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SUPREME COURT CASES

Waiving Right To Impeachment Evidence In Guilty Plea

In *United States v. Ruiz*, 122 S. Ct. 2450 (2002), Ruiz refused to accept a plea bargain requiring her to waive her right to impeachment evidence. The plea bargain was offered by federal prosecutors after immigration agents found marijuana in Ruiz' luggage. The plea bargain included a reduced sentence recommendation but required Ruiz to waive indictment, her right to impeachment information, and her right to appeal. Despite her refusal of the plea bargain, Ruiz pleaded guilty to unlawful drug possession and asked the court to sentence her at the reduced sentence recommended pursuant to the plea. The district court refused and Ruiz appealed the sentence. The Ninth Circuit vacated the sentence, finding the waiver provision of the plea bargain unconstitutional. The Ninth Circuit reasoned since the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial, the same requirement applies to plea bargains. The government sought *certiorari*, arguing the Ninth Circuit's requirement was unique among circuits, could force the government to reveal identities of cooperating informants or other witnesses, and would deplete government resources on trial preparation prior to plea bargaining.

The Supreme Court reversed, reasoning although exculpatory impeachment material is part of a defendant's basic Constitutional right to a fair trial, such a right does not extend to guilty pleas since by its nature a guilty plea requires a defendant to forgo a fair trial. Specifically, the Court cited three reasons impeachment material need not

be disclosed to defendants prior to entering into a plea: first, impeachment information relates to the fairness of trial, not to whether a plea is voluntary; second, the Court found no legal authority embodied in either the Supreme Court's earlier cases nor in cases from other circuits to support the Ninth Circuit's decision; and third, due process considerations mitigate against such disclosure, since the defendant's due process rights are satisfied with the government's disclosure of any information establishing the defendant's innocence, but the government's interests are adversely impacted by the premature disclosure of government witness information. Ultimately, the Court held the Constitution does not require plea agreement disclosure of impeachment information.

TITLE 26 AND TITLE 26 RELATED CASES

Six Year Limitation Period Applicable To 26 U.S.C. § 7202

In *United States v. Adam*, 296 F.3d 327 (9th Cir. 2002), the Fifth Circuit affirmed the district court's determination that a six year statute of limitations applied to 26 U.S.C. § 7202. Adam was charged with three counts of wilfully failing to pay over taxes to the IRS in violation of § 7202, for the first, third and fourth quarters of 1994. The day before his trial was to commence, Adam pled guilty to one count of § 7202 for the fourth quarter of 1994. Two weeks later, Adam filed a notice of intent to withdraw his guilty plea and almost two months later filed a motion to withdraw the guilty plea. In his motion, Adam argued, among other things, the statute of limitations barred his indictment.

The government pointed out that every circuit which considered the issue of the appropriate statute of limitations for a violation of § 7202 has held that § 6531(4) covers § 7202. The court was persuaded by the reasoning in *United States v. Gollapudi*, 130 F.3d 66 (3rd Cir. 1997) and *United States v. Musacchia*, 900 F.2d 493 (2nd Cir. 1991), that the plain language of IRC § 6531(4) encompasses the conduct engaged in by Adam. As Adam was unable to show a persuasive reason for creating a split among the circuits on this issue and finding the plain language of § 6531(4) includes violations of § 7202, the court held a six year statute of limitations applies to § 7202.

Firm Indications of Fraud

In *United States v. Foster*, 01-80264, 2002 U.S. Dist. LEXIS 12341 (E.D. Mich., July 1, 2002), Foster, who was charged with filing false individual tax returns, moved to suppress certain evidence on the grounds the revenue agent who audited his returns continued the examination after the agent had identified a firm indication of fraud in violation of the Internal Revenue Manual.

IRS regulations explicitly prohibit a revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation. Effectively what is involved in such a situation is, as described in *United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998), an unreasonable consensual search under the Fourth Amendment and a denial of due process under the Fifth Amendment because the consent was induced by fraud, trickery, or misrepresentation by the revenue agent. The court noted, the “firm indications of fraud” standard is a difficult standard for federal courts to apply because it is inherently vague and depends, in large part, on the good faith and professional judgement of the revenue agents conducting the investigation. The case law suggests a revenue agent has developed a firm indication of fraud when he/she has established the taxpayer has engaged in a consistent pattern of substantial underreporting of income or overstatement of deductions to the extent an intent to evade taxes can be inferred.

Initially during the audit, the revenue agent only had access to information gathered from IRS data bases, public records and documents furnished by an informant. At an initial meeting with Foster, the revenue agent was given very little in the way of information or documents. At this point in time, the information in the hands of the revenue agent was sufficient to suggest the subject return was not accurate, however, it was not sufficient to firmly indicate the presence of fraud. It was not until Foster’s lawyers

presented the revenue agent with a draft amended return and disclosed additional bank accounts that the gross underreporting became readily apparent. At this point in time, the revenue agent knew there were firm indications of fraud, concluded her meeting with the lawyers and initiated a criminal referral. The court ultimately denied Foster’s motion to suppress concluding he was not misled by the revenue agent, who did not have a firm indication of fraud until the point in time she suspended the audit.

Application Of 26 U.S.C. § 7212(a) To TIGTA Agents

In *United States v. Lovern*, 293 F.3d 695 (4th Cir. 2002), the Fourth Circuit affirmed Lovern’s conviction under 26 U.S.C. § 7212(a) for impeding, intimidating, or obstructing an employee of the United States acting in his capacity under Title 26 of the United States Code. Beginning in 1998, Lovern repeatedly called the Richmond, Virginia, office of the IRS to complain about his taxes. Eventually, IRS officials instructed Lovern not to call anymore, referring him instead to the Richmond office of the Treasury Inspector General for Tax Administration (TIGTA). Thereafter, Lovern regularly called TIGTA. Because of the perceived threatening nature of some of the calls, a TIGTA agent recorded some of the incoming calls. Based on these conversations, Lovern was convicted of violating § 7212(a).

On appeal, Lovern asserted the TIGTA agent was not acting in an official capacity under Title 26 when he threatened him. Lovern pointed out the primary source of TIGTA’s authority is Title 5, which gives TIGTA agents the authority to protect IRS employees from threats and to investigate any such threats. Lovern contends the TIGTA agent was acting in an official capacity during the subject conversation, but not under Title 26. The Fourth Circuit held Lovern was correct in that much of TIGTA’s authority is derived from Title 5. Under 26 U.S.C. § 7803(d)(3)(B), however, TIGTA is required to “establish and maintain a toll free telephone number for taxpayers to use to confidentially register complaints of misconduct by IRS employees . . .” It was beyond question the TIGTA agent was receiving complaints registered by Lovern during the subject conversation. While there was no doubt the TIGTA agent was talking to Lovern during the subject conversation to protect employees of the IRS’s Richmond office from Lovern’s threatening phone calls, he was also providing Lovern an opportunity to register complaints of IRS misconduct. Thus, the TIGTA agent was acting within the scope of authority granted TIGTA under Title 26.

Hyde Amendment Prevailing Party

In *United States v. Campbell*, 291 F.3d 1169 (9th Cir. 2002), the Ninth Circuit affirmed the district court's denial of Campbell's petition for an award of attorneys' fees under the Hyde Amendment, 18 U.S.C. § 3006A. Campbell, indicted for mail fraud, entered into a diversion agreement with the government which required him to perform community service, pay restitution and report regularly to a pretrial services officer. After successfully fulfilling the diversion agreement's requirements, the government dismissed the indictment. Following the dismissal, Campbell petitioned for attorney's fees under the Hyde Amendment, arguing he was a "prevailing party" and was entitled to an attorney's fee award.

The Ninth Circuit held Campbell was not a "prevailing party" as required under the Hyde Amendment because he had received no relief on the merits. The court noted the statute did not define the term "prevailing party" and there was no case law definitively interpreting the term. To define the term, the court incorporated the definition announced by the Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), and adopted by it in *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002), which defined "prevailing party" under the Equal Access to Justice Act, which by statutory design, the Hyde Amendment is required to apply. Based on those two decisions, the court concluded a "prevailing party" was one who has "received at least some relief on the merits of his claim." The court found Campbell did not fit the description since Campbell's experience "was more akin to that of a convicted defendant." Accordingly, Campbell was not a "prevailing party" for purposes of the Hyde Amendment and, thus, not entitled to attorney's fees.

SEARCH AND SEIZURE

Special Master

In *United States v. Stewart*, 2002 U.S. Dist. LEXIS 10530 (S.D.N.Y. June 11, 2002), Stewart was indicted on charges of, *inter alia*, conspiring to provide material support to designated foreign terrorist organizations. Stewart, a criminal defense attorney, moved for the appointment of a Special Master to review items seized from her law office for privileged material. The government argued its privilege team would provide adequate safeguards to protect any privileges and should be allowed to perform an initial review of the items for privilege purposes. After one of Stewart's clients was convicted in 1995 of participating in the 1993 World Trade Center bombing, she continued to communicate with him, allegedly as his attorney. The government obtained a search warrant for

Stewart's law office, which was part of a suite she shared with four other lawyers. The search was conducted by a special team of law enforcement officers who had been segregated from the prosecution team in order to prevent the prosecution from viewing privileged materials uncovered during the search. At arraignment, Stewart argued a Special Master should be appointed to review the seized items since some of the items involved the representation of criminal defendants who were unrelated to Stewart's case.

The court agreed, finding appointment of a Special Master to review the seized materials appropriate for several reasons. First, the United States Attorney's Manual acknowledges such appointment may be appropriate in some circumstances. Second, Stewart's case was exceptional since the documents seized were likely to contain not only privileged materials of unrelated criminal defendants, but also of clients of attorneys other than Stewart. Third, courts previously employed Special Masters to review materials seized from the law offices of criminal defense attorneys, and a few courts which allowed for review by government privilege teams, later opined the use of other methods of review may have been better. Finally, the court was unpersuaded by the government's argument the case would be delayed by injecting a third party to review materials seized. The court noted the materials in this case were not voluminous and the extraordinary facts of the case favored the appointment of a Special Master, thus overriding the government's countervailing concerns.

INVESTIGATIVE TECHNIQUES

Electronic Surveillance - Necessity Requirement

In *United States v. Ramirez-Encarnacion*, 291 F.3d 1219 (10th Cir. 2002), Ramirez-Encarnacion ("Ramirez") appealed the district court's refusal to suppress evidence obtained through a wiretap. Ramirez was one of several Mexican nationals indicted as a result of a multi-state narcotics investigation. Ramirez and her co-conspirators were suspected of transporting drugs into the United States. The investigation led federal agents to a facility in Colorado used by the conspirators for drug trafficking. A wiretap authorized for that facility was later expanded to include communications from Ramirez' house. Ramirez moved to suppress evidence obtained from the expanded wiretap, arguing the government's evidence failed to meet the standard of necessity required to obtain an authorized wiretap. The district court disagreed, finding the wiretap was necessary for the successful completion of the investigation. Ramirez pleaded guilty to one count of

using a communication facility to further a conspiracy to distribute narcotics, but appealed the court's finding of necessity.

The Tenth Circuit first resolved a conflict within the Circuit regarding the applicable standard of review. Although previous decisions endorsed a *de novo* standard, the appellate court, after consulting the *en banc* court, held a district court's determination of necessity in authorizing a wiretap must be reviewed under an abuse of discretion standard of review. In deciding whether a wiretap is necessary, a district court must find the government showed traditional investigative techniques (1) were tried unsuccessfully, (2) reasonably appeared to be unsuccessful if tried, or (3) were too dangerous to attempt. In this case, the court noted, the government met its burden of proof in obtaining authorization for the wiretap. See, 18 U.S.C. § 2518(1)(c). The government, prior to requesting the wiretap, utilized pen registers and interviewed confidential sources to further the investigation. Surveillance and undercover filtration were impossible due to the rural nature of the area and tight-knit nature of the conspiracy. Furthermore, a search warrant executed at the residence of one of the conspirators gleaned little additional information and only caused the other conspirators to flee to Mexico. The district court, therefore, did not abuse its discretion in finding the government made an adequate showing of necessity.

SENTENCING

Obstruction Of Justice Enhancement Appropriate For Perjury During Plea Withdrawal Hearing

In *United States v. Adam*, 296 F.3d 327 (9th Cir. 2002), the Fifth Circuit held the district court did not err in imposing an obstruction of justice enhancement, under U.S.S.G. § 3C1.1, on the basis of Adam's testimony at his plea withdrawal hearing. Adam was indicted for three counts of wilfully failing to pay over taxes to the IRS in violation of 26 U.S.C. § 7202. The day before his trial was to commence, Adam pled guilty to one count of violating § 7202. Two weeks later, Adam filed a notice of intent to withdraw his guilty plea and almost two months later filed a motion to withdraw the guilty plea. In his motion, Adam argued, among other things, the district court improperly enhanced his sentence for obstruction of justice based on his statements under oath regarding the circumstances surrounding his guilty plea.

In affirming the district court's decision to enhance Adam's sentence, the court noted the guideline included

the providing materially false information to a judge as an example of conduct to which an obstruction of justice enhancement applies. In this case, the court found the district court's determination that Adam lied under oath at his plea withdrawal hearing was supported by the record.

Special Skill And Offense Level For Conspiracy

In *United States v. Downing*, No. 01-1437, 2002 U.S. App. LEXIS 13541 (2nd Cir., July 18, 2002), the defendants, two accountants, became involved in a stock market manipulation scheme known as a "pump and dump," in which bribed stock promoters to artificially inflate a stock's price and then sell the stock when the price is high enough. The defendants were convicted of conspiring to commit securities and wire fraud in violation of 18 U.S.C. § 371. The Second Circuit held the enhancement under U.S.S.G. § 3B1.3 for use of special skill can apply in a conspiracy case even if the scheme did not progress to the point at which the special skill would have been put to use. Both defendants appealed, contesting the district court erred in applying § 3B1.3 and refusing to apply § 2X1.1(b)(2). In general, § 3B1.3 applies if the defendant ". . . used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." Although the commentary lists accountants as persons who possess a special skill, the defendants pointed out the scheme was aborted before they used their accounting skills in a manner contemplated by the guideline. Despite the absence of binding precedent in the Second Circuit, the court concluded, § 3B1.3, like most specific offense characteristics, applies to inchoate offences provided the court determines with reasonable certainty the defendant actually intended to use his or her special skill to facilitate or conceal the corresponding substantive offense. Section 2X1.1 instructs, unless specifically addressed elsewhere in the guidelines, sentences for inchoate crimes should correspond to those for the substantive offenses. Employing this analysis, the Second Circuit concluded the district court correctly applied § 3B1.3.

The Second Circuit, however, concluded the district court erred by declining to adjust the defendants' sentences downward pursuant to U.S.S.G. § 2X1.1(b)(2), which instructs district courts to reduce the base offense level if the conspirators failed to complete all the acts they believed necessary to carry out the substantive offense. Section 2X1.1(b) holds, if the crime is a conspiracy, the court is to "decrease [the base offense level for the substantive crime] by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful

completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.” The Second Circuit held the district erred by declining to apply § 2X1.1(b)(2) to the defendants’ sentences. Neither a defendant nor a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense. The conspiracy to carry out the “pump and dump” scheme did not ripen into a substantially completed offense.

Vulnerable Victim Adjustment

In *United States v. Firment*, 296 F.3d 118 (2nd Cir. 2002), Firment appealed his sentence, arguing the court erred in adjusting the offense level upward for an offense involving vulnerable victims. Firment and his co-conspirators persuaded victims of other telemarketing scams, most of them elderly and living on fixed incomes, to provide money for nonexistent lawsuits or investigations for the earlier scams. The conspirators also charged people fees to help them obtain credit lines, although no help was ever provided. In total, the scams netted the conspirators approximately \$700,000.00, and they all agreed not to report or pay taxes on the income. Firment was charged with conspiracy to commit mail fraud and conspiracy to impede and impair the lawful functions of the IRS.

Firment agreed to plead guilty to the tax conspiracy count and stipulated to a \$46,465.00 tax loss calculation. At sentencing, the district court applied several adjustments to Firment’s sentence, including a two level upward adjustment for vulnerability of the telemarketing victims, pursuant to U.S.S.G. § 3A1.1(b)(1).

The Second Circuit upheld the sentence, disagreeing with Firment’s contention the vulnerable victim adjustment under § 3A1.1(b)(1) was not applicable because the vulnerable persons were not related to his offense of conviction, which was tax conspiracy. The court held the vulnerable victim adjustment may be applied even if the victims are not the victims of the offense of conviction. The court noted the guideline commentary defines victim as a person who is a victim of the offense of conviction as well as a victim of any conduct for which the defendant is accountable under the relevant conduct guideline. Since Firment conceded at sentencing the conduct concerning the telemarketing scheme was relevant conduct and the victims of that scheme were vulnerable, the adjustment was not erroneous. The court also cited some of its previous decisions in which the vulnerable victim adjustment was upheld even though the entity directly targeted by the offense of conviction was different from the vulnerable person harmed.

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