinary people can comprehend what conduct is proscribed.
6 See Kolender v. Lawson, 461 U.S. 352, 357 (1983). Although we
7 recognize in many English words there lurk uncertainties, see
8 Rose v. Locke, 423 U.S. 48, 50 (1975) (per curiam), to meet the
9 fair warning prong an ounce of common sense is worth more than an
10 800-page dictionary. The second, more important aspect of the
11 void for vagueness doctrine requires that a statute "establish
12 minimal guidelines to govern law enforcement" so that police,
13 prosecutors and juries may not pursue their own personal
14 preferences. Kolender, 461 U.S. at 358.

15 Focusing on the case at hand "personal" and "pet" are words
16 that are comprehensible to an ordinary person. The common
17 meanings of these words, coupled with the Wild Bird Act's
18 explicit provisions as to who qualifies for the personal pet
19 exception, gave adequate notice to defendant that the activities
20 he was planning did not fit within the pet exception. An
21 ordinary person would realize that an exception to the import ban
22 for personally owned pets of repatriating Americans would not
23 apply if a person living in the United States asked an American
24 living abroad to pretend that birds being imported belonged to
25 the person living abroad. And the Act's provisions detailing who
26 qualifies for the personal pet exception establish more than

1 minimal guidelines to govern those charged with the Act's
2 enforcement.

3 B. Rule of Lenity

4 The rule of lenity, which appellant presses on this appeal,
5 only comes into play when a court after looking at all aids to
6 legislative meaning can do no more than "guess as to what
7 Congress intended." Muscarello v. United States, 524 U.S. 125,
8 138 (1998). To invoke lenity there must be grievous ambiguity in
9 a statute. Id. at 138-39. Such may not reasonably be said to be
10 the case with this statute.

11 IV The Jury Instruction

12 Appellant's next contention is that the trial court erred by
13 instructing the jury that the government had to prove "the bird
14 was not imported exclusively for the purpose stated in the import
15 permit." He maintains the district judge misinterpreted the Act
16 as allowing importation only if the applicant relied exclusively
17 on one -- and not more than one -- of the enumerated purposes.
18 According to Cullen, the interpretation matters to his case
19 because he had made known to the Wildlife Service that he
20 intended to import the birds not only as personal pets but also
21 for breeding. The relevant statutory language is as follows:
22 "[T]he Secretary may . . . authorize the importation of a bird of
23 the species if the Secretary determines that such importation is
24 not detrimental to the survival of the species and the bird is
25 being imported exclusively for any of the following purposes[.]"
26 16 U.S.C. § 4911 (emphasis added). The statute then specifies

1 the four exceptions already noted: scientific research;
2 personally owned pets of a person returning to the United States
3 after being out of the country for at least a year; zoological
4 breeding or display programs; and certain cooperative breeding
5 programs. Id.

6 We do not need to resolve whether Cullen is correct that the
7 district judge should have instructed the jury that the
8 government was required to prove the bird was not imported for
9 one or more statutory purposes. The error, if there was one, was
10 harmless because the only exception listed in § 4911 that could
11 even arguably have applied to Cullen was the personal pet
12 exception. Appellant makes much of the fact that he intended to
13 breed the birds, but there is no generalized breeding exception
14 set out in the Act. Instead, there are specific exceptions for
15 zoological breeding or display programs and for cooperative
16 breeding programs under the auspices of an avicultural,
17 conservation, or zoological organization. See 16 U.S.C. § 4911.
18 Appellant has never claimed that he was engaged in zoological
19 breeding or display programs, nor has he averred that he manages
20 a cooperative breeding program under the auspices of an
21 avicultural, conservation, or zoological organization.
22 Consequently, whether or not one could be convicted under the
23 Wild Bird Act for importing a bird for a set of dual purposes
24 both covered by § 4911's exceptions is irrelevant in this case.
25 Judge McMahon's instruction to the jury that it inquire into
26 whether the Black Sparrowhawks were imported exclusively for the

1 purpose stated in the import permit was correct or at worst
2 harmless error.

3 V Other Claims

4 Cullen insists that if his stated dual purpose ran afoul of
5 the Act, then the government should have rejected his application
6 for an importation permit. Thus, appellant's contention seems to
7 be that having issued the permit with full awareness of
8 defendant's plans, the government should not now be allowed to
9 turn around and later prosecute him for taking the very steps to
10 carry out his plans that it had earlier approved. This argument
11 is disingenuous because appellant made material
12 misrepresentations in the importation application and made false
13 statements regarding the ownership of the birds. Had the
14 government been fully aware of defendant's plans -- had he been
15 honest from the outset -- the Wildlife Service most certainly
16 would have rejected his application for an importation permit.
17 Having made misrepresentations to the Wildlife Service every step
18 of the way, Cullen cannot now successfully argue that the
19 government knew all along that what he was doing was illegal and
20 thus should not have granted him an importation permit.

21 We have reviewed appellant's remaining arguments and
22 concluded that none of them has merit.

23 CONCLUSION

24 Accordingly, for the reasons stated above, the judgment of
25 the district court convicting defendant Cullen of violating the
26 Wild Bird Act by unlawfully importing exotic birds into the

1 United States and for filing false statements with the Wildlife
2 Service is affirmed.