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Criminal Tax Bulletin

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TITLE 26 AND TITLE 26 RELATED CASES

Bank Fraud

In ***United States v. Reaume***, 338 F.3d 577, (6th Cir. 2003), Reaume opened checking accounts at a federally insured bank using small initial deposits, wrote checks from the accounts for products knowing there were insufficient funds to cover the checks, then returned the goods in exchange for cash. The bank refused to honor the bad checks and the actual losses were suffered by the retailers. A one count indictment alleged Reaume knowingly executed a scheme to defraud the bank in violation of 18 U.S.C. § 1344. Reaume appealed his conviction on the grounds there was no evidence he intended to defraud the bank itself, as opposed to the individual merchants, nor any evidence his acts caused the bank to actually transfer funds resulting from the fraud.

To sustain a bank fraud conviction pursuant to § 1344, the Sixth Circuit noted the government was required to prove three things: (a) Reaume knowingly executed a scheme to defraud a financial institution; (b) he did so with the intent to defraud; and, (c) the financial institution was federally insured. The court followed prior decisions in its reasoning, noting bank fraud is established when fraudulent activity causes the bank to transfer funds, even if the intended victim of the fraudulent activity is an entity other than a federally insured financial institution. *United States v. Everett*, 270 F.3d 986 (6th Cir. 2001). Thus, the court reasoned, it was irrelevant whether the bank was Reaume's intended victim. Furthermore, in *United States v. Hoglund*, 178 F.3d 410 (6th Cir. 1999), the court found the showing of a defendant's intent to put a bank at a risk of loss is sufficient to sustain a bank fraud conviction under § 1344. Thus, the bank need not have actually transferred funds to have been at a risk of loss. In affirming Reaume's conviction, the court followed the reasoning in both *Hoglund* and *Everett*, holding the intent to defraud a bank is satisfied where an intent to defraud some entity is present and the intended fraud places a federally insured financial institution at a risk of loss. Although the bank in this case never actually transferred funds, the evidence showed Reaume's acts could have caused the bank to transfer funds, thus putting the bank at a risk of loss.

18 U.S.C. ' 1343 Violations Involving Foreign Governments

In ***United States v. Pasquantino***, 336 F.3d 321 (4th Cir. 2003), a majority of the Fourth Circuit sitting en banc held the federal wire fraud statute, 18 U.S.C. ' 1343, is applicable to schemes to defraud foreign governments of their revenues. Pasquantino and his co-defendants were convicted under ' 1343 for participating in a scheme to smuggle alcohol from the United States into Canada to avoid paying higher Canadian excise taxes. A panel of the Fourth Circuit later vacated the defendants= convictions, however, at the government=s request, the Fourth Circuit voted to rehear the case en banc.

The defendants first challenged their convictions on the ground the common law revenue rule barred their prosecution under ' 1343. Alternatively, the defendants argued accrued tax revenue does not constitute property under ' 1343. The defendants= first argument presented an issue of first impression in the Fourth Circuit. The First and Second Circuits have reached conflicting decisions as to whether similar prosecutions are precluded by the common law revenue rule. Under the common revenue law, courts in the United States are to refrain from passing on the validity and operation of the revenue laws of foreign countries. As applied in the present case, the defendants view the common law revenue law as an absolute prohibition on American courts from recognizing a revenue law of a foreign sovereign.

The en banc majority held the common law revenue rule does not preclude prosecution under ' 1343 on the basis of a scheme to defraud a foreign sovereign of its property rights in accrued tax revenues. The majority reasoned affirming the defendants= convictions would not be the functional equivalent of enforcing the revenue laws of Canada and, therefore, does not require an inquiry into the validity and operation of Canadian law. Rather, the prosecution merely enforced the United States= interest in preventing its interstate wire communication systems from being used in furtherance of criminal enterprises. The fact the property at issue belonged to a foreign government is merely incidental. With respect to the defendants= second argument the majority held since a government has a property right in tax revenues when they accrue, the tax revenues owed to Canada by reason of the defendants= conduct in the present case constitute property for purposes of the wire fraud statute.

SEARCH AND SEIZURE

Third Party Consent

In ***United States v. Davis***, 332 F.3d 1163 (9th Cir. 2003), the Ninth Circuit ruled searches and seizures performed with only third party consent are unconstitutional unless the third party had mutual use or joint control over the searched and seized property at the time of the search.

Davis' suspected involvement in a deadly game of Russian roulette prompted authorities to search the apartment Davis leased along with his girlfriend and a third woman, Smith. Smith was the only one present when police arrived and the only one to consent to a search of the apartment. Smith told police which bedroom belonged to Davis and the belongings inside were Davis's. Once inside, authorities found a gun hidden in a gym bag under the bed.

The court found police lacked both actual and apparent authority to search Davis's room, citing two decisions in support of its position. In *United States v. Matlock*, 415 U.S. 164 (1974), the court said a third party may authorize a search if the third party has mutual use of and joint access to or control over the property in question. Smith did not have joint access or control over Davis's room. Smith occupied a separate bedroom in the apartment and the fact Davis hid the bag under the bed indicated his expectation of privacy. Consequently, there was no actual authority for the search. In *United States v. Fultz*, 146 F.3d 1102 (9th Cir. 1998), the court said apparent authority for a search does not exist if police were aware of facts negating the third party's right of consent to a search. Smith told police which room belonged to Davis and the room contained his belongings. Once authorities were made aware of these facts, it should have been clear Smith was not authorized to give consent.

Consent depends on the third party's access to or control over the specific container searched and not the premises as a whole. Though Smith had access to and control over the apartment, this control did not extend to Davis's bedroom which he occupied solely with his girlfriend and did not share with Smith. Since there was no actual or apparent authority for the search, the case was reversed and remanded.

Third Party Consent

In ***United States v. Shelton***, 337 F.3d 529 (5th Cir. 2003), the Fifth Circuit affirmed the district court's denial of Shelton's motion to suppress evidence removed from his home and handed over to authorities by his estranged wife.

Shelton was under investigation by the IRS for running a "skimming operation" and evading taxes in connection with the operation. After six years of marriage and due to suspicions of infidelity, Shelton's wife, Cheryl, moved out of the couple's home. With Shelton's knowledge and assent as sole owner of the property, Cheryl retained her house key and personal security access code. She made several visits to the home to collect personal belongings, sometimes alone and sometimes with friends or relatives. A week after leaving, Cheryl began cooperating with the IRS in its investigation of Shelton. Cheryl entered the house and turned over numerous documents and books related to Shelton's "skimming operation."

In his motion to suppress, Shelton alleged Cheryl lacked the common authority to consent to a search of the home, arguing her authority to enter the home after she moved out was restricted to picking up mail and retrieving personal belongings. In response, the government argued Cheryl possessed the requisite authority since she enjoyed unlimited physical access to the interior of the home without interference from Shelton.

The court determined the validity of a third party consent search necessitates a fact specific inquiry and the extent to which a defendant forgoes his expectation of privacy is a substantial factor in determining whether or not the third party has the requisite common authority to consent to a search. In this case, Shelton failed to alter his position in regard to Cheryl's use of the house after she moved out, thereby allowing her to continue to enter even without his presence. Thus, Shelton had a low expectation of privacy establishing Cheryl's common authority and Shelton's assumption of risk for a search.

Questions Unrelated To Traffic Stop

In ***United States v. Burton***, 330 F.3d 869 (6th Cir. 2003) Burton was convicted of offenses related to the possession of drugs and firearms. Burton entered a guilty plea and was sentenced to 120 months of imprisonment, followed by four years of supervised release.

A police officer responded to a tip alleging individuals were selling narcotics when he found Burton in a vehicle parked too close to a "no parking" sign. Burton was initially detained for this minor traffic violation. Burton got out of his car and, after questioning, admitted he had drugs in his possession. Burton also consented to a search of his car and a gun was discovered. Burton filed a motion to suppress the evidence obtained by the officer which the district court denied. Burton appealed the district court's decision alleging the scope of the initial stop exceeded that which is constitutionally permissible.

The court cited *Knowles v. Iowa*, 525 U.S. 113, (1998), which held the Fourth Amendment did not permit an officer to stop a driver for a traffic violation, issue a citation, and then search the vehicle. The court, however, found the instant case to be distinguishable since the officer had not issued Burton a traffic violation when he asked for consent to search the vehicle.

The court further noted in *United States v. Childs*, 277 F.3d 947,954 (7th Cir.) (en banc) *cert. denied*, 154 L. Ed. 2d 43, 123 S. Ct. 126 (2002), the Seventh Circuit relied upon *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which held "questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention to unreasonable detention." *Childs*, 277 F.3d 947, 954 (2002). Thus, the court concluded a police officer in the process of conducting a traffic stop does not violate the Fourth Amendment by asking questions unrelated to the purpose of the stop.

Incorrect Address Did Not Invalidate Anticipatory Search Warrant

In ***United States v. Lora-Solano***, 330 F.3d 1288 (10th Cir. 2003) Lora-Solano and Cortez-Cruz were convicted for possession of and intent to distribute controlled substances in violation of 21 U. S. C. § 841(a)(1). Both appealed the district court's denial of their motions to suppress evidence obtained during the execution of an anticipatory search warrant.

Based on information from an informant, law enforcement officers planned a controlled delivery of drugs. The informant was familiar with the area and had previously visited the residence to which the drugs were to be delivered, but gave the wrong address which was used in the anticipatory search warrant. When no residence was discovered at the address given, the informant who was with the police, identified the correct house; however, the correct house number was not communicated to the officer charged with obtaining the warrant which was ultimately executed.

Lora-Solano and Cortez-Cruz argued that listing the wrong house number and failure to provide a physical description of the premises to be searched, constituted a lack of sufficient particularity and, thus rendered the warrant invalid. The court cited *United States v. Pervaz*, 118 F.3d 1, 9 (1st Cir. 1997), which held "[t]he test for determining the adequacy of the description of the location to be searched is whether the description is sufficient 'to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.'" Since agents did not identify a residence at the dispatched address and the informant made the controlled delivery to the premises which was searched before the warrant was executed, the mistake of searching the wrong house was unlikely. Given that no reasonable probability existed for the wrong house to be searched, the court held the warrant satisfied the particularity requirement.

INVESTIGATIVE TECHNIQUES

Failure To Name Authorizing Official Not Fatal To Wiretap

In ***United States v. Radcliff***, 331 F.3d 1153 (10th Cir. 2003), Radcliff was convicted of conspiracy to possess and distribute methamphetamines. Much of the evidence used to convict Radcliff came from a government wiretap of Radcliff's brother-in-law's home.

On appeal, Radcliff moved to suppress evidence obtained from the wiretap on the grounds the order did not name the Department of Justice ("DOJ") official authorizing the request. 18 U.S.C. § 2516(1) requires authorization from a

DOJ official for a wiretap request and § 2518 requires the wiretap order specifically identify the authorizing official.

On its face the wiretap order was unlawful; however, suppression was not required unless the violated provision played a substantive role in the regulatory system. The holding in *United States v. Giordano*, later codified under 18 U.S.C. § 2518(10)(a)(i), mandates suppression only when the violated provision is one of the "statutory requirements that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures."

In this case, the violated provision was only designed to fix responsibility and played no substantive role in the statutory scheme. Thus, the violation did not call for suppression of the evidence. The authorizing DOJ officials were named in the applications, although they were not named in the actual wiretap order. This strengthened the argument against suppression, since the missing names were obtainable and the violation had no real negative ramifications. Accordingly, the Tenth Circuit affirmed the district court's denial of Radcliff's motion to suppress evidence obtained from the wiretap.

SENTENCING

Grouping

In ***United States v. Sedoma***, 332 F.3d 20 (1st Cir. 2003), Sedoma, a detective sergeant with the Tiverton, Rhode Island Police Department, was convicted of conspiracy to possess and distribute marijuana (21 U.S.C. § 846), conspiracy (18 U.S.C. § 371) and mail and wire fraud. On appeal, Sedoma argued the district court erred in failing to group the two conspiracy charges. Sedoma contended the two level increase for abuse of a position of trust, attached to the drug conspiracy charge, overlapped with the conspiracy to defraud charge. The government felt grouping ". . . would result in some of the conduct constituting the conspiracy to defraud going unpunished."

USGG § 3D1.2(c) provides counts should be grouped together "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The court determined a full overlap of conduct is not necessary to group counts. The conduct necessary for the first count need only be included in the conduct for the second count. "Embody" does not mean "fully accounts for." The court determined the conspiracy to defraud was committed for the purpose of facilitating the drug conspiracy and, therefore, embodied conduct within the meaning of § 3D1.2(c). The court also noted grouping in this case prevented ". . . double counting of offense behavior . . . [which] . . . Application note 5 to § 3D1.2 explains . . . [is] the purpose of subsection (c) . . ." Accordingly, the sentence was vacated and the case remanded for resentencing.

Miscarriage Of Justice Exception To Appeal Waiver

In ***United States v. Andis***, 333 F.3d 886 (8th Cir. 2003), Andis pled guilty to transporting a minor in interstate commerce for illegal sexual activity and waived his right to appeal as part of his plea agreement. Andis subsequently claimed a miscarriage of justice exception to certain conditions of his supervised release constituted an illegal sentence and, therefore, the waiver in his plea agreement did not bar the appeal of his sentence.

The court found no miscarriage of justice in this case although it agreed there is a narrowly construed miscarriage of justice exception to waivers. In prior cases, the court defined illegal sentences as those not authorized for the crime of conviction or those outside the statutory limits. An allegation the sentencing court misapplied the Sentencing Guidelines or abused its discretion does not constitute a miscarriage of justice and is not subject to appeal where a valid waiver exists.

A sentence is illegal when it is not authorized by law, exceeds a statutory provision, or violates an applicable statute. A sentence is not illegal when the terms of the sentence are not in excess of the relevant statutory provisions or the sentence itself is not legally or constitutionally invalid.

The court dismissed Andis's appeal since he admitted to entering the waiver knowingly and voluntarily and because the supervised release conditions were not based on some constitutionally impermissible factor, such as race, which would have made the sentence illegal.

Conviction Of Willful Offense Does Not Preclude Downward Departure For Mental Incapacity

In ***United States v. Cockett***, 330 F.3d 706 (6th Cir. 2003), the Sixth Circuit affirmed Cockett=s sentence of one year=s probation for each count of aiding and assisting in the preparation of false returns. The district court departed downward pursuant to USSG ' 5K2.13 based on a finding Cockett suffered from a significantly reduced mental capacity at the time she committed the offense. The government appealed the sentence arguing the departure was inconsistent with the jury=s finding, beyond a reasonable doubt, that Cockett understood the wrongfulness of her actions.

The court held ' 5K2.13 may be applied in cases in which a defendant is found guilty of a willful offense while suffering from a significantly reduced mental capacity not resulting from voluntary intoxication. Upholding the departure, the majority concluded there was enough evidence to support the district court=s finding that Cockett suffered from a depression and thought disorder that impaired her ability to reason, despite the level of sophistication required to commit the offenses. The court held Cockett Acould voluntarily and intentionally violate the tax laws, but nevertheless be impaired in her ability to exercise the power of reason.@ The court also found the impairment need not have a causal link to the offense committed. Although the parties agreed under Sixth Circuit precedent, a sentencing finding that directly conflicted with a jury=s verdict could not stand, the majority found it possible to reconcile the jury=s verdict against Cockett with the existence of a Asignificantly reduced mental capacity.@

The dissent believed it was impossible to reconcile the jury=s rejection of Cockett=s defense that she did not understand what she was doing was against the law, with the district court=s finding that Cockett was suffering from a significantly reduced mental capacity that contributed to her commission of the offense. Moreover, the dissent believed the trial evidence, including witness testimony, failed to support the district court=s finding of a significantly reduced mental capacity.

Relevant Conduct

In ***United States v. Reaume***, 338 F.3d 577, (6th Cir. 2003), Reaume opened several checking accounts with small initial deposits, wrote checks from the accounts for products knowing there were insufficient funds to cover the amount of the checks, then returned the goods to the same stores in exchange for cash. A jury convicted him of committing bank fraud in violation of 18 U.S.C. § 1344. Reaume appealed his sentence on grounds the district court improperly denied his motion for a reduction for acceptance of responsibility and improperly included relevant conduct in calculating his guideline range.

In affirming the sentence, the Sixth Circuit noted a lack of a guilty plea would not preclude a court from granting a reduction for acceptance of responsibility; however, the Sentencing Guidelines indicate such a reduction should be based primarily on pre-trial statements and, a defendant's conduct. At trial, Reaume contested the issue of whether he participated in the scheme and intended to defraud the bank, a factual determination regarding his responsibility for the criminal acts. In convicting Reaume, the jury found he harbored such an intent. Thus, Reaume made no indication he accepted responsibility for his acts and the refusal of the district court to award Reaume a reduction was not clear error.

In calculating Reaume's sentencing range, the district court estimated relevant conduct losses to be between $200,000 and $350,000. The relevant conduct was based on Reaume's prior arrests for bad checks, his admissions to making as much as $70,000 per year through his bad check scheme, and testimony Reaume traveled the country writing bad checks for three years and obtained thousands of dollars a month doing so. The Sixth Circuit upheld the calculations, noting the district court need only find the showing of relevant conduct be proven by a preponderance of the evidence, a standard which was met by the government.

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