

Defendant in Tax Fraud Case Gets New Trial

Cross References

- *El-Bey*, 7th Circuit Court of Appeals, November 1, 2017

A defendant in a tax fraud case filed a total of six fiduciary tax returns each seeking a \$300,000 refund. Each return was essentially identical claiming \$900,000 in trust income, \$900,000 in fees, \$7,590 in exemptions, and \$300,000 in withholding. The defendant signed each return, identifying himself as the fiduciary of the trust, and listed his date of birth as the date of trust creation. The defendant mailed three returns in the same envelope to the IRS in August 2009.

The IRS flagged these returns as frivolously filed and mailed three letters to the defendant informing him he would be assessed a \$5,000 penalty per return if he failed to file a corrected return within twenty days.

In November 2009, the defendant returned the three letters by mail to the IRS and included various vouchers and tax forms bearing no relation to the returns. The defendant filed the fourth identical tax return in December 2009. Based on this return, the IRS issued and mailed a \$300,000 refund check, of which the defendant deposited into his bank account. The defendant then used the funds for personal expenses including the purchase of two vehicles and to buy a house.

The defendant filed a fifth identical return in May 2010. Again, the IRS issued and mailed a \$300,000 refund check, of which the defendant deposited into his bank account. This time he used the funds to purchase five vehicles. Finally, in November 2010, the defendant filed the sixth return, but the IRS did not issue a refund.

IRS criminal investigators interviewed the defendant, and he admitted he signed and filed the returns and received and deposited the checks. The defendant did not explain how he came up with the numbers on the return and refused to answer questions regarding the \$300,000 withholding amounts on each return. Eventually he admitted he had not received \$900,000 each year as the Trust fiduciary. He was indicted on two counts of mail fraud and six counts of making false claims to the IRS.

The defendant represented himself without counsel during the district court proceedings and refused help from standby counsel that was appointed by the court. Before trial, the defendant filed numerous motions related to admiralty law, the Uniform Commercial Code, and the Federal Rules of Civil Procedure. Although irrelevant to the criminal proceedings, the motions pertained to the defendant's sovereign citizen beliefs. The district court judge ruled that evidence and testimony concerning the defendant's sovereign citizen affiliation or views were to be excluded from the jury's consideration. The judge

advised the defendant that non-compliance with this ruling could cause him to be excluded from court.

At trial, two IRS representatives testified as witnesses for the government regarding the defendant's tax returns and the three letters and two refund checks that the IRS sent him. During cross-examination, the defendant asked one witness whether it was her understanding that compliance with federal tax laws was voluntary. The witness responded:

"The tax laws are based on individuals taking their information, voluntarily putting them on the tax returns, and mailing them to the IRS. However, the law states if you don't do that the IRS can come in and file for you because the law states you file and pay your income tax."

The defendant continued:

"Now, you just contradicted yourself. Because in one case you are saying that the IRS is saying filing taxes is voluntary compliance?"

At this point, the district court judge interjected and the following exchange took place in the presence of the jury:

Judge: "Look, paying taxes is not voluntary."

Defendant: "That's what it says here. I'm not saying it."

Judge: "Come on."

Defendant: "Judge, I'm not saying it."

Judge: "You don't pay your tax, you go to jail."

Defendant: "Judge, I'm just saying what they are saying what they have..."

Judge: "Payment of taxes to the government is not voluntary."

Defendant: "Okay, judge, so you brought in from behind the law."

Judge: "Just...look, I'm going to kick you out if you keep on with this nonsense. You understand that? You can go watch the case from another room."

Defendant: "Okay. I am through."

Judge: "Don't you say that tax payment is voluntary."

Defendant: "I just asked a question. I didn't say it was. It's on the paper. I didn't say that, judge. But I'm done. I'm done."

The court then recessed for the day. Once the jury had left the courtroom, the judge continued to scold the defendant stating:

"You don't know the law because this stuff that you have been shoving at me for the last month about the Stamp Act...Foreign Sovereign Immunities Act...admiralty law....the Uniform Commercial Code and about the common law, this is all complete [B.S.]....You have to obey me and not keep arguing with me. And if you keep arguing, I kick you out, and I appoint [the court appointed council] and he becomes the lawyer, and you don't get to say anything."

Before adjourning proceedings that day, the judge threatened to eject the defendant from the trial proceedings several more times, outside the jury's presence.

The next day, before the jury entered the courtroom, the judge apologized to the defendant for expressions of frustration. The government expressed its concern that some of what happened the previous day may have been potentially prejudicial to the defendant. After the jury entered the courtroom, the judge said:

“You don’t have to worry about the exchanges that [the defendant] and I have had. And I don’t want you to feel any hostility to [the defendant] just because I got annoyed occasionally.”

The judge then proceeded to read parts of the transcripts of the previous day’s exchange back to the jury. The judge then told the jury:

“When I said: If you don’t pay taxes you go to jail, what I was simply saying was you must pay taxes, and if you don’t pay taxes its criminal and you can be sent to jail. I was not talking about [the defendant], because he isn’t charged with tax evasion.”

During closing arguments, the jury was given written instructions that the government had proposed. The jury was also given the following oral instructions by the judge that deviated from the government’s proposed instructions:

“One [element] is that...the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise. That’s very important, that notion of materiality. Because if you...sometimes people will lie, for example, out of embarrassment. You know, someone asks your age, you knock a couple of years off, or something like that. That would...those are not...those little white lies, those are not material falsehoods. They don’t...I mean, they may embarrass you when it’s discovered, but they’re not...that’s not wrongful conduct. It’s when, with specific reference to our case, if you...if you tell...if you tell the Internal Revenue Service a lie which is capable of getting them to do something which they would never do if they knew the truth, namely, give you \$300,000 to which you’re not entitled, that is a material falsehood. That’s fraud. And that is an element of the charges.”

The jury then deliberated for two hours and returned with a guilty verdict on all counts. The defendant appealed the case to the 7th Circuit Court of Appeals claiming that the district court conveyed bias against him, depriving him of his right to a fair trial.

The appeals court said it was clear from the transcript of the trial that the defendant was a difficult litigant. He filed numerous irrelevant motions, disregarded court instructions, and often inappropriately interrupted the district court to express disagreement and dissatisfaction. Nonetheless, the appeals court agreed with the defendant that the district court’s remarks during cross-examination of the government’s witness conveyed bias regarding his dishonesty or guilt. The judge interrupted the defendant at the beginning of his cross-examination, stating, “Look, paying taxes is not voluntary.” When the defendant noted that he was only reading what the document stated, the judge remarked, “Come on...” The appeals court said that statement was laced with skepticism.

The district court judge continued with further remarks in the presence of the jury reflecting upon the defendant's dishonesty or guilt. While the government contends that the district court's statements were merely meant to remind the defendant that his sovereign citizen views were not permitted at trial, the purpose of the comments cannot eliminate the bias conveyed to the jury.

The comments by the judge also seriously impaired the defendant's credibility as a pro se defendant in the eyes of the jury. Reversible error occurs when a judge so impairs a lawyer's credibility in the eyes of the jury as to deprive the defendant of a fair trial. While a district court judge must often confront courtroom behavior by attorneys which is deserving of censure, the judge's role in the exchange in this case went far beyond the correction of an alleged misstatement. The threat to eject the defendant from court occurred in the presence of the jury and so discredited him in the eyes of the jury that he could not have remained an effective spokesman for himself. This harm was exacerbated by the fact that the admonishment was not directed toward defense counsel, but, instead was aimed directly at the defendant while he was exercising his constitutional right to defend himself.

The appeals court also agreed with the defendant that the district court's comments were prejudicial. At one point, while trying to explain that the IRS was an innocent victim, the judge told the jury:

"If maybe, as I say, they were better funded, better organized, better administered, the IRS would not have given [the defendant] anything, that doesn't bear on his guilt or innocence. Because, I mean, there are a great many crimes that would not occur if the victim were more cautious, right? So if you go to the toughest neighborhood in Chicago and decide to take a stroll at 3 AM and you're attacked by someone, beaten up, you're a fool for having been there and exposed yourself to this person. But the person who attacked you is guilty of a crime. So you don't blame the victim for the crime, even if you think the victim was careless."

The appeals court said comparing the fraud crimes the defendant was charged with to a violent attack on an individual could be seen as an insinuation to the jury that the defendant's actions were as reprehensible as those of a violent and brutal criminal.

Most significant were remarks made by the judge in the presence of the jury that implied the defendant was inept, bumptious, or untrustworthy, or that his case lacked merit. Cumulatively, the comments telegraphed to the jury the judge's contempt for the defendant, and seriously prejudiced the defendant.

The appeals court said that although there is more than enough evidence of the defendant's guilt, the court conclude that the unfairness in the trial requires reversal. The court remanded the case for a new trial.