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Criminal Tax Bulletin

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TITLE 26 AND TITLE 26 RELATED CASES

Publicly Available Material Not Subject To *Brady* Request

In *United States v. Willis,* 277 F.3d 1026 (8th Cir. 2001), Willis appealed his conviction on two counts of income tax evasion under 26 U.S.C. § 7201 to the Eighth Circuit, alleging, *inter alia,* the government failed to disclose *Brady* material. Before trial, Willis made a *Brady* motion requesting any exculpatory evidence, specifically any documents in the government's possession relating to a program known as "De-Taxing America." Willis testified at trial he had relied on materials from De-Taxing America in forming his belief he was not legally obligated to pay federal income taxes. Willis received no documents from the government regarding De-Taxing America although its founders had been investigated by the IRS and permanently enjoined from marketing the program.

To establish a *Brady* violation, a defendant must show the government withheld material evidence favorable to the defendant. Evidence is considered material only if there is a reasonable probability the result of the trial would have been different had the material been disclosed to the defendant. *United States v. Keltner,* 147 F.3d 662, 673 (8th Cir. 1998). The Eighth Circuit opined the De-Taxing America materials did not meet the materiality standard. Moreover, the court observed the injunction against the De-Taxing America program was a matter of public record at the time of trial and all the information Willis sought could have been obtained by him independently through basic research. Publicly available information which a defendant could have discovered through reasonable diligence cannot be the basis for a *Brady* violation. *United States v. Jones,* 160 F.3d 473, 479 (8th Cir. 1998). Additionally, the Eighth Circuit concluded evidence showing other people had followed the De-Taxing America program would not have created a reasonable probability of a different result at Willis' trial. Accordingly, The Eighth Circuit concluded there was no *Brady* violation and affirmed the judgment of the district court.

Hyde Amendment - Attorney's Fees

In *United States v. Braunstein*, 281 F.3d 982 (9th Cir. February 25, 2002), the Ninth Circuit held Braunstein's Hyde Amendment appeal for attorney's fee was timely filed pursuant to Fed. R. App. P. 4(a) and was meritorious based on the government's "frivolous" prosecution. The Hyde Amendment, enacted by Congress in 1998, provides courts may award attorney's fees to prevailing criminal defendants "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Before addressing the merits of Braunstein's appeal, the court considered the government's claim that the appeal was untimely. The issue concerning which statute of limitations (civil or criminal) applies was one of first impression in the Ninth Circuit. The Fourth, Fifth, and D.C. Circuits have held Hyde Amendment appeals are civil matters governed by Fed. R. App. P. 4(a), which requires a notice of appeal to be filed within 30 days after the judgement or order appealed from is entered. The Tenth Circuit has held Hyde Amendment appeals are criminal matters governed by Fed. R. Cr. P. 4(b), which requires a notice of appeal to be filed within 10 days.

The Ninth Circuit ultimately adopted the reasoning of the Fifth Circuit in *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000), which rejected the argument Hyde Amendment appeals are criminal matters for three reasons. First, a motion under the Hyde Amendment does not

implicate the movant's liberty interests requiring the short 10 day statute. Second, the Hyde Amendment adopted substantially all of the "procedures and limitations" of the Equal Access to Justice Act, which provides for recovery of attorney's fees in unjustified civil actions brought by the government. Third, the court noted the government cannot, without statutory authority, appeal from a decision in a criminal case, a practical problem which might arise from characterizing a Hyde Amendment appeal as a criminal matter.

GRAND JURY

Lawyer Cannot Be Forced To Tell Grand Jury What Client Said To IRS Special Agents In Interview

In *In re Grand Jury Subpoena Date Oct. 22, 2001 (John Doe A. v. United States)*, 282 F.3d 156 (2nd Cir. 2001), the Second Circuit held the work product doctrine shields a lawyer from having to tell a grand jury what her client said to government agents during an interview in the lawyer's presence if the testimony may be used to indict the client for previous criminal conduct. The attorney moved to quash a subpoena compelling her testimony before the grand jury regarding statements her client, a corporate general counsel, made in a meeting with two IRS special agents, arguing her testimony would violate the work product privilege. Initially, the subpoena sought a factual report of what her client said in the meeting with the special agents. However, during oral argument, the government stated it also intended to use the attorney's testimony to support charges the general counsel committed fraud prior to the meeting in which the attorney was representing him.

In reversing the district court, the court found a key factor in its decision was the government now intended to use the lawyer's testimony, in part, to prove the client committed the very crime for which the lawyer was representing the client at the time of the meeting. The court found the two uses of the attorney's testimony had an important bearing on the resolution of the work product privilege claim. The court concluded the use of the testimony for the purpose of proving the client committed a crime fell within the work product privilege's zone of privacy of a lawyer's preparation to represent a client in anticipation of litigation.

FORFEITURE

Commingled Funds

In *United States v. McGauley,* 279 F.3d 62 (1st Cir. 2002), McGauley obtained fraudulent refunds by returning large amounts of allegedly stolen merchandise to retail stores. As a result of her scheme, McGauley received 220 refund checks totalling $55,296 and deposited the checks into various bank accounts, some of which were held jointly with her parents. McGauley conducted financial transactions using the accounts that held the refund money. The transactions included transfers between banks and withdrawals of over $300,000. McGauley was convicted, *inter alia*, mail fraud and money laundering and was ordered to forfeit $243,087 pursuant to 18 U.S.C. § 982(a)(1). McGauley appealed the forfeiture order, arguing 18 U.S.C. § 982(a)(1) does not authorize forfeiture of legitimate funds commingled with proceeds of unlawful activity. The First Circuit disagreed.

In her appeal, McGauley argued the forfeiture of $243,087 was excessive, since the total amount of refund checks she received was $55,296; therefore, the legitimate funds commingled with the fraudulent funds were not subject to forfeiture under 18 U.S.C. § 982. The First Circuit affirmed McGauley's conviction as well as the forfeiture of the commingled funds, and noted the district court gave proper jury instructions regarding the forfeiture. In its instructions, the district court cited language from both the money laundering and forfeiture statutes, stating the commingling of legitimate and tainted funds may expose legitimate funds to forfeiture if the commingling was involved in concealing the nature or source of the tainted funds. In this case, the First Circuit held a reasonable jury could find the extensive series of financial transactions McGauley initiated within two weeks of the search of her home was designed to conceal the nature of the proceeds of her unlawful refund scheme. The court also noted the district court cited similar findings in the Fifth, Seventh and Tenth Circuits to support its decision

INVESTIGATIVE TECHNIQUES

Recordings Obtained From A Wiretap Order Admissible Despite Flaws In Application

In *United States v. Smart,* 278 F.3d 1168 (10th Cir. 2002), Smart appealed his conviction of bribing a government official, alleging taped telephone conversations obtained by F.B.I. agents through a wiretap should be suppressed because the government's authorization was materially flawed, rendering the recordings inadmissible. Federal agents may obtain authorization to use a wiretap to intercept telephone calls only if they are investigating certain serious offenses enumerated in the wiretap statute, 18 U.S.C. § 2516. In Smart's case, of the seven offenses listed in the government's application for a wiretap order, five of the offenses were clearly enumerated in the statute; however, the remaining two offenses were not enumerated offenses.

In considering whether a reference to non-enumerated offenses in a wiretap application invalidates the applicable order, the Tenth Circuit first determined the wiretap statute does not indicate "where investigators suspect both enumerated and non-enumerated offenses, wiretaps are impermissible." The Supreme Court made clear in *United States v. Giordano*, 416 U.S. 505 (1974), suppression is not required under the wiretap statute unless "there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." *Id.* at 527. The Tenth Circuit opined this standard is not met by a reference to non-enumerated offenses, or even incorrectly describing non-enumerated offenses as enumerated ones.

In Smart's case, the court noted the scope of the wiretap investigation was limited to only three enumerated offenses. While the court was troubled by the wiretap application's incorrect characterizations, the Tenth Circuit nevertheless ruled the incorrect description of suspected non-enumerated offenses as enumerated offenses, does not invalidate a wiretap order as long as the authorization to wiretap was limited to only enumerated offenses. Accordingly, the Tenth Circuit affirmed the district court's order denying Smart's motion to suppress the recordings.

SENTENCING

Tax Offense Relevant Conduct Allowed In Concurrent Sentence For Fraud Offense

In *United States v. Feola,* 275 F.3d 216 (2nd Cir. 2001), Feola was sentenced to concurrent terms of 24 months' imprisonment for bank fraud in violation of 18 U.S.C. § 1344, and 12 months' imprisonment for willfully failing to file a federal income tax return in violation of 26 U.S.C. § 7203. Between 1995 and 2000, Feola's wife embezzled nearly four million dollars. Joint tax returns filed by the Feolas for 1996 and 1997, failed to report the embezzled money and the couple did not file returns for 1998 and 1999. Additionally, the Feolas submitted a copy of a false 1998 tax return to a bank in support of a loan application.

Feola contended the district court erred by using conduct relevant to the tax offense to impose a sentence for the bank fraud charge in excess of the statutory maximum for the tax offense. Feola claimed (1) the court should not have considered the embezzlement income generated by his wife in calculating the tax loss attributable to him, and (2) his sentence was contrary to the Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding a fact must be alleged in an indictment and determined by a jury if it results in a sentence for an offense above the statutorily specified maximum), because conduct relevant to the tax offense resulted in a concurrent sentence on the fraud count exceeding the statutory maximum of 12 months for the tax offense. Rejecting Feola's first claim, the court found Feola's assertion he was unaware the funds the couple received were the result of embezzlement completely lacked credibility. Regarding the second claim, the court noted "[t]he propriety of permitting relevant conduct for one offense to enhance an aggregate sentence on multiple counts has already been upheld in this Circuit . . . ." In Feola's case, the Second Circuit opined "conduct relevant to the tax offense will result in an aggregate sentence greater than the statutory maximum for that offense. However, the aggregate sentence is imposed because appellant has committed two offenses, not because a statutory maximum for any one offense has been exceeded." Accordingly, the Second Circuit ruled Feola's sentence did not violate the rule articulated in *Apprendi* and affirmed the sentence imposed by the district court.

Organizer/Leader Of A Criminal Activity

In *United States v. Anthony*, 280 F.3d 694 (6th Cir. 2002), Anthony engaged in a scheme to remove federally required child-proof safety mechanisms from disposable cigarette lighters. He also orchestrated an effort to conceal his conduct from investigators. Anthony pleaded guilty to making a materially false statement to a federal investigator in violation of 18 U.S.C. § 1001. The sole issue on appeal was whether the district court erred by increasing Anthony's offense four levels pursuant to U.S.S.G. § 3B1.1(a), which states "if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by four-levels."

The Sixth Circuit noted two reasons why the number of participants did not warrant a four level increase. The first required the identity of the offense in question since established case precedent in the circuit stated only conduct which could lead to a criminal conviction could be factored into its sentencing analysis. Since the removal of safety devices was not a criminal offense, the participants involved in this activity were irrelevant to the sentencing analysis. The second was based on the distinction between "participants" and "non-participants." Cases applying this guideline uniformly count as participants persons who were (1) aware of the criminal objective, and (2) knowingly offered their assistance. There was nothing in the record to suggest the fifth participant, Anthony's attorney, was a knowing and willing participant in the cover up scheme.

Since the five participant test failed, the pivotal question in the case concerned whether the criminal activity was "otherwise extensive." The Sixth Circuit adopted the

Second Circuit's analysis which authorizes a four level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants. The final test is to identify individuals whose contribution was so essential to the criminal objective, they should be counted as a participant irrespective of their true criminal intent. Ultimately, the Sixth Circuit held the district court based their findings on a consideration of impermissible factors, and thus remanded the case and directed the district court to examine the respective contributions of the participants and non-participants to determine whether the combined effort was equal to five criminally responsible participants.

Untruthful Defendant Properly Denied A Government Motion For Substantial Assistance

In *United States v. Wolf,* 270 F.3d 1188 (8th Cir. 2001), Wolf pled guilty to conspiring to distribute methamphetamine and was sentenced to a ten year prison term. Wolf appealed his sentence arguing the government's refusal to move for a substantial assistance downward departure was unconstitutional or motivated by bad faith. Wolf argued the district court erred when it denied his presentence motion to compel the government to file a motion for a substantial assistance downward departure pursuant to U.S.S.G. § 5K1.1 or 18 U.S.C. § 3553(e).

At Wolf's sentencing, the government presented evidence Wolf had been untruthful and his continued illegal conduct hampered his potential assistance against at least four co-defendants setting the government's investigation back four months. Thus, the court found the government's refusal to move for a substantial assistance downward departure pursuant to U.S.S.G. § 5K1.1 or 18 U.S.C. § 3553(e) did not violate constitutional standards because it was "rationally related to a legitimate governmental purpose-encouraging criminal defendants to be fully cooperative and forthright with the government." Further, the court explained, because there was no plea agreement requiring the government to file a substantial assistance motion, the filing of such a motion was at the government's discretion. Accordingly, the court found, absent a motion by the government, the district court generally lacked the authority to grant a downward departure based on a defendant's substantial assistance unless the refusal was based upon or motivated by some form of invidious discrimination. Wolf had made no claim of discrimination.

The essence of Wolf's allegation of bad faith was the more lenient treatment some of his co-conspirators received demonstrated the government's refusal was an attempt to dictate the length of his sentence and punish him for his lies and recalcitrance. The court found the government's refusal was based on the "destructive effect [of Wolf's] recalcitrance upon its investigation and other prosecutions." The court, ruling Wolf had not made the required threshold showing the government's refusal to file a substantial assistance motion was improper, affirmed Wolf's sentence.

2001 Amendment To Money Laundering Sentencing Guideline Is Substantive, Not Clarifying

In *United States v. Sabbeth,* 277 F.3d 94 (2nd Cir. 2002), Sabbeth filed a motion for reconsideration of his sentence, asserting the 2001 amendment to the money laundering sentencing guideline was a clarifying amendment and should be applied retroactively to his sentence. The 2001 amended guideline instructs courts to group two separate counts where one count is a money laundering offense and the other is an underlying offense. Sabbeth was convicted of bankruptcy fraud and money laundering in 2000, and was sentenced to ninety-seven months imprisonment. At sentencing, the court refused to group the offenses and found Sabbeth should be sentenced a Criminal History Category I with an offense level of 30. In his motion for reconsideration, Sabbeth argued the 2001 amendment required grouping his fraud and money laundering offenses, resulting in an offense level of 28.

The Second Circuit disagreed, although it acknowledged defendants generally may benefit from an amendment to the Sentencing Guidelines if the revision is a mere clarification, and not a substantive change. In this case, however, the court found the 2001 amendment to the money laundering guideline to be substantive, rather than clarifying, and refused to apply the amended Guideline retroactively to Sabbeth's sentence. The court noted the Sentencing Commission did not characterize the amendment as clarifying and explained Application Note 6 of the money laundering guideline resolved a circuit conflict on the issue of grouping money laundering offenses. Sabbeth argued resolving a circuit split was evidence the amendment was a mere clarification. Sabbeth argued this intent was also supported by the fact the grouping guideline, U.S.S.G. § 3D1.2, was not amended. The Second Circuit examined the entire amendment instead, which substantively redefined the way offense levels for money laundering are calculated. "The purpose and effect of the revision of § 2S1.1 demonstrates that Application Note 6 is the result of the substantive revision of the money laundering guidelines and not simply a separate, independent clarification of that provision of the existing law." *Id.*, 98. The Second Circuit affirmed Sabbeth's sentence.

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