UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

United States v. Zar

790 F.3d 1036 (10th Cir. 2015) · No. Nos. 13-1111, 13-1119, 13-1302 · Decided June 23, 2015

SUMMARY

The United States Court of Appeals for the Tenth Circuit affirmed the convictions and sentences of Derek Zar, Michael Jacoby, and Susanne Zar arising from a mortgage fraud scheme involving residential properties in Colorado. The court rejected challenges concerning the Speedy Trial Act, severance, suppression of statements made during an IRS interview, jury instructions, confrontation, ineffective assistance, and sentencing.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	MORITZ, Circuit Judge; Hartz; Matheson; Moritz
JURISDICTION	Federal
DECIDED	June 23, 2015
DOCKET	Nos. 13-1111, 13-1119, 13-1302
DISPOSITION	affirmed
PROCEDURAL POSTURE	Three defendants appealed their convictions and sentences following a joint federal jury trial and sentencing in the District of Colorado. They challenged pretrial rulings, jury instructions, admission of a codefendant's statements, ineffective-assistance claims, sentencing calculations, sentencing enhancements, and the denial of a sentencing variance.
STANDARD OF REVIEW	The court reviewed denial of severance, denial of dismissal for Speedy Trial Act violations, and the ends-of-justice continuance for abuse of discretion, while reviewing compliance with the Act's legal requirements de novo; suppression factual findings for clear error and legal conclusions de novo; jury-instruction and constructive-amendment issues de novo; the unpreserved Confrontation Clause claim for plain error; sentencing factual findings and role enhancements for clear error; and sentence reasonableness for abuse of discretion.
PRECEDENTIAL VALUE	published precedential opinion

PARTIES	Derek Zar, Michael Jacoby, Susanne Zar v. United States of America

TOPICS

speedy trial · miranda rights · suppression of evidence · jury instructions · sentencing

PRACTICE AREAS

criminal procedure · criminal fraud · evidence · sentencing

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying the Zars' severance motion and motion to dismiss the indictment under the Speedy Trial Act.
2. Whether the district court properly treated the challenged periods as excludable delay under the Speedy Trial Act.
3. Whether the Zars' in-home statements to IRS agents were obtained during a custodial interrogation requiring Miranda warnings.
4. Whether the wire-fraud jury instruction omitted an essential element or constructively amended the indictment.
5. Whether admission of Derek Zar's statements violated Susanne Zar's Sixth Amendment confrontation right.
6. Whether the court should address ineffective-assistance claims raised for the first time on direct appeal.
7. Whether judicial factfinding concerning loss amounts and sentencing-role enhancements violated the Fifth or Sixth Amendments under Apprendi and Alleyne.
8. Whether the district court used a proper method to calculate guideline loss and restitution.
9. Whether losses from three properties were properly attributed to Susanne Zar as relevant conduct.
10. Whether the three-level manager-or-supervisor enhancement applied to Derek Zar.
11. Whether the district court abused its discretion in denying Derek Zar's request for a sentencing variance.

HOLDINGS

1. The district court did not abuse its discretion in denying the Zars' motion to sever their trial from Jacoby's trial. The challenged delay was excludable under the Speedy Trial Act because motions were pending and because reasonable delay related to a joined codefendant's proceedings was excludable.
2. The district court properly granted the approximately 12-month ends-of-justice continuance, making the 346-day period excludable under the Speedy Trial Act.
3. The in-home interview of the Zars by IRS agents was not a custodial interrogation, so Miranda did not require suppression of their statements.
4. Instruction No. 17 included the essential elements of wire fraud and did not constructively amend the indictment.

5. Even assuming the admission of Derek Zar's testimonial statements without a contemporaneous limiting instruction was plain error, Susanne Zar was not entitled to reversal because she could not establish prejudice.
6. The court declined to address the defendants' ineffective-assistance claims because they were raised for the first time on direct appeal and the record lacked a district court ruling.
7. Apprendi and Alleyne did not require loss amounts or other sentencing facts to be charged, submitted to a jury, or proved beyond a reasonable doubt because the defendants were sentenced under advisory Guidelines ranges and below the statutory maximums.
8. The district court did not err in calculating guideline loss or restitution. The court was bound by Tenth Circuit precedent for the guideline calculation, and the restitution calculation properly used the money received from selling collateral rather than the collateral's value when received.
9. The district court did not clearly err in attributing losses from three properties to Susanne Zar for purposes of calculating her Guidelines sentence.
10. The district court did not clearly err in applying the three-level enhancement under U.S.S.G. § 3B1.1(b) because Derek Zar recruited participants, directed their activities, advised them about properties and grant programs, and connected them with Jacoby.
11. The district court did not abuse its discretion in denying Derek Zar's request for a variance and imposing a low-end, within-Guidelines sentence.

KEY QUOTATIONS

> *"Since the first element of wire fraud is a scheme to defraud and that element includes a scheme to obtain property by means of false or fraudulent pretenses, representations, or promises, omitting the phrase "defraud or" did not render the instruction constitutionally deficient."* (at 1057)

> *"Section 1B1.3(a)(1)(B) makes clear that a participant in a fraudulent scheme "undertaken by the defendant in concert with others" must be held responsible for "all reasonably foreseeable acts and omissions in furtherance of the jointly undertaken criminal activity.""* (at 1065)

FACTUAL BACKGROUND

Michael Jacoby organized a mortgage-fraud scheme involving 18 Colorado residential properties between 2005 and 2006. The scheme used inflated sales prices, falsified loan applications, undisclosed down-payment arrangements, and back-to-back transactions, with Derek and Susanne Zar participating as buyers and facilitators. Lenders foreclosed on and sold all 18 properties, suffering nearly $3 million in collective losses. Jacoby also made material misrepresentations in obtaining and refinancing two personal loans in 2007.

PROCEDURAL HISTORY

A federal grand jury charged the defendants with wire fraud and aiding and abetting, money laundering, and, as to Jacoby, bank fraud. After a three-week joint trial, the jury convicted Jacoby of 11 wire-fraud counts, three money-laundering counts, and two bank-fraud counts; Derek Zar of four wire-fraud counts and one money-laundering count; and Susanne Zar of three wire-fraud counts and one money-laundering count. The district court imposed prison terms, supervised release, and restitution. The Tenth Circuit consolidated the related appeals and affirmed all convictions and sentences.

DISPOSITION

affirmed

CASES CITED

- United States v. Apperson, 441 F.3d 1162, 1190 (10th Cir. 2006)
- United States v. Banks, 761 F.3d 1163, 1174-75 (10th Cir. 2014)
- United States v. Loughrin, 710 F.3d 1111, 1119, 1121 (10th Cir. 2013)
- Zafiro v. United States, 506 U.S. 534, 537-38 (1993)
- United States v. Margheim, 770 F.3d 1312, 1318 (10th Cir. 2014)
- Zedner v. United States, 547 U.S. 489, 503-07 (2006)
- United States v. Toombs, 574 F.3d 1262, 1269-73 (10th Cir. 2009)
- United States v. Garcia, 751 F.3d 1139, 1142 (10th Cir. 2014)
- United States v. Revels, 510 F.3d 1269, 1273 (10th Cir. 2007)
- Easley v. Cromartie, 532 U.S. 234, 242 (2001)
- United States v. Jones, 523 F.3d 1235, 1239-40 (10th Cir. 2008)
- United States v. Mabry, 728 F.3d 1163, 1166 (10th Cir. 2013)
- United States v. Rosborough, 366 F.3d 1145, 1148 (10th Cir. 2004)
- United States v. Wittig, 575 F.3d 1085, 1093 (10th Cir. 2009)
- United States v. Sharp, 749 F.3d 1267, 1280 (10th Cir. 2014)
- Neder v. United States, 527 U.S. 1, 12-13 (1999)
- United States v. Harrison P. Cronic, United States v. Cronic, 900 F.2d 1511, 1513 (10th Cir. 1990)
- Cleveland v. United States, 531 U.S. 12, 25-26 (2000)
- United States v. Welch, 327 F.3d 1081, 1104 (10th Cir. 2003)
- United States v. Prows, 118 F.3d 686, 692 (10th Cir. 1997)
- United States v. Bedford, 536 F.3d 1148, 1157 (10th Cir. 2008)
- United States v. Sells, 477 F.3d 1226, 1237 (10th Cir. 2007)
- United States v. Alexander, 447 F.3d 1290, 1298 (10th Cir. 2006)
- United States v. Clark, 717 F.3d 790, 813-15 (10th Cir. 2013)
- United States v. Sarracino, 340 F.3d 1148, 1158-59 (10th Cir. 2003)
- United States v. Pablo, 696 F.3d 1280, 1287, 1293 (10th Cir. 2012)
- Bruton v. United States, 391 U.S. 123, 135-36 (1968)
- Richardson v. Marsh, 481 U.S. 200, 208, 211 (1987)
- Spears v. Mullin, 343 F.3d 1215 (10th Cir. 2003)
- United States v. Galloway, 56 F.3d 1239, 1240, 1242 (10th Cir. 1995) (en banc)

- United States v. Crowe, 735 F.3d 1229, 1244 (10th Cir. 2013)
- United States v. Ray, 704 F.3d 1307, 1314 (10th Cir. 2013)
- United States v. Cassius, 777 F.3d 1093, 1096-99 (10th Cir. 2015)
- United States v. Washington, 634 F.3d 1180, 1184 (10th Cir. 2011)
- United States v. Yeung, 672 F.3d 594 (9th Cir. 2012)
- United States v. Sells, 541 F.3d 1227, 1234 (10th Cir. 2008)
- United States v. James, 592 F.3d 1109, 1113 (10th Cir. 2010)
- United States v. Cruz Camacho, 137 F.3d 1220, 1223-24 (10th Cir. 1998)
- United States v. Wilfong, 475 F.3d 1214, 1218 (10th Cir. 2007)
- United States v. Cordoba, 71 F.3d 1543, 1547 (10th Cir. 1995)
- United States v. Roberts, 14 F.3d 502, 522 (10th Cir. 1993)
- United States v. Peña-Hermosillo, 522 F.3d 1108, 1112-13 (10th Cir. 2008)
- United States v. Brown, 164 F.3d 518, 522 (10th Cir. 1998)
- United States v. Gonzalez Edeza, 359 F.3d 1246, 1248-49 (10th Cir. 2004)
- United States v. Beltran, 571 F.3d 1013, 1020-21 (10th Cir. 2009)
- United States v. Backas, 901 F.2d 1528, 1530 (10th Cir. 1990)
- United States v. Pofahl, 990 F.2d 1456, 1480-81 (5th Cir. 1993)
- United States v. Haley, 529 F.3d 1308, 1311 (10th Cir. 2008)
- United States v. Lente, 647 F.3d 1021, 1034-35 (10th Cir. 2011)
- Robers v. United States, 134 S. Ct. 1854, 1856 (2014)
- Caraway, 534 F.3d 1290, 1302 (10th Cir. 2008)
