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SECOND CIRCUIT REVIEW

ENHANCE HUSBAND'S SENTENCE BECAUSE WIFE
KEEPS ILL-GOTTEN GAINS?

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In this month's column, we discuss a controversial sentencing decision recently issued by the United States Court of Appeals for the Second Circuit addressing whether a convicted defendant's sentence can be enhanced because a third party — specifically, defendant's wife — declines to forfeit property held in her name that the court found was purchased using the proceeds of defendant's crimes.

The 'Patrick Bennett' Case

In *U.S. v. Patrick Bennett*,¹ the Second Circuit, in an opinion written by Judge Jon O. Newman and joined by Judge Jose A. Cabranes and Judge Alvin W. Thompson (United States District Court for the District of Connecticut, sitting by designation), reversed a district court ruling sentencing a defendant to 30-years imprisonment — a sentence that, according to Mary Jo White, U.S. Attorney for the Southern District of New York, may have been the longest ever imposed in a white-collar case.² The 30-year sentence included an upward departure of 10 years based on the refusal by defendant's wife to surrender properties held in her name that the district court found had been purchased using the proceeds of defendant's crimes.

Patrick Bennett was the chief financial officer of Bennett Financial Group (BFG), a family business based in Syracuse. BFG was in the business of financing office equipment leases and selling the leases to investors, for whom BFG would then collect the lease payments; the result for investors was supposed to be a low-risk income flow. Instead, investors — many of them elderly individual investors — lost their savings. The pyramid scheme and related frauds with which Mr. Bennett was charged constituted the largest such scheme in United States history, with losses of between \$500 million and \$700 million, spread among approximately 10,000 to 12,000 investors.³

Mr. Bennett was convicted in two different trials of multiple offenses, including money laundering, bank fraud, securities fraud, perjury and obstruction of justice. The first jury convicted on the perjury and obstruction of justice counts but hung on the other counts; the second convicted on the remaining counts identified above but hung on charges that Mr. Bennett ran a massive pyramid scheme by selling investors fictitious leases and by selling the same leases multiple times. (While Mr. Bennett was not convicted of these charges, the conduct underlying them was taken into account in the sentencing judge's loss calculation.) The second jury also returned a forfeiture verdict of \$109 million.

Following these two trials, the district judge conducted multiple sentencing hearings. After hearing objections to the presentence report and determining Mr. Bennett's adjusted offense level under the Sentencing Guidelines, Judge John S. Martin stated that "it was very important that every dollar of money that [Mr. Bennett] and his family had taken from the investors in this case be repaid."⁴ At a second hearing held a few months later to determine whether the Bennetts were withholding proceeds of

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Mr. Bennett's frauds, Judge Martin determined that certain assets held in Mrs. Bennett's name — including the family home and surrounding acreage and stock interests in a race track and a 175-room hotel — were proceeds of her husband's fraud.⁵ He then ruled that because "Mr. Bennett and his wife are still endeavoring to keep the proceeds of the fraud," he would depart upward by 10 years — bringing the total sentence to 30 years — if those assets were not surrendered before the final sentencing hearing. "Therefore, if at the time I come to impose sentence, these assets are not returned, I will impose a sentence of 360 months. So it is either 20 years or 30 years. The determination of that is [up] to Mr. and Mrs. Bennett."⁶ As the Second Circuit noted, at the time of this sentencing hearing separate forfeiture proceedings were pending in which Mrs. Bennett would have the opportunity to attempt to prevent forfeiture by asserting an "innocent owner" defense with respect to the assets at issue.⁷

At the final sentencing hearing held a month later, with the forfeiture proceedings still pending, Mrs. Bennett refused to surrender the family home and contended (through Mr. Bennett's attorney) that the hotel and racetrack interests were no longer under her control due to other pending litigation and to a negotiation under way to sell her hotel stock. Judge Martin imposed a sentence of 30 years, which he predicated expressly on the Bennetts' failure to surrender their criminally acquired assets. (Judge Martin did not make a finding as to whether the racetrack and hotel interests remained under Mrs. Bennett's control; however, as the Second Circuit noted, his reference to "assets" in the plural implied that he rejected this line of argument.⁸) Judge Martin also granted the government's application for an order requiring Mr. Bennett to forfeit \$109 million, the amount of the forfeiture verdict returned by the second jury.

The Second Circuit Opinion

In addressing the 10-year enhancement, the Second Circuit noted "we find very little precedent bearing on this issue. It is unusual for a sentencing judge to select a presumptive sentence and then state that the sentence will be increased if some action the judge deems appropriate is not taken. It is even more unusual to use the threat of an increased sentence to compel action by someone other than the defendant."⁹ The Second Circuit concluded, however, that it "need not explore generally the extent of a sentencing judge's authority to use the threat of increased punishment to compel action by a defendant or another person because in this case the use of such power conflicts with the statutory remedy that Congress has established to recapture the proceeds of various unlawful activities."¹⁰ In so holding, the Court reasoned that requiring Mrs. Bennett to choose between enhanced punishment for her husband and surrendering properties she claimed were her own would undermine her rights under the forfeiture statute, and concluded that it is impermissible to impose punishment for the purpose of causing a person to surrender his or her statutory rights.¹¹ Interestingly, this analysis implies that an enhancement based on a *defendant's* refusal to give up his or her own statutory right would be equally improper as the third-party refusal-based enhancement at issue.

Other portions of the court's opinion, however, emphasize its discomfort with the fact that the enhancement rendered Mr. Bennett's punishment dependent on the action of a third party. (This factor, of course, is closely intertwined with that of the statutory rights

discussed above, as it is by refusing to give up her statutory rights that Mrs. Bennett, as a third party, triggered the enhancement; nevertheless, the factors remain analytically distinct.)

Comparing Cases

For example, in rejecting the view that the enhancement was analogous to that approved in *United States v. Merritt*,¹² the court noted that, in that 1993 decision, the action on which the enhancement was predicated was under defendant's sole control. In *Merritt*, the Second Circuit upheld Judge Martin's upward departure in sentencing a defendant for conspiracy to defraud the United States for defendant's elaborate concealment of fraudulently obtained funds through a series of international corporate and bank transactions. It upheld the departure on the ground that the elaborate nature of the attempted concealment was an aggravating circumstance warranting an upward departure under the Sentencing Guideline allowing departure for circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."¹³

In rejecting the analogy between the two cases, the Second Circuit reasoned that, while the cases might be comparable had Mr. Bennett's sentence been enhanced "as added punishment for Bennett's own conduct in transferring to his wife's name assets obtained from proceeds of the crimes," the enhancement in fact was expressly predicated on the fact that "[Mr. Bennett] and his wife refused to surrender the properties" (emphasis in original).¹⁴ It concluded that "[w]hether or not Mrs. Bennett was refusing at the Defendant's behest, which Judge Martin believes, he cannot be punished because she will not relinquish her statutory right to contest the forfeiture of properties in her name."¹⁵

Broadly stated, the notion that additional punishment could be imposed on a husband because his wife refuses to give up property held in her name implies a choice between two somewhat archaic overtones: that a husband can be redeemed by his wife's willingness to sacrifice for him, or that a wife's behavior can be presumed to be under her husband's control. Judge Martin's sentencing enhancement, however, clearly was founded in his fact-specific determination that the decision not to relinquish the assets at issue was dominated by Mr. Bennett. He thus noted at the sentencing, "[i]ndeed, [Mr. Bennett's] continued use of these assets by him and his family, which he controls, and that was quite clear from the letter that he sent to me, there is no claim here that Mrs. Bennett wasn't willing to do this, but Mr. Bennett wants it. It's quite clear from all his statements to the court that this is conduct he is controlling."¹⁶

As noted above, however, the Second Circuit expressly rejected the notion that the enhancement would be rendered proper by a showing that the decision not to surrender the contested assets was made at Mr. Bennett's behest, apparently at least in part because such an enhancement would still constitute improper pressure on Mrs. Bennett to give up her statutory right to oppose forfeiture. In fact, the court further noted that enhancing Mr. Bennett's sentence for failing to *encourage* his wife to surrender proceeds of his crimes would put improper pressure on Mrs. Bennett to give up her statutory right, despite the fact that such encouragement (unlike Mrs. Bennett's ultimate decision) would be under Mr. Bennett's direct control. It reasoned that such an enhancement "too easily becomes an

indirect way to punish for the wife's refusal: a husband who claims to have urged his wife to surrender the property will risk being disbelieved unless his wife complies; realizing that risk, the wife is pressured to comply to spare her husband the additional time that would be imposed because of the sentencing judge's disbelief that the husband has sincerely urged her to capitulate."¹⁷

Defendant's Own Acts

The court concluded by suggesting that the risk of such improper pressure is best avoided by limiting the basis for enhancements to a defendant's own conduct, and noting that, on remand, "Judge Martin will be entitled to consider whether, apart from Mrs. Bennett's refusal to surrender the properties, the Defendant's own acts of concealment or any other appropriate factors warrant a departure above the twenty year sentence he stated would have been imposed had the properties been surrendered."¹⁸

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ENDNOTES

- 1 No. 00-1330, 2000 WL 589434 (2d Cir. May 31, 2001).
- 2 “Bennett Gets 30 Years In Prison Sentence One Of The Longest Ever For White-Collar Crime, Prosecutor Says,” *The Post-Standard*, April 29, 2000, at 1, available at 2000 WL 5833538.
- 3 See, e.g., *Assets In Pyramid Scheme Sold Off*, *Times Union*, April 13, 2001, at E5; Devlin Barrett, “\$700M Scammer May Get A Break,” *New York Post*, June 2, 2001, at 5; *Ex-Finance Chief Gets 30 Years For Fraud, Money-Laundering*, *Wall Street Journal*, May 1, 2000, at C15; “Today’s News Update,” *New York Law Journal*, June 11, 1999, at 1.
- 4 *Bennett*, 2001 WL 589434, at *1.
- 5 *Id.* at *1; “Gwen Bennett To Sell Hotel Vernon Downs Owners Have Agreed To Buy Comfort Suites,” *The Post-Standard*, May 18, 2000, available at 2000 WL 5836441.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.* at *2 n.3.
- 9 *Id.* at *2 (footnote omitted).
- 10 *Id.*
- 11 *Id.*
- 12 988 F.2d 1298 (2d Cir. 1993).
- 13 18 U.S.C. § 3553(b).
- 14 *Merritt*, 2001 WL 589543, at *3.
- 15 *Id.* (footnote omitted).
- 16 *Id.* at *3 n.7.
- 17 *Id.* at *3.
- 18 *Id.*