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United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
TONAWANDA COKE CORP., Defendant–Appellant.*
No. 14–1091–cr.
|
Jan. 11, 2016.

Synopsis
Background: Producer of foundry coke was adjudged guilty in a jury trial in the United States District Court for the Western District of New York, William M. Skretny, Chief Judge, 2014 WL 1053729, of offenses under Clean Air Act and Resource Conservation and Recovery Act (RCRA), and sentencing was imposed, including, inter alia, requirement of funding evaluative studies as community service. Corporation appealed.

Holdings: The Court of Appeals held that:

[1] producer's passing remark about rule of lenity defense was insufficient to preserve fair-notice argument for appellate review;

[2] producer's unpermitted storage of hazardous waste constituted continuing offense;

[3] court appropriately instructed jury with respect to RCRA offenses; and

[4] imposing as special condition of probation cost of funding evaluative studies was reasonable.

Affirmed.

West Headnotes (4)

[1] **Environmental Law**
Preservation of Error

Passing remark by producer of foundry coke, that charges against it under Resource Conservation and Recovery Act (RCRA) should be dismissed pursuant to rule of lenity, without further explanation in lengthy opening memorandum and reply memorandum, was insufficient to preserve producer's fair-notice argument for appellate review after being adjudged guilty of RCRA offenses, and thus appellate court would apply plain-error review to this issue, where remark merely flagged issue of lenity and left district court to fill in producer's argument. Solid Waste Disposal Act, § 1002, 42 U.S.C.A. § 6901.

Cases that cite this headnote

[2] **Environmental Law**
Accrual, Computation, and Tolling

Unpermitted storage of hazardous waste by producer of foundry coke, in violation of Resource Conservation and Recovery Act (RCRA), constituted continuing offense, and thus five-year statute of limitations did not start to run on this offense until such criminal conduct was completed, where RCRA's definition of "storage" and its description of offense contemplated prolonged course of conduct, and each day hazardous waste was stored brought new threat of harm that RCRA was intended to prevent. 18 U.S.C.A. § 3282(a); Resource Conservation and Recovery Act of

1976, §§ 2(d)(2)(A), 1004(33), 42 U.S.C.A. §§ 6928(d)(2)(A), 6903(33).

Cases that cite this headnote

[3] **Environmental Law**
Instructions

In prosecution of producer of foundry coke for unpermitted storage of hazardous waste by producer of foundry coke, in violation of Resource Conservation and Recovery Act (RCRA), court appropriately instructed jury that it had to be unanimous in its verdict and that, to convict, jury had to find producer to have "actively managed" waste it stored and to have violated RCRA every day during specific time period, and there was no support for producer's contention that jury was likely to be confused concerning need for unanimity simply because alleged acts of "active management" were distinct events. Resource Conservation and Recovery Act of 1976, § 2(d)(2)(A), 42 U.S.C.A. § 6928(d)(2)(A).

Cases that cite this headnote

[4] **Environmental Law**
Sentence

Imposing as special condition of probation requirement that producer of foundry coke fund, at cost of $12,200,000, two evaluative studies designed to investigate effects of its conduct on human health and environment, was reasonable in prosecution for violations of Clean Air Act and Resource Conservation and Recovery Act (RCRA), regardless of fact that studies so funded could produce evidence relevant to pending civil case in which producer was defendant, where court found that producer's conduct caused harm to those members of public who were reasonably concerned that their property or their health was compromised by effects of producer's illegality. 18 U.S.C.A. §§ 3553(a)(1, 2), 3563(b); Solid Waste Disposal Act, § 1002, 42 U.S.C.A. § 6901; Clean Air Act, § 101, 42 U.S.C.A. § 7401; U.S.S.G. § 8B1.3, p.s., 18 U.S.C.A.

Cases that cite this headnote

Appeal from a judgment of the United States District Court for the Western District of New York (William M. Skretny, Chief Judge).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED.**

Attorneys and Law Firms

John Emad Arbab, U.S. Department of Justice, for John C. Cruden, Assistant Attorney General, Washington, DC (Joseph J. Karaszewski, Assistant United States Attorney, on the brief, for William J. Hochul, Jr., United States Attorney, Western District of New York, Buffalo, NY), for Appellee.

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PRESENT: PIERRE N. LEVAL, JOSÉ A. CABRANES, RAYMOND J. LOHIER, JR., Circuit Judges.

SUMMARY ORDER

*1 Defendant-appellant Tonawanda Coke Corp. ("TCC") appeals the District Court's March 26, 2014 judgment adjudicating it guilty of offenses under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and imposing a sentence that includes, among other elements, a requirement of community service. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

TCC's principal contention on appeal is that its conviction on Counts 17, 18 and 19 of the indictment—the RCRA counts—should be reversed because TCC lacked fair notice that its conduct was criminal under RCRA. It further argues that its conviction on Count 17 should be reversed because the charged conduct occurred outside the limitations period; that the District Court erred in

failing to deliver to the jury a so-called specific unanimity instruction with respect to Count 17; and that the District Court "abused its discretion" in requiring that TCC, as a form of community service, fund two studies designed to evaluate the effects of its conduct. We reject each of these arguments and affirm.

[1] Our threshold inquiry concerns the standard of review applicable to TCC's fair-notice argument. The government contends that we should review only for plain error because TCC failed to preserve its argument below, Gov't Br. 37–38, and we agree. *See Millea v. Metro–North R.R. Co.*, 658 F.3d 154, 163 (2d Cir.2011) ("Arguments raised for the first time on appeal are deemed waived."); *United States v. Williams*, 399 F.3d 450, 454 (2d Cir.2005) (plain-error doctrine permits, in certain circumstances, correction of trial-court errors not raised below). In the proceeding before the District Court, TCC moved to dismiss the RCRA counts, supporting its motion with a 37–page opening memorandum and a 20–page reply memorandum. These filings contained much in the way of garden-variety statutory-interpretation argument but devoted between them no more than the following sentence arguably addressed to the issue of fair notice: "In view of the government's explanation of its legal theories regarding the meanings of the terms 'active management' and 'storage' as they relate to Count 17 and the meaning of the term 'land disposal' as it relates to Counts 18 and [19], the Defendant respectfully submits that these counts should also be dismissed based on the application of the rule of lenity." J.A. 241.

This passing remark, devoid of explanation, was insufficient to preserve TCC's fair-notice argument. We have held that, to preserve an issue for appeal, a party is obliged to "offer *some* argument or development of [the issue]" below; "merely incant[ing]" legal phrases before the District Court is not enough. *United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir.1995) (emphasis in original) (concluding that the government failed to preserve argument when it twice "invoked the mantra 'search incident to arrest' " before the trial court but did not develop the point); *see also United States v. Herrera–Martinez*, 525 F.3d 60, 65 n. 5 (1st Cir.2008) ("A mere assertion that the rule of lenity ought to mandate acquittal cannot be said to have preserved the issue."). This requirement is particularly salient in view of the argument that TCC failed to develop. The rule of lenity "applies only if, after using the usual tools of statutory construction, [the court is] left with a grievous ambiguity or uncertainty in the statute." *Robers v. United States*, —— U.S. ——, 134 S.Ct. 1854, 1859, 188 L.Ed.2d 885 (2014) (internal quotation marks omitted). Nothing in the competing briefs below suggested that this rigorous standard was met. TCC and the government advanced opposing views concerning the proper interpretation and application of the relevant RCRA provisions, but such disagreement (not unusual in litigation) does not ordinarily indicate insoluble statutory ambiguity. If TCC thought such ambiguity was present in this case, it was obligated to explain its position—not simply to flag the issue of lenity and leave to the District Court the task of filling in its argument.

***2** Accordingly, we apply plain-error review to TCC's fair-notice argument. "[T]he plain error doctrine permits a trial court error, not properly preserved for appeal, to warrant appellate relief when four factors are present: there must be an error, the error must be plain, the error must affect substantial rights, and the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Williams*, 399 F.3d at 454 (internal quotation marks omitted). TCC does not appear to contend that it is entitled to relief under this standard; in its briefing, it argues that the District Court erred but fails even to address the other elements of the plain-error test. We therefore conclude that TCC's fair-notice claim cannot survive review for plain error.

[2] TCC next argues that Count 17 of its July 29, 2010 indictment charged conduct that occurred outside of the applicable five-year statute of limitations, *see* 18 U.S.C. § 3282(a), and should therefore have been dismissed as time-barred. Count 17 alleged that TCC knowingly "stored" hazardous waste without a permit, in violation of 42 U.S.C. § 6928(d)(2)(A), from May 1998 to December 2009. J.A. 61. The government contends that Count 17 was not time-barred because the unpermitted "stor[age]" of hazardous waste is a so-called continuing offense, and the limitations clock therefore did not start until December 2009. Reviewing the question *de novo, see City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir.2011), we agree with the government.

A statute of limitations typically begins to run "when the crime is complete." *United States v. Eppolito*, 543 F.3d 25, 46 (2d Cir.2008) (quoting *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970)). "The time at which a crime is complete depends largely on the nature of the crime. Some crimes are instantaneous; others are continuing. A continuing offense is, in general, one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course." *Id.* (internal quotation marks and citations omitted). We presume that offenses are not continuing, but will conclude otherwise when circumstances so warrant: when "the explicit language of the substantive criminal statute [at issue] compels [the]

conclusion that Congress intended the offense in question to be construed as a continuing one, as where the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one, or where the statutory language describing the offense contemplates a prolonged course of conduct." *Id.* at 46–47 (alterations in original) (internal quotation marks and citations omitted).

We have no trouble concluding that the unpermitted "stor[age]" of hazardous waste under 42 U.S.C. § 6928(d)(2)(A) is a continuing offense. The statutory definition of "storage" provides that "[t]he term 'storage,' when used in connection with hazardous waste, means the containment of hazardous waste, *either on a temporary basis or for a period of years,* in such a manner as not to constitute disposal of such hazardous waste," 42 U.S.C. § 6903(33) (emphasis supplied); thus, "the statutory language describing the offense contemplates a prolonged course of conduct," *Eppolito,* 543 F.3d at 47 (internal quotation marks omitted). It is unsurprising that Congress, in enacting RCRA, employed language indicating that it understood "storage" to be a continuing offense. "Storage" of hazardous waste is in its nature similar to a crime of possession, and crimes of possession are generally regarded as continuing. *See, e.g., United States v. Waters,* 23 F.3d 29, 36 (2d Cir.1994) (observing that possession is a continuing offense); *United States v. Berndt,* 530 F.3d 553, 554–55 (7th Cir.2008). A person might initially store an item, or come to possess it, in a moment; but once stored or possessed, the item generally remains so until some affirmative act terminates the period of custody. *See Berndt,* 530 F.3d at 555 ("Everyday experience tells us that we possess things until we lose them, abandon them or they are taken from us."). And as is true of possession of contraband, "each day[ ]" that hazardous waste is stored "bring[s] a 'renewed threat of the substantive evil Congress sought to prevent.' " *Eppolito,* 543 F.3d at 47 (quoting *Toussie,* 397 U.S. at 122, 90 S.Ct. 858).

***3** TCC advances several arguments in support of its position that storage of hazardous waste is not a continuing crime, but none is convincing. It argues, first, that 42 U.S.C. § 6928(d)(2)(A) makes it unlawful not just to "store[ ]" hazardous waste without a permit, but to "treat[ ]" it or "dispose [ ]" of it; observing that neither treatment nor disposal seems a plausible candidate for continuing-offense treatment, TCC contends that "storage" should be treated the same as its statutory companions. But TCC identifies no reason why these three discrete forms of proscribed conduct must be subject to the same limitations period. Nor can we think of one. Each, after all, is defined separately in RCRA's "Definitions" section, and each comprises different elements, *see* 42 U.S.C. § 6903(3) (defining "disposal"); *id.* § 6903(33) (defining "storage"); *id.* § 6903(34) (defining "treatment"); we have no cause to think that Congress expected each to be treated identically for limitations purposes. We likewise find no merit in TCC's second argument: that the gravamen of its unlawful conduct was "active management," not "storage," and " 'active management' does not imply a continuing offense." Def. Br. 53. TCC was not convicted of actively managing hazardous waste. It was convicted of storing hazardous waste. The jury was instructed that it could not convict TCC of a storage offense without making the threshold determination that TCC had actively managed the waste it stored, *see* J.A. 1709–10, but the presence of this additional predicate for liability does not change the essential nature of the crime charged.

Accordingly, we conclude that "stor[age]" of hazardous waste in violation of 42 U.S.C. § 6928(d)(2)(A) is a continuing offense and that Count 17 did not charge conduct that occurred outside the limitations period.

[3] TCC's third argument, also directed at Count 17, is that the District Court should have specifically instructed the jury that it could not convict unless it found unanimously that TCC had engaged in at least one particular act of "active management." Reviewing the District Court's charge *de novo, see United States v. White,* 552 F.3d 240, 246 (2d Cir.2009), we find no error. "A general instruction on unanimity is sufficient to insure that ... a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of jury confusion," *United States v. Schiff,* 801 F.2d 108, 114–15 (2d Cir.1986) (citations omitted), and we perceive no such danger in this case. The jury was repeatedly instructed that it had to be unanimous to convict, *see* J.A. 1730, 1733–34; it was told that TCC had not violated RCRA unless it had "actively managed" the waste it stored, *see* J.A. 1709; and it found (unanimously) that TCC had violated RCRA every day from May 1998 (when the first alleged act of "active management" occurred) until December 2009, *see* J.A. 1814. TCC's suggestion that the jury is likely to have encountered confusion concerning the need for unanimity simply because the alleged acts of "active management" were "distinct events, separated by time and by their basic nature," *see* Def. Br. 55, finds no support in the record or in our case law.

***4** [4] Finally, we reject TCC's argument that the District Court "abused its discretion" in imposing, as a special condition of probation, a requirement that TCC fund (at a cost of $12,200,000) two evaluative studies designed to

investigate the effects of its conduct on human health and the environment. According to TCC, absent a finding that its behavior caused measurable harm of either type, this condition of probation is neither "reasonably related to the factors set forth in section 3553(a)(1) and (a)(2)" nor "reasonably necessary for the purposes indicated in section 3553(a)(2)." 18 U.S.C. § 3563(b); *see also* U.S.S.G. § 8B1.3 (policy statement concerning imposition of community service on organizational defendants providing that "[c]ommunity service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense").

TCC's argument relies on too narrow a conception of "harm." The District Court found—irrespective of whether TCC's conduct has resulted in demonstrable physical injury to the environment or to the people living near its plant—that it has caused harm to those members of the public who are reasonably concerned that their property or their health has been compromised by the effects of TCC's illegality. *See* J.A. 2245–46. The law takes account of this kind of injury in other contexts. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citizens' "reasonable concerns about the effects of [defendant's] discharges ... directly affected [their] recreational, aesthetic, and economic interests," satisfying the injury-in-fact requirement and giving rise to standing). We cannot conclude—particularly in view of district judges' "wide discretion in determining what sentence to impose," *United States v. Ryan*, 806 F.3d 691, 693 (2d Cir.2015) (internal quotation marks omitted)—that the District Court erred in taking account of it here.

Nor are we convinced that TCC's sentence is improper because the studies it funds might produce evidence relevant to a pending civil case in which it is a defendant. We are not aware of (and TCC has not identified) any authority standing for the proposition that a criminal sentence, otherwise appropriate in all respects, is rendered improper because it might bear incidentally on civil litigation. Accordingly, we conclude that in requiring TCC to fund evaluative studies designed to determine the effects of its conduct, the District Court acted within its broad authority to fashion a just sentence.

CONCLUSION

We have reviewed all of TCC's arguments on appeal and find them to be without merit. We thus **AFFIRM** the March 26, 2014 judgment of the District Court.

All Citations

--- Fed.Appx. ----, 2016 WL 105805

Footnotes

* The Clerk of Court is directed to amend the official caption to conform with the caption above.

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