

CRIMINAL LITIGATION

Month in Review: July 2006

United States v. Martin, No. 05-16645 (11th Cir. July 11, 2006)

Reviewing Martin's sentence for the second time, the Court of Appeals for the Eleventh Circuit found a sentence of 7 days' imprisonment unreasonably lenient and vacated the sentence. In both appeals, the parties agreed that Martin's advisory guidelines range was 108 to 135 months' imprisonment, and that Martin's substantial assistance to the government warranted a downward departure pursuant to U.S.S.G. § 5K1.1. The "hotly contested dispute both times" was whether the "extremely lenient" sentence given by the district court was reasonable.

Martin pled guilty to falsifying books and records and to conspiracy to commit securities fraud, commit mail fraud, and falsify books and records. Martin was identified for sentencing as an organizer or leader of a fraud which resulted in losses in excess of \$80 million. After Martin (a former CFO of HealthSouth) provided evidence in the trial of Richard Scrushy (the former CEO of HealthSouth), the government recommended a sentence of 42 months' imprisonment (a 9-level departure), but the district court granted Martin a sentence of 7 days' imprisonment (a 23-level departure). Martin also agreed and was sentenced to forfeit \$2.375 million and pay a \$50,000 fine.

The court vacated the sentence and remanded for resentencing, finding the sentence unreasonable because it "is not remotely commensurate with the seriousness and extensive scale of the crimes and does not promote respect for the law, does not provide just punishment for the offense, as § 3553(a)(2)(A) requires, and does not afford adequate deterrence to the criminal conduct here, as § 3553(a)(2)(B) mandates." The court explained that "cooperation, while commendable and extremely valuable, is not a get-out-of-jail-free card."

Noting that it has reversed Martin's sentence twice, and also reversed the same judge for extraordinary downward departures in three other appeals, the court remanded with instructions for the district court to reassign the case to another judge.

United States v. Stein, No. S1 05 Crim. 0888 LAK (S.D.N.Y. July 25, 2006)

In the ongoing saga of the accounting fraud case against former KPMG partners, Judge Kaplan suppressed certain proffers and their fruits as the result of coercion. The court found the government responsible for the substantial pressure to cooperate exerted on defendants by KPMG in response to the government's threats to indict the company.

The government threatened KPMG with indictment in connection with allegedly abusive tax shelters and, relying on the Thompson Memorandum, demanded that KPMG make witnesses available, including employees under criminal investigation. Although it was KPMG policy to pay the legal fees of its employees under criminal investigation for actions related to their work, KPMG bowed to government pressure and told its personnel it would cut off payment of legal expenses of any employee who refused to talk to the government or who invoked the Fifth Amendment.

Judge Kaplan held that these threats alone were not sufficient to prove coercion because there can be other compelling reasons to cooperate with the government, and that an individual alleging coercion in violation of the Fifth Amendment must present evidence of both subjective coercion in the mind of the individual and of reasonableness of the individual's feelings of coercion.

Although the court found no coercion with respect to seven of the defendants, it did suppress statements made by Richard Smith and Mark Watson. After the Government made KPMG aware of Mr. Smith's refusal to provide a proffer, KPMG threatened to fire him. Mr. Smith, whose family was entirely dependent upon him for support, testified that he then rejected his attorney's advice and agreed to proffer in order to save his job. Mr. Watson, a former employee of limited financial means, testified that he agreed to return for two additional proffer sessions because he could not afford to pay for what he regarded as an adequate defense and felt compelled to return in order to avoid KPMG cutting off payment of his legal fees. The court credited the testimony of both defendants, and found that certain proffers made by those defendants were coerced.

In holding the government responsible for the coercion, Judge Kaplan found that the government "quite deliberately precipitated KPMG's use of economic threats to coerce the proffer statements in question," and that there was a "clear nexus" between the government and the specific conduct of which defendants complained.

United States v. Ebbers, No. 05-4059-CR (2d Cir. July 28, 2006)

The Court of Appeals for the Second Circuit affirmed Ebbers' conviction and sentence to 25 years' imprisonment, denying Ebbers' contentions that: (i) the district court erred in permitting the government to introduce testimony by immunized witnesses while denying immunity to potential defense witnesses who were rendered unavailable to Ebbers by their invocation of the Fifth Amendment privilege, (ii) the district court should not have given a conscious avoidance instruction, (iii) the government should have been required to allege and prove violations of Generally Accepted Accounting Principles ("GAAP"), and (iv) his sentence was based on an inaccurate calculation of losses, and unreasonable in length.

In an interesting explanation of the interplay between GAAP and criminal liability, the court stated:

[D]ifferences of opinion as to GAAP's requirements may be relevant to a defendant's intent where financial statements are prepared in a good faith attempt to comply with GAAP. The rules are no shield, however, in a case such as the present one, where the evidence showed that accounting methods known to be misleading – although perhaps at time fortuitously in compliance with particular GAAP rules – were used for the express purpose of intentionally misstating WorldCom's financial condition and artificially inflating its stock price.

With respect to Ebbers' sentence, the court recognized that "[t]wenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." The court further acknowledged that under the advisory guidelines, "it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment" and that "even the threat of indictment on wafer-thin evidence of fraud may therefore compel a plea." The court, however, refused to substitute its judgment for that of Congress, and upheld the sentence as "harsh but not

unreasonable” given Congress’ policy decisions.

United States v. Beng-Salazar, No. 04-50518 (9th Cir. July 6, 2006)

The Court of Appeals for the Ninth Circuit held that timely Sixth Amendment objections in a pre-*Booker* case based on *Apprendi* and *Blakely* were sufficient to preserve a *Booker* challenge to sentencing under the mandatory Sentencing Guidelines. Defendant Beng was convicted of illegal reentry following deportation and sentenced under the mandatory Sentencing Guidelines. Beng’s pre-sentencing report recommended an increased sentence based on his previous deportation following a conviction for a crime of violence.

Beng objected to sentencing on Sixth Amendment grounds, but he did not explicitly object to or challenge the constitutionality of the mandatory nature of the Guidelines. The 9th Circuit held that these Sixth Amendment objections were sufficient to preserve Beng’s *Booker* claim, in part because it would have been almost impossible to predict at the time of Beng’s trial that the Guidelines would be rendered advisory and to craft objections accordingly. The court vacated the sentence and remanded for resentencing under the advisory Guidelines.

U.S. v. Pettigrew, No. 05-2187 (10th Cir. July 27, 2006)

The Court of Appeals for the Tenth Circuit declined to apply a strict “fruit of the poisonous tree” doctrine to unsolicited incriminating statements made subsequent to a voluntary statement made in violation of *Miranda v. Arizona*. The court held that the admissibility of such statements turns on the voluntariness of the inculpatory statement.

Pettigrew was convicted of involuntary manslaughter and assault following an alleged hit and run while driving under the influence. Pettigrew made three self-incriminating statements while in police custody before police advised him of his *Miranda* rights. The first two statements were in response to questions by police. The first statement was suppressed as the result of custodial interrogation under *Miranda*, and the court never ruled on the admissibility of the second statement. Pettigrew’s third statement was not in response to police questioning, but Pettigrew argued that it should be excluded as “fruit of the poisonous tree” of his first statement.

Noting that the Supreme Court has rejected automatic application of the “fruits” doctrine to *Miranda* violations, the Court held that *Miranda*’s twin goals of trustworthiness of the evidence and deterrence of police coercion would best be served by admission of unsolicited inculpatory statements knowingly and voluntarily made following voluntary statements made in violation of *Miranda*. The Court concluded that Pettigrew’s third statement was voluntary and affirmed Pettigrew’s conviction.

U.S. v. Gotti, No. 04-2746-CR(L) (2d Cir. July 12, 2006)

The Court of Appeals for the Second Circuit addressed the scope of the Supreme Court’s holding in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003), (“*Scheidler II*”). The court found that *Scheidler II* did not preclude conviction for extortion for misappropriation of intangible rights, but instead required that a defendant obtain or

attempt to obtain the right for him or herself, as opposed to merely depriving a victim of that right.

Defendants appealed their convictions on a long list of RICO violations relating to alleged organized crime activity. Defendants-appellants Peter Gotti, Richard G. Gotti, Anthony Ciccone, and Richard Bondi argued that *Scheidler II* invalidated all of the counts under the Hobbs Act which allege extortion of intangible property rights. The court explained that the Supreme Court's decision did not reach, overrule, or impact the holding in *United States v. Tropiano*, 418 F.2d 1069 (2nd Cir. 1969), which established misappropriation of intangible property rights as extortion, and emphasized that *Scheidler II* merely required the "intent to exercise, sell, transfer, or take some analogous action" with respect to the right extorted from the victim. The court found that the defendants intended to profit from the rights extorted from their many victims and upheld the convictions.

United States v. Ponds, No. 03-3134 (D.C. Cir. July 14, 2006)

The D.C. Circuit reviewed the government's use of information derived from materials it received pursuant to an act of production grant of immunity, remanding the case after reversing the conviction of a criminal defense attorney who allegedly received a Mercedes from a client but failed to report the car for forfeiture. The court held that defendant Pond's production of documents in response to a subpoena by the Maryland Assistant U.S. Attorney (AUSA) was sufficiently testimonial to implicate Pond's Fifth Amendment rights against self-incrimination.

Pond allegedly received a Mercedes Benz in exchange for representing a drug dealer named Jerome Harris. Pond registered the car under his sister's name. After Harris pled guilty, the court asked him at sentencing where the Mercedes was for forfeiture purposes, but Pond failed to disclose that Harris had given him the car. The U.S. Attorney's office later learned from Harris that Pond was in possession of the automobile and initiated an investigation. AUSA Wilkinson discovered a retainer agreement in Harris's cell that discussed the Mercedes and DEA agents saw the car parked outside Pond's home. After Wilkinson subpoenaed several categories of documents from Pond and Pond threatened to exercise his Fifth Amendment rights, Wilkinson narrowed the scope of the subpoena and moved for act of production immunity under 18 U.S.C. 6003.

The narrowed subpoena requested several categories of documents, including documents that refer to any vehicles belonging to Harris "if access to that vehicle was provided to you by any means." The court took exception to the government's lack of specific knowledge about the documents they requested, noting, for example, the government's request for documents contingent on Harris' provision of access to a vehicle to Pond. The court found provision of these documents to be testimonial in nature, as their production was an acknowledgement by Pond that the documents existed and were under his control. Invoking the Supreme Court's decision in *Hubbell*, the court found this production of documents to be too broad to constitute a mere surrender of documents. Consequently, the government was restricted by its grant of immunity and Pond's Fifth Amendment rights in its use of the information that it gleaned from the documents, even though the government potentially could have discovered the same information independently. Because the government could not prove that it would have discovered this information absent Pond's disclosure, the court reversed Pond's conviction and remanded to determine the degree of the government's impermissible use and whether that use was harmless.

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