United States v. Wilson, 962 F.2d 16 (9th Cir. 04/23/1992)

[1] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[2] Nos. 91-10047, 91-10048, 91-10049, 91-10050

[3] 1992.C09.45246 <http://www.versuslaw.com>

[4] filed: April 23, 1992.

[5] **UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,**
v.
YVONNE WILSON, J.F. SPANN, SAM MERIT, AND ODED BENARY, DEFENDANT-APPELLANTS.

[6] Appeal from the United States District Court for the District of Arizona. DC No. CV-87-00080-RCB. Robert C. Broomfield, District Judge, Presiding.

[7] Before: Choy, Farris and Rymer, Circuit Judges

[8] MEMORANDUM

[9] Yvonne Wilson, Sam Merit, Oded Benary, Eldon Bollinger, Tom Leding, and J.F. Spann were indicted on one count of wire fraud (18 U.S.C. § 1343), ten counts of interstate transportation of a victim of fraud (18 U.S.C. § 2314), one count of fraud in the sale of securities (15 U.S.C. § 77q), one count of sale of unregistered securities (15 U.S.C. § 77e), and one count of conspiracy to commit offenses against the United States (18 U.S.C. § 371). Wilson, Merit, Benary, and Spann appeal from their convictions on various counts. We affirm.

[10] I. Merit's Extradition

[11] Merit argues that the district court lacked in personam jurisdiction because his extradition from the Republic of South Africa violated this country's treaty of extradition with the

was paid out to the defendants, accounts controlled by the defendants, or companies that the defendants controlled or attempted to control. The question therefore did not assume facts not in evidence.

[32] D. Cross-Examination of Skinner

[33] Spann argues that the district court erred by restricting his cross-examination of Gordon Todd Skinner in violation of his rights under the Confrontation Clause of the Sixth Amendment. See United States v. Bonanno, 852 F.2d 434, 439 (9th Cir. 1988), cert. denied, 488 U.S. 1016 (1989).

[34] Count 1 of the indictment (wire fraud) alleged that Merit, while in Arizona, placed a call to Skinner in Oklahoma on June 4, 1984, for the purpose of executing the scheme to defraud. Spann claims that the credibility of Skinner, who was under state indictment in New Jersey for a drug offense, became a "critical issue in the trial." Skinner, who refused to answer any questions that he felt implicated the ongoing criminal proceedings in New Jersey, invoked his Fifth Amendment privilege numerous times. Spann claims that Skinner's silence on these issues prevented him from exploring Skinner's bias and motivation to assist the government.

[35] To the extent Spann implies that his Sixth Amendment rights must trump Skinner's Fifth Amendment rights, he is incorrect. The Supreme Court has never construed the Sixth Amendment to mean "that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself." McCray v. Illinois, 386 U.S. 300, 314 (1967).

[36] The jury had sufficient information with which to evaluate Skinner's credibility and bias. See Bonanno, 852 F.2d at 439. On direct examination, Skinner testified that he had been arrested and charged in Boston in 1987 with possession of marijuana with intent to distribute, which charges were later dropped. He also testified that he had been arrested in New Jersey in 1989 for a drug offense, that he had been charged under New Jersey's drug kingpin statute, that the trial was pending, and that the offense carried a sentence of twenty-five years to life. Further, he testified that he was cooperating with the government in an ongoing criminal investigation in order to gain "some sort of a favorable input to my problems in New Jersey," but that his cooperation in that unrelated investigation had nothing to do with his testimony in this case.

[37] On cross-examination, Skinner testified extensively about his cooperation with federal authorities on several occasions, and the benefits he had obtained and hoped to obtain in exchange for that cooperation. Although the court did not allow defense counsel to explore whether Skinner's cooperation was connected in any way to his step-father and placed several other limitations on the cross-examination, defense counsel had ample opportunity to establish bias and motive. The district court therefore did not abuse its discretion in allowing Skinner to invoke his privilege against self-incrimination and otherwise limiting

Skinner's cross-examination.

[38] E. Failure to Give Limiting Instructions Upon Mention of "the RICO Action" and the SEC Injunction

[39] Benary argues that the district court erred in denying his motions for mistrial and for a limiting instruction when a witness testified that Merit and Benary had been involved in a RICO lawsuit. Benary also claims that he was denied a fair trial when a government witness was allowed to read the text of an SEC injunction that had been entered against Merit and his associates.

[40] On redirect examination, a government witness testified that Merit, Benary, and Tracon had been defendants in "a RICO action" arising out of Tracon's attempted purchase of Coral Air, a commuter airline in the Virgin Islands. The court did not abuse its discretion, because the defense opened the door by asking the government witness about certain activities in connection with the RICO action. Assuming that a limiting instruction was requested, it was within the court's discretion to decline to give one. It is doubtful that a jury of laypersons would even know what "RICO" means; in any event, the testimony was not so extensive or inflammatory that the jury would likely have labeled Benary a "racketeer." Moreover, in its general charge to the jury, the court instructed the jury that "the defendants are not on trial for any conduct or offense not charged in the indictment." Cf. United States v. Soliman, 813 F.2d 277, 279 (9th Cir. 1987) (nearly identical instruction sufficient to warrant Conclusion that court did not abuse discretion in failing to give limiting instruction concerning "other crimes" evidence). Finally, in light of the overwhelming evidence against the defendants, it is more probable than not that any impermissible inference drawn by the jury did not materially affect the verdict. Cf. United States v. Guerrero, 756 F.2d 1342, 1347 (9th Cir.), cert. denied, 469 U.S. 934 (1984).

[41] Benary also complains about the district court's failure to give a limiting instruction when a government witness read the SEC injunction. Having failed to ask for one, however, he "waived the request." United States v. Jenkins, 785 F.2d 1387, 1396 (9th Cir.), cert. denied, 479 U.S. 855, 889 (1986). There was no plain error.

[42] F. Merit's Threat to a Witness

[43] Benary argues that he was denied a fair trial when the court allowed a government witness to testify about a threat Merit had made without giving a limiting instruction as to the admissibility against Benary of Merit's threat. Kolleen Kubik, office manager of Securities Transfer in Florida, testified that Merit, in the course of demanding the return of certain Tracon records, said to her, "I'm going to take care of you, little girl." Because Benary did not request a limiting instruction, he waived his request. No plain error appears in the testimony of Kubik, who only related Merits words without attempting to characterize them as a threat.

[52] To support a conviction under 18 U.S.C. § 1343, the call "need not be an essential part of the contemplated scheme, [but] need only be made for the purpose of executing the scheme." United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981), cert. denied, 456 U.S. 905 (1982). The transcript of the call shows that Merit and Skinner discussed the mining equipment at the Arizona site, the production start-up date, a brochure Skinner was preparing to promote the Tracon mine to potential investors, and Skinner's anticipated visit to the mine site. The Discussion was "for the purpose of executing [the] scheme" to defraud. 18 U.S.C. § 1343. Even if Merit and Skinner had only discussed the loan desired by Merit, as Merit claims, to the extent that Merit sought the loan to keep Tracon afloat, the call was "for the purpose of executing [the] scheme" to defraud. See United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982) ("Usefulness [of the wire transmissions] to the perpetrator is sufficient under section 1343."), cert. denied, 461 U.S. 932 (1983). Accordingly, "there was substantial relevant evidence produced from which the jury reasonably could have found the defendant guilty beyond a reasonable doubt." United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988).

[53] Merit next challenges the sufficiency of the evidence under counts 1 and 14. He argues that because his prior Elkins Act conviction and SEC injunction were public, "non-corporate" information, his failure to disclose them to investors could not constitute fraudulent conduct under the wire fraud statute in the absence of a duty to disclose, and could not support his conviction for conspiracy under count 14.

[54] The scheme to defraud, however, involved both affirmative misrepresentations and material omissions. Many of the victims of the scheme testified that they were induced to invest in Tracon by the defendants' misrepresentations regarding the mine's potential and past production, Merit's past business activities, and the ownership of the mining equipment.*fn3

[55] Although in this circuit "a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged," United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985), the government's case did not rest solely on the alleged omissions. Evidence of affirmative misrepresentations sufficiently established the requisite scheme to defraud under the wire fraud statute. See United States v. Benny, 786 F.2d 1410, 1418 (9th Cir.) ("Proof of an affirmative, material misrepresentation supports a conviction of mail fraud without any additional proof of a fiduciary duty."), cert. denied, 479 U.S. 1017 (1986); cf. United States v. Biesiadecki, 933 F.2d 539, 542-43 (7th Cir. 1991) (district court did not abuse its discretion in admitting evidence of omissions where there was also "abundant evidence" of affirmative misrepresentations). Therefore, it is unnecessary for us to decide whether Merit and his codefendants owed an independent duty to the potential investors in this case.

[56] C. Benary

[57] Benary contends that the government failed to carry its burden of proving that Tracon stock was not exempt from registration and that his conviction under count 13 (interstate sale of