Is the government required to prove that the defendant intended to conceal the knives that he attempted to bring onto the aircraft?

UNITED STATES v. FLUM
518 F.2D 39 (8TH CIR. 1975)
OPINION BY: WEBSTER, J.

Thomas Lawrence Flum was convicted in a jury-waived trial of attempting to board an aircraft while having about his person a concealed dangerous and deadly weapon, in violation of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1472 (1). In this appeal Flum contends that he was convicted upon insufficient evidence since there was no evidence tending to establish that he intended to conceal the knives which were discovered during a pre-boarding search of his carry-on luggage and personal belongings. The government, while arguing in the alternative that there was sufficient evidence of intent to conceal, first contends that the statute does not require proof of such intent. The District Court so held and we agree.

At the time of the incident in question, the statute provided in relevant part:

Whoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon, or whoever attempts to board such an aircraft while having on or about his person a concealed deadly or dangerous weapon, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Facts

On July 20, 1973, defendant Flum, accompanied by some friends, arrived at the Lincoln Municipal Airport at approximately 5:20 p.m. He first went to the ticket counter and purchased a ticket. The agent instructed him to proceed immediately to the gate where the passengers on his flight were already boarding. The defendant proceeded to a security post through which passengers must pass before reaching the departure gate. During the security inspection which followed, guards discovered a switchblade knife with a 3 3/4 inch blade and a butcher knife with a 7 7/8 inch blade. The butcher knife was found in a suitcase, wrapped in loose clothing. The switchblade knife was found inside a small gray box which was on the counter with other belongings.

Issue

The essential elements of the relevant offense prohibited by 49 U.S.C. § 1472 (1) are (1) attempting to board an aircraft (2) while carrying a deadly or dangerous weapon (3) which was concealed on or about the defendant's person. Flum was clearly attempting to board an aircraft, and the deadly and dangerous character of the knives is likewise not disputed. What is disputed is whether the evidence showed beyond reasonable doubt that the weapons were "concealed" within the meaning of the statute.

The FAA guidelines furnished to preboard screening personnel define as dangerous:

> KNIVES—All sabers, swords, hunting knives, and such other knives considered illegal by local law. . . .

The defendant contends that the statute takes as its source the common law crime of carrying a concealed weapon and therefore requires the same proof of *mens rea,* that is, a specific intent to conceal. Flum testified that he had intended to check his bags in advance of boarding but lacked time to do so because he had arrived at the airport only five minutes prior to take-off time. Since no one inquired whether he had any weapons in his possession, he argues, his act of presenting his belongings for inspection negated any intent to conceal. If intent to conceal were an essential element of the offense, this would be a compelling argument.

Reasoning

The provision of the statute applicable to the instant case makes no reference to intent. In order then to determine whether the requirement of specific intent is nonetheless implied from the nature of the statute, we turn again to the classic test which Judge (now Justice) Blackmun announced for our court:. . . .

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause. . . .

1. ***Policy.*** In 1961 Congress adopted certain amendments to the Federal Aviation Act of 1958, for the purpose of "extend[ing] Federal criminal laws to certain acts committed on board aircraft—in particular, such acts as aircraft hijacking, murder, manslaughter, assault, maiming, carrying concealed deadly or dangerous weapons, and stealing personal property." Nowhere in the report [accompanying the law] is found any inference of a congressional purpose or policy that intent to conceal must be demonstrated in order to prove the fact of concealment. . . .

2. ***Standard.*** We cannot say that the standard expressed in the plain meaning [of the statute] is unreasonable. A demonstrated need to halt the flow of weapons on board aircraft, which had exposed to peril large numbers of passengers and jeopardized the integrity of commercial travel, justified a stringent rule, adherence to which was properly expected of all persons traveling by air, for their mutual safety.

3. ***Penalty.*** The statutory penalty, a maximum fine of $1000 or imprisonment for not more than one year, or both, makes the offense a misdemeanor . . . and is thus "relatively small." . . .

4. ***Effect of Conviction.*** Little need be said of the fourth requirement. Conviction of this offense does not gravely besmirch; it does not brand the guilty person as a felon or subject him to any burden beyond the sentence imposed.

5. ***Source of Statute.*** It is argued that the statute makes into a federal offense that which was an offense at common law: carrying a concealed weapon. The common law offense required proof of an intent to conceal; hence, defendant argues, the statute impliedly contains the same requirement. . . . The thrust of the federal statute, a misdemeanor, is to prohibit entry of an airplane with such weapon concealed upon one's person. The offense is not simply carrying the concealed weapon about one's person, but in boarding or attempting to board an aircraft with it.

6. ***Congressional Purpose Supporting.*** The Congress, as demonstrated sought to promote safety in aircraft by extending the federal criminal laws to aircraft-related acts as a deterrent to crime. This purpose supports the conclusion that Congress did not intend to impede the deterrent effect of its statute by imposing upon the government prosecutor the added burden of showing the state of mind of the person found attempting to board an aircraft with a deadly or dangerous concealed weapon. If conviction depended upon proof of misrepresentation at the security gate or some other furtive act inconsistent with innocence, then the congressional purpose to keep weapons out of the passenger section of aircraft would depend entirely upon the thoroughness of the inspection, since in almost every case a person who presented his bags for inspection would thereby have rebutted in advance a claim that he possessed a specific criminal intent to conceal. To the contrary, we think the congressional purpose of keeping weapons from being taken on board airplanes by passengers fully supports the conclusion that intent to conceal is not an essential element of the offense.

While intent to conceal is not an essential element of the offense and therefore need not be established in order for the prosecution to make a submissible case, the fact of concealment is an essential element and must be proved beyond reasonable doubt.

The classic definition of a concealed weapon is one which is hidden from ordinary observation. . . . A submissible case is made when the government establishes that a person has attempted to board an aircraft with a dangerous or deadly weapon on or about his person which is hidden from view.

We do not intimate that the weapon must in all cases be in open view prior to inspection. The trier of the fact could consider, for example, evidence offered on behalf of the defendant that he had informed the inspector of the presence and location of a deadly or dangerous weapon among his belongings. The obviousness of the weapon is a factor to be taken into consideration under all of the relevant facts and circumstances.

Concealment under subsection (1) of the statute is measured by what a defendant did or failed to do, not by his intent. The inspection process in a particular case may be an objective fact to be considered with other objective facts on the issue of concealment. Not every inspection will uncover a concealed weapon, and no congressional purpose to let the fact of a security inspection operate as an absolute defense to the charge can be found in either the statute or its legislative history. Each case must stand upon its own facts.

Holding

While defendant submitted his bags and belongings to an inspection, as he was required to do, this objective fact

was insufficient to overcome as a matter of law the finding of the District Court that the knives were concealed, a finding which is fully supported by the evidence.

It will be argued that the statute thus construed may operate harshly upon passengers boarding aircraft with articles which potentially are deadly or dangerous weapons. Balanced against the heavy risks to large numbers of passengers, including those who would carry such weapons on board with no evil purpose, we cannot say that the resulting effect is too severe. It requires no recitation of recent history to remind us that such risks are real, and in comparison, the statute—broad though its reach may be—is a reasoned response to a demonstrated need.

Dissent, *Heaney, J.*

The decision of the majority permits imposition of criminal liability upon the housewife who carries scissors in her sewing bag; the fisherman who carries a scaling knife in his tackle box; the professional who carries a letter opener in his briefcase; the doctor who carries scalpels in his medical bag; and the tradesman who carries a hammer in his tool kit.

The majority attempts to avoid this problem by pointing out that concealment is always a factual question and that all facts and circumstances can be considered in determining whether a weapon has been concealed. This ambiguous language may be taken by some as requiring that an intent to conceal be found, but I am not willing to leave the matter in such an ambiguous state. I agree that an oral disclosure of the weapon and the obviousness of its presence upon the physical search rebut the criminal act. They also rebut the criminal intent. The understandable failure to orally disclose the existence of a weapon, when momentarily the contents of the hand luggage will be subjected to a full search, or the fortuitous manner in which a passenger packs his hand luggage should not be the sole factors determining guilt. Only by preserving the defendant's opportunity to put before the jury evidence that the act of concealment was without culpability will the innocent be protected. Easing the prosecutor's burden cannot be justified when the result is injustice.

It is not the imposition of criminal liability upon those who innocently carry weapons in their hand luggage but the preflight boarding searches that will "halt the flow of weapons on board aircraft." This extraordinary procedure is the practical method Congress has chosen to insure flight safety. The requirement of intent as an essential element . . . will not undermine that procedure or its purpose. The intent requirement will only insure that prosecutions under the statute will be limited to those persons who would be deterred thereby. The statute should not be construed to serve a purpose it cannot achieve.

The troublesome problem of selective enforcement is also aggravated by the majority's decision. As revealed in the Federal Aviation Administration's First Semi-Annual Report to Congress on the Effectiveness of Passenger Screening Procedures, 67,710 weapons were detected in 1974. As a result thereof, however, only 1,147 arrests for weapons-related offenses were made. The percentage of arrests made to weapons detected was 1.69%. It is apparent that the security officer possesses an enormous amount of unreviewable discretion. The decision of a majority of this Court increases that discretionary power and places the determination of innocence in the hands of the police.

◆ Questions for Discussion

1. Why does the federal court establish that the statute does not require a criminal intent?
2. What are the reasons Congress has made the prohibition on bringing a deadly or dangerous weapon onto a plane a "strict liability offense?" Do you believe that this results in significant injustice to the flying public?
3. Summarize the argument of the dissent. Do you agree that public safety can be adequately protected and still require a "criminal intent?"
4. As a judge, would you vote with the majority or the dissent?

Cases and Comments

1. ***Hand Guns.*** A Virginia statute, §18.2-308.1(B), makes it a felony for an individual to possess "any firearm designed or intended to expel a projectile . . . while such person is upon . . . any public . . . elementary . . . school, including buildings and grounds. . . ." Deena Estaban, a fourth-grade elementary school teacher, left a zippered yellow canvas bag in a classroom that was found to contain a loaded .38 caliber revolver. She taught a class in the room earlier in the day that was primarily comprised of children in wheelchairs. The defendant claimed that she inadvertently left the gun in the bag that she used to carry various teaching aids. After teaching in the classroom, Esteban took the teaching aids with her but left the yellow bag. Esteban explained that she placed the gun in the bag and took it to the store on the previous Saturday and then forgot that the pistol was in the bag and inadvertently carried it into the school.

The trial court interpreted the statute as providing for a strict liability offense and ruled that the prosecution

was not required to demonstrate criminal intent. Esteban was convicted and received a suspended term of incarceration and a fine. The Virginia Supreme Court ruled that the legislature intended to assure that a safe environment exists on or about school grounds and that the presence of a firearm creates a danger for students, teachers, and other school personnel. The court stressed that the fact that Esteban "innocently" brought a loaded revolver into the school "does not diminish the danger." A footnote in the decision indicated that Esteban possessed a concealed handgun permit that specifically did not authorize possession of a handgun on school property. Would requiring a criminal intent impede the safety and security of the school? Should teachers be permitted to arm themselves? See *Esteban v. Commonwealth,* 587 S.E.2d 523 (Va. 2003).

2. ***An Open Bottle of Intoxicating Liquor.*** Steven Mark Loge was cited for a violation of a Minnesota statute that declares it a misdemeanor for the owner of a motor vehicle, or the driver when the owner is not present, "to keep or allow to be kept in a motor vehicle when such vehicle is upon the public highway any bottle or receptacle containing intoxicating liquors or 3.2 percent malt liquors which has been opened." This does not extend to the trunk or to other areas not normally occupied by the driver or passengers. Loge borrowed his father's pickup truck and was stopped by two police officers while on his way home from work. One of the officers observed and seized an open beer bottle underneath the passenger's side of the seat and also found one full unopened can of beer and one empty beer can in the truck. Loge passed all standard field sobriety tests and was issued a citation for a violation of the open bottle statute. At trial, Loge testified that the bottle was not his, but he nevertheless was convicted based on a determination by the trial and appellate court that this was a strict liability offense. The Minnesota Supreme Court affirmed that the plain language of the statute indicated that the legislature intended this to be a strict liability offense and that a knowledge requirement would make conviction for possession difficult, if not insurmountable. The Supreme Court also observed that drivers who are aware of this statute will carefully check any case of packaged alcohol before driving in order to ensure that each container's seal is not broken. The dissent noted that the language "allow to be kept" clearly indicated a knowledge requirement. Absent a provision for intent, there is a risk that individuals will be convicted "not simply for an act that the person does not know is criminal, but also for an act the person does not even know he is committing." Does the prevention of "drinking and driving" justify the possible conviction of innocent individuals? See *State v. Loge,* 608 N.W.2d 152 (Minn. 2000).