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SUPREME COURT CASES

Unissued State Licenses Are Not Property Under the Mail Fraud Statute

In ***Cleveland v. United States***, 121 S.Ct. 365 (2000), Cleveland and others were prosecuted under 18 U.S.C. § 1341 for making false statements when applying to the state police for permission to operate video poker machines. The mail fraud counts alleged, Cleveland and a co-defendant, in applying for and seeking renewal of the video poker license, had fraudulently concealed they were the true owners of the business which applied for the license. These counts also served as predicates for money laundering and racketeering charges.

Before trial, Cleveland moved to dismiss the mail fraud counts on the ground the alleged fraud did not deprive the state of "property" under § 1341. The district court denied the motion, concluding "licenses constitute property even before they are issued." The Fifth Circuit affirmed Cleveland's conviction, considering itself bound by a prior circuit decision holding Louisiana video poker licenses are "property" under 18 U.S.C. § 1341.

Rejecting all the government's arguments, the Court concluded the state video poker license did not qualify as property within § 1341's compass. The Court found it did not suffice that the object of the fraud could have become property in the recipient's hands. For purposes of the mail fraud statute, the thing obtained must have been property in the hands of the victim. The Court stated that state and municipal licenses in general, and the video poker licenses in particular, did not rank as property for purposes of § 1341, in the hands of the official licensor. Further, "equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." Absent a clear statement of Congressional intent, the Court refused to read the statute as having that result. Thus, a unanimous Supreme Court, settling a circuit split, held an unissued state or municipal license is not "property" for purposes of the federal mail fraud statute and, therefore, a scheme to obtain a license from the state by false pretenses is not punishable under the statute.

TITLE 26 AND TITLE 26 RELATED CASES

Violation Of Code Of Professional Responsibility

In ***In re Complaint as to the Conduct of Daniel J. Gatti,*** 8 P.3d 966 (2000), Gatti, a private practitioner licensed to practice law in Oregon, while gathering facts as part of his representation of a client, misled others to believe he was a medical doctor. When confronted by the Oregon Bar, Gatti responded that the State Professional Responsibility Board of the Oregon Bar had previously held Oregon Department of Justice lawyers who, in the course of an undercover operation, advised "investigators to have individuals pose as janitors and injured workers for the purpose of infiltrating chiropractors' and lawyers' offices to obtain information about suspected fraudulent workers' compensation claims," had violated no provisions of the Code of Professional Responsibility. Gatti cited this holding for the proposition that since government attorneys can oversee undercover operations, private practice attorneys should be able to conduct "investigations," even if in doing so they mislead.

Since Gatti put into play the role of government attorneys overseeing or rendering advice in the course of undercover operations, both the United States Attorney for the Judicial District of Oregon and the Attorney General for the State of Oregon filed *amicus curiae* briefs urging the Supreme Court of Oregon to recognize a "prosecutorial exception" to the Oregon Code of Professional Responsibility. In deciding the case, the Supreme Court of Oregon rejected Gatti's argument as well as the positions asserted by those government and private parties who had filed *amicus curiae* briefs. The Supreme Court of Oregon held neither government nor private attorneys were ". . . entitled to misrepresent [their] identity and purpose to gather information without violating the [Oregon] Code of Professional Responsibility and ORS 9.527(4)."

Good Faith Upheld

In ***Gandy v. United States***, 99-40205, 2000 U.S. App. LEXIS 31751 (5th Cir. Dec. 11, 2000), the Fifth Circuit affirmed the district court's finding the IRS special agents were not liable for disclosing to third party witnesses that Gandy was under criminal investigation. Gandy appealed the district court's decision which held although the disclosures were in violation of 26 U.S.C. § 6103, the errors were in good faith, as the agents believed the disclosures were necessary to perform their jobs. Thus, pursuant to 26 U.S.C. § 7431(b), the district court held liability did not attach to the disclosures.

On appeal, Gandy argued a reasonable IRS agent could not have acted in good faith in orally disclosing he (Gandy) was under criminal investigation when the Handbook for Special Agents § 347.2 prohibits such a disclosure in circular letters. Gandy further argued no reasonable agent could interpret IRS regulations and manuals to authorize a statement made orally, while forbidding it in a written disclosure. The court, however, agreed with the government that in-person interviews are more focused and selective than mass mailings of circular letters and, therefore, held a reasonable agent could conclude the specific rules governing written disclosures in circular letters would not apply across the board to all disclosures, including oral disclosures.

Furthermore, the court specifically cited Treasury Regulation § 301.6103(k)(6)-1 and the Handbook for Special Agents § 348.3 in support of its holding. The court noted those sections supported the agents' conclusion that they could orally inform a potential witness they are conducting a criminal investigation. The court found it to be clear that agents are authorized to display their credentials and badges identifying them as CID agents when interviewing a third party, as required by IRM § 977(11).1(4). Despite this holding, the court declined to "decide the difficult legal question of whether agents['] . . . oral disclosures that Gandy was under criminal investigation were necessary [because it] agree[d] with the district court that agents . . ., as reasonable agents, were in good faith in believing that the disclosures were authorized and, therefore, necessary."

Omission of Materiality Instruction Held Harmless

In ***United States v. Foster***, 229 F.3d 1196 (5th Cir. 2000), the Fifth Circuit held the omission of a jury instruction on materiality in a prosecution for presenting false and fraudulent claims for tax refunds in violation of 18 U.S.C. § 287, was subject to a harmless error analysis. Foster made the fraudulent claims for refund in connection with the 1996 tax returns of three different individuals. Each count charged Foster with filing a claim for "black taxes in the amount of $43,209" which he knew was false, fictitious and fraudulent. Foster appealed his conviction contending the district court erroneously refused to charge the jury that materiality was an essential element of 18 U.S.C. § 287, and such error prejudiced his defense and thus, not harmless.

The Fifth Circuit cited to *Neder v. United States,* 527 U.S. 1 (1999), where the Supreme Court held the omission of a jury instruction on materiality, where it was an essential element of the offense, was subject to a harmless error analysis. Thus, if the error was harmless beyond a reasonable doubt, the conviction could stand. In this case, the Fifth Circuit noted the error, if any, in omitting a materiality instruction was of such quality. There was no doubt the amounts claimed in the "black tax returns" that Foster assisted with were as material as they were unjustified. Thus, the court concluded Foster's false statements were material to the tax refund claims and his conviction was affirmed.

OTHER CONSTITUTIONAL ISSUES

18 U.S.C. § 371 Conviction Vacated For Sixth Amendment Violation

In ***United States v. Doherty***, 233 F.3d 1275 (11th Cir. 2000), the Eleventh Circuit vacated Doherty's conviction on the ground the district court's denial of his motion to sever his trial violated his Sixth Amendment right to cross-examination. Doherty and two co-defendants, Gaudet and Hatter, were convicted of, *inter alia*, conspiracy to defraud the Service in violation of 18 U.S.C. § 371. The convictions stemmed from the defendants alleged involvement in a multi-state conspiracy to defraud the United States of federal excise taxes on sales of diesel fuel purchased for highway use. Doherty, Gaudet, and Hatter worked for Young as truck drivers, delivering the diesel fuel for its illegal re-sale.

When the government provided notice of its intent to introduce the testimony of an IRS special agent to relate statements made by Gaudet which incriminated both Gaudet and Doherty, Doherty filed a motion to server his case from his co-defendants. Doherty argued pursuant to the holding of *Bruton v. United States*, 391 U.S. 123 (1968), his Sixth Amendment right to cross examination would be violated if the special agent was permitted to testify. The district court denied the motion finding no *Bruton* violation. When Doherty renewed his motion at trial, it was overruled again and the district court allowed the agent's testimony which inculpated Doherty and served as a confession for Gaudet.

Although the court found the evidence was sufficient to support Doherty's conviction as a conspirator, it vacated his convictions pursuant to the Supreme Court's decision in *Bruton* finding the district court had committed a violation by permitting the agent's testimony regarding Gaudet's incriminating statements.

Injunctions Against Sale Of Tax Protest Programs Are Permissible Prior Restraints On Political Speech If Narrowly Drawn

In ***United States v. Raymond***, 228 F.3d 804 (7th Cir. 2000), Raymond and his co-defendant, as members of the U.S. Taxpayers Party, sold collections of material ("the Program"), which they represented were a method of legally removing the purchasers from the jurisdiction of the federal government's taxing authorities. In March 1997, the United States filed a civil suit against the defendants requesting a permanent injunction against their sale of the Program and against their participation in any conduct intended to interfere with the enforcement of the internal revenue laws. The district court granted the injunction and the defendants appealed to the Seventh Circuit.

On appeal, the defendants argued their promotion and sale of their Program constituted political advocacy and the injunction was an unconstitutional prior restraint on free speech. Relying on *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987), the court reasoned since the injunction was a court order that forbade speech activities, it constituted a classic example of a prior restraint on speech. Construed narrowly, however, the court determined the injunction did not violate the defendants' First Amendment rights.

For example, after re-writing part of the injunction, the court found provisions enjoining incitement to violate the tax laws permissible since incitement to imminent unlawful activity is unprotected speech. The court also found provisions enjoining advertising, marketing and selling documents which provide false tax advice permissible since false, deceptive or misleading commercial speech is also unprotected. Further, the court found provisions enjoining the supply of materials or assistance in filing false IRS forms and provisions enjoining the filing of frivolous FOIA requests permissible since these actions also constitute incitement to imminent unlawful activity.

FORFEITURE

No Community Property Interest in Property Forfeited Criminally

In ***United States v. Hooper***, 229 F.3d 818 (9th Cir. 2000), the Ninth Circuit held any community property interest conferred by state law in the proceeds of a spouse's drug trafficking is not protected from federal criminal forfeiture under 21 U.S.C. § 853. Hooper and Ralph are wives of criminal defendants who plead guilty to drug trafficking and agreed to the forfeiture of cash and property in which Hooper and Ralph asserted an interest under California community property law.

Interpreting 21 U.S.C. § 853(n)(6)(A), the court decided unless a claimant is a bona fide purchaser, the criminal forfeiture statute limits its protection of third parties' property interests to interests which vested prior to the commission of the crime. The criminal forfeiture statute provides a third party may petition for relief from a criminal forfeiture if he/she establishes by a preponderance of the evidence (1) he/she is a bona fide purchaser or (2) the property meets the requirements of § 853(n)(6)(A). Section 853(n)(6)(A) requires a claimant to show he/she has a legal right, title or interest in the property which renders the order of forfeiture invalid because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title or interest of the defendant at the time of the commission of the acts giving rise to forfeiture.

The court explained the statute's temporal requirement "at the time of the commission of the acts which gave rise to the forfeiture" applies to both property interests or interests "vested in the petitioner rather than the defendant" and the alternative "or was superior to any right, title or interest of the defendant." The court noted the legislative history indicated the temporal requirement was intended to prevent a defendant from defeating forfeiture by conveying title prior to conviction. The court acknowledged the practical effect of § 853(n)(6)(A) is that it is unlikely ever to apply to proceeds of a crime and is far better designed to deal with instrumentalities of the crime, such as the family car used for drug trafficking. Thus, the court concluded, to qualify for relief under § 853(n)(6)(A), Hooper and Ralph's legal interest, if any, must have been vested in them at the time their husbands committed their crimes.

Money Laundering And Forfeiture Laws Used To Attack Foreign Tax Evasion

In ***United States v. $15,270,885.69 Formerly on Deposit in Account No. 8900261137***, 2000 U.S. Dist. LEXIS 12602 (S.D.N.Y. August 25, 2000), a federal district court approved the use of the money laundering and forfeiture laws of the United States to prosecute and forfeit the assets of those who evade a foreign country's taxes and transaction reporting requirements. On August 20, 1999, the day after the Bank of New York ("BONY") money laundering scandal came to light, the FBI seized $15,270,885.69 from the correspondent account maintained at BONY by the Russian bank, Sobinbank. The government, thereafter, filed a forfeiture complaint pursuant to 18 U.S.C. §§ 981, 984, and 1956, alleging the Sobinbank account, along with several other accounts at BONY held in the name of shell companies, served as "a pipeline for the surreptitious movement of approximately $7 billion from Russia to fund suspicious or illegal activities around the world." Moreover, the government alleged these transfers defrauded the Russian government of taxes and violated that nation's currency controls. Sobinbank filed a motion to dismiss the complaint arguing Sobinbank lacked sufficient detail of criminal activities relating to its account.

The district court accepted the government's theory that the seized funds were the proceeds of schemes to avoid Russian taxes and capital controls as well as the proceeds of the kidnaping of a Russian businessman, both of which were specified unlawful activities. *See* § 1956(c)(7)(B)(ii) - (iii) and *United States v. Trapilo*, 130 F.3d 547, 552 (2nd Cir. 1997) (finding evasion of foreign taxes or currency controls to be properly considered a "scheme to defraud" the proceeds of which are subject to forfeiture irrespective of any technical arguments that could be made regarding such violations' explicit exclusion from § 1956). Relying on *Trapilo*, the court stated, "what is proscribed is [the] use of the telecommunications systems of the United States in furtherance of a scheme whereby one intends to defraud another of property. Nothing more is required. The identity of the victim and the success of the scheme are irrelevant." *Id*. Accordingly, Sobinbank's motion to dismiss was denied.

MONEY LAUNDERING

Disclosure In Compliance With Subpoena Falls Under Immunity Provision Of Annunzio-Wylie Act

In ***Coronado v. Bankatlantic Corp, Inc.***, 222 F.3d 1315 (11th Cir. 2000), Bankatlantic informed federal authorities of suspicious practices occurring in its new international division which was formed as a result of Bankatlantic's recent acquisition of Megabank. Authorities impaneled grand juries in Florida, New York and New Jersey which, in the spring of 1996, issued subpoenas demanding account documents and records regarding all of the accounts in Bankatlantic's international division. Bankatlantic complied with the subpoenas turning over information regarding all international division accounts, including Coronado's account which had been opened in May of 1996. In June of 1996, Coronado's account was frozen and forfeiture proceedings were commenced against the account shortly thereafter. Coronado's account was later released and the funds returned with interest before the end of 1996. In September of 1996, Coronado filed a class action lawsuit claiming Bankatlantic had violated the Electronic Communications Privacy Act, the Right to Financial Privacy Act and Florida law by disclosing his account information to grand juries. Bankatlantic moved for summary judgement claiming immunity from liability since its disclosure of Coronado's account information in compliance with the subpoenas fell under the immunity provision of the Annunzio-Wylie Act. In June of 1998, the district court granted Bankatlantic's motion for summary judgement and Coronado appealed.

On appeal, the Eleventh Circuit found the immunity provision of the Annunzio-Wylie Act provided immunity from liability for three types of disclosures: 1) disclosures of any possible violation of law or any regulation; 2) disclosures pursuant to the Annunzio-Wylie Act itself; and, 3) disclosures pursuant to "any other authority." The Eleventh Circuit defined "other authority" as legal authority derived from a statute, regulation, court order, or other source of law specifically authorizing disclosure. Since subpoenas are issued under the authority of a court and may be enforced through contempt proceedings, the Eleventh Circuit found subpoenas possess the force of law and may be considered "other authority" for purposes of the Annunzio-Wylie Act.

Coronado argued the subpoena was invalid since his account information was privileged under the Electronic Communication Privacy Act and, for that reason, Bankatlantic should not have made the disclosure. The Eleventh Circuit, without reaching the question whether Coronado's information was privileged, found forcing a bank to challenge a facially valid subpoena would fly in the face of both the Annunzio-Wylie Act's clear intent to encourage cooperation with money laundering investigations and the more general policy prohibiting witnesses from testing the limits of a grand jury's authority.

Accordingly, the Eleventh Circuit held, subpoenas constitute "other authority" for purposes of the Annunzio-Wylie Act and Bankatlantic's disclosure in compliance with the subpoena fell under the immunity provision of the act.

SENTENCING

Grouping And Relevant Conduct

In ***United States v. Fitzgerald***, 232 F.3d 315 (2nd Cir. 2000), Fitzgerald was charged with three counts of tax evasion, thirteen counts of mail fraud and one count of conversion. The district court severed the mail fraud and conversion counts and proceeded to trial on the tax evasion counts. Following Fitzgerald's conviction on all of the tax evasion counts, the district court did a grouping analysis under U.S.S.G. § 3D1.2(d), resulting in the tax offenses being one group and the mail fraud and conversion offenses being another separate group, although the latter offenses had not proceeded to trial and, therefore, were not counts of conviction. The district court, however, concluded the two groups could not be grouped together.

The district court applied U.S.S.G. § 3D1.4, counting the tax evasion group as one unit and the conversion/mail fraud group as another unit for purposes of relevant conduct. Here, the tax offense level was eighteen and with the two level grouping addition, resulted in a total offense level of twenty. Fitzgerald challenged the district court's conclusion that his conversion and mail fraud should be characterized as relevant conduct to his tax evasion scheme. Fitzgerald also challenged the enhancement of his sentence based on this finding of relevant conduct. The Second Circuit held, although the district court correctly took the conversion and mail fraud offenses into account as relevant conduct, it improperly treated those violations as a separate group in calculating the base offense level, rather than recognizing they could be grouped pursuant to § 3D1.2(d) and, thereby, considered as relevant conduct under § 1B1.3(a)(2). The court, considering the foregoing, held the facts of the case demonstrated the conversion and mail fraud offenses were part of the same plan as the tax evasion and thus should have been included as relevant conduct. Thus, as provided by § 1B1.3(a)(2), the Second Circuit concluded the correct analysis included an aggregation of the loss attributable to all of Fitzgerald's offenses which yielded an offense level of nineteen, one less then that computed by the district court.

Sentencing Entrapment

In ***United States v. Searcy***, 233 F.3d 1096 (8th Cir. Nov. 13, 2000), a confidential government informant requested Searcy to sell him crack. Searcy responded he did not sell crack, only powder. Over the next four weeks, the confidential informant made five or six further requests of Searcy to sell him crack. Finally, Searcy agreed, sold crack to the confidential informant and was arrested. Searcy pled guilty to possession with the intent to distribute crack. Although Searcy's guilty plea resulted in waiver of his right to raise entrapment as a defense to the elements, it did not result in waiver of his right to raise sentenicng entrapment as a basis for a downward departure under U.S.S.G. § 2D1.1, Application Notes 12 and 15. At sentencing, the government prevailed in its argument that Searcy had to prove he was predisposed not to commit the crime and the government acted outrageously to overbear his will. Searcy failed to meet his burden of proof and his entrapment claim was rejected.

On appeal, Searcy contended the district court's rejection of his sentencing entrapment claim for failure to prove outrageous government conduct was improper. On review, the Eighth Circuit noted the Guidelines link drugs to specific sentencing ranges based primarily upon the quantity or type of drugs involved in an offense. The government, therefore, can manipulate a defendant's sentence by selectively charging violations based on quantity or type of drugs. The Eighth Circuit acknowledged many of the sentencing entrapment cases of the past required a defendant to prove outrageous government conduct. The Eighth Circuit, however, observed neither the language of Application Notes 12 and 15, nor recent case law, mentions outrageous conduct. See, *United States v. Berg*, 178 F.3d 976 (8th Cir. 1999). Rather, Application Notes 12 and 15 and *Berg* focus on the predisposition of the defendant to commit the crime. In conclusion, the Eighth Circuit held proof of outrageous conduct is not required for a downward departure based on sentencing entrapment.

Heartland of Money Laundering Statute Not Just for Drug Trafficking and Racketeering Specified Unlawful Activities

In ***United States v. Bockius***, 228 F.3d 305 (3rd Cir. 2000), the Third Circuit held the heartland of the United States Sentencing Guidelines' provisions on money laundering covers more than money laundering associated with large scale drug trafficking and racketeering activity. Bockius plead guilty to wire fraud, foreign transportation of stolen funds, money laundering and agreed to forfeiture of numerous assets. Bockius was the president and one of four principals of an insurance brokerage firm, who in 1995, fled to the Cayman Islands with $600,000 stolen from the brokerage and its clients .

The district court, relying on *United States v. Smith*, 186 F.3d 290 (3rd Cir. 1999), ruled the heartland of the money laundering guidelines U.S.S.G. § 2S1.1 encompasses only conduct related to extensive drug trafficking and racketeering activity, and it departed to sentence Bockius under the more lenient fraud guidelines. The government appealed contending the district court misinterpreted *Smith* and adopted too narrow a view of the heartland. The Third Circuit, in agreeing with the government, confirmed the heartland of the money laundering guidelines applied to typical money laundering as well as to those activities connected with extensive drug trafficking and serious crime. *Smith*, the court explained, was concerned about application of the stiff penalties provided in the money laundering guidelines to cases in which the money laundering activity was merely incidental to the underlying criminal scheme.

The court held Bockius' conduct in moving funds through casinos and shell corporations in the Cayman Islands was more than merely incidental to his fraudulent scheme and the money laundering guideline, rather than the fraud guideline, should have been applied. Finding the district court misapplied *Smith*, the Third Circuit vacated Bockius' sentence and remanded the case for resentencing with direction for the district court to engage in a heartland analysis before applying the money laundering guideline.

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