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WHITE-COLLAR CRIME

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High Court: More Burdens Placed on Defense; Pro-Prosecution?

With the Supreme Court's criminal docket overshadowed last term by its important sentencing decisions forbidding executions of the mentally retarded and barring capital sentences unless a jury finds an aggravating factor, white-collar crime received even less attention than usual from the Court.

One decision, in a civil securities enforcement matter, broadly construes the reach of the Securities Exchange Act and may have bearing on the scope and impact of certain fraud prosecutions. Several of the Court's other decisions have serious ramifications for any defendant and warrant discussion in this column. These cases place additional burdens on defendants and belie a decidedly pro-prosecution sentiment that is likely to present added hurdles to the defense in a climate already hostile to individuals facing prosecution for business crime.

Purchase or Sale of Securities

Fraud in Connection With the Purchase or Sale of Securities. As the standard-bearer in the current legal crusade against corporate wrongdoers, the SEC was handed a victory with the Court's decision in Securities and Exchange Commission v. Zandford.[1] If corporate defendants were hoping that the Supreme Court would reinvigorate the requirement in §10(b) of the Securities Exchange Act of 1934 that securities fraud occur "in connection with the purchase or sale of any security," those hopes were dashed by Zandford. In a unanimous opinion written by Justice John Paul Stevens, the Court broadly construed the reach of §10(b), requiring only that the scheme to defraud coincide with the purchase or sale of securities and rejecting the notion that there must be some misrepresentation about the value of a particular security to run afoul of the act.


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The respondent had been convicted of wire fraud for misappropriating the proceeds of a series of securities sales made on behalf of customers whose brokerage account he managed during a two-year period. The customers had granted the broker broad discretion over their account, with the understanding that he would invest conservatively in order to preserve the safety of principal and income. Instead, without their knowledge or consent, he transferred almost $350,000 of their securities into accounts he controlled, selling those securities and using the proceeds for his own benefit. In addition to the criminal case, the SEC also commenced a civil proceeding against the respondent alleging that he had violated §10(b) and Rule 10b-5 based on the same activity. It successfully moved for summary judgment, asserting that respondent's conviction on the criminal charges estopped him from contesting the facts establishing the §10(b) violation.

The Fourth Circuit not only reversed the grant of summary judgment, but directed that the civil complaint be dismissed, because it failed to allege a sufficient connection between the fraud and the sale of a security. It reasoned that the sales of the victims' securities were incidental to the fraud of absconding with the proceeds, and that the crime for which respondent was convicted was a simple scheme to steal assets and did not involve the manipulation of a particular security.

In reversing this decision, the Supreme Court stressed that the securities sales and the fraudulent practices were not independent events, but were part of a series of transactions undertaken over an extended period, that enabled the respondent to convert the proceeds from the sale of the victims' securities to his own use. The Court found that a fraudulent scheme involving securities in a discretionary account represents a substantial threat to investor confidence in the securities industry, inasmuch as it prevents customers from trusting their brokers to invest for their bene-

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fit. This was not an instance, the Court observed, where the respondent executed legitimate securities transactions and subsequently misappropriated the proceeds. Rather, the complaint alleged that he sold the victims securities "secretly intending from the beginning to keep the proceeds." It further observed that while the defendant's misappropriation of the proceeds provided persuasive evidence that he had violated §10(b), misappropriation is not an essential element of the offense. Rather, it noted in reliance on Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.,[2] that "[i]t is enough that the scheme to defraud and the sale of securities coincide."

Exculpatory Impeachment Information

No Right to Exculpatory Impeachment Information Prior to Plea. In United States v. Ruiz,[3] the Court upheld the constitutionality of a guilty plea agreement that specifically required the defendant to waive her right to receive impeachment information regarding informants or other witnesses, or any information supporting affirmative defenses as a condition of the plea. The defendant declined to waive those rights, losing the benefit of a "fast track" plea bargain under which the government would have recommended a two-level downward departure. She subsequently pleaded guilty without any agreement and appealed the denial of the two-level downward departure. The Ninth Circuit vacated her sentence, holding that the government's obligation to provide impeachment information to a defendant before trial entitles the defendant to receive the same information before entering into a plea agreement.

The Supreme Court reversed, holding that the Constitution does not require "preguilty plea disclosure of impeachment information." The Court noted at the outset that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary. …" It observed that its previous cases, including Brady v. United States,[4] McMann v. Richardson,[5] and United States v. Broce, 488 US 563 (1989), have not required that a defendant have complete knowledge of all relevant circumstances for a guilty plea to pass constitutional muster. Rather, a court may accept a guilty plea accompanied by waivers of constitutional rights, notwithstanding the fact that the defendant may be laboring under misapprehensions about the quality of the prosecution's case, the likely penalties, the admissibility of certain evidence or the strength of a potential defense. It found it difficult to distinguish between a defendant's ignorance of grounds for impeachment from the other forms of ignorance tolerated in its previous decisions.

Finally, the Court held that the due-process considerations that require disclosure of trial-related impeachment evidence militate against finding a disclosure right before a guilty plea. It noted that due process requires consideration not just of the private rights at stake, but also of the value of the additional safeguard and the adverse impact of the requirement on the government's interests. The Court reasoned that finding a preguilty plea right to impeachment information offered little value to the defendant because the utility of such information depends on a defendant's independent awareness of the details of the government's case. It further observed that such an obligation could seriously interfere with the government's interests in securing pleas that are factually justified, desired by defendants, and further the efficient administration of justice because premature disclosure of witness information could disrupt ongoing investigations, subject prospective witnesses to serious harm and require the government to devote substantially more time to trial preparation prior to plea bargaining.

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Unobjected to Error

Defendant's Burden to Show That Unobjected to Error Affected Substantial Rights. The Court sided with the government in a second guilty-plea case, holding in United States v. Vonn[6] that a defendant who fails to object to a trial judge's error in conducting a guilty-plea colloquy as required by Rule 11, bears the burden of proving that the error affected his substantial rights.

Rule 11(h) provides that a judge's failure to comply with the requirements of Rule 11 that "does not affect substantial rights shall be disregarded." That provision parallels the general harmless error rule of Rule 52(a). The question of whether the defendant or the prosecution should bear the burden in an appellate determination of whether an unobjected to Rule 11 error is harmless, arises from the fact that Rule 11(h) does not include a "plain error" provision similar to that of Rule 52(b), which provides that a defendant who fails to object to error in the trial court must bear the burden on appeal of showing that such error affected substantial rights. The Court was not persuaded by the defendant's argument that the burden should rest with the government, because the "plain-error" rule "would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge." Noting that if the government bore the burden under these circumstances, the defendant would lose nothing by failing to object to obvious Rule 11 error when it occurs, the Court held that a defendant who remains silent in the trial court, must bear the burden of showing that the error affected his substantial rights when challenging that error on appeal.

Rule 11(h)

The Court noted that Rule 11(h) on its face offered little guidance. The defendant argued that Congress' failure in Rule 11 to pair a harmless error provision with a "plain-error" provision as it did in Rule 52 implied that Congress intended that defendants who did not object to Rule 11 error should be relieved of the burden to show prejudice generally imposed by the plain-error rule on silent defendants. The Court noted however, that this is not the only implication that can be drawn from the failure to include a plain-error

provision in Rule 11(h). It found that an equally plausible reading would be that where a defendant fails to object, absent a plain-error rule, that defendant would have no right of direct appellate review whatsoever.

The Court concluded that the most likely explanation for the omission of a plain-error provision from Rule 11(h) was that in enacting Rule 11(h), Congress was narrowly focused on responding to the claim that harmless-error analysis was inapplicable to Rule 11 proceedings. That claim arose from the Court's 1969 decision in United States v. McCarthy,[7] in which the Court reversed the conviction of a defendant who had pleaded guilty to tax evasion because the trial court had failed to ensure that defendant understood the factual and legal elements of the crime to which he was pleading guilty. At the time, Rule 11 required only in general terms that the court accepting a guilty plea establish that the defendant was acting voluntarily and that he understood the charge and the factual basis for the plea. Subsequently, in 1975, Congress "transformed Rule 11 into a detailed formula for testing a defendant's readiness" to plead guilty requiring that the defendant be instructed on a number of specific rights that he would have if he opted to go to trial. Some courts read McCarthy as requiring automatic reversal if the trial court erred in any aspect of the Rule 11 procedures. Rule 11(h) was added to clarify that reversal should not be automatic, but was required only where error affected a defendant's substantial rights, with the Advisory Committee admonishing that "Rule 11 should not be given such a crabbed interpretation that ceremony [be] exalted over substance."

Conflict of Interest

In a case that sharply divided the Court and produced no fewer than five opinions (including three separate dissents joined by four Justices), the Court held that even where a trial judge fails to inquire into a potential conflict of interest about which she knew, or should have known, the defendant, to obtain reversal of his conviction, must establish that such conflict adversely affected his counsel's performance. In Mickens v. Taylor,[8] the defendant's trial counsel on capital murder charges had also been the victim's attorney on unrelated charges at the time of his murder. The judge who appointed defendant's counsel was the same judge who dismissed the charges against the defendant's victim and knew or should have known that both defendant and victim were represented by the same attorney. On appeal from denial of defendant's habeas corpus petition, the Fourth Circuit Court of Appeals assumed that the trial judge had neglected her duty to inquire into this conflict, but declined to order an automatic reversal on that basis because the defendant had not demonstrated any adverse affect on counsel's performance. The Supreme Court affirmed.

The majority opinion rejected petitioner's argument that the Court's earlier decision in Wood v. Georgia[9] established an unambiguous rule that where a trial judge fails to inquire into an obvious potential conflict, the defendant need only show the existence of that conflict to obtain reversal. The defendant relied on the Court's direction in Wood that the trial court grant a new hearing to defendants if it determined on remand that an actual conflict existed, without also requiring a showing of adverse impact on counsel's performance. The majority explained that this direction in Wood was "shorthand" for its earlier formulation in Cuyler v. Sullivan,[10] that a defendant who shows that a conflict of interest "actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." The majority concluded that defendant was required to make such a showing, reasoning that the trial court's awareness of a conflict "neither renders it more likely that counsel's performance was significantly affected nor in any way renders the verdict unreliable."

Significantly, the Court went beyond merely holding that the respondent in Mickens v. Taylor was required to show an adverse impact on his counsel's performance. It openly questioned whether the relaxed standard in Sullivan, which requires no showing of prejudice (as generally required by Strickland v. Washington[11]) once an adverse impact on counsel's performance is established, should apply in circumstances other than a conflict involving active representation of conflicting interests. Noting that courts of appeal have "unblinkingly" applied Sullivan to a variety of attorney conflicts including conflicts arising from obligations to former clients, as well as to conflicts implicating counsel's personal interests, the majority observed that Sullivan does not clearly establish or even support such an expansive application and suggested that it might be appropriate to treat differently conflicts arising from concurrent and prior representation.

Conclusion

With the proliferation of legislation enacting criminal laws designed to combat white-collar crime as well as the increasing use of these and existing laws to push the limits of prosecution in white-collar cases, the Court may well be pressed to consider more white-collar cases than it did in this and recent years. The Supreme Court has shown that it has not been reticent in intervening to resolve a perceived national crisis. As the prosecutions mount in the growing scandal involving corporate management, we can look for more involvement by the nation's highest court in white-collar matters.

(1) 122 SCt 1899 (2002).
(2) 404 US 6 (1971).
(3) 122 SCt 2450 (2002).
(4) 397 US 742 (1970).
(5) 397 US 759 (1970).
(6) 122 SCt 1043 (2002).
(7) 394 US 459 (1969).
(8) 122 SCt 1237 (2002).
(9) 450 US 261 (1981).
(10) 446 US 335 (1980).
(11) 466 US 668 (1984).