UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY HENDERSON, Defendant.	Case No. CR 17-348-DMG ORDER VACATING JUDGMENT

Defendant Jeffrey Henderson appeals from the judgment entered by the Honorable Suzanne H. Segal, United States Magistrate Judge, finding defendant guilty of maintaining a "structure" or "significant surface disturbance" without authorization in the Angeles National Forest in violation of 36 C.F.R. § 261.10(a) and guilty of using a fire at the encampment in violation of 36 C.F.R. § 261.52(a). Pursuant to the judgment entered on May 25, 2017, Judge Segal sentenced Defendant to two years of probation and ordered him to pay a total of $70.00, consisting of two $10.00-mandatory assessment fees and two $25.00-mandatory processing fees.

This Court has jurisdiction to entertain this appeal pursuant to 18 U.S.C. §§ 3231 and 3402.

I.
PROCEDURAL BACKGROUND

Defendant was charged with violating 36 C.F.R. §§ 261.10(a) and 261.52(a).

Section 261.10(a) prohibits "[c]onstructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or approved operating plan when such authorization is required."

Section 261.52(a) prohibits "[b]uilding, maintaining, attending or using a fire, campfire, or stove fire," when prohibited by order. Order No. 05-01-16-07 ("Fire Order") was in effect on October 24, 2016 and prohibited the use of fire in the Angeles National Forest.

On May 25, 2017, after a court trial, Defendant was found guilty as charged of the offense of violating Sections 261.10(a) and 261.52(a). The court stated as follows:

> The Government has proven beyond a reasonable doubt that Defendant is in violation of both of these regulations for the maintaining of a structure on Forest Service land and for using a fire improperly on Forest Service land. There will be a more detailed statement of the Court's findings after today's proceedings.

[Doc. # 7 at 86.]

On June 7, 2017, Magistrate Judge Segal issued her written statement of decision with the following findings: (1) on October 24, 2016, Henderson was encamped in the Angeles National Forest outside an authorized campground, where he "erected a tent at the encampment and caused 'significant surface disturbance' by, among other things, maintaining the tent in an unauthorized place for an extended period, thereby impeding the natural growth of plants in the area, clearing areas for sleeping and cooking, and leaving bottles, a chair and other materials on the ground," and he "was not authorized to

erect a tent or cause other improvements or ground disturbance in that area;" and (2) Henderson "used fire at the encampment in violation of Order No. 05-01-16-07," he was not exempt from Order No. 05-01-16-07, which was publicly available in multiple locations, including a public website, and such availability constituted constructive notice to Henderson. Statement of Decision. [Doc. # 1 at 13-14.[1]]

II.
ISSUES ON APPEAL

Henderson contends that his conviction under Section 261.10(a) should be overturned because (1) a tent is not a "structure," (2) he did not create a "significant surface disturbance," and (3) the regulation is void for vagueness. He contends that his conviction under § 261.52(a) should be overturned because (1) there was no evidence that Defendant built or maintained any kind of fire, (2) the Government failed to establish that the Fire Order was in effect on October 24, 2016, and (3) the Fire Order was void for vagueness.

III.
STANDARD OF REVIEW

The scope of an appeal from a Magistrate Judge's judgment is "the same as in an appeal to the court of appeals from a judgment entered by a district judge." Fed. R. Crim. P. 58(g)(2)(D).

In reviewing for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier

[1] Page references are to page numbers inserted in the header of the document by the CM/ECF filing system.

of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Review of a trial court's interpretation of a regulation is *de novo* as a question of law. *United States v. Hoff*, 22 F.3d 222, 223 (9th Cir. 1994).

II.

DISCUSSION

A. VIOLATION OF 36 C.F.R. § 261.10(a)

At the conclusion of the May 25, 2017 court trial, Judge Segal orally found that Defendant maintained a "structure" on Forest Service land" in violation of 36 C.F.R. § 261.10(a).

In her written statement of decision, Judge Segal found Henderson caused "'significant surface disturbance' by, among other things, maintaining the tent in an unauthorized place for an extended period, thereby impeding the natural growth of plants in the area, clearing areas for sleeping and cooking, and leaving bottles, a chair and other materials on the ground." [Doc. # 1 at 14.] Henderson contends that a tent is not a "structure," as that term is used in the regulation and that erecting the tent and moving some dirt around is not sufficient to constitute a "significant surface disturbance."

1. STRUCTURE

The Government contends that a tent meets Black's Law's definition of the term, "structure," as "any construction, production, or piece of work artificially built up or composed of parts purposefully joined together." [Doc. # 21 at 16.] Judge Segal's oral finding of a structure was based on the testimony of Officer Christopher Gonzales of the Forest Service, who testified that he accompanied Officer Yvette Orellana on October 24, 2016, when they went to an encampment in the Angeles Forest containing multiple tents, including Defendant's tent.

From Judge Segal's written findings that "Henderson was encamped . . . outside an authorized campground," "Henderson . . . maintain[ed] the tent in an unauthorized place

. . . ," and Henderson was not authorized to erect a tent. . . ." [Doc. # 1 at 13-14], it appears that Judge Segal was under the impression that camping outside of a developed campground or outside of designated campsites was prohibited. But that is exactly what dispersed camping is. Officer Gonzales testified that in addition to camping in designated campsites, one may disperse camp in non-developed areas. Government counsel asked Officer Gonzales, "[w]hen you're camping outside of a developed campground, what type of camp are you allowed to build?" [Doc. # 7 at 28.] Officer Gonzales replied, "[y]ou could have a tent. You're not allowed to do any improvements to the land – cut any trees down, harm any forest service products, trees – basically just put a tent and enjoy the camping location you picked for yourself, as long as you're not disturbing anybody else." *Id.* On the current record, it is undisputed that dispersed camping is allowed and, although it is subject to restrictions, such as maintaining a distance from waterways, limitation on number of consecutive days allowed, and fire restrictions, none of those restrictions was the subject of the Section 261.10(a) charge. The evidence is clear that one is allowed to erect a tent when engaged in dispersed camping.[2] Because dispersed camping is permitted, and because dispersed camping may include the erection of a tent outside of designated campsites, it would be unreasonable to interpret a regulation that prohibits the maintenance of a "structure" to include "tent" in the definition of a prohibited "structure." Accordingly, this Court construes the term "structure" as used in the list of prohibitions in 36 C.F.R. § 261.10(a) not to include a "tent."[3]

[2] According to the pertinent regulations, "camping" is "the temporary use of National Forest System lands for the purpose of overnight occupancy without a permanently-fixed structure." 36 C.F.R. § 261.2.

[3] The issue on appeal is limited to whether a tent is a structure within the meaning of 36 C.F.R. § 261.10(a). In determining that a "tent" is not a "structure," this Court does not reach the question of whether a tent could be a structure if it is specially constructed so as to meet some standard of permanence or other similar non-transitory quality. There are no facts on this record to suggest that the tent in this case would meet such a standard.

2. SIGNIFICANT SURFACE DISTURBANCE

In her written statement of decision, Judge Segal found that caused significant surface disturbance by erecting and maintaining a tent: "Henderson erected a tent at the encampment and caused 'significant surface disturbance' by, among other things, maintaining the tent in an unauthorized place for an extended period, thereby impeding the natural growth of plants in the area, clearing areas for sleeping and cooking, and leaving bottles, a chair and other materials on the ground." [Doc. # 1 at 14.]

The Government contends that "Black's law defines a 'disturbance' as an 'act causing annoyance or disquiet,' surface as 'the top layer of something, especially land,' and 'significant' as 'embodying or bearing some meaning. In contrast, Defendant argues that the case law addressing this issue has involved "intense, large-scale work or damage done to the land, work such as tree-clearing, laying down of a road, building of a mine, excavation of minerals, damage to roads, trees, rocks, and the like." [Doc. # 20 at 18.] While Defendant is correct that the case law has involved large-scale disturbance of land, such as mining and tree-clearing, that does not mean that disturbance on a smaller scale cannot amount to a significant disturbance. The issue here is whether the disturbance to the land caused by Defendant's tent in this case was "significant."

As with the term "structure," a review of what is permitted in "dispersed camping" is instructive when addressing what amount of disturbance would constitute a "significant disturbance" under this regulation. In other words, because dispersed camping is allowable, some limited disturbance to the surface would also be expected and permitted that is consistent with camping. Judge Segal found that the disturbance – impeding of plant growth, clearing of sleeping and cooking areas and leaving bottles, a chair and other materials on the ground – was caused by maintaining the tent in an unauthorized place for an extended period. She further found that "Henderson was not authorized to erect a tent . . . ." [Doc. # 1 at 14.] These findings appear to be contradicted by Officer Gonzales' testimony that dispersed camping is permitted outside of the developed campground or outside of designated campsites. But the evidence from the October 24, 2016 visit to the

encampment was that the tent had been there for a while—though there was no evidence as to how long: around the tent, the soil was cleared, and there was a chair, welcome mat, some water bottles and a stove in front. The issue is whether this disturbance was merely the product of dispersed camping or constituted "significant surface disturbance." In light of the fact that dispersed camping is permitted in the areas outside of designated campsites, the definition of "significant" in the phrase, "significant surface disturbance," as that term is used in the list of prohibitions in 36 C.F.R. § 261.10(a), cannot reasonably include the limited amount of surface disturbance found to have been caused by Defendant's tent, which on the current record is merely consistent with camping.

B. VIOLATION OF 36 C.F.R. § 261.52(a)

At the conclusion of the May 25, 2017 court trial, Judge Segal orally found Defendant in violation of 36 C.F.R. § 261.52(a) for using a fire improperly on forest service land.

In her written statement of decision, Judge Segal found (1) Henderson used a fire in violation of the Fire Order, which prohibited the use of fire until the end of the official 2016 fire season; (2) the Fire Order was publicly available in multiple locations, including a public website, and constituted constructive notice to Henderson; (3) Henderson was not exempt from the Fire Order because his stove was not being used within an authorized developed campground and was not one of the devices authorized by the Fire Order.

Defendant contends that (1) the Government did not prove that Defendant built or maintained a fire and that there was no evidence that anyone saw Defendant use a fire or that the stove was his, (2) the Government failed to establish that the Fire Order was in effect on October 24, 2016 and (3) the Fire Order was void for vagueness because it did not state the date of the end of the 2016 fire season.

With regard to the Government's proof of Defendant's use of a fire, Officer Gonzales was asked, "What caused you to conclude that this was a campstove?" [Doc. #

7 at 32.] He responded, "There was white ash below it." *Id.* When asked, "Did it appear to have been recently used?," Officer Gonzales stated, "The ash was white below it. So, I believe it was recently used the night before or that day." *Id.* Officer Gonzales was also asked, "What did you observe that caused you to conclude that he had violated the prohibition on having a campfire or stove fire in the forest?" In response, Officer Gonzales testified "Well, he said it was his camp. It was located in front of his tent. It had a – the ash below it. The gentleman stated that fire is not illegal." [Doc. # 7 at 41.] Later in the trial, government counsel stated, "If the defendant is willing to stipulate that that was his voice on the video, and that that was his tent and the stove that we saw – which he's effectively already done in his judicial filings – we're happy to not call Office Orellana in the interest of time." [Doc. # 7 at 64.] In response, Defendant stated, "I will stipulate to that." [Doc. # 7 at 65.] Defendant does not point to any contrary evidence. As such, there was sufficient evidence of Defendant's use of fire.

As for proof that the Fire Order was in effect on October 24, 2016, while Officer Gonzales did not know when the 2016 fire season ended, he testified that the Fire Order was in place and effective on October 24, 2016. [Doc. # 7 at 37.] There was no evidence to the contrary.

Defendant contends that the Fire Order was void for vagueness because it did not state the date of the end of the 2016 fire season. The Fire Order is authorized by 46 C.F.R. § 261.52(a) and prohibits the use of a fire. Its dissemination provides notice of the prohibition. Judge Segal found that the Fire Order "was publicly available in multiple locations, including a public website, and constituted constructive notice to Henderson of the prohibition." [Doc. # 1 at 14.] While the dissemination of the Fire Order was sufficient to put Defendant on notice of its contents, the sufficiency of its contents is the problematic issue. The Fire Order states that the period of its effectiveness is "September 8, 2016, through the end of the official 2016 fire season." The Fire Order does not state when the official 2016 fire season would end and does not provide any clue as to how one may determine when the fire season would end. No evidence was presented at trial

as to the end of the 2016 fire season or how one could find out when it would end. The website also does not reveal this information. In fact, even Officer Gonzales testified that he did not know when the 2016 fire season ended. He testified that he knew that the fire season had not ended as of October 24, 2016, but there was neither evidence presented explaining how Gonzales knew it had not ended by that date nor how anyone else could have known that it had not ended by that date.

"To be struck down for vagueness, a statute or regulation must fail 'to give a person of ordinary intelligence fair notice that his contemplated conduct' is forbidden." *Donavan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981), quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). While the Fire Order provided sufficient notice that using a fire outside of the designated campsites was prohibited during its effective period, it stated its effective period as September 8, 2016 through the end of the official 2016 fire season. From that stated effective period, a person of ordinary intelligence would not have fair notice of when the fire season would end and, therefore, would not have fair notice of when the use of a fire was prohibited. The Government argues, "[a]lthough Officer Gonzales was not certain of the exact date when the 2016 fire season ended, he was certain that the Fire Order was still effective on October 24, 2016. . . . That is all that matters for purposes of defendant's vagueness challenge." [Doc. 21 at 22-23.] No evidence was presented, however, explaining how Officer Gonzales knew that the Fire Order was still effective on October 24, 2016, from which it could be determined that a person of ordinary intelligence would also know that the Fire Order was still in effect on October 24, 2016. As a result, the Court finds that the Fire Order is void for vagueness.

III.

CONCLUSION

Based on the foregoing, the Court finds as follows:

1. It was error for the Magistrate Judge to have found Defendant Henderson was guilty of violating 36 C.F.R. § 261.10(a) by placing or maintaining a structure or causing a significant surface disturbance on National Forest System lands; and
2. It was error for the Magistrate Judge to have found Defendant Henderson was guilty of violating 36 C.F.R. § 261.52(a) and Order No. 05-01-16-07 by using a fire, campfire, or stove fire because Order No. 05-01-16-07 is void for vagueness.

Accordingly, IT IS ORDERED that Defendant Henderson's conviction for violating C.F.R. §§ 261.10(a) and 261.52(a) is vacated and this action is remanded for further proceedings consistent herewith.

DATED: April 30, 2018

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

cc: Hon. Suzanne Segal
United States Magistrate Judge