

Criminal Tax Bulletin

*Department of Treasury
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*Office of Chief Counsel
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SUPREME COURT CASES

Conspiracy Not Automatically Ended When Government Frustrates Objective

In *United States v. Jimenez Recio*, 123 S. Ct. 819 (2003), the Supreme Court reversed and remanded the Ninth Circuit's reversal of the conviction of Jimenez Recio and codefendant, Lopez-Meza, for conspiracy to possess and distribute illegal drugs. On appeal, Jimenez Recio and Lopez-Meza argued there was insufficient evidence for the jury to find they had joined the conspiracy before the government's intervention. In the Ninth Circuit pursuant to *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997), a conspiracy terminates when "there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy." Accordingly, to uphold the conviction for conspiracy, the evidence must be sufficient to show Jimenez Recio and Lopez-Meza joined the conspiracy before the government seized the drugs and defeated the object of the conspiracy.

In overruling *Cruz*, the Supreme Court held "[a] conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has 'defeated' the conspiracy's 'objective.'" In reaching this conclusion, the Court looked to basic conspiracy law, in which the Court had repeatedly held "the essence of a conspiracy is 'an agreement to commit an unlawful act.'" The Court also noted, but for the Ninth Circuit, no other Federal Court of Appeals has adopted the Ninth Circuit rule and three have explicitly rejected it. The Court also stated "the *Cruz* rule would reach well beyond arguable police misbehavior, potentially threatening the use of properly run law enforcement sting operations."

TITLE 26 AND TITLE 26 RELATED CASES

Aiding And Assisting

In *United States v. Gambone*, 314 F.3d 163 (3^d Cir. 2003), the Gambones, two brothers who owned a family construction business, were convicted of aiding and assisting in the preparation of false tax returns and conspiracy. The case against the Gambone brothers involved a three-pronged scheme to file false personal tax returns and to aid and assist certain of their employees and subcontractors in doing the same. The first prong of the scheme involved a plan to receive payment from home purchasers for "extras" in cash. The cash was not reported on the business's books and was subsequently not reported to the IRS. The second prong of the scheme focused on failing to report and pay employment taxes on overtime wages. In a related way, the Gambones disguised certain employees' raises as expense reimbursements, which were not reported as income, therefore, avoiding employment tax. Similarly, some employees were paid off the books rather than from payroll accounts. To conceal these payments, the Gambones had their finance department prepare and file false tax documents including false Forms W-2. The third prong of the conspiracy charged the Gambones with failing to issue Forms 1099 for services rendered by subcontractors, thus assisting them in filing false tax returns.

On appeal, the Gambones challenged their 26 U.S.C. § 7206(2) convictions contending their conduct, at most, was a scheme to provide false Forms W-2 and argued they should have been prosecuted under § 7204, a misdemeanor offense. The Gambones argued § 7204's language provided the exclusive penalty for willfully furnishing a false Form W-2 to an employee and noted the three year statute of limitations under § 7204 had already expired. In the alternative, the Gambones argued the evidence was

insufficient to sustain a conviction under § 7206(2) as that section required proof of conduct beyond the mere furnishing of false Forms W-2. They contended they had taken no affirmative steps with respect to their employees' false tax returns beyond furnishing false Forms W-2. The Third Circuit concluded the government may prosecute conduct involving, but not limited to, furnishing false Forms W-2 to employees under § 7206(2). The relevant inquiry is whether the Gambones engaged in some affirmative conduct which at least encouraged their employees to prepare or present false returns. While there was no direct evidence that either of the Gambones explicitly counseled any of their employees to under report their income, there was ample circumstantial evidence to allow the jury to conclude the Gambones aided and assisted them in doing so by encouraging exactly that behavior. The evidence supported the inference the Gambones intended their employees to under report their income, since any inconsistent reporting would have pointed to their own under reporting, which they took great pains to hide by creating false employee time cards and manipulating the company's books.

The Gambones also challenged their conspiracy convictions. The indictment described three ways the Gambones conspired to defraud the United States. The Third Circuit stated they would affirm the conspiracy conviction as long as there was ample evidence to support any one of the three alleged prongs of the conspiracy. Finding there was sufficient evidence for at least two prongs, skimming cash received for "extras" and not reporting overtime wages, the court affirmed the conspiracy convictions.

Severing Tax Counts

In *United States v. Smith*, 308 F.3d 726 (7th Cir. 2002), Smith and his co-conspirator, Lowe, were convicted of several drug related charges, including conspiracy and possession with intent to distribute marijuana. Lowe was also convicted of failure to file income tax returns in violation of 26 U.S.C. § 7203. The evidence used to convict Lowe consisted of co-conspirators' statements implicating Lowe in the conspiracy, evidence gathered from surveillance, and evidence of Lowe's lavish lifestyle seized pursuant to search warrants, including \$100,000 in cash from a safe buried in the dirt floor of Lowe's basement. Before trial, Lowe filed a motion to sever the tax counts from the conspiracy counts, arguing the evidence used to support the tax counts would unfairly prejudice the jury on the drug counts. The court denied Lowe's motion to sever and Lowe was tried simultaneously on all counts. On appeal, Lowe argued, *inter alia*, the district court abused its

discretion in denying his severance motion.

The Seventh Circuit upheld the district court's determination, indicating the evidence in Lowe's case was not prejudicial because it was mutually admissible for either the tax or drug charges. The court disagreed with Lowe's claim that evidence of his lavish lifestyle, used to show he had unreported income in excess of income from his used car lot, would prejudice the jury into believing the source of wealth showed a propensity for trafficking drugs. Although the court agreed the inference of drug trafficking could be made, the court held such evidence was admissible, especially since it overlapped the evidence the government used to support the drug conspiracy charges. Thus, the evidence was not unfairly prejudicial nor was denying Lowe's motion an abuse of discretion.

FORFEITURE

CAFRA's Hardship Provision Applied

In *United States v. \$1,231,349.68*, 227 F. Supp. 2d 125 (D.D.C. 2002), defendant Sampedro's wife and daughter (claimants) filed hardship petitions as to the two automobiles and a bank account seized for forfeiture by the government. The claimants filed the instant action pursuant to 18 U.S.C. § 983(f)(3), the hardship provision, following the denial by the FBI of their request for release of the seized property. The claimants alleged one automobile was for the wife's use in her daily activities and the other was for the daughter's use for a summer job. The wife also claimed the funds in the bank account were to be used to start a travel agency, and were proceeds of a legitimate business.

In ruling on the hardship petitions, the court took a mechanical approach in analyzing whether the claimants' satisfied the statute. The court determined with respect to the two automobiles, the four factors outlined in 18 U.S.C. § 983(f)(1)(A)-(D), A) claimants' possessory interest in the property; B) claimants' ties to the community; C) substantial hardship to the claimants; and, D) whether claimants' hardship is outweighed by the risk the property will be destroyed, damaged, lost, concealed or transferred, all weighed in the claimants' favor. Thus, the court granted the claimants' request for release of the two automobiles.

With respect to the bank account, although the court found most of the factors weighed in the claimants' favor, the conditions set forth in 18 U.S.C. § 983(f)(8) precluded release of the funds. The court determined the funds in the account fell within the ambit of § 983(f)(8)(A), which

prohibits the release of property when it is “contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized.” The court found the claimants failed to carry their burden of demonstrating the funds were the proceeds of a legitimate business and thus, it could not permit the release of funds to the claimants. *See* 18 U.S.C. §983(f)(8)(B)

CAFRA’s Fugitive Disentitlement Applied

In *United States v. \$1,231,349.68*, 227 F. Supp. 2d 125 (D.D.C. 2002), the district court analyzed the fugitive disentitlement doctrine, 28 U.S.C. § 2466, to bar claimant Sampedro, who resisted extradition to the United States from Spain, from contesting a civil forfeiture action. Sampedro, who was under investigation for bribing government officials and defrauding the United States had fled the United States six days before a warrant was issued for his arrest. He was subsequently apprehended in Spain and at the time of this action, was fighting extradition because he felt the United States had treated him unfairly during its investigation of his alleged criminal activities.

The court granted the government’s motion to strike Sampedro’s claim contesting the forfeiture action finding the fugitive disentitlement doctrine applied to Sampedro. The court found Sampedro met all three conditions enumerated in § 2466(a)(1), as Sampedro was aware of the allegations against him, purposefully fled the United States and continued to avoid prosecution by opposing extradition. The court also found, although Sampedro was in custody in Spain, it was not because of any criminal conduct on his part in that jurisdiction, thus § 2466(a)(2) did not apply to preclude application of the statute. Finally, the court denied Sampedro’s motion to stay the forfeiture proceeding pursuant to 18 U.S.C. § 981(g)(2) as the language of the statute was clear that only a claimant to a civil forfeiture action could seek to stay the proceedings under this provision, and Sampedro could not be a claimant because of his fugitive status.

CAFRA’s Fugitive Disentitlement Applied

In *United States v. Contents of Account Number 68108021*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002), the court granted the government’s motion to dismiss claimant Collazos’ claim pursuant to the fugitive disentitlement doctrine, 28 U.S.C. § 2466. Collazos operated a currency exchange business from which she transferred millions of dollars between the United States and Columbia. When Collazos was indicted for money laundering, she refused to

return to the United States unless granted pre-trial release; which the government denied. Collazos transferred funds from two accounts to a brokerage account believing the two accounts were soon to be seized. The government seized the brokerage account and instituted the forfeiture action. Collazos failed to attend depositions but claimed she was entitled to due process in the forfeiture action. Relying on pre-CAFRA case law, Collazos argued the statute did not apply to her because she was not in the jurisdiction when the financial crimes occurred, claiming she had not been in the United States since 1977. In the alternative, she argued the statute was nonetheless unconstitutional as violating the Due Process Clause.

The court dismissed Collazos claim pursuant to CAFRA’s fugitive disentitlement provision, 28 U.S.C. § 2466, which grants courts the authority to dismiss claims if the claimant is a “fugitive” as defined by statute. To determine whether the provision applied, the court noted it must determine “whether the instant civil forfeiture action is, in fact, related to a pending criminal prosecution and whether [Collazos] has had appropriate notice of such prosecution.” If yes, then the court must determine whether Collazos purposefully left, or declined to reenter the United States. In this case the court concluded the forfeiture action was, in fact, related to a pending criminal case in another jurisdiction of which Collazos was aware. This awareness was bolstered by the fact Collazos’ counsel attempted to negotiate a pretrial release for her in the pending criminal action, a condition she required before she would agree to reenter the United States. Further, rejecting Collazos’ Due Process claim, the court found Second Circuit precedent has held the fugitive disentitlement doctrine constitutional.

SENTENCING

Organizer-Leader

In *United States v. D’Ambrosia*, 313 F.3d 987 (7th Cir. 2002), D’Ambrosia and his co-conspirators ran an illegal offshore internet based bookmaking operation and concealed income earned from the wagering. The scheme involved placing sports bets for clients offshore, then depositing profits from the operations into offshore bank accounts in the Bahamas to evade federal income taxes. D’Ambrosia and his co-conspirators waived indictment and pleaded guilty to offshore wagering offenses and filing false income tax returns. In the plea agreement, D’Ambrosia and his co-defendants stipulated they conspired together to defraud the IRS by using their illegal bookmaking company to pay vendors and bettors, and by placing the profits into offshore bank accounts in nominee names. The stipulated

tax loss amount exceeded \$1.4 million. The district court grouped the offenses for sentencing purposes, but added a four level increase to each sentence, determining they were leaders and organizers of the tax conspiracy. The coconspirators appealed, arguing they merely followed the tax advice of an attorney who set up the offshore accounts for them.

The Seventh Circuit found U.S.S.G. § 3B1.1 requires the determination of whether a defendant is an organizer or leader to be based on all relevant conduct and not solely on the basis of the elements and acts cited in the count of conviction. The court noted, D'Ambrosia and his coconspirators operated a multi-jurisdictional offshore empire which was clearly relevant to their roles in the tax conspiracy. They specifically conspired to evade taxes by directing staff within their organization to place the profits of their company into offshore accounts. Furthermore, the tax shelters increased the profits obtained from the bookmaking scheme and helped hide the existence of the organization from federal regulators. In affirming the sentences, the court also noted D'Ambrosia and his coconspirators did not need to be leaders of the attorney's deferred compensation program; it was enough each of them used the attorney's program to conceal, from the IRS, the income and assets they derived from their illegal betting scheme.

Supervised Release

In *United States v. Allen*, 312 F.3d 512 (1st Cir. 2002), the First Circuit affirmed special conditions of supervised release imposed against Allen after he pled guilty to a single count of tax evasion. On appeal, Allen asserted two arguments attacking the special conditions imposed. First, he argued the conditions were overboard and involved a greater deprivation of liberty than was reasonably necessary. Second, he contended the special condition requiring him to attend mental health treatment improperly

delegated judicial authority to a probation officer.

Under U.S.S.G. § 5D1.3, a court may impose additional conditions of supervised release where they are reasonably related to the offense and the history of the defendant, as long as they do not deprive the defendant of a greater amount of liberty than is reasonably necessary. Specifically, Allen challenged the court's determination that he provide his probation officer with access to any requested financial information. He also questioned certain limitations placed on his ability to obtain credit. The First Circuit held these conditions were authorized under § 5D1.3(d)(2)-(3) in situations where the defendant was paying fines in installments. Next, Allen challenged the special condition prohibiting his possession of alcohol and his presence at establishments primarily serving alcohol. Based on the record, the First Circuit held the district court's alcohol prohibition was reasonably related to Allen's history of alcohol abuse and served to foster the goals of supervised release including Allen's rehabilitation and protection of the public.

Finally, Allen claimed the district court impermissibly delegated judicial authority to the probation officer when ordered the "defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer." The First Circuit noted while cases or controversies committed to United States Constitution Article III courts cannot be delegated to nonjudicial officers for resolution, that general principle does not prohibit courts from using nonjudicial officers to support judicial functions, as long as that judicial officer retains and exercises ultimate responsibility. The First Circuit found the district court was merely directing the probation officer to perform ministerial support services and was not giving the officer the power to determine whether Allen had to attend psychiatric counseling.

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