

Criminal Tax Bulletin

*Department of Treasury
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SUPREME COURT CASES

Involuntary Medication In Criminal Trials

In *Sell v. United States*, 123 S.Ct. 2174, the Supreme Court found the involuntary administration of antipsychotic drugs to criminal defendants solely for trial competency purposes may be permissible without violating a defendant's Fifth Amendment right to reject medical treatment.

Sell, a dentist, was indicted on charges of mail and Medicaid fraud, money laundering, and conspiracy to kill a witness and an FBI agent. The court found Sell, who had a long history of mental illness, incompetent to stand trial and hospitalized him for treatment. When Sell refused antipsychotic medication, the prison medical staff sought authorization to administer drugs involuntarily. The federal magistrate approved the involuntary administration on the grounds Sell was a danger to himself and others without medication. The district court and the Eighth Circuit upheld the magistrate's decision to use forcible medication but *only* for trial competency purposes. The courts rejected the lower court's belief Sell posed any danger to himself or others.

The Supreme Court found the Eighth Circuit erred in permitting Sell's forcible medication solely for trial competency reasons because the requisite factors were not present. Involuntary medication used exclusively for trial competency purposes is only permissible when treatment is medically appropriate and substantially unlikely to have side effects that may undermine the fairness of a trial, less intrusive alternatives have been considered and rejected, and treatment is necessary to significantly further important governmental trial related interests. The governmental interests at stake must be important and involuntary medication must be necessary to significantly further these interests. In addition, forcible medication must be substantially more likely to render a defendant competent

to stand trial without interfering significantly with a defendant's ability to communicate with counsel, express emotions, or react to trial developments. Since none of these critical factors were addressed, the Eighth Circuit's judgment was reversed and the case was remanded.

The Court also noted, when forcible medication is requested for reasons other than trial competency (e.g. defendant is gravely disabled or poses a danger to himself or others), the relevant tests outlined in *Washington v. Harper*, 494 U.S. 210 (1990) and *Riggins v. Nevada*, 504 U.S. 127 (1992) should be applied.

TITLE 26 AND TITLE 26 RELATED CASES

Summonses Issued For Criminal Purposes

In *Scotty's Contracting and Stone Inc. v. United States*, 326 F.3d 785 (6th Cir. 2003), the Six Circuit held the IRS's summons authority includes power to issue summonses for the purpose of investigating criminal offenses. In conjunction with the criminal tax investigation of the owner of Scotty's Contracting ("Scotty's"), an IRS special agent issued summonses to two accountants who worked for Scotty's. Among other things, the summonses requested testimony regarding Scotty's tax records. Scotty's filed a motion seeking to quash the summonses arguing they were issued in bad faith because their sole purpose was to aid the criminal investigation of Scotty's owner. Scotty's also claimed they would violate Kentucky's accountant-client privilege. In response, the government moved for summary enforcement of the summonses. The district court denied Scotty's motion to quash and granted the government's motion for summary enforcement. With a lack of Sixth Circuit precedent, the district court relied upon opinions from other circuits which concluded the IRS may properly issue summonses for the sole purpose of a criminal investigation. Scotty's appealed the district court's holding.

Affirming the district court, the Sixth Circuit held the IRS may validly issue a summons under 26 U.S.C. § 7602, as amended in 1982, for the sole purpose of a criminal investigation. In 1982, Congress amended § 7602 in two ways significant to this appeal. First, Congress added a fifth purpose for which the IRS could issue a summons. The statute, as amended, provides the IRS may issue a summons for “the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.” 26 U.S.C. § 7602(b). Second, Congress explicitly dictated when the IRS’s summoning authority ends: when the IRS refers a criminal case to the Department of Justice. 26 U.S.C. § 7602(d)(1).

The Sixth Circuit held, according to the plain language of the amended statute, the IRS’s authority to issue summonses for purposes of investigating “any offense” relating to the tax code is extinguished only when the investigation is referred to the Department of Justice. “The statute does not say that the IRS may issue summonses for the purpose of investigating any offense, unless the sole purpose is to investigate a criminal offense.” This decision is consistent with decisions of the Second, Third, Eighth, Tenth and Eleventh Circuits. The Sixth Circuit also noted the Supreme Court has held the IRS’s summoning authority under § 7602 is not limited by any state law accountant-client privilege. See *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

Hyde Amendment

In *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003), the Sixth Circuit defines the standard defendants must meet to obtain a Hyde Amendment attorney fees award. The Hyde Amendment, 18 U.S.C. § 3006A, authorizes award of attorneys’ fees and court costs to a criminal defendant “where the court finds that the position of the United States was vexatious, frivolous, or in bad faith.”

Heavrin was originally indicted on 14 counts of bankruptcy fraud. The district court granted Heavrin’s motion for acquittal on all counts and his request for fees pursuant to Hyde, finding three of the four substantive counts Heavrin was charged with frivolous. The government appealed.

In determining the standard for Hyde Amendment attorney fees, the court used Hyde Amendment’s civil counterpart, the Equal Access to Justice Act (“EAJA”), because the Hyde Amendment expressly states it is subject to the procedures and limitations of the EAJA. Since the EAJA analyzes the government’s position as a whole rather than on a count by count basis, the court decided the same

holistic approach should be used under Hyde Amendment. Thus, the court may find some merit in the government’s case and still award fees if, on the whole, the government’s position was vexatious, frivolous, or in bad faith. Likewise, the court may find part of a case frivolous and still not award fees if the government’s position, on the whole, was not vexatious, frivolous, or in bad faith.

The court then provided concrete definitions for vexatious, frivolous and bad faith. Adopting definitions used by the Fourth and Eleventh Circuits, the court held vexatious “. . . is defined as without reasonable or probable cause or excuse,” bad faith “. . . implies the conscious doing of a wrong because of dishonest purpose or moral ambiguity” and frivolous means “. . . lacking a reasonable legal basis where the government has little prospect of attaining sufficient evidence by the time of trial.” The attorney fees awarded were vacated and the case was remanded so the district court could make a determination using the proper legal standard.

***Kastigar* Hearing Not Required In Regard To Testimony Given Before A Louisiana Grand Jury**

In *United States v. Martin*, 2003 U.S. App. LEXIS 10749 (5th Cir. May 30, 2003) Martin was convicted of violating 26 U.S.C. §§ 7201 and 7206(1) and 18 U.S.C. § 371. Martin was a businessman who owned several businesses in the offshore oil servicing industry. Over a span of about four years, Martin successfully diverted over \$500,000 of income through a business associate’s company. The tax investigation utilized information which came from the transcript of Martin’s testimony, where he was a “non-target” witness before a Louisiana grand jury. Since Martin was a non-target witness, he argued his testimony was immunized under La. Code Crim. Proc. Article 433.A(2) and, therefore, the district court should have held a *Kastigar* hearing requiring the government to show a source other than his grand jury testimony for evidence used at trial. Article 433.A(2), in pertinent part, states, “. . . [a]ny evidence or testimony obtained under this Subsection from a witness who later becomes a target shall not be admissible in a proceeding against him.”

The Fifth Circuit reviewed the language in the statute and decided Article 433.A(2) only applied to the evidence or testimony from a non-target witness who becomes a target of the “. . . grand jury before which he was called to testify.” No evidence existed to suggest Martin became a target of the state grand jury and, thus, he failed to come

within the meaning of Article 433.A(2). Accordingly, a *Kastigar* hearing was not warranted and the district court's holding was affirmed.

FORFEITURE

Timeliness

In *United States v. Ninety-Three Firearms (Short)*, 330 F.3d 414 (6th Cir. 2003), the Sixth Circuit upheld a grant of summary judgment for the government holding prosecutors did not violate the statute of limitations pursuant to 18 U.S.C. § 924(d)(1) or Short's due process rights despite waiting nearly five years to seek judicial forfeiture of the defendant's firearms.

In 1994, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") seized 93 firearms and ammunition from Short's home. One month later, ATF initiated administrative forfeiture proceedings for the firearms. Short requested return of the property in a petition for remission and mitigation which was denied. He was convicted and sentenced nearly a year later. In 1999, the government instituted a judicial forfeiture action under § 924(d)(1). Short alleged the judicial forfeiture action was untimely pursuant to § 924(d)(1) and the delay violated his due process right to a prompt hearing.

Section 924(d)(1) provides "[a]ny action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure." The court interpreted "any" to mean "either/or." Since the administrative proceeding was commenced within 120 days, the judicial proceeding did not also have to satisfy the 120 day requirement. It makes sense to await the outcome of an administrative proceeding before instituting a judicial proceeding since a claimant may prevail in a petition for remission or mitigation and, judicial proceedings are more costly. Also, § 924(d)(1) expressly incorporates provisions of the Internal Revenue Code including the five year statute of limitations provision for bringing judicial forfeiture actions under 26 U.S.C. § 7327. Since the judicial proceeding was instituted within the five year period and the administrative proceeding was timely filed, there was no statute of limitations violation.

The court instituted a four factor balancing test to determine the due process issue: length of the delay, reason for the delay, claimant's assertion of his right, and prejudice to the claimant. The court found no violation of due process because the filing delay could be attributed to the government's wait for a final determination in Short's

criminal proceeding among other factors.

Commencement of Forfeiture Actions

In *United States v. \$8,221,877.16*, 330 F.3d 141 (3rd Cir. 2003), the Third Circuit ruled an action to forfeit substitute assets under 18 U.S.C. § 984 commences with the actual filing of the forfeiture action not the seizure of assets.

In January 1999, the DEA seized over \$8 million from bank accounts belonging to Kesten Development Corporation ("Kesten"). Kesten was allegedly involved in a drug money laundering conspiracy. In June 2000, the government initiated a forfeiture action under 18 U.S.C. §§ 981, 984.

Section 981 allows for forfeiture of property involved in money laundering offenses as long as the action is commenced within five years of the offense. In addition, the government must be able to trace the seized property directly to the offense giving rise to the forfeiture. However, fungible property, such as Kesten's seized bank account funds, is easy to move and hard to trace. Where traceability becomes too difficult, the government may initiate a forfeiture action under § 984 which allows an action for untraceable property as long as the action is commenced within one year of the offense.

Kesten filed a motion to dismiss based on the one year statute of limitations in § 984, arguing the government failed to timely commence the forfeiture action. The district court dismissed Kesten's motion reasoning seizure of the funds alone was sufficient to commence the action and granted the forfeiture.

On appeal, the Third Circuit ruled the statute of limitations requirement under § 984 had not been met because seizure of property alone does not commence a forfeiture action. Fed. R. Civ. P. 3 expressly states a civil action is commenced by filing a complaint with the court. The government did not file a formal action within the one year period. The case was reversed and remanded. On remand, the district court must determine whether the government

can adequately trace the seized property pursuant to the requirements under § 981. If so, the government has a cause of action under § 981 since the action was filed within five years of the offense.

Burden Of Proof

In *United States v. Gasanova*, 2003 U.S. App. LEXIS 10265 (5th Cir. May 22, 2003), the Fifth Circuit affirmed the district court's conviction of the Gasanovas (husband and wife) and held the government's burden of proof for criminal forfeiture is preponderance of the evidence. After being convicted of smuggling aliens into the United States, the government sought the forfeiture of the Gasanovas' home and vehicles pursuant to 8 U.S.C. § 1324(a)(2). The Gasanovas appealed, contending the district court applied the wrong burden of proof in the forfeiture proceeding by requiring the government prove by only a preponderance of the evidence that the property at issue was connected with the offenses.

The Fifth Circuit had not considered this issue before and, therefore, looked to other circuits which had decided the question. The court acknowledged in past decisions, a proof greater than the preponderance of the evidence was required when particular facts can dramatically alter the sentencing options of the court to the detriment of the defendant. The court, however, recognized the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held heightened evidentiary standards should be applied only to those facts which expose a defendant to punishment beyond the statutory minimum of the charged offense. In this case, forfeiture of all the property related to the charged conduct is prescribed in the statutes encompassing the offense. As a result, the court concluded the statutorily prescribed forfeiture is warranted upon a showing of a preponderance of the evidence.

MONEY LAUNDERING

Money Laundering Conspiracy

In *United States v. Bolden*, 325 F.3d 471 (4th Cir. 2003), the Boldens, husband and wife, were convicted of filing false returns, money laundering and other offenses relating to a broad Medicaid fraud scheme facilitated through the operation of their nursing home. The Boldens manipulated Medicaid's reimbursement system to inflate Medicaid payments which they used for their personal benefit. Medicaid made initial "prospective payments" which required each facility to file an annual cost report detailing both the direct and indirect costs a nursing facility actually

incurred. If actual direct costs were less than the direct cost component of the prospective payment, the facility had to repay the difference to Medicaid. The Boldens' scheme increased direct costs reported in the cost report to eliminate Medicaid overpayments and to generate additional payments from Medicaid. The Boldens appealed multiple aspects of their money laundering and related money laundering conspiracy convictions.

Rejecting all their arguments, the Fourth Circuit held the Boldens' underlying fraud scheme produced proceeds through Medicaid's prospective payments from the financial transactions on which their money laundering convictions were based. Further, these transactions were designed to conceal the prohibited transactions from Medicaid and compensate the coconspirator for his part in the scheme, encouraging his continued participation. The court also found certain purchases provided for partial deliveries which provided an aura of legitimacy to the payments allowing further concealment of the scheme. The court found this was enough to convict them of promotion and concealment money laundering.

Further, the court held 18 U.S.C. § 1956(h), the money laundering conspiracy statute, does not require an overt act to be alleged or proven nor do details about the nature of the unlawful activity underlying the character of the proceeds need to be alleged. In addition, allegations of the specific type of money laundering the Boldens conspired to commit did not need to be alleged or proven since a multiple object conspiracy was alleged.

INVESTIGATIVE TECHNIQUES

Audio and Video Surveillance

In *United States v. Corona-Chavez*, 328 F.3d 974 (8th Cir. 2003), the Eighth Circuit affirmed the district court's denial of Corona-Chavez's motion to suppress video and audio surveillance evidence used to obtain a drug conviction against him. Corona-Chavez had arranged for a co-defendant to deliver drugs to him at a hotel room. The co-defendant was stopped by police at a rest stop while transporting the drugs, and agreed to participate in a controlled delivery of the drugs to Corona-Chavez. Police installed the co-defendant in a hotel room with video and audio surveillance, which included a body wire and a video camera with audio. Chavez-Corona received directions over the hotel room telephone from the co-defendant and arrived at the hotel room shortly thereafter. The telephone recording was introduced into evidence at trial. The district court denied Corona-Chavez's motion to suppress, adopting the underlying magistrate judge's finding the co-

defendant consented to the recording.

The Eighth Circuit agreed, noting Title I of the Electronic Communications Privacy Act of 1986 provides interception of a communication is lawful if a party to the communication has given prior consent to the interception. The court reasoned the co-defendant's participation in the telephone call knowing the call would be intercepted supported a finding of implied consent to the interception. Since the co-defendant was required to place a device into her ear to record the conversation, the court found the co-defendant was aware the conversation was being intercepted. Similarly, the co-defendant consented to the videotaping of the hotel meeting, the audio portion of which was intercepted permissibly like the telephone call. Finally, the court examined the admissibility of the video recording under Fourth Amendment standards. Specifically, the court found Corona-Chavez had no reasonable expectation of privacy in a hotel room because he was there for a commercial rather than a social purpose, and because he assumed the risk a party to the conversation might divulge or record the conversation. The court further noted Corona-Chavez was not videotaped while alone or alone with a different co-defendant; rather, he was videotaped only while meeting with the co-defendant who had consented to the taping. The court affirmed the conviction.

SENTENCING

Sophisticated Means

In *United States v. Hart*, 324 F.3d 575 (8th Cir. 2003), the Eighth Circuit reversed the district court's application of a two level enhancement for sophisticated means and remanded the case for resentencing. Hart operated a bail bond company and sold used cars through a corporation which conducted business under the name Midtown Motors. Hart also referred car buyers to a luxury car dealership, Plaza Motors, and received commission checks for the referrals. Hart did not keep records of the commission checks, but did provide Plaza Motors with a tax identification number for reporting purposes. Plaza Motors reported all the issued commission checks to the Service on Forms 1099. Hart endorsed the checks to a third party who acted as a private banker for Hart, and the checks were used to pay Hart's personal expenses, including his mortgage, personal loans and credit card bills. Hart failed to file income tax returns or pay federal income tax on his personal income and was indicted on two counts of income tax evasion in violation of 26 U.S.C. § 7201. He pleaded guilty to one count pursuant to a plea agreement stipulating the commission checks were personal income. The district court included the checks as personal income in its tax loss calculation and found Hart's failure to maintain records of the checks, concealment of the checks by directing them to

be paid to a corporation, and transfer of the checks through a private banker supported a two-level enhancement for sophisticated means. Hart objected to the enhancement.

The Eighth Circuit agreed with Hart, stating the enhancement applies only when conduct is especially complex or intricate, and Hart's failure to keep records did not rise to that level. Hart provided Plaza Motors with a tax identification number for the checks and personally endorsed the checks. The checks were reported to the government by Plaza Motors on Forms 1099, and the Service conceded to their receipt at the sentencing hearing. Also, the company to which the checks were made payable was legitimate and directly traceable to Hart. In deciding to remand, the court stated, "[t]his is not a case where a lack of record keeping can be combined with other factors to find sophisticated concealment of an offense. The district court erred in applying the enhancement because of a lack of record keeping, standing alone, evinces no sophistication, and the other factors considered by the district court did not conceal the offense." *Id.*, *12-13.

Mandatory Consideration Of Relevant Conduct

In *United States v. Hayes*, 322 F.3d 792 (4th Cir. 2003), the Fourth Circuit held relevant conduct *must* be considered during sentencing. Relevant conduct refers to all acts that "[a]re part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(1)(B)(2). In 2001, Hayes was found guilty of 24 counts of tax fraud and was sentenced to 30 months imprisonment. Hayes appealed his conviction and the government cross appealed on the grounds the district court erred in failing to consider Hayes' relevant conduct during sentencing.

Hayes' relevant conduct consisted of an additional 63 fraudulent returns for which he was not indicted. The 24 indicted returns contained inflated deductions which cost the government \$75,814, while the 63 non-indicted returns resulted in additional losses of \$199,017. Both loss amounts were utilized in the presentence report to compute the sentencing range. However, at sentencing the district court granted Hayes' objection to the inclusion of the non-indicted loss amount and the \$199,017 was not included in the final sentencing determination. The district court felt consideration of relevant conduct was not necessary since the indicted amount alone provided ample punishment to reflect the gravity of the offense.

Granting the government's cross appeal, the Fourth Circuit held district courts may not exercise discretion to determine what constitutes an appropriate sentence without regard to

the sentencing guidelines. “The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional.” *Witte v. United States*, 515 U.S. 389, 402 (1995). The guidelines specifically state “a defendant’s offense level ordinarily *shall* be determined on the basis of relevant conduct.” § 1B1.3(a). Accordingly, the inclusion of relevant conduct in sentencing is not a choice, it is a requirement. The case was remanded for resentencing.

Loss Calculation, Vulnerable Victim And Abuse Of Trust

In *United States v. Bolden*, 325 F.3d 471 (4th Cir. 2003), Mr. and Mrs. Bolden, were convicted of several offenses resulting from a complex Medicaid fraud scheme facilitated through the operation of their nursing home. The Boldens appealed multiple aspects of their sentence including their fraud loss calculations, grouping and Ms. Bolden’s vulnerable victim and abuse of trust enhancements.

The Fourth Circuit held the fraud and money laundering convictions were properly grouped together pursuant to USSG § 3D1.2(d) since the fraud and money laundering counts involved substantially the same harm and were part of a continuous, common scheme to defraud Medicaid. The court held the district court’s findings on the fraud losses attributed to Mr. Bolden were inadequate and noted, irrespective of the verdict, the district court was obliged to make individualized findings on the fraud loss and

d e t e r m i n e the scope of the criminal activity Mr. Bolden agreed to jointly undertake. Without such findings, the court found there were insufficient factual assertions to justify i n c l u s i o n of all the lease transactions in the fraud calculation. The court held the fraud loss calculation as to Mrs. Bolden was correct, except for the inclusion of missing invoice costs. The government failed to provide any evidence as to why the missing invoices were fraudulent while Mrs. Bolden provided testimonial affidavits supporting the validity of at least some of the missing invoices. Accordingly, the government failed to meet its burden as to these aspects of the fraud loss calculations.

The court held Mrs. Bolden’s vulnerable victim enhancement was improperly applied since, n o t w i t h s t a n d i n g the victims were elderly and suffering from physical and mental ailments, there was no evidence their vulnerability facilitated Mrs. Bolden’s offense of conviction.

Finally, the court held Mrs. Bolden’s sentence was p r o p e r l y enhanced for having abused her position of trust she occupied as to Medicaid which entrusted her with thousands of dollars which were to be paid to Medicaid’s beneficiaries. This abuse contributed “... significantly to the commission and concealment of the fraud scheme.”

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