UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States v. Gerti Muho

No. 18-11248, United States Court of Appeals for the Eleventh Circuit (October 22, 2020)

SUMMARY

In _United States v. Muho_, the Eleventh Circuit affirmed convictions for bank fraud, wire fraud, aggravated identity theft, and money laundering, and a 264-month sentence. The court held that the district court did not err by permitting the defendant to proceed pro se after a valid _Faretta_ waiver, and that it did not abuse its discretion by partially denying the defendant’s Rule 17(b) motion to subpoena two witnesses (a psychiatrist and a state supreme court justice) where the defendant failed to demonstrate specific facts showing necessity and relevancy. On a matter of first impression, the court interpreted U.S.S.G. § 2B1.1(b)(16)(A) and held that a two-level enhancement applies when a defendant derives more than $1 million in gross receipts from a financial institution as a result of the offense, requiring the institution to be both the source of the property and a victim of the fraud—which was satisfied where the defendant fraudulently induced a bank to wire funds from a depositor’s account. The court also found the sentence substantively reasonable.

CASE DETAILS

COURT	United States Court of Appeals for the Eleventh Circuit
WRITING FOR THE COURT	W. Keith Watkins; Jill A. Martin; Kevin C. Newsom
JURISDICTION	Federal
DECIDED	October 22, 2020
DOCKET	18-11248
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the Southern District of Florida
STANDARD OF REVIEW	For the failure to appoint counsel issue, de novo or plain error; for the Rule 17(b) motion, abuse of discretion; for the sentencing enhancement, de novo; for substantive reasonableness, abuse of discretion.
PRECEDENTIAL VALUE	Published
PARTIES	Gerti Muho v. United States of America

TOPICS

criminal procedure · sixth amendment · right to counsel · sentencing · fraud · standard of review · harmless error · preservation of error · appellate procedure · evidence

PRACTICE AREAS

Criminal law, white-collar crime, sentencing

QUESTIONS PRESENTED

1. Whether the district court erred in not reinstating counsel for Muho despite his valid invocation of his right to self-representation.
2. Whether the district court abused its discretion in denying, in part, Muho's Fed. R. Crim. P. 17(b) motion.
3. Whether the district court erred in applying a two-level sentencing enhancement for deriving more than $1,000,000 from a financial institution where Muho fraudulently induced a bank to transfer funds from another customer's account.
4. Whether the district court imposed a sentence that was substantively unreasonable.

HOLDINGS

1. The trial court's failure to override sua sponte the defendant's waiver of his right to counsel—where the waiver's validity was clear, uncontested on appeal, and repeatedly reaffirmed after signs of uncertainty—is due to be affirmed.
2. The district court did not abuse its discretion because Muho failed to meet his burden of articulating specific facts showing the relevancy and necessity of the requested witnesses' testimony. Any error was harmless given the overwhelming evidence and the ability to present the defense.
3. The enhancement was correctly applied. To trigger the enhancement, the financial institution must be the source of the property (having property rights) and must have been victimized by the offense. HSBC-Monaco was both the source and the victim.
4. The sentence was not substantively unreasonable. The district court considered the § 3553(a) factors, applied a slight downward variance, and imposed a sentence within the Guidelines range and below the statutory maximum.

KEY QUOTATIONS

> *"The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."* (6)

> *"The trial court's failure to override sua sponte the defendant's waiver of his right to counsel—where, as here, the waiver's validity was clear, uncontested on appeal, and repeatedly reaffirmed after signs of uncertainty—is due to be affirmed."* (7)

> *"We hold today that, to trigger the § 2B1.1(b)(16)(A) enhancement, at least in a case involving property held by a financial institution for a depositor, the financial institution (1) must be the source of the property, which we interpret as having property rights in the property, and (2) must have been victimized by the offense conduct."* (14)

> *"Muho's conviction and sentence are AFFIRMED."* (26)

FACTUAL BACKGROUND

After graduating from law school, Gerti Muho worked for Fletcher Asset Management (FAM), an investment firm. He had access to personal information of employees and interns. After resigning in April 2013, he used fraudulent documents to take control of FAM's entities through a shell company called Leveraged Hawk. He convinced HSBC-Monaco to wire transfer over $2 million from Soundview Elite's account to Leveraged Hawk's account. He was indicted in May 2016, and a second superseding indictment charged him with bank fraud, wire fraud, aggravated identity theft, and money laundering. He proceeded to trial pro se after a Faretta hearing and was convicted on all counts after an eleven-day trial with less than three hours of jury deliberation.

PROCEDURAL HISTORY

Muho was indicted on 40 counts of bank fraud, wire fraud, aggravated identity theft, and money laundering. After an eleven-day trial, he was convicted on all counts and sentenced to 264 months' imprisonment. He appeals his conviction and sentence.

DISPOSITION

affirmed

CASES CITED

- Faretta v. California, 422 U.S. 806 (1975)
- Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)
- Illinois v. Allen, 397 U.S. 337 (1970)
- Cross v. United States, 893 F.2d 1287 (11th Cir. 1990)
- Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002)
- United States v. Garey, 540 F.3d 1253 (11th Cir. 2008)
- United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005)
- United States v. Stanley, 739 F.3d 633 (11th Cir. 2014)
- United States v. Rinchack, 820 F.2d 1557 (11th Cir. 1987)
- United States v. Izquierdo, 448 F.3d 1269 (11th Cir. 2006)
- United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005)
- United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004) (en banc)
- United States v. Link, 921 F.2d 1523 (11th Cir. 1991)
- United States v. Gill, 864 F.3d 1279 (11th Cir. 2017)

- United States v. Manley, 893 F.2d 1221 (11th Cir. 1990)
- United States v. Rodriguez, 732 F.3d 1299 (11th Cir. 2013)
- United States v. Tham, 118 F.3d 1501 (11th Cir. 1997)
- United States v. Stinson, 734 F.3d 180 (3d Cir. 2013)
- Shaw v. United States, 137 S. Ct. 462 (2016)
- Loughrin v. United States, 573 U.S. 351 (2014)
- United States v. Van Alstyne, 584 F.3d 803 (9th Cir. 2009)
- United States v. Huggins, 844 F.3d 118 (2d Cir. 2016)
- United States v. Early, 686 F.3d 1219 (11th Cir. 2012)
- Gall v. United States, 552 U.S. 38 (2007)
- United States v. Rosales-Bruno, 789 F.3d 1249 (11th Cir. 2015)
- United States v. Irey, 612 F.3d 1160 (11th Cir. 2010) (en banc)
- United States v. Hunt, 941 F.3d 1259 (11th Cir. 2019)
