In the Court of Appeals of the State of Alaska

State of Alaska, Appellant, v. **Kenneth J. Jouppi,** Appellee.	Court of Appeals No. **A-13147** **Order** Petition for Rehearing Date of Order: **11/14/2022**

Trial Court Case No. **4FA-12-03228CR**

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.*

On consideration of the petition for rehearing filed by Kenneth Jouppi on **10/4/2022**, and the response filed by the State on **10/10/2022**,

IT IS ORDERED that the petition for rehearing is **DENIED**.

Entered at the direction of the Court.

JUDGE MANNHEIMER, concurring.

I join the Court's decision to deny Jouppi's petition for rehearing, and I write separately to address the argument that Jouppi raises based on the United States Supreme Court's decision in *Southern Union Company v. United States*, 567 U.S. 343. 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

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* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

First, I conclude that Jouppi waived this argument by failing to adequately brief it to this Court.[1] But second, I conclude that Jouppi's argument has no merit.

In *Apprendi v. New Jersey*,[2] the Supreme Court held that, after a defendant has been found guilty of a criminal offense by a jury, a sentencing court normally has no authority to impose any greater sentence than would be authorized by the facts inherent in the jury's verdict. (The only exception is when the greater sentence is based on the fact that the defendant has one or more prior criminal convictions.)

Southern Union raised the question of whether the rule announced in *Apprendi* applied to fines as well as to sentences of imprisonment.

The Southern Union Company was charged with unlawfully storing hazardous waste — an offense that carried a maximum fine of $50,000 for each separate day of the violation.[3] Although the government presented evidence that Southern Union had stored the hazardous waste unlawfully for over two years, the jury was given a verdict form that did not ask the jurors to specify the precise dates (or range of dates) on which the company violated the statute.[4]

After the jury found Southern Union guilty, the sentencing court imposed a fine of $6 million. This fine was based on the court's conclusion that, given the

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[1] *See Windel v. Carnahan*, 379 P.3d 971, 980 (Alaska 2016) (holding that an argument is waived when it is "given only a cursory statement in the argument portion of [the party's] brief") (quoting *Burts v. Burts*, 266 P.3d 337, 344 (Alaska 2011)).

[2] 530 U.S. 466, 490; 120 S.Ct. 2348, 2362–63; 147 L.Ed.2d 435 (2000).

[3] *See* 42 U.S.C. § 6928(d); *Southern Union*, 567 U.S. at 347, 132 S.Ct. at 2349.

[4] *Southern Union*, 567 U.S. at 347, 132 S.Ct. at 2349.

evidence presented in the case, the jury's verdict represented a finding that Southern Union had unlawfully stored the hazardous waste for 762 days.[5]

The Supreme Court held that the sentencing court's action violated *Apprendi*. More specifically, the Court held that, because the jury returned a verdict that did not specify the duration of the violation, the company's fine was limited to the $50,000 fine authorized for a single day's violation of the statute — and that *Apprendi* barred the sentencing court from increasing the company's fine based on a judicial finding that the company had violated the statute for hundreds of days.[6]

Based on the Supreme Court's decision in *Southern Union*, Jouppi argues that the sentencing judge in his case violated the *Apprendi* rule when the judge assumed (for sentencing purposes) that Jouppi was either aware of, or was willfully blind to, the presence of the entire nine gallons of beer found in his airplane (rather than just the single six-pack that was sitting in plain view). But this judicial fact-finding does not present an *Apprendi* issue.

The maximum authorized fine in *Southern Union* hinged on the number of days that the company was in violation of the hazardous waste statute. Because the jury's general verdict could be based on only a single day's violation, the company's maximum sentence was the $50,000 maximum daily fine.

But the forfeiture of Jouppi's airplane did not hinge on the precise amount of beer involved in his offense. The mandatory forfeiture of Jouppi's aircraft was triggered by the fact that the jury convicted him of bootlegging under AS 04.11.499(a)

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[5] *Ibid.*

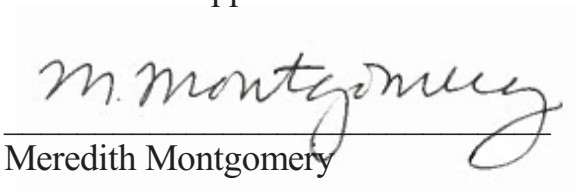
[6] *Id.*, 567 U.S. at 352, 132 S.Ct. at 2352.

— bootlegging *any amount* of alcoholic beverages. *See* AS 04.16.220(a)(3)(C) and 220(i)(1).

The amount of beer affected the level of Jouppi's bootlegging offense — *i.e.*, whether it was a misdemeanor or a felony.[7] But AS 04.16.220(a)(3)(C) authorized the sentencing court to order the forfeiture of Jouppi's airplane for any violation of AS 04.11.499(a), regardless of whether that act of bootlegging was a misdemeanor or a felony. Indeed, the forfeiture of the airplane was not only authorized but was mandated by AS 04.16.220(i)(1).

Thus, in contrast to the situation in *Southern Union*, the forfeiture of Jouppi's airplane was authorized by the facts inherent in the jury's verdict — wholly apart from the sentencing court's finding on the question of whether Jouppi was aware of, or was willfully blind to, the precise amount of beer he was carrying in his plane. For this reason, the sentencing court's fact-finding did not implicate Jouppi's Sixth Amendment rights under *Apprendi*.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Trial Court Clerk
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[7] *See* AS 04.16.200(e).

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