Criminal Tax Bulletin

Department of Treasury ***Office of Chief Counsel***
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FOURTH AMENDMENT

En Banc Eleventh Circuit Upholds Use of Court Order to Obtain Historical Cell Site Data

In ***United States v. Davis***, 785 F.3d 498 (11th Cir. 2015) (*en banc*), the Eleventh Circuit held that the government's use of a court order rather than a search warrant to obtain the defendant's historical cell site data did not violate the Fourth Amendment.

Quartavius Davis ("Davis") participated in seven armed robberies. He was indicted for violations of the Hobbs Act and other offenses. Before trial, Davis moved to suppress historical cell site location information obtained by the government from third-party cell phone providers by means of a court order under 18 U.S.C. § 2703(d) rather than a warrant. The district court denied Davis's motion. Davis was convicted on all counts and sentenced to 1,941 months' imprisonment.

On appeal, a panel of the Eleventh Circuit held that the government violated Davis's Fourth Amendment rights by obtaining the historical cell site data without a warrant. The panel affirmed Davis' convictions, however, based on the good-faith exception to the exclusionary rule. The Eleventh Circuit granted en banc rehearing.

The en banc court first noted that in contrast to cases involving a GPS device, a physical trespass, or real-time or prospective cell site data, this case narrowly involved historical cell tower connection information contained in pre-existing, legitimate business records maintained by a third-party telephone company. The court concluded that Davis had no reasonable expectation of privacy in the non-content data contained in the company's business records. Thus, the government's use of a court order to obtain these records was not a search and did not violate Davis's Fourth Amendment rights. The appellate court held that the district court did not err in denying Davis's motion to suppress, and affirmed his convictions.

Eleven Circuit Upholds Admission of Illegally Obtained Evidence That Would Have Been Found in Inventory Search

In ***United States v. Johnson***, 777 F.3d 1270 (11th Cir. 2015), the Eleven Circuit held that evidence found in the defendant's vehicle during an illegal search was admissible under the inevitable discovery exception to the exclusionary rule because the evidence would have been discovered in a later inventory search.

After discovering that the truck Shawnton Johnson ("Johnson") was driving was registered to a deceased owner, a police officer stopped Johnson for failure to signal a turn. When a search of Johnson's license history revealed that his license was currently suspended, the officer decided to arrest him. Before doing so, the officer looked inside the truck and noticed an item wrapped in a cloth. Upon removing the cloth, the officer discovered a sawed-off shotgun and arrested Johnson. Following the arrest, the officer had the truck impounded because there was no other registered owner, and he conducted a detailed inventory search.

Before trial, the district court granted Johnson's motion to suppress the shotgun as the fruit of an illegal search. On reconsideration, the court reversed this decision, concluding that the inevitable discovery exception applied. Johnson pleaded guilty to being a felon in possession of a firearm, but retained the right to appeal the denial of his motion to suppress.

On appeal, the Eleventh Circuit affirmed the district court's decision, holding that the shotgun had been properly admitted under the inevitable discovery exception. The court explained that the exception applied because the government had established a reasonable probability that the shotgun would have been discovered by lawful means and that such means were being actively pursued prior to the illegal search. The court noted that to satisfy the "active pursuit" requirement, the government need only establish that the police would have found the evidence through ordinary investigation of evidence already in their possession, which the government had done in this case.

Third Circuit Holds Suppression Not Required Despite Failure to Present List of Items to Be Seized During Search

In ***United States v. Wright***, 777 F.3d 635 (3d Cir. 2015), the Third Circuit held that, although the government violated the Fourth Amendment when it failed to present the list of items to be seized during the execution of a warrant, the violation did not require suppression of the evidence seized.

Based on evidence that Michael Wright ("Wright") had conducted a conspiracy to distribute marijuana, the government sought a warrant to search Wright's apartment. A federal magistrate judge approved the application, signing both the warrant and the attached affidavit, which contained the list of items to be seized and was incorporated into the warrant by reference. The affidavit was then removed at the request of the U.S. Attorney's Office and sealed in order to protect the ongoing investigation. The DEA agent who was organizing the search received the final warrant but did not notice that it no longer included a list of items to be seized. As a result, the list was not present when the warrant was executed. The search was conducted in conformity with the warrant, and there was no indication that items not listed were seized.

At trial, Wright filed a motion to suppress the evidence gathered from his apartment. The district court granted his motion. A panel of the Third Circuit vacated and remanded, the district court denied the motion on remand, and Wright was subsequently convicted of drug offenses.

On appeal, the Third Circuit affirmed the district court's denial of Wright's motion to suppress. The appellate court reasoned that even if a warrant is facially invalid, an assessment of the officer's culpability and the value of deterrence may counsel against suppression. In making this assessment, the court considered (1) the extent to which the violation undermined the purposes of the Fourth Amendment; and (2) what the government gained from the violation. The court reasoned that the violation at issue here did not result in an impermissible general search, and there was no reason to believe that any aspect of the search was unsupported by probable cause. Further, the court opined that the government gained nothing from the Fourth Amendment violation because the agents would have collected the same evidence if the list had been present during the search. Accordingly, the court concluded that suppression of the evidence was not required.

SIXTH AMENDMENT

Second Circuit Holds Defendant Did Not Waive Right to Impartial Jury

In ***United States v. Parse***, 789 F.3d 83 (2d Cir. 2015), the Second Circuit held that the defendant did not waive his right to an impartial jury as a result of his attorneys' alleged failure to exercise due diligence to discover a juror's misconduct.

David Parse ("Parse") was a broker employed by an investment banking firm that executed a series of tax shelter transactions. Parse and four codefendants were tried for a number of tax and tax-related offenses. Three of Parse's codefendants – Paul Daugerdas ("Daugerdas"), Donna Guerin ("Guerin"), and Denis Field ("Field") – were found guilty, and one of the codefendants was acquitted. Parse himself was convicted of one count of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and one count of corruptly endeavoring to impede the administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). He was sentenced to 42 months' imprisonment.

Parse, Daugerdas, Guerin, and Field subsequently moved for a new trial pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure, on the ground that one of the jurors, Catherine M. Conrad ("Conrad"), had lied and withheld material information during voir dire and was biased against the defendants. Following an evidentiary hearing, the district court found it undisputed that Conrad lied extensively and concealed important information about her background. The district court granted the new-trial motion of Parse's codefendants, but it denied Parse's motion, finding that his attorneys either knew of Conrad's misconduct prior to the verdict or failed to act with reasonable diligence based on the information they had, and that Parse had thus waived his right to an impartial jury.

On appeal, the Second Circuit concluded that the district court's findings regarding Parse's attorneys' knowledge were not supported by the record. The Second Circuit further determined that the district court's alternate ruling – *i.e.*, that Parse's right to an impartial jury was waived because his attorneys failed to exercise due diligence – was based on an error of law. The court explained that such a waiver must be a knowing, intelligent act and therefore cannot be based on a failure to acquire sufficient information. Accordingly, the Second Circuit vacated the judgment of conviction against Parse and remanded the matter for a new trial.

Fifth Circuit Holds Defendant Waived Right of Confrontation

In ***United States v. Ceballos***, 789 F.3d 607 (5th Cir. 2015), the Fifth Circuit held that the defendant had waived her right of confrontation when her counsel stipulated to the admission of evidence.

Customs and Border Protection ("CBP") agents in El Paso, Texas detained Abel Viera Mendez ("Viera"), a Mexican national attempting to enter the U.S. without authorization. With Viera's consent, one of the agents posed as Viera, answered a call on Viera's cell phone from a suspected smuggler, and requested a ride. Soon afterward, Sandra Lisseth Ceballos ("Ceballos") arrived at the location in a vehicle matching the smuggler's description. After the agent stated that he was "Abel" and confirmed that Ceballos was aware of "Abel's" immigration status, Ceballos invited the agent into the vehicle. Ceballos was then arrested.

At trial, the government did not call Viera as a live witness, but instead questioned one of the CBP agents regarding the subject matter of what Viera had told him following his apprehension. In addition, at the government's request, the agent recited Viera's sworn, written statement. Ceballos's counsel had stipulated to the admission of this evidence prior to trial. Ceballos was convicted of (1) conspiracy to transport aliens within the U.S. for private financial gain; and (2) transporting and attempting to transport an alien within the U.S. for private financial gain.

On appeal, Ceballos contended in part that the district court violated her rights under the Confrontation Clause of the Sixth Amendment by admitting Viera's testimony into evidence without first establishing that he was unavailable and that Ceballos had a prior adequate opportunity to cross-examine him. The Fifth Circuit concluded, however, that it could not review Ceballos's claim because she had waived her right of confrontation through her counsel's unchallenged stipulation to the admission of the testimony. The court rejected Ceballos's argument that the case of *Crawford v. Washington*, 541 U.S. 36 (2004), had effected a change in the law governing waiver, explaining that the pre-*Crawford* waiver rule still applied. Under this rule, counsel may waive a client's right of confrontation by stipulating to the admission of evidence, so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy. The court determined that these requirements had been met in this case.

EVIDENCE

Seventh Circuit Holds District Court Did Not Err in Admitting Other-Act Evidence

In ***United States v. Curtis***, 781 F.3d 904 (7th Cir. 2015), a case involving the willful failure to pay income taxes in violation of 26 U.S.C. § 7203, the Seventh Circuit held that the district court did not abuse its discretion in admitting evidence of the defendant's other wrongdoing in subsequent years, pursuant to Federal Rules of Evidence, Rule 404(b).

George W. Curtis ("Curtis") ran a successful law practice as a sole proprietorship. In 1996 and 1997, he filed returns reporting tax obligations of $218,983 and $248,236, respectively, but made no payments toward those debts, and he failed to file a return for 1998. In 1999, he entered into an installment agreement with the IRS. He filed a return for 2000 but failed to pay more than $90,000 in taxes owed. He entered into a second installment agreement and subsequently filed returns for 2003 and 2004 reflecting unpaid tax liabilities of $176,802 and $61,000, respectively. In 2006, he paid a portion of his tax liabilities. On his returns for 2007, 2008 and 2009, he reported tax liabilities of $151,906, $113,354, and $112,973, respectively, but he made no payments towards these liabilities. The IRS referred the matter for criminal investigation, and Curtis was ultimately charged with three counts of violating § 7203 for the years 2007, 2008 and 2009.

Prior to trial, the government stated it would offer evidence under Rule 404(b) that Curtis failed to pay payroll taxes for his law firm's employees for the third and fourth quarters of 2013. Curtis moved to exclude this evidence. The district court denied Curtis's motion, and the jury convicted him on all three counts.

On appeal, the Eleventh Circuit held that the district court did not abuse its discretion by allowing the other-act evidence. The appellate court reasoned that Curtis had opened the door to the relevance of his conduct after the charged years by implying that he had fully paid his recent tax obligations. The court further determined that the evidence was relevant to Curtis's anticipated defense that he acted with a good faith misunderstanding. Finally, the court opined that the evidence was relevant to the issue of Curtis's intent.

IDENTITY THEFT

Eleventh Circuit Holds Use of Name and Forged Signature Qualifies as "Means of Identification" under § 1028A

United States v. Wilson, 788 F.3d 1298 (11th Cir. 2015), the Eleventh Circuit held that the use of a person's name and forged signature sufficiently identifies a specific individual to constitute a "means of identification" under the aggravated identity theft statute, 18 U.S.C. § 1028A.

Freddie Wilson ("Wilson") obtained a license to operate as a check casher in Florida. Over the course of three months, Wilson deposited checks totaling more than $336,000 into a bank account that he had failed to identify on his license application. Nearly all of the funds deposited were from 37 United States Treasury tax-refund checks. The refund checks were associated with fraudulent tax returns filed in the names of other individuals. The checks were endorsed with forged signatures. Wilson used the money in the bank account almost exclusively for personal expenses.

Wilson was convicted of violating 18 U.S.C. § 641 (theft of government funds); 18 U.S.C. § 1028A (aggravated identity theft); 18 U.S.C. § 1957 (conducting an unlawful monetary transaction); and 18 U.S.C. § 1505 (obstructing a criminal investigation). He was sentenced to 102 months' imprisonment.

On appeal, Wilson contended in part that the evidence was insufficient to sustain his convictions for aggravated identity theft, because the use of the victims' names on the refund checks, with no other identifying information, did not constitute a "means of identification" under § 1028A. The Eleventh Circuit disagreed, holding that the use of a person's name and forged signature on a United States Treasury check sufficiently identifies a specific individual to qualify as a "means of identification" under § 1028A. The court reasoned that under the plain language of the statute, the use of a name, alone or in conjunction with any other information, constitutes a means of identification so long as the name could be combined with other information to identify a specific individual.

On this and other grounds, the court affirmed Wilson's convictions and sentence.

OBSTRUCTION OF JUSTICE

Eighth Circuit Holds Obstruction Statute Has Nexus Requirement

In ***United States v. Petruk***, 781 F.3d 438 (8th Cir. 2015), the Eighth Circuit held that 18 U.S.C. § 1512(c)(2), which prohibits obstruction of an official proceeding, requires a sufficient nexus between the proceeding and the obstructive conduct at issue.

Elfred Petruk ("Petruk") was arrested for stealing a pickup truck and was charged separately in Minnesota state court and federal court. While incarcerated on the state theft charges in December 2012 and before the federal charges were filed in June 2013, Petruk unsuccessfully attempted to obtain a false exculpatory statement by calling a friend and instructing her to arrange for another woman to sign a statement that she was with him on the night the truck was stolen. Subsequently, after the federal prosecution was initiated, Petruk also attempted to obtain a false confession. He was ultimately convicted in federal court of one count of carjacking in violation of 18 U.S.C. § 2119(1) and two counts of corruptly attempting to obstruct an official proceeding in violation of 18 U.S.C. § 1512(c)(2). The district court sentenced him to three concurrent terms of 168 months' imprisonment.

On appeal, the Eighth Circuit held that a successful prosecution under § 1512(c)(2) requires proof that the defendant contemplated a particular, foreseeable proceeding, and that the contemplated proceeding constituted an "official proceeding," which is defined under 18 U.S.C. § 1515(a)(1)(A) to include a proceeding before a federal judge, court, or grand jury, but not a state proceeding. Turning to the facts presented at trial, the court concluded that the evidence was insufficient to convict Petruk of obstruction for attempting to secure statements from false alibi witnesses while incarcerated on state charges. The evidence showed that Petruk's efforts were directed at securing false statements to use in Minnesota state court, and were not aimed at the federal prosecution that was initiated later. Accordingly, the court vacated one of Petruk's convictions for attempting to obstruct an official proceeding.

MONEY LAUNDERING

Fifth Circuit Holds Knowing Acceptance of Drug Proceeds Did Not Establish Participation in Money Laundering Conspiracy

In ***United States v. Cessa***, 785 F.3d 165 (5th Cir. 2015), the Fifth Circuit held that evidence of the defendant's knowing acceptance of illegal drug proceeds as payment for his services was not sufficient to support his conviction for money laundering conspiracy, notwithstanding that his actions had the effect of concealing the illegal proceeds.

Los Zetas, a Mexican drug cartel, ran a U.S. quarter-horse racing business that the cartel used to launder money. The cartel used the proceeds of cocaine sales to purchase quarter horses in the U.S. through legitimate-appearing intermediaries. Los Zetas generated "clean money" by repeatedly "selling" horses to individuals or shell companies controlled by coconspirators. The cartel also paid for horse training, breeding, veterinary bills, and racing expenses with the proceeds of illegal drug sales.

Eusevio Huitron ("Huitron") worked as a horse trainer for the cartel's horse-racing operation for nearly two years. He accepted a total of $505,007 in cash payments from Los Zetas for his horse-training services. Huitron, along with three other individuals involved in the horse-racing operations, was convicted of conspiring to launder money in violation of 18 U.S.C. § 1956(h). As alleged in the indictment, the object of the conspiracy was to conceal the source or nature of the illegal drug proceeds.

On appeal, the Fifth Circuit held that there was insufficient evidence to establish that Huitron joined the conspiracy knowing its purpose and intending to further that purpose. The court reasoned that the evidence established, at best, that Huitron knowingly accepted drug money from known drug dealers in exchange for horse-training services. The court held that this was not enough circumstantial evidence from which a reasonable jury could conclude beyond a reasonable doubt that Huitron intended to further the cartel's illegal activities. Accordingly, the court reversed Huitron's conviction.

FORFEITURE

Eighth Circuit Holds Defendant's Consent to Forfeiture Does Not Waive Nexus Requirement

In ***United States v. Beltramea***, 785 F.3d 287 (8th Cir. 2015), the Eighth Circuit held that, notwithstanding the defendant's consent to the forfeiture of his properties, the district court's forfeiture order was plain error where there were no facts in the record to establish a nexus between the properties and the defendant's offenses of conviction.

Randy Beltramea ("Beltramea") solicited investments from numerous individuals and represented that the money would be used to open a Subway restaurant franchise, when in fact he used the funds for personal purposes and for a real estate development project called Castlerock Estates. Beltramea's criminal scheme also involved making fraudulent representations to two banks, attempting to avoid paying taxes, and failing to comply with other tax-related obligations. Beltramea pleaded guilty to wire fraud, aggravated identity theft, money laundering, false statement to a financial institution, and tax evasion. He was sentenced to 111 months' imprisonment and ordered to forfeit various properties owned by him or by one of his legal entities, including three rental properties and four parcels of property that comprised Castlerock Estates.

On appeal, the government argued that Beltramea had waived his right to contest the forfeiture because his trial counsel signed the preliminary forfeiture order. The government contended that this signature constituted Beltramea's consent to the forfeiture and his agreement that the government had established the requisite nexus between the properties and his offenses. The Eighth Circuit disagreed, explaining that a defendant's consent to forfeiture does not abrogate the nexus requirement and that the district court had an independent duty to ensure that the required nexus existed. The Eighth Circuit noted that there were no facts in the record establishing a nexus between the three rental properties and several of the Castlerock lots and Beltramea's offenses of conviction. Accordingly, the appellate court vacated and remanded the district court's forfeiture order.

D.C. Circuit Questions Failure to Identify Fraud Victim in Plea Agreement

In ***United States v. Emor***, 785 F.3d 671 (D.C. Cir. 2015), the D.C. Circuit reversed the district court's denial of a private school's petition for ancillary forfeiture proceeding, suggesting that the government should have identified the victim of the defendant's fraud in the plea agreement.

Charles Emor ("Emor") was a director of SunRise Academy ("SunRise"), a private nonprofit school in the District of Columbia ("District"). The District reimbursed over $400,000 monthly to SunRise for its educational services. From 2006 to 2010, Emor used funds from SunRise's bank accounts for personal purposes. Emor also caused SunRise to transfer over $2 million as a purported investment in his for-profit company, Core Ventures ("Core"). Core neither used the funds for their purported purpose nor repaid Sunrise. Instead, the funds were used, in part, to purchase insurance for a vehicle that Emor drove.

After the government seized the vehicle and more than $2 million from Core's bank account, Emor pleaded guilty to one count of wire fraud. The plea stated that Emor fraudulently obtained money from SunRise's bank account, but no fraud victim was identified. Instead, the government argued that the court could determine the victim at sentencing. After Emor pleaded guilty, the government took the position that, for restitution and forfeiture purposes, the victim was the District. The district court deferred a determination of the victim's identity until the preliminary forfeiture hearing, which SunRise was not allowed to attend. After the district court issued a preliminary order of forfeiture, SunRise filed a petition, claiming it was the owner of the forfeited property and the victim of Emor's fraud. The district court denied the petition, holding that SunRise lacked standing because it was an alter ego of Emor, a finding the court made at the hearing from which SunRise was excluded.

The D.C. Circuit reversed the denial of SunRise's petition for an ancillary hearing, on the ground that SunRise had stated a valid claim of relief when it alleged its ownership of the forfeited property. In giving guidance upon remand, the appellate court cautioned that the government could not use the forfeiture proceeding to establish additional facts – including the identity of the fraud victim – that would contradict the factual basis for the plea or alter the scope of legal liability to which Emor had pleaded.

SENTENCING

Eighth Circuit Holds Repetitive and Coordinated Conduct May Constitute Sophisticated Means

In ***United States v. Jones***, 778 F.3d 1056 (8th Cir. 2015), the Eighth Circuit held that the district court properly enhanced the defendant's sentence for use of sophisticated means, based on the defendant's repetitive and coordinated tax evasion scheme.

William Fielding Jones, Jr. ("Jones"), a consultant in the packaging industry, did business through his company, SAM Packaging. He became delinquent in paying his taxes and entered into an installment plan with the IRS. Subsequently, Jones took numerous actions to avoid paying more than $300,000 in back taxes. He first refused to provide the IRS with his bank statements and then provided partly redacted copies. He submitted financial disclosure forms that failed to disclose his accounts at the bank to which he directed his financial activity. He commingled his personal and business accounts, and he dealt in cash. Jones also refused to turn over SAM Packaging's accounts receivable. In 2010, he informed the IRS that he was unemployed, when in fact he had started a new company and continued doing business. He also performed work for customers without billing them, thus preventing the IRS from levying on his accounts receivable. Jones listed multiple Employer Identification Numbers for SAM Packaging and used a former employee's social security number on his corporate tax returns.

Jones pleaded guilty to tax evasion, in violation of 26 U.S.C. § 7201. At sentencing, the district court imposed a two-level enhancement for use of sophisticated means under U.S. Sentencing Guidelines ("Guidelines") §2T1.1(b)(2). The court determined a Guidelines range of 30 to 37 months' imprisonment and then varied downward, sentencing Jones to 24 months' imprisonment.

On appeal, Jones argued the district court improperly enhanced his sentence for use of sophisticated means, because his actions were typical of tax evasion offenses. The Eighth Circuit opined that even if the individual steps were not complicated, repetitive and coordinated offense conduct can amount to a sophisticated scheme. The appellate court concluded that the district court did not clearly err in imposing the sophisticated means enhancement.

TABLE OF CASES