3rd Circ. Ruling Fine-Tunes The 'But It's Hemp' Defense

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A difficult lesson was learned after marijuana was discovered in a suitcase at the airport: The government does not have to prove cannabis is marijuana to convict you of trafficking in marijuana.

A recent decision from the U.S. Court of Appeals for the Third Circuit clarified that, following the passage of the 2018 Farm Bill, the legal burden has shifted, requiring the accused to produce evidence that the cannabis is not marijuana.

Traveling by airplane with marijuana was all over the news after Gigi Hadid, a model and television personality, was arrested and released for marijuana possession in the Cayman Islands after the Cayman Islands Customs and Border Control searched her luggage and discovered alleged marijuana and paraphernalia in July.

But not all instances of cannabis in international travel result in a simple slap on the wrist — as Raquel Rivera, the defendant in U.S. v. Rivera,[1] recently learned the hard way.

Rivera's story also provides a valuable lesson to the accused and their legal representatives. One does not need to be a lawyer to know that the prosecution must prove beyond a reasonable doubt that the defendant committed the crime. We hear it constantly on television shows, true-crime podcasts and the news — but it isn't necessarily so, at least not on appeal. Rivera and her attorney also found this out the hard way.

Cannabis Discovered by U.S. Customs and Border Protection

The saga began when Rivera flew from Miami to Saint Thomas. CBP officers searched her two suitcases at the Saint Thomas airport. Rivera was evasive about who owned the suitcases and who packed them but did not persuade the government officers that they were not hers.

Ultimately, a grand jury charged Rivera with

1. conspiracy to possess, with intent to distribute, less than 50 kilograms of marijuana; and
2. possession, with intent to distribute, less than 50 kilograms of marijuana.

Raising the Distinction Between Hemp and Marijuana at Trial At Trial

The government's expert testified that the cannabis discovered in Rivera's luggage was marijuana. On cross-examination by Rivera's attorney, the government's expert stated that he did not determine the precise amount of Delta-9 THC in the cannabis.

The amount of THC is critical because the 2018 Agriculture Improvement Act, also known as the 2018 Farm Bill, amended the Controlled Substances Act to exclude hemp from the definition of marijuana.

Both hemp and marijuana are the plant Cannabis sativa L., but hemp has a THC concentration of 0.3% or less on a dry weight basis. Following this change in law, hemp is no longer considered a controlled substance.

Unfortunately for Rivera, she and her attorneys did not introduce at trial evidence of the THC content of the cannabis in her suitcases. In fact, as the Third Circuit later noted in discussing the case's procedural history, "[a]fter the government presented its evidence, Rivera rested without presenting any evidence," and instead "moved for judgment of acquittal under Federal Rule of Criminal Procedure 29."

Under Federal Rule of Criminal Procedure 29, a defendant is entitled to a judgment of acquittal if, viewing the record in the light most favorable to the government, no rational jury could have found the defendant guilty beyond a reasonable doubt.

As such, "Rivera argued that the government failed to prove its case beyond a reasonable doubt because it did not present evidence that there was more than 0.3% THC in the seized substance."

The U.S. District Court of the Virgin Islands deferred ruling on the Rule 29 motion until after the jury returned a verdict. Rivera was acquitted of the conspiracy offense and convicted of the possession offense. After this, the district court denied Rivera's motion for judgment of acquittal.

Shifting Burdens When Hemp Versus Marijuana Becomes a Legal Issue

Rivera appealed her conviction, and the Third Circuit upheld her conviction on July 19. Why was Rivera's conviction upheld when the government did not prove that the cannabis contained more than 0.3% THC?

The court stated the reason is that the law places the burden on Rivera to introduce evidence showing that the cannabis was 0.3% or less THC.

The appeals court in U.S. v. Rivera examined the Farm Bill's amendments to the CSA and congressional intent when enacting it.

It focused on Title 21 of the U.S. Code, Section 885(a)(1), which "provides that the government does not need to 'negative any exemption or exception set forth' in the subchapter of the Controlled Substances Act that defines marijuana."

Moreover, the Third Circuit found that, through Section 885(a)(1), "Congress placed 'the burden of going forward with evidence' of 'such exemption or exception' squarely on 'the person claiming the benefit.'"

Thus, the court concluded, "[b]y excluding hemp from the definition of marijuana, the Farm Bill carved out an exception to marijuana offenses: Someone with cannabis possesses marijuana except if the cannabis has a THC concentration of 0.3% or less."[2]

The appeals court opinion does not state what the THC content was in the cannabis in Rivera's suitcase. It would appear that Rivera's mistake was that her counsel introduced no evidence at trial that the cannabis was hemp,

not marijuana, or presented evidence from which a judge or jury could conclude the cannabis was not marijuana.

Of course, this may not have been an oversight by Rivera's attorney. Indeed, if the cannabis were marijuana, it would have been a mistake for the defense to introduce evidence of the THC content of the cannabis, proving it was marijuana. Her best option, given those facts, may have been to raise the arguments she did and rely on a Federal Rule of Criminal Procedure 29 motion.

Is Hemp an Affirmative Defense?

Certain defenses to an alleged criminal act are affirmative defenses. For example, in murder trials in which the facts clearly show that the defendant killed the victim, the defendant will often contend that they killed the victim in self-defense.

While state laws vary, generally, self-defense is an affirmative defense, which means the defendant has the burden of producing evidence of that defense. In other words, the defendant must put on some evidence from which a jury can find self-defense.

Once the defendant does so, the burden of proof returns — or shifts back — to the prosecution, which must disprove self-defense beyond a reasonable doubt.

According to the Third Circuit, asserting that cannabis is, in fact, hemp and not marijuana is an affirmative defense — but it was not one offered by Rivera's attorney at trial.

Instead, on appeal, her attorney claimed that the government failed to establish that the cannabis in question was not hemp. The court rejected this because it stated that proving cannabis is marijuana is not an element of the crime.

Under the appeals court's analysis, this would be like claiming that a person convicted of murder was not guilty because the prosecution did not address the possibility of self-defense and produce evidence demonstrating the killing was not done in self-defense.

In either case, the defendant must assert their own affirmative defense and may not rely on the prosecution to proactively eliminate the possibility of an unraised affirmative defense.

The decision thus rests upon the presumption that any substance that contains any amount of THC is federally illegal marijuana. In fact, at trial, the government admitted that it never determined the precise amount of THC in the substance — only that there was a positive result on a single test utilized to determine whether a substance contains any THC.[3]

That Rivera was convicted of a federal marijuana crime beyond a reasonable doubt when no evidence demonstrated the cannabis was not hemp is also worth noting.

The issues raised in the Rivera case also raise constitutional issues regarding an individual's right to an opportunity to present a meaningful defense.

For example, if an indigent defendant cannot afford to test the THC level of the cannabis they were arrested for possessing, are they denied justice when convicted for possessing marijuana? In other words, is justice served when one identically situated defendant can afford to hire an attorney to raise hemp-specific issues and to test the THC level of the cannabis to prove it is hemp, and one cannot?

Lessons Learned and Best Practices

For a number of reasons, as a preliminary matter, it is important for all persons involved in any way with cannabis to know the THC content of cannabis they possess, sell, grow, process or are in contact with in any way.

Cannabis sativa L. is a plant in the Cannabis genus, a species of the Cannabaceae family. The distinction between hemp and marijuana — which are both Cannabis sativa L. — is that hemp has a THC concentration of 0.3% or less.[4]

This distinction is purely a legal fiction: a fact created by the legislature and the courts that, in turn, results in different outcomes in otherwise similar circumstances.

Further, marijuana and hemp look and smell identical. However, marijuana is a Schedule I controlled substance, while hemp is a heavily regulated commodity. The Farm Bill allows for a wide range of commercial activity, but does not create a legal presumption that all cannabis is hemp.

The key takeaway from the decision entered in Rivera's case, for both supermodels and regular people everywhere, is that if you are accused of trafficking in marijuana and the cannabis is not marijuana, you — the accused — have the burden of producing evidence that the cannabis is excepted from the definition of marijuana under the Farm Bill because its THC content is 0.3% or less.

The Farm Bill legalized hemp, but it did not legalize marijuana. According to the Third Circuit in Rivera, a defendant's failure to raise this distinction and provide evidence at trial can result in waiver of the issue altogether, and a presumption, which will not be disturbed on appeal, that cannabis is federally illegal marijuana.

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Jump to top.

[1] U.S. v. Rivera, 74 F.4th 134, 136 (3d Cir. 2023).

[2] U.S. v. Rivera, 74 F.4th 134, 136 (3d Cir. 2023).

[3] U.S. v. Rivera, 74 F.4th 134, 137 (3d Cir. 2023).

[4] U.S. v. Rivera, 74 F.4th 134, 136 (3d Cir. 2023), citing 7 U.S.C. § 1639o(1).

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