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SUPREME COURT CASES

Unprovoked Flight From Police In High Crime Area Justifies *Terry* Stop

In ***Illinois v. Wardlow***, 120 S. Ct. 673 (2000), the Supreme Court held the unprovoked flight of Wardlow upon observing a caravan of police vehicles converging on an area known for heavy narcotics trafficking gave rise to a reasonable suspicion that Wardlow was involved in criminal activity. Thus, an investigatory stop of Wardlow did not violate the Fourth Amendment as interpreted by *Terry v. Ohio*, 392 U.S. 1 (1968).

Two uniformed police officers of the special operations section of the Chicago Police Department were driving the last car of a four car police caravan. The police were on a mission to investigate drug transactions in an area notorious for drug trafficking. The officers in the last car observed Wardlow standing next to a building holding an opaque bag. Upon seeing the police officers, Wardlow immediately fled. The officers followed him down an alley, cornered him, and conducted a protective pat down search for weapons. During the frisk, one of the officers squeezed the bag Wardlow was holding and felt a hard, heavy object similar to the shape of a handgun. Upon opening the bag, the officers discovered a .38 caliber handgun loaded with five live rounds of ammunition. Wardlow was arrested and eventually convicted of unlawful use of a weapon by a felon.

On appeal, the Illinois Supreme Court upheld the intermediate appellate court's reversal of Wardlow's conviction, determining sudden flight in a high crime area does not create reasonable suspicion to justify an investigatory stop pursuant to the holding of *Terry*. The court relied upon *Florida v. Royer*, 460 U.S. 491 (1983), to explain that although police have the right to approach individuals and ask questions, the individual has no obligation to respond and may simply go on his or her way. The Illinois court determined flight was similar to the exercise of one's right to "go on one's way" and, thus, could not justify reasonable suspicion to conduct a *Terry* stop.

The Supreme Court began its analysis by stating the principles as first applied in *Terry* governed the case. There, the Court held ". . . an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Terry*, 392 U.S. at 30. The Court recognized "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Brown v. Texas*, 443 U.S. 47 (1979). However, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." The Court pointed to its previous finding in *Adams v. Williams*, 407 U.S. 143 (1972), where it held ". . . the fact that a stop occurred in a "high crime area" was among the relevant contextual considerations when conducting a *Terry* analysis." Here, it was not merely Wardlow's presence in an area known for narcotics trafficking, but his unprovoked flight upon observing the police which aroused the police officers' suspicions. "Headlong flight -- wherever it occurs -- is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such," opined the Court. In the absence of "empirical studies dealing with inferences drawn from suspicious behavior," courts must rely upon "commonsense judgements and inferences about human behavior." The Court determined the officers were justified in suspecting Wardlow was involved in criminal behavior and, therefore, in investigating further. In response to the dissent and the defendant's argument that innocent people may flee from police, the Court pointed out the Fourth Amendment's probable cause standard accepts the risk that innocent people may be arrested and detained by police. However, the "*Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further." In this case, Wardlow just happened to be found in possession of a handgun, in violation of an Illinois firearms statute.

TITLE 26 AND TITLE 26 RELATED CASES

Hyde Amendment

In ***United States v. Gilbert***, 198 F.3d 1293 (11th Cir. 1999), Gilbert was convicted of fraudulently concealing assets in a bankruptcy. His conviction was reversed, however, because the Eleventh Circuit concluded the statute of limitations had expired before he was indicted. Relying on the Hyde Amendment, Gilbert filed a motion in district court seeking an award of attorney fees and costs arguing the government did not have a good faith basis for charging him in light of the statute of limitations issue and the fact they did not give the grand jury exculpatory evidence relating to his interest in certain bankruptcy assets. As the prevailing party, Gilbert contended he was entitled to an award of attorney fees and costs because the government's position in prosecuting him was "vexatious, frivolous, or in bad faith." The district court denied Gilbert's motion and he appealed.

The Eleventh Circuit held a prevailing party must show the government's position underlying the prosecution amounts to prosecutorial misconduct - a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous. Addressing Gilbert's first argument, the court noted the question of when the statute of limitations begins to run in a bankruptcy fraud case was an issue of first impression in the Eleventh Circuit. Although some circuits had addressed the issue in other factual situations, prior to the decision in the underlying case, there had been no decision addressing the specific issue of when the statute of limitations begins to run where a Chapter 11 proceeding has been converted to Chapter 7. Thus, allowing fees and costs against the Department of Justice when a conviction is reversed on a legal issue of first impression, as was the case here, would chill the ardor of prosecutors and prevent them from prosecuting with earnestness and vigor.

Even in its earliest form, the court found, the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake. Furthermore, once the district court judge accepted the government's legal position in the case, it would have been extremely difficult to conclude the issue was not debatable among reasonable lawyers and jurists and, therefore, it was not frivolous.

In addressing Gilbert's second argument, the court held, failing to disclose to the grand jury exculpatory evidence is not a basis for concluding the government's position in an underlying prosecution was "vexatious, frivolous, or in bad faith," especially considering the trial jury convicted Gilbert with knowledge of that evidence. Consequently, the court affirmed the district court's denial of Gilbert's Hyde Amendment motion.

Liability Pursuant to 26 U.S.C. § 7202

In ***United States v. Thayer***, 201 F.3d 214 (3rd Cir. 1999), Thayer and his wife were sole owners of several corporations, all of which used one consolidated corporate account for their business banking. For the years 1991 through 1994, two of these corporations, MIS and ELOP, reported but failed to pay employee federal withholding and FICA taxes in violation of 26 U.S.C. § 7202. Thayer was tried and convicted, *inter alia*, of violating § 7202.

Thayer appealed his conviction arguing the charge was inapplicable to him since he was not a "person required to collect, account for, and pay" taxes, i.e., an employer. Rather this charge applied to MIS and ELOP since they were the employers and he was only an officer in these corporations. The Third Circuit looked to 26 U.S.C. § 7343 which contains the definitions applicable to Chapter 75, encompassing § 7202. Section 7343 states a "person" includes an officer or employee of a corporation. Further, the Third Circuit analogized § 7202 to § 6672(a) which, applying the same language as § 7202, imposes civil penalties on persons for failure to pay employee federal withholding and FICA taxes. In *Slodov v. United States*, 436 U.S. 238 (1978), § 6672 was held to apply to corporate officers or employees responsible for paying employee federal withholding taxes. Since Thayer was a corporate officer responsible for paying employee federal withholding taxes, § 7202 was applicable to him and he could be convicted for failure to pay.

Thayer also argued § 7202 was a conjunctive statute requiring *both* failure to report *and* failure to pay for conviction. Thus, since he only reported, both requirements of § 7202 were not met and he could not be convicted. The Third Circuit relied on *United States v. Brennick*, 908 F.Supp. 1004 (D. Mass. 1995) which held, a conjunctive interpretation of § 7202 "would result in a greater penalty for one who simply failed to collect trust fund taxes, than for one who collected them and, as is charged here, used them for his own selfish purposes . . ., so long as he notified the I.R.S. that he collected the tax. That Congress intended to make such a distinction is simply inconceivable." Thayer countered, Congress intended to punish more severely those who neither pay nor report in order to encourage reporting. The Third Circuit stated this argument does not convincingly answer *Brennick's* Congressional intent analysis and affirmed Thayer's conviction.

Disclosure Of Return Information

To Informant Seeking Reward

In ***Confidential Informant v. United States***, 45 Fed. Cl. 556 (2000), the Court of Federal Claims partly granted an Internal Revenue Service informant's request for documents relating to the taxpayer against whom he informed, holding the requested information may be disclosed under the exceptions provided in 26 U.S.C. §§ 6103(h)(2)(B) and (h)(4)(B).

Pursuant to a written agreement with the Service, the informant provided information regarding alleged tax violations by a certain taxpayer in exchange for a defined sum of money. When the informant's administrative claim for payment under the agreement was denied by the Service, he brought an action seeking a declaratory judgment, an accounting, and breach of contract damages. The informant propounded several discovery requests to which the Service refused to respond, invoking laws and regulations prohibiting or limiting disclosure of tax information.

Upon reviewing the discovery challenge, the Court of Federal Claims determined the Service's objections based on § 6103 (confidentiality of return information) were over broad. With little analysis, the court found specific statutory exceptions to § 6103 permitted disclosure of certain information responsive to the discovery requests. Specifically, § 6103(h)(2)(B) permits disclosure in the course of a federal court proceeding involving tax administration provided the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding. And, § 6103(h)(4)(B) permits disclosure in a judicial proceeding pertaining to tax administration if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding. Here, there was no dispute the requested return information would resolve this tax administration matter. Consequently, the court ordered the Service to respond to certain aspects of the discovery requests at issue.

No Estoppel From Tax Loss Stipulated In A Plea Agreement

In ***In Re: Larry Howard Minkoff***, No. 97-22962-11-JAR, 1999 Bankr. LEXIS 1721 (Bankr. D.Kan Dec. 6, 1999), Minkoff argued in a bankruptcy proceeding, the Service was estopped from filing a larger claim for the 1992 tax year than was agreed to in a prior plea agreement. In 1996, Minkoff plead guilty to a violation of 26 U.S.C. § 7206(1) pertaining to his 1992 return . In the plea agreement, the government stipulated the 1992 tax loss did not exceed $70,000.00. In August 1998, Minkoff, and other related entities, filed for a Chapter 11 Reorganization and the Service filed a proof of claim for $206,309.00, which was Minkoff's corrected tax liability for 1992. Minkoff argued, based on his plea agreement in the criminal tax case, the Service was estopped from claiming he owed more than $70,000.00 for 1992.

In rejecting Minkoff's argument, the court held the Service was not bound by the tax loss stipulated by the government for sentencing purposes. The court found Minkoff's civil tax liability for 1992 was not litigated in the criminal case and the plea agreement was silent on the issue of his civil tax liability. Further, the agreement indicated the parties were not stipulating to civil tax liability nor foreclosing the Service from a later audit or assessment of civil tax liability. The court found the civil tax liability was not actually litigated, it was simply an amount determined to enable the court to set a base offense level. Consequently, the court held estoppel was not applicable.

New Bankruptcy Fraud Statute Narrowed

In ***United States v. Lee***, No. 99-499, 2000 U.S. Dist. LEXIS 342 (E.D. Pa. Jan. 20, 2000), the court granted Lee's motion to dismiss Count 10 of the Superseding Indictment which charged him with bankruptcy fraud under 18 U.S.C. § 157(2). In Lee's motion, he argued his actions did not amount to a violation of the statute. Lee was an officer of a medical supply company which filed for Chapter 11 relief a few months after being suspended as a Medicare provider. Since Lee could no longer directly lease specialty beds to Medicare patients, he arranged to lease the beds to a second company, whose owner was also his employee, for re-leasing beds to patients. Lee's maximum take from the proposed lease was approximately $15,500.00.

The government alleged Lee prevailed on the second company's owner to hire his fiancee as a consultant as a way to funnel an improper, indirect $90,000.00 payment to himself. The government argued Lee's filing of the consent order that failed to disclose his receipt of this indirect payment through his future wife served to conceal the scheme or artifice to defraud, thus triggering § 157.

In granting Lee's motion, the court declined to read the statute as broadly as courts have read the mail fraud and securities fraud statutes. Specifically, the Government's argument asked the court to regard Lee's bankruptcy filing with respect to § 157(2) in the same light as mailings have come to be seen in mail fraud prosecutions under 18 U.S.C. § 1341 so that any bankruptcy filing related at all to a "scheme or artifice to defraud" could be the jurisdictional element converting the fraud into a federal bankruptcy crime. The court declined to give § 157 such breadth without Congress' specific direction. The court found Lee's failure to fully disclose all of his remuneration from the lease to be a civil concern, rather than a criminal one.

The government's second attempt at expanding the reach of § 157 was also rejected by the court's denial of its motion for reconsideration. *United States v. Lee*, No. 99-499, 2000 U.S. Dist. LEXIS 566 (E.D. Pa. Jan. 25, 2000).

SEARCH AND SEIZURE

Extended Detention Of Motorist To Conduct Canine Sniff After Valid Traffic Stop Violated Fourth Amendment

In ***United States v. Dortch***, 199 F.3d 193 (5th Cir. 1999), Dortch's vehicle was stopped by Texas highway patrol officers for purportedly traveling too close to a tractor trailer. Dortch, who was driving, and a female companion were the only occupants in the vehicle. At the officers' request, Dortch exited the car and produced his driver's license and the car's rental papers. The officers determined the car was rented to a third person and neither Dortch nor his companion were properly listed as authorized drivers. Dortch and the woman then proceeded to provide inconsistent answers concerning Dortch's relationship to the person who had rented the vehicle and as to why they were traveling in that area of Texas.

One of the officers then took Dortch's license and the rental papers and called in a computer check to determine whether the car had been stolen or if there were any outstanding warrants for Dortch. The officers told Dortch he would be free to leave after the check for warrants was complete, however, they were going to detain the vehicle to perform a canine sniff. After approximately five minutes the computer check came back negative, but the officers failed to inform Dortch of this fact. They then waited another five minutes for the dog to arrive, at which time the officers told Dortch the computer check had revealed nothing. Nevertheless, they conducted the dog sniff of the vehicle with Dortch remaining at the scene. The dog alerted to the driver's side door and seat, but the subsequent search uncovered no contraband. The dog handler then suggested there could be contraband on the person who was sitting in the driver's seat. The officers testified Dortch then consented to a pat down search which led to the discovery of a plastic bag containing 137 grams of cocaine. Dortch's motion to suppress the evidence was denied and he was convicted of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841.

On appeal, Dortch argued, once the officers issued the oral warning for the traffic violation and received information from the computer check that he had no outstanding warrants, the justification for the stop ended and, therefore, the prolonged detention and warrantless search of his person violated the Fourth Amendment. In opposition, the government contended, because the arrival of the drug sniffing dog occurred within moments of the completion of the computer check and because the computer check served a valid law enforcement purpose, Dortch was not unreasonably detained. *See United States v. Sharpe*, 470 U.S. 675, 685 (1985).

Initially, the Fifth Circuit recognized the detention of a motorist for a computer check during a lawful traffic stop does not violate the Fourth Amendment. *See, e.g., United States v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993); *United States v. Kelley*, 981 F.2d 1464, 1469 (5th Cir. 1993). Moreover, had the dog sniff occurred while the computer check was pending, there would have been no violation. However, "[t]he Constitution was violated . . . when the detention extended beyond the valid reason for the initial stop. To be sure, Dortch did not feel free to leave even after the officer had informed him that the computer check was completed, because the officers still held his license and rental papers and had told him they were going to detain his car until the dog team arrived . . . Dortch's acquiescence at this point cannot be considered voluntary." Finding the government's reliance upon *Sharpe*, supra. misplaced, the court determined that unlike the officers who detained motorists for the arrival of a DEA agent in *Sharpe*, the officers in this case did not have a reasonable or articulable suspicion that Dortch was trafficking in drugs. The confusion as to Dortch's relationship to the renter of the vehicle and as to why he and the woman were in that part of Texas gave rise only to a reasonable suspicion that the car might have been stolen. The court concluded, "[o]nce [Dortch] was not permitted to drive away, the extended detention became an unreasonable seizure, because it was not supported by probable cause." Accordingly, the Fifth Circuit reversed Dortch's conviction, holding the inculpatory evidence was the fruit of an illegal search.

OTHER CONSTITUTIONAL ISSUES

Sixth Amendment Right To Counsel

In ***United States v. 87 Blackheath Road***, 201 F.3d 98 (2nd Cir. 2000), the Second Circuit denied the appellant's motion for assignment of Criminal Justice Act ("CJA") counsel in her appeal from a civil forfeiture decree, holding a litigant challenging a civil forfeiture does not have a Sixth Amendment right to counsel.

The property located at 87 Blackheath Road, Lido Beach, New York and a bank account held in the names of Alla

Aginsky and her husband Roman Aginsky were civilly forfeited pursuant to a jury verdict. The forfeiture action stemmed from a criminal case against Mr. Aginsky. Mrs. Aginsky was represented in that proceeding by CJA counsel appointed by the district court upon a motion for substitute counsel. The district court granted the motion without discussion of the propriety of using CJA funds for that litigation.

Mrs. Aginsky appealed the forfeiture and moved for the continuation of her CJA counsel in the appeal proceeding on the ground the complexity of the action warranted appointment of CJA counsel. Denying the motion, the Second Circuit cited a Supreme Court decision circumscribing the Sixth Amendment right to counsel to criminal proceedings, *United States v. Austin*, 509 U.S. 602 (1993), and joined its sister circuits in holding a litigant challenging a civil forfeiture has no Sixth Amendment right to counsel. Accordingly, the motion for appointment of CJA counsel was denied.

EVIDENCE

Unstipulated Polygraph Evidence Properly Excluded

In ***United States v. Cordoba***, 194 F.3d 1053 (9th Cir. 1999), the Ninth Circuit affirmed a district court's decision to exclude polygraph evidence based on findings the evidence failed to meet the standard of admissibility established for scientific evidence under FED. R. EVID. 702 and the probative value of the evidence did not outweigh its prejudicial effect under FED. R. EVID. 403.

Cordoba, who was driving a van later found to contain a large amount of cocaine was tried and convicted of possession of cocaine with the intent to distribute. At trial, he presented a defense of lack of knowledge and attempted to bolster his credibility with the results of a polygraph test supporting his lack of knowledge contention. The district court excluded the evidence under *Brown v. Darcy*, 783 F.2d 1389 (9th Cir. 1986) (holding unstipulated polygraph evidence is per se inadmissible). On appeal, the Ninth Circuit held Brown was overruled by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (requiring a district court to make a particularized factual inquiry into the scientific validity of the proffered polygraph evidence under Rule 702, as well as weigh the probative value of the evidence against its prejudicial effect under Rule 403). The case was remanded with instructions to reconsider the admissibility issue under the *Daubert* standard.

On remand the district court held a two day evidentiary hearing, received extensive briefings and ultimately concluded the polygraph evidence was inadmissible under both Rules 702 and 403. According to the district court, the *Daubert* standard was not met because the test given to Cordoba was flawed, the reliability of Cordoba's polygraph evidence was questionable, undermining its relevance, and the risk of unfair prejudice substantially outweighed the probative value of the polygraph evidence. The district court reinstated Cordoba's sentence and he appealed.

On further review, the Ninth Circuit found the district court did a thorough and careful evaluation of all the proffered evidence regarding the reliability of the polygraph evidence. The court gave the district court's findings substantial deference and concluded it did not abuse its discretion in ruling the evidence failed to satisfy the *Daubert* standard and was inadmissible under Rule 702. The court also held the district court did not abuse its discretion in finding the probative value of the flawed polygraph exam did not outweigh the substantial risk of an unfair prejudice which may result from admitting such evidence.

PRIVILEGES

Attorney Client Privilege Does Not Exist Between Tribal Attorney And Tribe Member

In ***United States v. Dakota***, 197 F.3d 821 (6th Cir. 1999), Dakota was an agent of the Keweenaw Bay Indian Community (KBIC), a Michigan Indian tribe operating a casino on its reservation. Dakota was paid by a gaming machine company attempting to lease machines to KBIC's casino to act as spokesperson for the gaming machine company. Dakota did not report the payments he received from the gaming machine company on his individual income tax returns.

In 1991, Dakota asked the attorney for KBIC whether it was appropriate to obtain a share of the profits generated by the gaming machine company's installation of machines in the casino. The attorney advised Dakota he must disclose his profit to the tribal counsel before it voted on which company's machines to lease. At trial, the attorney testified to his 1991 conversation with Dakota, who was subsequently convicted of receiving kickbacks and conspiracy in violation of 18 U.S.C. § 666 and of subscribing to false income tax returns in violation of 26 U.S.C. § 7206(1). Dakota appealed his conviction, *inter alia*, alleging violation of his attorney-client privilege.

On appeal, the Sixth Circuit noted there is usually no attorney-client privilege between an attorney for a

corporation and an officer of that corporation. The only exception to this rule is found in situations where a corporate officer makes clear to the corporate attorney he is personally consulting the corporate attorney and the corporate attorney accepts the communication knowing conflicts may arise with his representation of the corporation. Analogizing KBIC to a corporation, the court reasoned no attorney-client privilege existed between the attorney for KBIC and Dakota. The burden of establishing the existence of the attorney-client privilege rests with the person asserting it. Since Dakota had not indicated he was personally consulting the attorney for KBIC and had not proved the attorney for KBIC accepted and gave the communication in any capacity other than as attorney for KBIC, the court held Dakota had not established the existence of the attorney-client privilege.

FORFEITURE

Judicial Forfeiture Is Proper Remedy When Notice Of Prior Administrative Forfeiture Found Defective, Despite Expiration Of Statute Of Limitations

In ***United States v. Dusenbery***, 201F.3d 763 (6th Cir. 2000), Dusenbery was convicted of engaging in a continuing criminal enterprise by overseeing and operating his cocaine distribution network while incarcerated, in violation of 21 U.S.C. § 848. Incident to his conviction, the government administratively forfeited several items of Dusenbery's property between July, 1990 and April, 1992, including over $100,000.00 and two automobiles. In July, 1996, Dusenbery filed a motion pursuant to Fed. R. Crim. P. 41(e) seeking the return of his property, claiming its seizure violated due process since the government had failed to provide him adequate notice of its intent to pursue administrative forfeiture proceedings. The government responded by asserting it had sent personal notice to the correctional facility where Dusenbery was incarcerated, as well as publishing notice of the intended forfeiture in the Cleveland Plain Dealer newspaper.

The district court denied Dusenbery's motion finding he had received adequate notice of the proposed forfeiture. On appeal, the Sixth Circuit determined the record before it did not establish the notice Dusenbery had received was constitutionally adequate and remanded the case for an evidentiary hearing, instructing the district court if it found insufficient notice, Dusenbery should be allowed to contest the forfeitures. On remand, the district court found documentary evidence filed by the government demonstrated Dusenbery had never received actual notice of the forfeiture, thus obviating the need for an evidentiary hearing. The district court then considered the merits of the forfeiture, rejecting Dusenbery's new argument that the judicial forfeiture proceedings were barred by the expiration of the five year statute of limitations provided for in 19 U.S.C. § 1621.

On appeal, the Sixth Circuit acting upon the assumption the initial notice to Dusenbery was insufficient, framed the issue as "[w]hat is the proper remedy for a due process violation in an administrative forfeiture proceeding when the statute of limitations for filing a judicial forfeiture action has expired." Upon reviewing other circuits which had previously addressed the issue, the court found a glaring split of opinion.

The Ninth and Tenth Circuits have previously held the administrative forfeiture is void and the government is barred from commencing new forfeiture proceedings by 19 U.S.C. § 1621, the applicable statute of limitations. Conversely, the Second Circuit, in *Boero v. DEA*, 111 F.3d 301, 305-307 (2nd Cir. 1997), held inadequate notice should be treated as voidable, not void, and "the proper remedy is simply to restore the right which a timely Rule 41(e) notice would have conferred on the claimant: the right to judicially contest the forfeiture and to put the government to its proofs under a probable cause standard." Finding itself in agreement with the Second Circuit, the court stated "we fail to see the equity in allowing the claimant more than he would have been accorded in the first place; namely the fortuitous benefit of avoiding the forfeiture process altogether." Moreover, the rulings of the Ninth and Tenth Circuits "might encourage some claimants with borderline notices and nothing to lose (presumably because they will not be able to rebut the government's proofs) to sit on their Rule 41(e) motions until the five year statute of limitations has run." Accordingly, the Sixth Circuit affirmed the district court's decision to rule on the merits of Dusenbery's forfeitures, despite the expiration of the statute of limitations.

MONEY LAUNDERING

Transfer Of Illegal Proceeds To A Third Party Constitutes Concealment

In ***United States v. Majors***, 196 F.3d 1206 (11th Cir. 1999), the defendants conspired to sell investors worthless securities of three corporations they controlled: Alliance

Fuel Corporation, Alliance Petroleum, Inc., and Virex. The money invested in these corporations was then shifted through the accounts of these corporations, finally ending up in the accounts of a fourth corporation, IRM, which was also controlled by the defendants. The defendants withdrew the investor's money from IRM's accounts and used it for personal purposes. The defendants were convicted of a number of charges including conspiracy to commit money laundering and money laundering. They appealed their conviction for money laundering on the ground there was insufficient evidence to prove they intended to conceal the proceeds of their investment scheme.

The defendants cited *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995) in support of their argument that there was no evidence of concealment. In *Dobbs*, the defendant's conviction for money laundering was reversed because his deposit of the proceeds of his illegal cattle sale into his wife's bank account and subsequent personal use of these proceeds was considered open and notorious, thus lacking an intent to conceal. The defendants argued, since their transfers among the corporate accounts and their withdrawals from IRM were open and notorious, the concealment element of money laundering was not met.

The Eleventh Circuit distinguished *Dobbs*, noting the deposit in *Dobbs* did not involve the use of third party bank accounts. Relying on *United States v. Powers*, 168 F.3d 741 (5th Cir. 1999), the court found transfers of illegal proceeds into a third party bank account from which they are withdrawn and used for personal expenses constitutes evidence of intent to conceal. Since the defendants transferred the proceeds of their investment scheme to IRM's accounts before withdrawal, their transfer to IRM constituted evidence of their intent to conceal. The court further stated, transfers of illegal proceeds through a large number of accounts constitutes concealment even when all accounts involved are in the defendant's own name.

INVESTIGATIVE TECHNIQUES

First Amendment Precludes Civil Liability For Innocent Receipt Of Or Publication Of Illegally Obtained Wiretap Information

In ***Bartnicki v. Vopper***, 200 F.3d 109 (3rd Cir. 1999), a Wyoming school board and a school district teachers' union were engaged in contentious contract negotiations, during which an unknown person intercepted and recorded a cell phone conversation between the union's chief negotiator and the union president. The union president stated, if the school board failed to move on proposed salary increases it might be necessary to blow off the front porches of some of their houses. The tape was strategically sent to Yocum, the president of a taxpayer organization opposing the union's position. Yocum gave a copy of the tape to a local radio station which, in turn, aired the tape. The contents of the tape were also publicized in television broadcasts and newspapers.

Yocum, two radio stations and their reporters were sued by the union negotiator and the union president under the civil liability provisions of the federal wiretap law. The wiretap statute generally prohibits any person from intentionally disclosing the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute. All the parties moved for summary judgment. The district court denied these motions and an interlocutory appeal followed to resolve the legal question as to whether the First Amendment precluded imposition of civil damages for the disclosure of a tape recording of an intercepted phone conversation containing information of public significance when the defendants played no role in the interception.

The Third Circuit first determined the wiretap statute was not subject to strict scrutiny. The court held intermediate scrutiny was appropriate because the legislative intent behind the statute was content-neutral, *i.e.*, the purpose of the civil liability provision is to strengthen the ban on unauthorized interception by denying the wrongdoer the fruits of his wrongful labor and eliminating the demand for those fruits by third parties.

The intermediate scrutiny test usually applied to a content-neutral regulation in First Amendment cases requires an examination of whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication. Under the facts in this case, the governmental interest in denying the wrongdoer the fruits of his labor was not at issue because none of the defendants played a role in the illegal interception so as to be categorized as wrongdoers. With regard to the governmental interest in eliminating third party demand, the court concluded the interest can be more directly achieved by enforcing the statute against the illegal interceptor and aiders and abettors, rather than against nonparticipating defendants. The court held the wiretap statute failed the test of intermediate scrutiny and, therefore, may not constitutionally be applied to penalize the disclosure of illegally intercepted information where there is no allegation the defendants participated in or encouraged that interception.

SENTENCING

"Tax Loss" Does Not Include Interest And Penalties

In ***United States v. Hunerlach***, 197 F.3d 1059 (11th Cir. 1999), Hunerlach was convicted of violating 26 U.S.C. §§ 7201 and 7206(1), and sentenced to a term of 60 months imprisonment. The tax loss used to calculate the base offense level included interest and penalties. On appeal, Hunerlach argued the court erred in including interest and penalties in calculating "tax loss" for purposes of determining his base offense level for sentencing.

The Eleventh Circuit agreed with Hunerlach, vacated his sentence and remanded for re-sentencing. The court found, although the language in U.S.S.G. § 2T1.1 could be read to include interest and penalties in calculating "tax loss," the phrase "total amount of loss that is subject to the offense" could also be read as not including interest and penalties. Finding the language used in the guideline provision ambiguous, the court turned to the Commentary to § 2T1.1 to resolve the ambiguity. In application Note 1, the Commission unequivocally stated "the tax loss does not include interest and penalties." Section 2T1.1 comment (N1) (1997).

Abuse Of Trust Must Be Found In Relation To Victim Of The Offense

In ***United States v. Guidry***, 199 F.3d 1150 (10th Cir. 1999), Guidry, an accountant, was employed as the controller for Wichita Sheet Metal. As a co-signatory of the company's bank account, Guidry embezzled over $3 million by writing checks in $10,000.00 increments for alleged federal tax payments which she later cashed for herself and then altered the company's books to conceal the embezzlement scheme. Guidry failed to report the embezzlement income on the joint federal income tax returns she filed for the years 1993 through 1995. A jury found Guidry guilty of three counts of willfully filing a false individual income tax return in violation of 26 U.S.C. § 7206(1). The district court sentenced her to sixty months imprisonment.

Guidry appealed her conviction and sentence arguing, *inter alia*, the district court erred in imposing a two level sentencing enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3. Section 3B1.3 provides: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase [the offense level] by 2 levels." Application of this enhancement is predicated on two factual findings: (1) the defendant possessed a position of trust; and (2) the defendant abused the position to significantly facilitate the commission or concealment of the offense. *United States v. Burt*, 134 F.3d 997, 998-99 (10th Cir. 1998). The district court's imposition of the two level enhancement was based on findings that Guidry occupied a position of trust at Wichita Sheet Metal and her embezzlement activity was relevant conduct, committed to avoid detection of her false income tax returns.

Reviewing these findings, the Tenth Circuit held the application of the enhancement was inappropriate because Guidry did not occupy a position of trust vis-a-vis the government, thereby failing the first step of the *Burt* analysis. The court explained the position of trust must be found in relation to the victim of the offense. The victim in a false income tax case, as in this case, is the government and here there was no relation of Guidry's position of trust to the government. The Tenth Circuit affirmed the convictions but concluded the district court's sentencing enhancement for abuse of position of trust was clearly erroneous, and remanded the case for re-sentencing.

Grouping And Violation of Judicial Process

In ***United States v. Thayer***, 201 F.3d 214 (3rd Cir. 1999), as factually set forth on page 2, Thayer was convicted, *inter alia*, of violating 26 U.S.C. § 7202 and 18 U.S.C. § 152 (Bankruptcy Fraud). At sentencing, the court failed to group the tax and bankruptcy counts. On the bankruptcy counts, Thayer's base offense level was increased two levels pursuant to U.S.S.G. § 2F1.1(b)(3)(B) for violation of a judicial process. From the resulting offense level of 19, the court then departed downward six levels to level 13 and based on a Criminal History Category III, sentenced Thayer to 18 months, the minimum sentence in the range.

Thayer appealed the district court's failure to group his tax and bankruptcy offenses. He cited § 3D1.2(b) which requires grouping offenses involving the same victim, or the same primary victim, together rather than separately. Thayer argued, though the bankruptcy offense involved other creditors, the government, as the largest creditor, was the primary victim, as it was the primary victim of the tax offenses. The Third Circuit held Congress sought to protect and benefit all creditors in enacting the bankruptcy code and small creditors could not be described as secondary to large creditors. The government was not the primary victim of the bankruptcy offense and the court was correct in not grouping the tax and bankruptcy convictions.

Thayer also appealed the lower court's enhancement of his

sentence pursuant to § 2F1.1(b)(4)(B) for violation of a judicial process, arguing such an enhancement can be applied only when a specific court order is violated. Thayer contended his concealment of bankruptcy assets constituted a violation of general court proceeding, but not a violation of any specific court order. The Third Circuit noted a split among the circuits on whether this enhancement requires violation of a specific court order or a general court proceeding and turned to Comment 6 of § 2F1.1(b)(4)(B) for guidance. The Third Circuit, joining the First and Second Circuits, found this comment's reference to a "prior decree or order" means § 2F1.1(b)(4)(B) more likely refers to a specific court order, than a general court proceeding. Since Thayer did not violate any specific court order, the court was incorrect in enhancing his sentence.

Finally, Thayer argued the lower court's enhancement under § 2F1.1(b)(4)(B) was not harmless error and the sentence should be vacated. The government argued the sentence should not be vacated since Thayer could not prove the court would grant another six level downward departure decreasing his sentence from his current sentence. The Third Circuit held Thayer had met his initial burden of proving the court relied on an invalid factor in sentencing and the taxpayer had no further burden of proving this invalid factor was determinative of his sentence. Rather the government must prove the court would have imposed the same sentence absent the invalid factor. Since the government could not prove this point, the sentence was vacated and the matter was remanded for re-sentencing.

Obstruction And Special Skill

In ***United States v. Gormley***, 201 F.3d 290 (4th Cir. 2000), Gormley was the proprietor of a convenience store out of which he operated a return preparation business associated with another return preparation business, MDP. Gormley solicited customers, obtained necessary information and Forms W-2, and sent this information to MDP for electronic filing. MDP then issued refund checks in the amount of the customer's anticipated refund, less fees, in return for the customer's assigning to MDP the actual refund check. To fraudulently increase the amount of refunds, Gormley often included false information in the returns he prepared. Gormley was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 286 and of filing fraudulent claims for refund in violation of 18 U.S.C. § 287. At his pre-sentencing interview with a probation officer, Gormley professed innocence and stated the false information in his customers' returns was a result of his customers' fraud, not of his own falsification efforts. Because of these statements, the court applied enhancements for obstruction of justice and use of a special skill.

On appeal, Gormley argued U.S.S.G. § 3C1.1 precluded application of the obstruction enhancement since it is premised on the basis of denial of guilt. The Fourth Circuit found Gormley went beyond merely denying his guilt by implicating his customers. His statements exhibited actions with a conscious purpose to obstruct justice. Moreover, they were material since, if believed, they could have affected the appropriate sentence within the calculated range. The Fourth Circuit's decision controverted the Eleventh Circuit's holding in *United States v. Gardiner,* 955 F.2d 1492 (11th Cir. 1992) where it was held a presentence explanatory assertion of innocence similar to Gormley's could not be material since, in order to believe such an assertion, one must disregard the jury verdict.

Gormley also challenged the imposition of an enhancement based on special skill, arguing. § 3B1.3 defines special skill as a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. The Fourth Circuit held, though formal education is not a mandatory prerequisite to a special skill enhancement, the skill must at least be one obtained through the equivalent of such formal education and must be one that is not possessed by members of the general public. Gormley's experience in the tax preparation business did not amount to a special skill since he had no formal training in the area of return preparation or accounting and since return preparation is a skill exercised by millions of Americans each year. Moreover, a special skill enhancement may not be based on a co-conspirator's actions. Thus, the special skill enhancement applied to Gormley could not be based on MDP's special authorization from the Service to file returns electronically.

State Firearms Offense Not Considered "Relevant Conduct" For Sentencing Purposes In Federal Firearms Prosecution

In ***United States v. Ahmad***, 202 F.3d 588 (2nd Cir. 2000), upon execution of a search warrant for Ahmad's home, the police found: (1) a semi-automatic pistol with an obliterated serial number; (2) a 16 gauge sawed off shotgun; (3) four silencers; and, (4) seven other firearms, totaling thirteen items in all. Ahmad was subsequently convicted in federal court of several federal firearms crimes. At sentencing, pursuant to the Guidelines, the district court made a series of upward adjustments to Ahmad's base offense level of 18, finally ordering a term of imprisonment of 110 months, followed by three years of supervised release.

On appeal, Ahmad challenged, *inter alia*, the district court's four level increase to his offense level based upon a finding that thirteen firearms were involved in his offenses, as opposed to six, thus qualifying for an upward adjustment pursuant to § 2K2.1(b)(1). In opposition, the government asserted although federal law did not prohibit possession of the seven uncharged firearms, their possession by Ahmad violated state and local law, therefore, they were properly counted as relevant conduct constituting the same course of conduct as the offense of conviction.

In rejecting the government's argument, the Second Circuit focused its analysis on the definitions of "offense" and "relevant conduct" provided for in the Guidelines, as well the applicable explanatory notes. First, the court noted, "§ 2K2.1(b)(1) specifically directs that we count only the firearms involved in 'the offense'." The Guidelines define "the offense" to mean the "offense of conviction and all relevant conduct under § 1B1.3." Relevant conduct includes offenses which would be grouped for sentencing purposes under § 3D1.2(d) and were "part of the same course of conduct or common scheme or plan of the offense of conviction." The Guidelines, however, contain a specific limitation with respect to relevant conduct as applied to firearms. Application Note 9 of § 2K2.1 specifies "only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed" are to be included "for purposes of calculating the number of firearms under subsection (b)(1)." Next, the court turned to the government's argument in support of finding state offenses to be relevant conduct where the Guidelines refer to "other offenses." It pointed out under § 1B1.3(a)(2) state offenses are not counted as conduct relevant to a federal offense unless the state offense would have been a federal offense but for lack of a jurisdictional element. Furthermore, uncharged offenses can only be part of the "same course of conduct or common scheme or plan as the offense of conviction" where the offenses may be grouped under § 3D1.2(d). The court concluded, "[c]onduct that may only be charged as a state crime, because it involves elements under state law that are not elements of a federal crime, may not be grouped under § 3D1.2(d) and thus may not be considered as 'relevant conduct' under § 1B1.3(2)." Accordingly, since Ahmad's possession of the seven additional firearms amounted to a state crime defined by elements not criminalized under federal law, it was error to include the state offense as relevant conduct.

If Basis For An Enhancement Is Not Challenged, Clear And Convincing Evidence Is Not Required

In ***United States v. Romero-Rendon***, 198 F.3d 745 (9th Cir. 1999), Romero-Rendon was arrested trying to enter the United States illegally. Computer checks revealed he had a criminal history in the United States and had previously been deported. Romero-Rendon pled guilty to being a deported alien found in the United States in violation of 8 U.S.C. § 1326. At his sentencing hearing, the government requested a sixteen level enhancement since his criminal history involved violent crime. Romero-Rendon objected to the enhancement on grounds it was based only on the Presentence Report ("PSR"), not on conviction documents. He did not object to the characterization of his previous crime as violent.

On appeal, Romero-Rendon argued the government should be required to prove his previous violent crime by clear and convincing evidence, which it cannot do based only on the PSR. Romero-Rendon based his argument on *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999) which involved a defendant whose sentence was being enhanced due to his previous violent crime. *Hopper* held, when a sentencing enhancement has a severe effect on the sentence relative to the offense of conviction, the government must satisfy the "clear and convincing" standard, rather than the usual "preponderance of the evidence" standard.

The Ninth Circuit distinguished *Hopper* on grounds the defendant in *Hopper* had challenged the accuracy of the characterization of his previous crime as violent. Since Romero-Rendon never objected to the characterization of his previous crime as violent, the Ninth Circuit reasoned the clear and convincing standard did not apply. The Ninth Circuit held, where the defendant does not challenge the accuracy of the information on which the judge bases the sentence enhancement, a preponderance of the evidence is the appropriate standard, regardless of the severity of the enhancement. The Ninth Circuit also addressed Romero-Rendon's objection to basing his enhancement only on the PSR, without reference to the conviction documents. The Ninth Circuit held, the PSR may be relied on by the sentencing judge and conviction documents are necessary only if the PSR fails to mention the statutory section of conviction.

Defendant's Failure To Cooperate Is Improper Basis To Boost Sentence Within Guidelines Range

In ***United States v. Rivera (Walden)***, 196 F.3d 144 (2nd Cir. 1999), two brothers, Jerry and Jackie Walden, were convicted of conspiring to distribute and to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846. At sentencing, the district court ordered Jerry Walden to serve 480 months in prison, while his brother Jackie received 348 months. In doing so, the court found "a refusal to assist in the investigation of others is an

appropriate factor in determining where within a guideline range a sentence may be imposed . . . ." Moreover, with respect to Jerry Walden, the judge stated "I . . . regard his failure to come forward and to assist the government in its investigations following his conviction in this case as affecting the point within the guideline range to which I am sentencing him . . . of the 480 months, I am attributing in my mind 60 months to his failure to assist the government post-conviction."

On appeal, Jerry Walden contended the district court violated his Fifth Amendment right against self-incrimination by sentencing him in part based upon his failure to assist and cooperate with the government following his conviction. He argued the Fifth Amendment provides a "safeguard against judicially coerced self-disclosure," which extends to the sentencing phase of a criminal proceeding as well. *See Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 1312 (1999) (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). Furthermore, Walden claimed the holding of *Mitchell*, which prohibits a court from drawing adverse inferences from a defendant's silence at sentencing, should also be interpreted as prohibiting a court from imposing a sentence based on a defendant's failure to cooperate.

Distinguishing the present case from *Mitchell*, the Second Circuit stated the "issue in this case . . . is not whether the district court improperly drew an inference from the defendant's silence, but rather whether it could consider Walden's refusal to cooperate . . . when it made its sentencing determination." In *Roberts v. United States*, 445 U.S. 552 (1980), the Supreme Court held a defendant's failure to cooperate may be considered by a sentencing court. However, in *United States v. Stratton*, 820 F.2d 562 (2nd Cir. 1987), the Second Circuit divided this consideration into two types, the distinction being a court may consider a defendant's failure to cooperate as a basis for withholding leniency but not as a basis for increasing the severity of the defendant's sentence. The court noted *Stratton* arose before the implementation of the sentencing guidelines, when courts had broader discretion in fashioning sentences, thus making it more difficult for appellate courts to discern between a penalty or a refusal of leniency. The court then found guidance from the Seventh Circuit's post-guidelines decision in *United States v. Klotz*, 943 F.2d 707, 710 (7th Cir. 1991), which held district courts are free to consider a defendant's lack of cooperation in assigning a sentence within the guidelines range. As long as the sentence falls within the guidelines range, *Klotz* teaches, it cannot properly be conceptualized as a "penalty." There, the defendant faced a range of 151 to 188 months in prison and received a term of 181 months. On review, the Seventh Circuit determined Klotz was not penalized for his non-cooperation. The sentencing judge's comments regarding lack of cooperation were interpreted to mean that he found the defendant to be a "callous person, unconcerned about the injuries he inflicted on others." 943 F.2d at 711. Here, in contrast, the district court "explicitly imposed an additional five year sentence on Jerry Walden for his refusal to cooperate with the authorities following his conviction." The court determined the sentence was "impossible to reconcile" with its holding in *Stratton*. Accordingly, the Second Circuit remanded the case to the district court for re-sentencing.

Sentencing Court Departure Without Prosecution's Consent

In ***United States v. Rodriguez-Lopez***, 198 F.3d 773 (9th Cir. 1999), Rodriguez-Lopez pled guilty to being an alien present in the United States after deportation in violation of 8 U.S.C. § 1326. Rodriguiez-Lopez offered to stipulate to deportation and argued at his sentencing hearing he should be granted a downward departure on this basis. The government opposed Rodriguez-Lopez's departure request on grounds he had not pled guilty earlier pursuant to a "fast track" plea agreement. The government argued its consent was required for a departure based on the deportation stipulation. The district court denied Rodriguez-Lopez' request, basing the denial on its belief it was precluded from granting a departure because the government did not consent.

On appeal, the Ninth Circuit referred to *Koon v. United States*, 518 U.S. 81 (1996). In *Koon*, the Supreme Court upheld the district court's departure based on factors not mentioned in the Sentencing Guidelines. The Supreme Court held, all possible potential departure factors cannot be comprehensively listed and analyzed in advance. District courts, therefore, maintain discretion to make factual determinations whether an unmentioned factor is grounds for departure. Such decisions to depart should be accorded substantial deference and review should be limited to determination whether the unmentioned factor is one proscribed by the Sentencing Guidelines.

Since stipulation to deportation is not mentioned in the Sentencing Guidelines as a ground for departure, the Ninth Circuit applied the Supreme Court's analysis to the instant case. Reasoning the Sentencing Guidelines' list of proscribed factors does not include lack of government consent, the Ninth Circuit concluded absence of consent does not constitute an absolute bar to departure. The Ninth Circuit held creation of mandatory conditions for departure, such as government consent, would impermissibly shift the locus of discretionary decision making from the district court to the prosecutor. Rather, the district court must decide departures on a case by case basis and thus, the sentence was reversed and the matter remanded to the

district court.

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