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MONEY LAUNDERING

Fifth Circuit Applies *Santos* and *Cuellar* to Laundering of Proceeds from Unlawful Distribution of Controlled Substances

In *United States v. Brown*, No. 05-20997, 2008 WL 5255903 (5th Cir. December 18, 2008), the Fifth Circuit affirmed the money laundering convictions of several pharmacists who conspired with doctors to distribute medicines under cover of false prescriptions.

The appellants owned and operated independent pharmacies that filled large numbers of fraudulent prescriptions for painkillers. The prescriptions were written by doctors and sold to drug dealers and addicts, who would have the prescriptions filled at the appellants' pharmacies and would then consume the drugs or resell them on the streets at a higher price. The appellants deposited cash earned from the drug sales into pharmacy bank accounts, and the money was subsequently withdrawn from those accounts to purchase more drugs.

At trial (following an earlier trial that ended in a hung jury), the appellants were convicted of conspiracy unlawfully to distribute controlled substances, unlawful distribution of controlled substances, money laundering promotion (18 U.S.C. § 1956(a)(1)(A)(i)), money laundering concealment (18 U.S.C. § 1956(a)(1)(B)(i)) and money laundering spending (18 U.S.C. § 1957). The appellants were ordered to pay monetary penalties and were sentenced to terms of imprisonment ranging from 120 to 151 months.

On appeal, the appellants made a number of evidentiary, sentencing and other challenges to the various convictions. They challenged their money laundering promotion convictions in part on the grounds that the Supreme Court's decision in *United States v. Santos*, 128 S.Ct. 2020 (2008), rendered the government's evidence of "proceeds" insufficient.

Although it declined to decide the precedential value of the 4-1-4 opinion in *Santos*, the Fifth Circuit held that, even under the plurality's stringent interpretation of the term "proceeds" in the money laundering statute (*i.e.*, its holding that "proceeds" means "profits" when there is no legislative

history to the contrary), the appellants' challenge failed. The court noted the government had introduced evidence that the appellants' drug sales were profitable even after their gross receipts were reduced by expenses. Based on this evidence, the court held that the government had sufficiently shown the money laundering transactions involved "proceeds" of illegal drug sales.

With respect to the money laundering concealment convictions, the Fifth Circuit noted that under *Cuellar v. United States*, 128 S.Ct. 1994 (2008), the government needed to show that concealment of the nature of the funds was the goal of the transactions at issue. The court held that the government's evidence was sufficient to meet the standard articulated in *Cuellar*: "By their concealment contrivances, the defendants intended to and did make it more difficult for the government to trace and demonstrate the nature of these funds. . . . The transactions were in cash so that they were not easily tracked. Most deposits were below ten thousand dollars so as to avoid setting off any reporting requirements that might then lead to unwanted attention concerning the funds' nature." 2008 WL 5255903 at *12. The court concluded that the government had produced sufficient evidence to support the concealment charges.

Accordingly, the court affirmed the appellants' money laundering convictions.

SEARCH AND SEIZURE

Second Circuit Holds Warrantless Inventory Search of Impounded Vehicle Satisfied Supreme Court Requirements

In *United States v. Lopez*, 547 F.3d 364 (2d Cir. 2008), the Second Circuit affirmed the district court's denial of the defendant's motion to suppress evidence found in a warrantless search of his impounded car, on the ground the Supreme Court's requirements for inventory searches had been satisfied.

Following the arrest of Ricardo Lopez ("Lopez") for driving while intoxicated, police officers conducted a warrantless inventory search of his impounded car. During the search, they found cocaine, cocaine-related

paraphernalia and a loaded .38 caliber gun. The officers created an inventory list of the contents of the car that specifically referenced certain items and included a general catch-all description of items the officers considered to be of no substantial value.

Prior to trial, Lopez moved to suppress the evidence recovered from the car during the inventory search. He argued that the search could not be justified as an inventory search because the officers did not prepare an inventory list of the items found and did not adhere to any prescribed standard procedure for the conduct of inventory searches.

At the combined bench trial and evidentiary hearing, one of the officers testified that it was her practice to itemize objects in an inventory list only when they had some value. The other officer testified that it was her practice to make a complete list of returned property to be signed by the recipient. However, the second officer stated that the absence of a list of “noncontraband property” was not a violation of police regulations.

The district court denied the suppression motion and then found Lopez guilty of possession of cocaine with intent to distribute and possession of two firearms in furtherance of a drug trafficking crime.

On appeal, the Second Circuit affirmed. The circuit court explained that warrantless inventory searches are permitted because their purpose is not to detect crime or to serve criminal prosecutions, but rather to protect the owner’s property, to protect the police against spurious claims of lost or stolen property, and to protect the police from potential danger. However, the court acknowledged the Supreme Court’s requirement that inventory searches be conducted under standardized procedures in order to prevent them from becoming a ruse for “a general rummaging” to discover incriminating evidence.

The circuit court interpreted the Supreme Court’s requirement of standardized procedures to mean simply that police departments must adopt a standardized policy governing the search of impounded vehicles (*e.g.*, a policy that all impounded vehicles must be searched). In this case, because police department policy called for an inventory search of any car seized upon the arrest of an intoxicated driver, the circuit court held that the Supreme Court’s standards for the conduct of a warrantless inventory search were fully satisfied. Accordingly, the court affirmed the denial of Lopez’s suppression motion as well as his convictions.

EVIDENCE

Sixth Circuit Holds Evidence Need Not Be Suppressed Even Though Obtained in Civil Audit after “Firm Indications of Fraud”

In *United States v. Rutherford*, Nos. 07-2312, 07-2313, 2009 WL 248679 (6th Cir. February 4, 2009) the Sixth Circuit reversed the district court’s order suppressing evidence obtained during a civil examination after the IRS had “firm indications of fraud.” The circuit court held that, even though the IRS violated its internal policy by proceeding with the civil audit, the defendants’ due process rights were not violated.

Defendants Jon Rutherford and Judith Bugaiski (“Rutherford and Bugaiski”) were officers of Metro Emergency Services (MES), a non-profit tax exempt organization operating a homeless shelter for women. The IRS conducted a civil audit of MES, during which they conducted two rounds of interviews with the defendants. Following the second round of interviews, the revenue agents involved in the case determined that a criminal referral should be made. Two years after the referral, the defendants were charged with various criminal tax violations, including tax evasion, failure to pay employment taxes, making false returns, and conspiracy to defraud IRS investigators.

In a pretrial motion to suppress evidence and dismiss the indictment, the defendants claimed that the IRS agents improperly continued the civil examination after “firm indications of fraud” had emerged, thus violating IRS policy as stated in the Internal Revenue Manual. By doing so, the defendants argued, the IRS had violated their constitutional rights.

At trial, the district court found that firm indications of fraud had emerged by the time the IRS conducted its second round of interviews with the defendants. Based on this finding, the court held that incriminating statements made in the later stage of the civil investigation had to be suppressed because the continuation of discussions under a civil audit after firm indications of fraud had emerged violated the Due Process Clause of the Fifth Amendment.

On appeal by the government, the Sixth Circuit determined that the district court’s finding was not clearly erroneous, and it proceeded on the assumption that the IRS civil investigation was improperly continued. However, the circuit court concluded that merely failing to refer a case to the Criminal Division pursuant to the IRS’s internal policy is not sufficient to establish a violation of the defendants’ right to due process.

The circuit court explained that the Fifth Amendment is implicated only when a federal agent's conduct actually compels a person to speak against his will. With respect to Rutherford and Bugaiski, the court determined that there was no credible basis for concluding that their statements were coerced. The circuit court noted that the district court found no evidence that the agents deliberately disregarded the manual in order to mislead the defendants. Nor was there evidence in the record suggesting Rutherford and Bugaiski were familiar with the manual, or that they were lulled into a false sense of security about the nature of the charges they might face. The circuit court therefore concluded that the defendants' statements were given voluntarily and could be admitted into evidence without infringing upon their constitutional rights.

Accordingly, the circuit court reversed the district court's order granting the defendants' pre-trial motion to suppress evidence and remanded for further proceedings consistent with its opinion.

SENTENCING

Supreme Court Holds Sentencing Court Impermissibly Applied Presumption of Reasonableness to Guidelines Range

In *United States v. Nelson*, 555 U.S. ----, 2009 WL 160585 (January 26, 2009), the Supreme Court held that a sentencing court erred in presuming that a sentence within the Federal Sentencing Guidelines ("Guidelines") was reasonable.

Lawrence Nelson ("Nelson") was convicted of one count of conspiracy to distribute cocaine. The district court calculated Nelson's sentencing range under the Guidelines and imposed a sentence of 360 months in prison, which was the bottom of the range. During sentencing, the judge stated that under Fourth Circuit precedent, "the Guidelines are considered presumptively reasonable," so that "unless there's a good reason in the [statutory sentencing] factors..., the Guideline sentence is the reasonable sentence."

On appeal, Nelson argued that the district court impermissibly applied a presumption of reasonableness to his Guidelines range. The Fourth Circuit affirmed Nelson's conviction and sentence, noting that within-Guidelines sentences are presumptively reasonable and rejecting Nelson's argument that the district court's reliance on that presumption was error.

The Supreme Court granted certiorari, vacated the Fourth Circuit's decision and remanded the case for further consideration in light of its decision in *Rita v. United States*, 551 U.S. 338 (2007).

On remand, the Fourth Circuit again affirmed the district court's sentence. The circuit court acknowledged that, although an appellate court "may apply a presumption of

reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines,...the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." However, the Fourth Circuit upheld the sentence, finding that the district court did not treat the Guidelines as "mandatory" but rather understood they were only advisory.

The Supreme Court again granted certiorari and again reversed the circuit court's decision. The Court summarized the current state of the law as follows: "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson*, 2009 WL 160585 at *2 (emphasis in original). Finding that the sentencing judge impermissibly applied a presumption of reasonableness to Nelson's Guidelines range, the Court remanded for further proceedings consistent with its opinion.

Sixth Circuit Holds Sentencing Court May Consider Acquitted Conduct

In *United States v. White*, 551 F.3d 381 (6th Cir. 2008), the Sixth Circuit held that a sentencing court may take acquitted conduct into account when determining the offense level under the Federal Sentencing Guidelines ("Guidelines") so long as the resulting sentence does not exceed the jury-authorized United States Code maximum.

Roger Clayton White ("White") was convicted of armed robbery and possessing a firearm with the serial number removed but was acquitted of the other offenses with which he was charged. At sentencing, the district court applied the Guidelines' relevant-conduct principles and determined that uncontested evidence of shots being fired in the bank and at pursuing officers warranted certain offense-level enhancements: seven levels for discharging a firearm during the robbery, and three levels for assaulting a law enforcement officer during flight. The court justified using this acquitted conduct to enhance White's sentence by stating that he aided and abetted that conduct and that it was reasonably foreseeable to him that guns would be discharged in furtherance of the jointly-undertaken criminal activity. When addressing the 18 U.S.C. § 3553(a) factors, the sentencing court also noted that the use of firearms during the robbery placed the lives of several individuals in jeopardy and that White's offense was one of the most egregious bank robberies it had ever seen.

On appeal, White contended that the district court had improperly considered acquitted conduct. A panel of the Sixth Circuit reviewed his appeal and affirmed, but urged en banc consideration. Rehearing en banc was granted with respect to the question of whether the district court violated White's Sixth Amendment right to trial by relying on acquitted conduct for sentencing.

In its en banc opinion, the Sixth Circuit noted that, even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts may find facts using the preponderance-of-the-evidence standard. Therefore, the circuit court reasoned that a post-*Booker* sentencing court may consider acquitted conduct if it finds facts supporting that conduct by a preponderance of the evidence, so long as (1) the court determines the sentence under an advisory Guidelines regime, not a mandatory one; and (2) the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict.

Based on this analysis, the Sixth Circuit concluded that the district court properly exercised its authority in sentencing White and affirmed his conviction.

CRIMINAL TAX BULLETIN

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