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SUPREME COURT CASES

Effective Assistance Of Counsel

In *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), the Supreme Court held in order to demonstrate a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish the conflict of interest adversely affected his/her counsel's performance. This case originated from a state murder trial where a Virginia jury convicted Mickens of premeditated murder for which he was later sentenced to death. Mickens filed a petition for writ of habeas corpus alleging he was denied effective assistance of counsel because one of his court appointed attorneys had a conflict of interest at trial. Federal habeas counsel had discovered Micken's lead trial attorney was representing the victim on assault and concealed weapons charges at the time of the murder. The trial attorney did not disclose to the court, his co-counsel, or Mickens that he had previously represented the victim. The district court denied the petition. A panel of the Fourth Circuit reversed, but the *en banc* court affirmed. The Supreme Court granted the petition for writ of certiorari.

Before the Supreme Court, Mickens relied upon the remand instruction in *Wood v. Georgia*, 450 U.S. 261 (1981), which directed the trial court to grant a new probation revocation hearing if it determined "an actual conflict of interest existed." Mickens contended the holding in *Wood* established an unambiguous rule where the trial judge neglects a duty to inquire into a potential conflict of interest, the defendant, to obtain reversal of the judgement, must only demonstrate his lawyer was subject to a conflict of interest and not the additional requirement that the conflict adversely affected counsel's performance. In *Wood*, multiple defendants were represented by the same attorney, who had been hired by their employer, and the possibility of conflict was sufficiently apparent to impose upon the trial court a duty to inquire further. The Supreme Court explained "an actual conflict of interest," as used in *Wood*, meant a conflict that affected counsel's performance and *Wood* had not changed the rule established in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which held a defendant must demonstrate a conflict of interest actually affected the adequacy of his/her representation. Ultimately, the Supreme Court affirmed the denial of habeas relief based on the finding of the Court of Appeals which failed to establish the conflict of interest adversely affected Micken's counsel's performance.

Consent to Search

In *United States v. Drayton,* No. 01-631, 2002 U.S. LEXIS 4420, (June 17, 2002), the Supreme Court held the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to a search. The two defendants, Drayton and Brown, were traveling on a bus en route from Florida to Michigan. At a scheduled stop, the driver allowed three police officers to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges. Once onboard, one officer knelt on the drivers seat and faced the rear of the bus and the other two went to the rear of the bus where one remained stationed facing forward. The third officer worked his way toward the front of the bus, speaking with individual passengers as he went. The main aisle remained unobstructed during the

questioning. According to one of the police officers, passengers who declined to cooperate or who chose to exit the bus at any time would have been allowed to do so without argument. The police officer conducting the questioning noticed Drayton and Brown were wearing heavy jackets and baggy pants despite the warm weather. After checking their luggage, the officer asked Brown if he could check "his person." After detecting hard objects similar to drug packages, Brown was escorted off the bus. A similar search of Drayton, produced similar objects which turned out to be bundles of cocaine. Brown and Drayton were arrested and later charged with federal drug violations.

Brown and Drayton moved to suppress the cocaine, arguing the consent to the pat-down search was illegal. In denying Brown and Drayton's motions, the district court determined the police conduct was not coercive and Brown and Drayton's consent to search was voluntary. The Eleventh Circuit reversed and remanded based on its prior holdings that bus passengers do not feel free to disregard officers' requests to search absent some positive indication that consent may be refused. The Supreme Court accepted *certiorari* to decide whether police officers must advise bus passengers during these encounters of their right not to cooperate. In *Florida v. Bostick*, 501 U.S. 429 (1991), the Supreme Court made clear the proper inquiry "is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." Applying the *Bostick* framework to the facts of this case, the Supreme Court concluded the police did not seize Brown and Drayton when they boarded the bus and began questioning the passengers. The officers gave the passengers no reason to believe they were required to answer their questions. The officers made no intimidating movements and did not brandish their weapons. The aisle of the bus also remained free so anyone could exit. Nothing the officers said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter. The Court rejected the suggestion police officers must always inform citizens of their right to refuse, when seeking permission to conduct a warrantless consent search.

TITLE 26 AND TITLE 26 RELATED CASES

Miranda Rights

In *United States v. Rutherford*, 01-10164, 2002 U.S. App. LEXIS 7874 (9th Cir., April 29, 2002) (Unpublished), the Ninth Circuit affirmed the district court's order entering judgements of conviction against the Rutherfords for making and filing false income tax returns for 1992 and for failing to file income tax returns for 1993. On appeal, the Rutherfords argued an IRS special agent interrogated them without identifying herself or informing them of their constitutional rights, and all evidence obtained as a result of the interrogation violated their Fifth Amendment rights and was inadmissable. The Ninth Circuit noted the Supreme Court's decision in *Beckwith v. United States*, 425 U.S. 341 (1975) (quoting *Rogers v. Richmond*, 365 U.S. 534 (1961)), which held an IRS agent need not provide *Miranda* warnings to an individual under IRS investigation before questioning unless the individual was in custody or "special circumstances" were present "such as to overbear [the individual's] will to resist and bring about confessions not freely self-determined." There was no evidence the meeting between the special agent and the Rutherfords was custodial in nature, nor were "special circumstances" involved, therefore the special agent was not required to give the Rutherfords *Miranda* warnings.

OTHER CONSTITUTIONAL ISSUES

Right To Counsel Can Be Voluntarily Waived

In *United States v. Turner,* 287 F.3d 980 (10th Cir. 2002), Turner, who represented himself at trial, was convicted of three counts of tax evasion in violation of 26 U.S.C. § 7201 and two counts of failure to file a tax return in violation of 26 U.S.C. § 7203. On appeal, Turner argued his conviction should be overturned because his waiver of his right to counsel was not knowingly and intelligently given. Both at his arraignment and at trial, Turner stated he wished to represent himself, despite repeatedly being advised of the hazards of not retaining counsel.

The Tenth Circuit affirmed Turner's conviction because it found the "district court had provided . . . Turner with enough information to make an informed, knowing, and thus legally intelligent decision whether to waive his right to counsel." The court noted, based on case law, Turner had a constitutional and statutory right to waive his right to counsel and represent himself at trial. Once Turner exercised his constitutional right, then a court must satisfy three requirements: the assertion must be voluntary, the relinquishment of the benefits of representation must be done knowingly and voluntarily and the assertion must be made in a timely manner. In this case, the court noted the only issue was whether Turner's waiver was knowingly and intelligently made, and in this context, knowing and intelligent meant only that Turner was reasonably informed by the court of the hazards of self-representation and had

sufficient understanding of those hazards.

To ensure defendants knowingly and intellegently waive their right to counsel, ideally, courts should conduct a "thorough and comprehensive formal inquiry including such topics as the nature of the charges, the range of punishment, possible defenses, and a disclosure of the risks involved in representing oneself pro se." A review of the record in this case revealed both the magistrate judge during arraignment and the district court judge at trial, advised Turner of the charges against him, the potential length of his sentence according to the Sentencing Guidelines, that his defense theories made little, if any, sense and attempted to impress upon him the difficulties of self representation. Thus, the court upheld Turner's waiver.

GRAND JURY/RULE 6(e)

Grand Jury Subpoenas And Civil Protective Orders

In *In Re: Grand Jury,* 286 F.3d 153 (3rd Cir. 2002), the Third Circuit held a grand jury subpoena supercedes a protective order unless the party seeking to quash the subpoena can demonstrate exceptional circumstances which clearly favor subordinating the subpoena to the protective order. The target of the grand jury investigation was involved in civil commercial litigation between private parties. The court in the civil case issued a state protective order over any and all civil discovery gathered in the civil case. As discovery continued in the civil matter, a grand jury began investigating the target for alleged mail fraud, wire fraud and tax violations, all of which related to the civil litigation. The grand jury issued a subpoena to the target's attorney for the civil discovery. The target filed a motion to intervene and to quash the subpoena. The government filed a cross-motion to compel compliance with the subpoena. All parties agreed the discovery sought by the grand jury was gathered under the state protective order.

In upholding the subpoena, the district court noted the existing circuit conflict as well as the absence of a Third Circuit decision on the issue. The court found the protective order was improvidently granted and, therefore, the grand jury was entitled to subpoena the documents gathered in the civil case. The target appealed.

The Third Circuit observed the Fourth, Ninth and Eleventh Circuits all applied a per se rule that a grand jury subpoena always trumps a protective order. The Second Circuit, however, held the opposite, stating absent a compelling need for the information, a protective order takes precedence over a grand jury subpoena. The Third Circuit examined the historical function of the grand jury as well as the importance of civil protective orders in serving public interest. The court noted as a cornerstone of our justice system, the grand jury serves the highest of public interests; therefore, its function must not be improperly intruded upon and should override the important, but not as unique and essential, interest served by a civil protective order. Ultimately, the Third Circuit joined the First Circuit in holding there is a strong but rebuttable presumption in favor of a grand jury subpoena, but stressed the presumption may only be rebutted in the rarest and most important of cases.

EVIDENCE

Proof Of Willfulness

In *United States v. Bishop,* 01-50266, 2002 U.S. App. LEXIS 10190 (9th Cir., May 30, 2002), the Ninth Circuit affirmed the defendants' convictions for conspiring to defraud the IRS in violation of 18 U.S.C. § 371 and attempting to evade personal income taxes in violation of 26 U.S.C. § 7201. The main issue at trial, and on appeal, was whether the defendants' conduct was willful. Specifically, the defendants argued (1) the district court erred in relying on an objective standard for good faith in determining willfulness, and (2) the district court improperly excluded, as hearsay, proffered testimony about willfulness. The defendants caused disbursements to themselves from their Subchapter S corporation to be reflected on the business's books and tax returns as "shareholder loans." The government argued the "sharholder loans" were, in fact, distributions of income and noted there were no promissory notes indicating an obligation to repay, no repayment schedules, no personal collateral, and no authorization for the loans in the corporate minutes.

The defendants contended they could not have been willful in treating the money they received from their corporation as "shareholder loans" since they relied on the professional advice of their accountant, who subsequently died before trial. The Ninth Circuit rejected this claim, holding, even after *Cheek v. United States*, 498 U.S. 192, 201 (1991), the reliance-on-accountant defense still requires defendants to make full disclosure of all relevant information to the professional. The defendants did not challenge the district court's factual findings that they failed to disclose all the relevant information to the professionals on whose advice they relied. The Ninth Circiuit held because the district court applied the correct legal standard to defendants' reliance defense, and the defendants did not challenge the factual findings underlying the decision, the district court

did not err on this issue.

The Ninth Circuit also rejected the defendants' claim that statements they made to the second accountant, who succeeded the deceased accountant, about advice received from the deceased accountant qualified as "state of mind" testimony, which is an exception to the rule against hearsay under Federal Rule of Evidence 803(3). Statements of memory used to prove the fact remembered are excluded from the "state of mind" exception. In any event, the Ninth Circuit concluded any error in excluding the second accountant's testimony about what defendants told him they intended to do or why they intended to do it, was harmless. Such testimony would be self-serving and duplicative of defendant's own testimony about their state of mind. Although the testimony might have been helpful in a jury trial, in a bench trial as here, it would have been cumulative and irrelevant.

PRIVILEGES

Attorney-Client Privilege Does Not Extend To Non *Kovel* Accountants

In *Cavallaro v. United States,* 284 F.3d 236 (1st Cir. 2002), petitioners sought to quash a third party administrative summons issued to petitioners' accounting firm seeking documents the firm created or received while working on estate tax and corporate merger issues with petitioners' attorneys. Petitioners' argued the accounting firm was assisting their attorneys in tax planning, thus they would be covered under the attorney-client umbrella espoused in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). They also argued the documents were protected because they fell within the common interest rule. *Kovel* holds the presence of an accountant, whether hired by the lawyer or by the client, during a communication between a client and an attorney does not destroy the attorney-client privilege when the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer.

Rejecting petitioners' arguments, the First Circuit held the record did not show any party hired the accounting firm to assist the law firm in providing legal advise and, therefore, the attorney-client privilege did not extend to the accounting firm. Further, the petitioner's second argument also failed because the common interest rule presumed a valid underlying privilege, which did not exist in this case. The common interest rule is typically understood to apply when two or more clients consult or retain an attorney on particular matters of common interest, such that the communications between each of them and the attorney are privileged against third parties. The First Circuit noted the common interest rule is an exception to the general rule the attorney-client privilege is waived when privileged information is disclosed to a third party.

Note: After July 22, 1998, there is a limited privilege for accountant-client communications codified at 26 U.S.C. § 7525; however, § 7525(a)(2) provides the privilege is limited to non-criminal tax matters before the Service or in a federal court.

MONEY LAUNDERING

Money Laundering As A Continuing Offense

In *United States v. Moloney,* 287 F.3d 236 (2nd Cir. 2002), Moloney argued his conviction, following a guilty plea to money laundering in violation of 18 U.S.C. § 1956(a)(1)(A), must be vacated because § 1956 does not create a continuing offense and, therefore, each transaction must be charged as a separate crime. Moloney's argument was based " . . . on whether an indictment charging money laundering as a continuing offense states an offense which is cognizable, in the sense of charging conduct made illegal by statute."

Affirming Moloney's conviction, the Second Circuit held " . . . criminal charges may aggregate multiple individual actions that otherwise could be charged as discrete offenses as long as all of the actions were part of a single scheme." The holding was based on the court's general rule which favors " . . . allowing a common scheme to be treated as part of a single offense." The court recognized other federal courts have held § 1956 does not create a continuing offense. The court pointed out, however, " . . . those cases lack the Second Circuit's general presumptions in favor of allowing a common scheme to be treated as part of a single offense." Further, the court noted the legislative history does not undercut this presumption of allowing multiple acts that are part of a single scheme to be charged as a single count. Thus, the court concluded because no convincing reason exists to deviate from it's general rule, a single money laundering count can encompass multiple acts provided each act is part of a unified scheme.

SENTENCING

Relevant Conduct

In *Leonard v. United States*, 289 F.3d 984 (7th Cir. 2002), Leonard submitted her own fraudulent claim for a tax

refund and assisted five other individuals prepare and submit ten false income tax returns claiming excessive refunds. For each of these returns, including her own, Leonard prepared and included an altered or completely fictitious Form W-2. After being indicted on eleven counts, Leonard entered a guilty plea to the count related to her own return and the district court granted the government's motion to dismiss the remaining counts. At sentencing, the district court found Leonard's fraudulent filing of tax returns on behalf of others "relevant conduct"

and Leonard's sentence was adjusted accordingly. On appeal, Leonard argued her sentence of 30 months was improper for two reasons.

First, Leonard argued the district court erred when it considered the tax fraud she committed on behalf of others as "relevant conduct." Pursuant to § 1B1.3(a)(2), "relevant conduct" includes any acts or omissions that were "part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 9(A) defines "common scheme or plan" as two or more offenses "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." In Leonard's case, all the financial transactions in which Leonard was involved established a "common scheme or plan." Each transaction involved the filing of false tax returns seeking a refund and the IRS was a common victim in each instance. Leonard's *modus operandi* was also the same for each transaction in that she attached an altered or falsified Form W-2.

Secondly, Leonard argued the district court acted contrary to the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by enhancing Leonard's sentence based on prior tax offenses which were not proven to a jury beyond a reasonable doubt. The Seventh Circuit rejected this argument, stating it is well settled in the Seventh Circuit that *Apprendi* does not apply in cases where the actual sentence imposed is less severe than the statutory maximum. Here, the statutory limit was five years and the sentence imposed, even after the "relevant conduct" adjustment was only 30 months. Accordingly, the Seventh Circuit rejected Leonard's arguments and affirmed the district court's inclusion of relevant conduct in its sentence.

Abuse Of Trust And Restitution

In *United States v. Morris,* 286 F.3d 1291 (11th Cir. 2002), Morris and four co-conspirators fraudulently obtained investors' funds and then used bank wire transfers to conceal the funds and promote the investment fraud. Morris, a non-practicing attorney, pleaded guilty to conspiracy to defraud and conspiracy to launder money. At sentencing, a two level enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3 was recommended because Morris's co-conspirators told the victims Morris was an attorney and because Morris had used an attorney trust account to launder the money.

The Eleventh Circuit reversed the application of the enhancement because the government failed to show Morris not only held a place of public or private trust but also abused that position in a way that significantly facilitated the offense. The government argued the enhancement should apply because Morris's co-conspirators represented Morris as an attorney and trader to the victims. The Eleventh Circuit found the co-conspirators statements could not constitute an abuse of trust by Morris since Morris did not represent himself as occupying a position of trust to the victims. The guideline requires the enhancement be based on each defendant's culpability. There was also no evidence to show Morris acted as an attorney on behalf of any of the victims. In regard to the attorney trust account, the court noted there was no commingling of the fraudulent funds with non-related funds and none of the victims even knew the account existed; therefore, there was no abuse of a position of trust. The Eleventh Circuit interpreted the enhancement as requiring more than a mere showing the victim had confidence in the defendant; rather, the government must show more of a fiduciary function or relationship between the attorney defendant and the victims.

Although the court reversed the enhancement, it affirmed the order of restitution. Morris was told of the fine but not the restitution. Although Fed. R. Crim. P. 11(c) requires the court to explain a defendant's liability for both fines and restitution, the Eleventh Circuit noted the restitution order was considerably less than the fine Morris was given notice of at the plea.

Departure

In *United States v. Reinke,* 283 F.3d 918 (8th Cir. 2002), Reinke was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. At sentencing, the district court departed downward sentencing Reinke to six months in a community facility, two years probation and three years supervised release. The district court specifically found Reinke's case fell within the heartland of the appropriate guideline prior to departing downward. The district court based the downward departure on Reinke's lack of pecuniary gain, her lesser role in offense and expressed remorse. The government appealed arguing the downward departure was not appropriate because the district court found Reinke's case fell within the heartland of the applicable guideline, and even without that finding,

the district court did not identify any basis for departure that was not adequately accounted for in the Sentencing guidelines.

Vacating the sentence, the Eighth Circuit held the departure could not be affirmed on the basis provided by the district court. The court noted "[a]ccording to the Sentencing Commission and *Koon*, departures are only appropriate when a case falls outside the heartland." *See Koon v. U.S.*, 518 U.S. 81 (1996). Thus, the district court's decision to depart downward was hampered by its finding that Reinke's case fell within the heartland of the guideline. Further, the court found in order to determine whether a case falls outside the heartland, the district court must articulate the factors that make the case atypical. If those factors are already taken into account by the Sentencing guidelines, the district court may not base a departure on them unless the factors are present to an exceptional degree or in some unusual form. In this case, the district court's decision was improper because it made no findings as to the extraordinariness of any factor, and found that case fell within heartland of guidelines.

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