

Criminal Tax Bulletin

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SEARCH AND SEIZURE

Particularity

In *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003), the Ninth Circuit reversed the district court's denial of Bridges' motion to suppress evidence. Bridges, through his tax consulting business, ATC, advised clients to proclaim themselves non-resident aliens to avoid payment of Federal income taxes. From 1997 through 2000, ATC filed more than 100 claims with the IRS requesting tax refunds on behalf of its "non-resident alien" clients. IRS special agents executed a search warrant on ATC's offices in January, 2000. In April, 2001, Bridges was convicted of, *inter alia*, filing false claims for refund and attempting to interfere with the administration of tax laws, based on evidence seized pursuant to the search warrant. Bridges appealed his conviction, arguing the search and seizure violated the Fourth Amendment because the warrant was defective and overbroad. Although the Ninth Circuit found the application for the search warrant was supported by the affidavit and was more than sufficient to demonstrate probable cause, it found the scope of the warrant itself overly broad, since the affidavit was neither attached to the warrant nor was it incorporated by reference.

The Ninth Circuit reviewed the Supreme Court's interpretation of the Fourth Amendment's particularity requirement as well as its prior decisions over the past twenty years and noted the purpose of the requirement is to ensure targets of search warrants are able to ascertain what crimes are alleged to have been committed and what corresponding items are authorized for seizure. Here, the warrant failed to allege any specific violations. The court noted a warrant which does not set forth particular criminal conduct will be sufficient only if the affidavit, which sets forth the criminal conduct, accompanies the warrant and if the warrant incorporates the affidavit by reference, neither of which occurred here. The court also criticized language in the list of items to be seized attached to the warrant, finding the verbiage "including, but not limited to" overly broad, since the effect was

unclear what exactly the agents were expected to seize. It was also not enough for the district court to find the business permeated with fraud since the agent's affidavit did not clearly state the business was entirely fraudulent and there was no evidence the government thought the business was permeated with fraud when making its application.

Qualified Immunity

In *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), Special Agent Erath had a warrant to search a three-story building for evidence of income tax evasion. Bybee, who was not a target of the investigation, lived on the third floor. When Bybee demanded loudly and repeatedly that Erath produce the warrant, Bybee claimed Erath used excessive force in handcuffing her painfully tight the first 30 minutes, and unlawfully detained her for several hours while the search proceeded, all in violation of her Fourth Amendment rights. The district court denied Erath's summary judgment motion in which Erath claimed entitlement to qualified immunity on all claims.

In deciding Erath's entitlement to qualified immunity, the court found it had to first determine if the facts, taken in the light most favorable to Bybee, showed Erath's conduct violated a constitutional right. Second, if Erath violated such a right, then the court must determine whether that right was clearly established. As to Bybee's claim Erath used excessive force in handcuffing her, the court held it was clearly established "that the amount of force Bybee says Erath used in handcuffing her was excessive, and a reasonable agent in Erath's position would have known that such conduct violated the Fourth Amendment" and, therefore, Erath was not entitled to Immunity.

Concerning Bybee's claim that her detention during the search was unlawful, the court held. Erath was entitled to qualified immunity as it had not been clearly established this conduct violated Bybee's constitutional rights at the time the search occurred.

FORFEITURE

Civil Forfeiture Statute Of Limitations Tolled By Pension Law

In *United States v. All Funds*, 345 F.3d 49 (2nd Cir. 2003), the Second Circuit held the statute of limitations applicable to an *in rem* action to forfeit the proceeds of Medicare fraud is equitably tolled during the time the fraudulently obtained funds were in a pension plan protected by the anti-alienation provision of the Employee Retirement Income Security Act, ERISA. Edward Weiss, owner of an ambulance service which had fraudulently billed Medicare, pled guilty to one count of filing false claims in violation of 18 U.S.C. § 287. Weiss commingled fraudulent proceeds with legitimate revenues and established a pension plan. In 1998, the pension plan was dissolved and the funds were transferred into an IRA. As the funds were no longer covered by ERISA, the government sought forfeiture of the funds. Weiss moved to dismiss the government's forfeiture action as barred by the one year statute of limitations in 18 U.S.C. § 984(c). The district court agreed and dismissed the government's suit.

On appeal, the government alleged contributions to the company's pension plan were derived from the income from the false Medicare claims. Once in the plan, however, the funds were protected by ERISA's anti-alienation provision, which states pension funds may not be "assigned or alienated" while the money is held by the plan administrator. Thus, the government argued, ERISA's anti-alienation provision prevented it from initiating the forfeiture action until the pension plan was dissolved and began disbursement of the funds. Based on Supreme Court case law the Second Circuit reversed the district court and found the government could not touch the pension plan assets until the plan was terminated and the assets distributed. Further, the court found "it would be inequitable to bar the government from proceeding against the funds in this suit simply because the [Weisses] invested their ill-gotten gains in a pension plan." Thus, the court held equitable tolling was appropriate in this case as "equitable tolling . . . permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity, even when the limitations period would otherwise have expired."

Substitute Assets

In *United States v. Saccoccia*, 344 F. 3d 31 (1st Cir. 2003), the First Circuit held the "substitute assets" provision of the RICO statute, 18 U.S.C. § 1963(m), did not permit forfeiture of untainted property of defense attorneys who had already

spent the tainted funds of their client which were used to pay their legal fees. Saccoccia was indicted under RICO and the government sought forfeiture of all his business and personal property derived from the racketeering activities, including almost \$137 million in currency. In the alternative, the government sought forfeiture of all non-tainted property of equivalent value should the tainted property be unavailable. The district court promptly enjoined the transfer of the forfeitable property designated in the indictment.

Saccoccia hired two attorneys to defend him against the racketeering charges and paid them close to \$1 million in legal fees in cash. A year later, he was convicted and ordered to forfeit the \$137 million. After learning about the large cash payment of legal fees, the government moved to compel the attorneys to turn over the fees as property subject to forfeiture. The district court found the attorneys lacked probable cause to believe the fees paid to them came from SUA proceeds until after Saccoccia was convicted. Accordingly, the district court held the government could not reach the legal fees paid prior to the conviction; however, the fees paid after the conviction were forfeitable. The attorneys appealed the district court's decision that their post-conviction legal fees were subject to forfeiture.

The government argued its right to forfeit was derived from the attorneys' knowing violations of the post-indictment injunction which constrained Saccoccia and his attorneys from transferring any funds subject to forfeiture. RICO's substitute assets provision states in the event tainted property is unavailable, the government may forfeit "any other property of the defendant." The First Circuit concluded the plain language of the statute did not provide "an avenue through which the government may reach a third party's untainted assets as a substitute for tainted assets which the third party had already transferred prior to the date of forfeiture." The court recognized an implicit limitation in § 1963(m), the substitute assets provision, that the government may reach only the defendant's substitute assets, and not those of a third party. The First Circuit, however, suggested the government may still be able to recover the money from the attorneys through contempt proceedings or state conversion claims.

Application Of Relation-Back Provision To Substitute Assets

In *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003), the Fourth Circuit held property conveyed to a third party after the commission of the act giving rise to forfeiture can be reached as substitute property under the Criminal

Forfeiture Act's "relation-back" provision. In connection with McHan's conviction for drug trafficking, the district court determined he was required to forfeit \$1.5 million of tainted proceeds. Based on McHan's failure to account for the proceeds, the court entered, as part of McHan's sentence, a preliminary order forfeiting real estate and other property under the substitute assets provision of 21 U.S.C. § 853(p). McHan's family filed a petition under § 853(n), claiming the substitute property had been properly conveyed to them by McHan. After a hearing on the petition, the district court released some of the property and issued a final order of forfeiture with respect to the remainder.

On appeal, McHan's family argued: (1) under the Due Process Clause they were entitled to be heard before the district court issued its preliminary order of forfeiture; (2) the relation-back principle of § 853(c) applies only to "tainted" property and not to the forfeiture of substitute property; and (3) the district court violated the Seventh Amendment by denying their request to have the hearing on their petition conducted before a jury.

With respect to due process, the Fourth Circuit concluded § 853(n) provides all necessary precautions by requiring the petitioners receive notice of the forfeiture before its final implementation; they be given a hearing; they be allowed to present witnesses and evidence; and, they be permitted to cross-examine any witnesses who appear at the hearing.

Addressing the claimants' second argument involving the relation-back principle, the Fourth Circuit held § 853(c) does not specifically preclude the application of the relation-back principle to substitute property. The court reasoned the language of § 853(p) seems to equate substitute property with tainted property when the tainted property has been placed beyond the reach of forfeiture, through loss, transfer, lack of jurisdiction, loss of value, or commingling with other property. The court was similarly unpersuaded by the claimants' argument that the relation-back principle as applied to substitute property should be limited to the date of the criminal forfeiture or, at worst, to the date of indictment. The court found the time frame for the substitute assets provision should begin at the time of the criminal act. Denying the government the ability to obtain substitute property by allowing a defendant to divest himself/herself of property after a criminal act would run contrary to the purpose of the statute.

Finally, the court rejected the claimants' contention that they were entitled to a jury trial under the Seventh Amendment. Noting a § 853(n) hearing is ancillary to sentencing in a criminal trial, the court concluded since there is no jury trial right in criminal sentencing, there should also be no right to a jury trial in proceedings ancillary to sentencing.

Foreign Property – Statute Of Limitations

In *Contents of Account Number 03001288 v. United States*, 344 F.3d 399 (3rd Cir. 2003), the Third Circuit held the five year statute of limitations governing *in rem* drug forfeiture actions is tolled during the time the property is located outside the United States. Eight years after the claimant pleaded guilty to heroin trafficking, the government filed an *in rem* forfeiture action for the proceeds of the illegal trafficking which were located in three bank accounts in the United Arab Emirates. The claimant contended the action was time barred under the statute of limitations applicable to *in rem* drug forfeitures actions, 19 U.S.C. § 1621.

Section 1621 establishes a five year limitations period, but an exception states "the time of absence from the United States of the person subject to the penalty of forfeiture, or of any concealment or absence of the property, shall not be reckoned within the five-year limitations period." The claimant argued the foreign accounts did not fall within the exception because the government could have established "constructive control" of the accounts pursuant to 28 U.S.C. §1355, which grants certain district courts *in rem* jurisdiction over property located abroad.

The Third Circuit found no connection between a district court's ability to exercise jurisdiction and the tolling of the statute of limitations found in the exception to §1621. The court reasoned §1621 clearly states the limitations period shall be tolled during any concealment or absence of the property. The claimant argued, if the exception to the limitations period were read literally, no period of limitations involving property located abroad, would be applicable to forfeiture actions under §1355. The claimant further contended the legislative history of §1621 indicates Congress did not consider the potential effects and did not intend that result.

The Third Circuit disagreed. First, the plain language of §1621 is unambiguous. Second, even if it considered the legislative history, Congress's silence does not indicate it did not intend for the indefinite tolling of the limitations period for forfeitures of drug tainted assets located abroad. The court reasoned the government faces a huge task in securing foreign assistance to deal with the effects of international drug trade, and Congress may have considered this and chosen to give law enforcement some leeway.

SENTENCING

Standard Of Review For Departures

In *United States v. Thurston*, 338 F.3d 50 (1st Cir. 2003), the First Circuit reversed the district court's downward departure after reviewing the sentence under the new de novo standard of review. Thurston was the vice president of a medical laboratory who was convicted of conspiring to defraud Medicare of over \$5 million. At sentencing, the guideline range was 63 to 78 months imprisonment (statutory maximum 60 months), but the district court departed downward 16 levels based on a potential sentencing disparity between Thurston and his co-conspirator and on Thurston's extraordinary charitable works.

On appeal, the government argued the downward departure was unwarranted and excessive. The First Circuit applied the new de novo standard of review for sentencing departures from the PROTECT Act and agreed. First, it noted Congress's change in standard of review was a procedural, not substantive, change and thus does not violate the Ex Post Facto Clause. The court also saw "no unfairness" in Congress's requiring appellate courts to take a closer look at whether a district court erred in departing. *Id.*, *56-57.

In regard to the district court's grounds for departure, the court found the sentencing guidelines prohibit departures for sentencing disparity alone, and noted previous First Circuit decisions have held such departures are beyond the district court's authority. Thus, the departure for sentencing disparity in Thurston's case was impermissible. Further, the guidelines discourage downward departures based on charitable good works. Although Thurston presented evidence he devoted time and money to his church and aided community members, the court noted corporate executives are better situated to and generally do make large financial contributions and are often expected to aid the community. Thurston's charitable good works, when considered with his financial position and the extent of his crime (which is now treated more seriously in the guidelines) were not of an extraordinary nature to warrant a departure. The First Circuit vacated the sentence and remanded for imposition of the statutory maximum.

Departures For Extraordinary Family Circumstances

In *United States v. Leon*, 341 F.3d 928 (9th Cir. 2003), Leon was convicted of 32 counts of preparing false income tax

returns. Based on the tax loss and Leon's criminal history, the sentencing range was 27-33 months imprisonment. The district court departed downward six levels based on the poor health of Leon's wife and Leon's irreplaceable role as her caretaker. The departure reduced Leon's sentencing range to 10-16 months imprisonment, and the court divided Leon's sentence between imprisonment and home detention. The government appealed, arguing the district court erred in finding Leon's family circumstances extraordinary.

The Ninth Circuit affirmed, finding permissible downward departures for extraordinary family circumstances generally involve situations where the defendant is an irreplaceable caretaker of family dependents. The Ninth Circuit followed its recent trend of affirming departures for family circumstances and also distinguished this case from other cases where such departures were reversed. In those cases, the Ninth Circuit reasoned, the defendants requesting the departures were not found to be irreplaceable. In this case, the district court noted Leon's wife had recently undergone surgery to remove a cancerous kidney, had subsequently lost the ability to work, and had a documented history of depression. Regarding the latter, a psychologist presented unrefuted evidence showing Leon's wife would be at risk of committing suicide should Leon be incarcerated. Since the district court in this case found Leon's wife to be in exceptionally poor emotional and physical health and found Leon to be the only person available to tend to her needs, the court did not err in departing downward. The Ninth Circuit found no merit in the government's contention that the court's use of suicidal feelings to support departures could result in a high volume of defendants who claim to have family members who might commit suicide upon the defendant's incarceration, since the cases cited by the government dealt with defendants' anxiety, not family members. The court point out, in this case, Leon's wife's depression was documented and occurred prior to Leon's indictment.

Departures For Consecutive Sentences

In *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003), Pressley was convicted in 1996 of various drug charges and appealed his sentence of 360 months, arguing, *inter alia*, the consecutive sentences resulted in more jail time than the statutory maximum of any of his crimes and the court should have departed for the harsh conditions of his presentence confinement. The Eleventh Circuit remanded on the latter issue, but affirmed the rest of the sentence.

In regard to the imposition of consecutive sentences, the Eleventh Circuit noted as long as the sentence imposed on

each count was within the statutory maximum for that count of conviction, the ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not forbid imposing the sentences consecutively. Furthermore, the district court correctly found the imposition of consecutive sentences was mandatory under U.S.S.G. § 5G1.2(d). In so holding, the Eleventh Circuit disagreed with the Second Circuit, which has held § 5G1.2(d) does not mandate consecutive sentences, since such an interpretation indicates the Sentencing Commission did not give adequate consideration to situations where prosecutors might have manipulated charging decisions to achieve the highest possible sentence. On the contrary, the Eleventh Circuit noted, the Commission neutralized such arbitrary or manipulative charging situations with its grouping rules in Chapter Three of the Guidelines. Instead, § 5G1.2(d) proves the Commission

intended to ensure achievement of sentences as close as possible to the calculated guidelines' range. Regarding Pressley's presentence confinement argument, the court noted confinement conditions while awaiting sentencing could be a basis for granting a downward departure, depending upon the facts of the case. In this situation, the district court remarked on Pressley's harsh presentence confinement conditions, but thought it lacked authority to depart. The Eleventh Circuit disagreed and remanded, directing the district court to exercise its discretion on whether a departure was warranted.

CRIMINAL TAX BULLETIN

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