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UNITED STATES OF AMERICA, - against - BERYL BARCLAY, Defendant.

02 Cr. 1535 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 10513

June 4, 2004, Decided

June 8, 2004, Filed

DISPOSITION: Defendant was sentenced to eighteen months imprisonment, to be followed by three years supervised release. Defendant was also ordered to make full restitution to victim.

LexisNexis(R) Headnotes

COUNSEL: [*1] For USA, Plaintiff: Rosemary Nidiry, UNITED STATES ATTORNEY, NEW YORK, NY.

For Beryl Barclay, Defendant: Oliver A. Smith, Leon M. Greenberg, Esq., New York, NY.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINIONBY: ROBERT W. SWEET

OPINION:

SENTENCING OPINION

Sweet, D.J.,

On January 29, 2004, the defendant Beryl Barclay ("Barclay") was convicted of one count of Conspiracy to Commit Bank Fraud in violation of *18 U.S.C. § 371* and one count of Bank Fraud, in violation of *18 U.S.C. § 1344* after a jury trial.

The Offense Conduct

This statement of facts draws on the Presentence Investigation Report prepared by the U.S. Probation Office.

In January 2002, a Postal Inspector with the United States Postal Inspection Service and other postal inspectors spoke with an investigator at J.P. Morgan Chase ("Chase") who informed inspectors of the following:

On December 31, 2001, a check in the amount of \$117,038 dated December 14, 2001 (the "12/14 Check") was deposited into an account at Chase in the name of "Omjavi Corp" (the "Omjavi Account"). The payor of the 12/14 Check was an insurance company located in New York, New York. In the payee

[*2] section of the 12/14 Check, the name "Omjavi Corp." appeared, with a Brooklyn address. A representative of the insurance company informed the Investigator that "Omjavi Corp." was not the intended payee of the 12/14 Check, and that the information in the payee section of that check had been altered.

On October 12, 2001, a United States Treasury check issued out of Denver, Colorado, in the amount of \$103,575, and dated September 20, 2001 (the "9/20 Check") was deposited into the Omjavi Account. In the payee section of the 9/20 Check, the following appeared in typeface on the top line: "Omjavi Corp. C/O."

Below that, the following appeared in a visibly different typeface: "NYS Income Tax, Processing Unit, PO Box 3967, New York, NY 10008-3967." A representative of the accounting office of the United States Government that issued the 9/20 Check, confirmed that "Omjavi Corp." was not the intended payee of that check, and that the information in the payee section of that check was altered.

The Omjavi Account was opened on October 5, 2001, at a Chase branch in Manhattan with a business signature card in the name of "Omjavi, Inc." Barclay was listed on the business signature card as the

[*3] president of "Omjavi, Inc." Her signature also appeared on the business signature card. Another individual was listed as the vice president of "Omjavi, Inc." on the business signature card.

On the account opening document that was submitted for the Omjavi Account, an address in the Bronx was provided as the primary address of "Omjavi, Inc." In the section entitled Principal Officers, Partners or Proprietors, on that same document, Barclay's home address was listed as the same address as that of Omjavi, Inc.

Between October 5, 2001 and February 25, 2002, the

following were the only deposits made into the Omjavi Account: On October 9, 2001, the deposit of one cent; on October 12, 2001, the deposit of the 9/20 Check for \$103,575, at a Chase Branch in Brooklyn, New York; on November 14, 2001, the deposit of \$100; and on December 31, 2001, the deposit of the 12/14 Check for \$117,038 at a Chase branch in Manhattan.

After the 9/20 Check for \$103,575 was deposited on October 12, 2001, the bank records revealed that between October 12, 2001, and November 26, 2001, about 10 checks were written off of the Omjavi Account totaling \$103,500. Of these ten checks, about five checks, ranging

[*4] from \$1,500, to \$9,800, were written to "cash" and endorsed on the back by "Beryl Barclay." The endorsement signature on the back matched the signature of Barclay on the account opening documents for the Omjavi Account.

Two of the ten checks were written to "Beryl Barclay," one for \$23,000 and one for \$2,000. These checks were signed by the Vice President. The endorsement signature on the back matched the signature of Barclay on the account opening documents for the Omjavi Account.

Three of the ten checks were written to three different individuals. These checks ranged in amount from \$7,000

to \$20,700. Each of these checks appeared to be signed by Barclay with the same signature matching the signature on the account opening documents for the Omjavi Account.

The balance on the Omjavi Account on November 26, 2001, was approximately \$75. After the 12/14 Check for \$117,038 was deposited on December 31, 2001, between January 1, 2001, and February 25, 2002, about twelve checks were written off of the Omjavi Account totaling approximately \$107,000. Of these twelve checks, approximately two checks, for approximately \$7,500 and \$8,500 respectively, were written to "Cash" and endorsed

[*5] on the back by "Beryl Barclay" with a signature matching the signature of Barclay on the account opening documents for the Omjavi Account.

The other ten checks written off of the Omjavi Account ranged in amount from \$5,000 to \$15,000. These checks were written to eight different individuals. Each of these checks appeared to be signed by Barclay with the signature matching the signature on the account opening documents for the Omjavi Account.

The balance on the Omjavi Account as of January 16, 2002, when the account was frozen by Chase, was approximately \$389.

When the postal inspector visited the Bronx address listed as the address of "Omjavi, Inc." on the checks related to the Omjavi Account and the account documents submitted to Chase, Barclay answered the door of what was a multi-family residence.

Barclay was arrested on September 5, 2002. The individual or individuals she obtained the stolen checks from have not been identified. Barclay stated that someone named "Kevin" gave her the funds. Barclay opened the fraudulent account and then either deposited the two stolen checks into that account or gave the account information to someone else to deposit those two stolen checks.

[*6] She wrote checks off the account, nearly emptying the account within weeks. The two stolen checks were the only significant activity on the account. She wrote checks out to cash, to herself, to her sister, her boyfriend and her 14 year old daughter; it is unclear to the government whether her family realized that the funds were fraudulent.

Victim Impact

According to the government, the identifiable victim in this case is J.P. Morgan Chase, which sustained a loss of the two stolen checks negotiated, which total \$220,613. A remaining balance of \$389 was retained by Chase, reducing the restitution to \$220,224.

Offender Characteristics

Beryl Barclay was born on December 20, 1946, in St. Catherine, Jamaica. At age 24, in 1970, Barclay traveled with her group to the U.S. to perform in night clubs in Connecticut, and Brooklyn, New York; she resided in the Bronx. On May 29, 1971, she married Owen Barclay in Manhattan, with whom she had two children, Omar Barclay, age 29, and Jason Barclay, age 23. Barclay's third and youngest child, Victoria Hoggard, age 16, resides with Barclay. The defendant's sister, Dorrell, also resides with Barclay.

Barclay reportedly

[*7] applied for permanent residence and received her "Green Card" in 1974. According to the Immigration and Customs Enforcement database, Barclay entered the U.S. on February 10, 1974, and is a naturalized U.S. citizen. She provided a copy of her naturalization certificate which indicates that she was naturalized on January 28, 1981.

Financial Condition: Ability to Pay

Barclay's most recently submitted financial affidavit reflects approximately \$1,900 in personal bank accounts, and a house which Barclay estimates to be worth \$185,000, which has a mortgage balance of \$103,000.

Barclay listed additional liabilities which total approximately \$15,000. Barclay listed her monthly cash inflows which include her net monthly salary, \$1,765, plus \$160 in additional work pay; child support in the amount of \$200; and income of her sister who resides with her, in the amount of \$500, totaling \$2,625.47 in total net monthly income. The itemization of the defendant's net monthly expenses was requested but was not completed.

Offense Level Computation

The November 1, 2001 edition of the Guidelines Manual, in effect at the time the offense was committed, was utilized

[*8] for calculation purposes in accordance with § 1B1.11(b)(1).

The guideline for a violation of *18 U.S.C. § 371* is found in § 2X1.1, which provides that the base offense level is represented by the base offense level from the guideline for the substantive offense, Bank Fraud, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty. Counts One and Two are grouped together as the offense level is determined largely on the basis of the total amount of harm or loss, pursuant to § 3D1.2(d).

The guideline for a violation of the substantive

offense, bank fraud, is found in § 2B1.1, which calls for a base offense level of six.

Adjustment for Amount of Loss

Based on a total loss of \$220,613, the offense level is increased 12 levels, pursuant to § 2 B1.1(b)(1)(G), to 18. Barclay objects to this loss enhancement, arguing that the enhancement should reflect only the financial benefit retained by her.

Barclay relies on *U.S. v. Studley, 47 F.3d 569 (2d Cir. 1995)* in arguing that the enhancement for loss amount should be restricted to Barclay's own fraudulent activity

[*9] and should not include the fraudulent activities of others. While Studley does permit the exclusion of loss caused by others when the loss was not reasonably foreseeable by the defendant, see *id. at 574* (citing § U.S.S.G. § 1B1.3, Applic. Note 1 (1989, 1990, 1991)), in this case the loss calculation includes only the monetary loss caused as a direct result of Barclay's conduct. Barclay has not contested that a loss of \$220,613 was not reasonably foreseeable.

In *United States v. Zeneski*, 912 F. Supp. 43 (E.D.N.Y. 1996), the defendant, after pleading guilty to conspiracy

to commit credit card fraud, argued that he should be sentenced based only on the \$3,500 worth of computer equipment he received. *Id. at 47*. In rejecting the defendant's argument, the court noted that "when a defendant is hired to play a role necessary to the completion of a criminal episode, he will be held liable for all other acts necessary to the completion of that episode." *Id.* (interpreting U.S.S.G. § 1B1.3, Applic. Note 2, Illus. (c)(3)). Here, Barclay's participation in the deposit of the checks was necessary for the completion of the bank fraud.

[*10] The court further held that "there is no indication that [the defendant] is liable only for the amount he was paid for his participation." *Id.* The argument of the *Zeneski* court is persuasive, and the loss enhancement will be based on the total loss to the victim.

Adjustment for Mitigating Role

Barclay argues that she is entitled to a three level decrease in offense level pursuant to § 3B1.2 for her limited role in the offense. The Application Notes to § 3B1.2 states "that the range of adjustments in § 3B1.2

are 'for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant' and that the determination 'is heavily dependent upon the facts of the particular case.'" *United States v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990) (quoting § 3B1.2, Applic. Note 3(A) and (C)). However, a reduction pursuant to § 3B1.2 "will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime." *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999)

[*11] (per curiam), cert. denied, 528 U.S. 1094, 120 S. Ct. 830, 145 L. Ed. 2d 698 (2000). Further, "the defendant bears the burden of establishing by a preponderance of the evidence that [she] is entitled to a mitigating role adjustment under section 3B1.2 of the Sentencing Guidelines." *United States v. Carpenter*, 252 F.3d 230, 234 (2d Cir. 2001).

Barclay notes that the government has not argued that Barclay devised the conspiracy, nor that she stole or altered the checks. However, Barclay's role in the conspiracy was not minor. Barclay opened the Omjavi

Account herself and used the name of a company that she used to be the President of and which was defunct when the account was opened, and Barclay controlled the account. In addition to depositing or facilitating the deposit of the two altered checks, Barclay wrote over twenty checks over the course of several months, nearly emptying the account. On some checks, Barclay noted on the memo line that the checks were for "equipment purchase" or "consultation," despite the fact that no business existed at the time. Because Barclay's role in the conspiracy was substantial and essential, see *United States v. Yu*, 285 F.3d 192, 200 (2d Cir. 2000)

[*12] (factor to be considered in determining nature of role is "the importance of the defendant's actions to the success of the venture."), the request for a reduction under § 3B1.2 is denied.

Aberrant Behavior Departure

Barclay has moved for a downward departure on the grounds of aberrant behavior pursuant to § 5K2.20, and because of exceptional family circumstances.

Aberrant behavior is defined in the Guidelines as "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B)

was of limited duration; and (C) represents a marked deviation from an otherwise law-abiding life." § 3B1.2 Applic. Note 1; see also *United States v. Castellanos*, 355 F.3d 56 (2d Cir. 2003). Barclay's criminal conduct required planning: she opened the Omjavi account in October 2001 in the name of a non-existent corporation, and then deposited, or facilitated the deposit of one check a week later, and another check over two months later. Further, while the scheme lasted only three months, that was because Chase froze the Omjavi account once it suspected wrongdoing. A departure based on aberrant behavior is therefore not warranted.

[*13]

Family Circumstances Departure

Downward departures based on family circumstances "are a discouraged basis for departure because the Commission has deemed them to be not generally relevant." *United States v. Tejada*, 146 F.3d 84, 87 (2d Cir. 1998) (quoting *United States v. Galante*, 111 F.3d 1029, 1034 (2d Cir. 1997)); see also U.S.S.G. § 5H1.6 ("Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."). "For this reason, a district court may depart downward

on this basis only if the 'hardship in a particular case is exceptional.'" *Tejada*, 146 F.3d at 87 (quoting *Galante*, 111 F.3d at 1034).

Barclay argues that she is the sole breadwinner in the family, and is solely responsible for the upbringing of her teenaged daughter. According to Barclay, the father of her daughter plays only a minimal role in his daughter's life. Under such circumstances, courts have granted downward departures based on family circumstances. See, e.g., *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (upholding 13-level downward departure for defendant

[*14] who was solely responsible for care of four young children); *United States v. White*, 301 F. Supp. 2d 289, 296-97 (S.D.N.Y. 2004) (eight-level departure for defendant who is the sole caregiver of six young children); *United States v. Ekwunoh*, 888 F. Supp. 369, 373 (E.D.N.Y. 1994) (fact that defendant was solely responsible for support of three young children justified thirteen-level downward departure); *United States v. McGee*, 802 F. Supp. 843, 844 (E.D.N.Y. 1992) (downward departure granted where defendant's nephew depended on her for safety, health and education); *United States v. Gerard*, 782 F. Supp. 913 (S.D.N.Y. 1992) (downward departure granted where defendant was "the

sole care provider to two children, aged sixteen and seventeen"). It is true that:

even the most extenuating family circumstances may be outweighed by other considerations. The defendant's crime may be serious enough that, for purposes of incapacitation or specific or general deterrence, the full Guidelines sentence must be imposed.

White, 301 F. Supp. 2d at 295-96 (quoting *United States v. Naugle*, 879 F. Supp. 262, 265 (E.D.N.Y. 1995)).

[*15] Barclay's crime, however, is not so serious that it outweighs the rationale for a departure based on family circumstances, which is "not that [Barclay's] family circumstances decrease her culpability, but that [courts] are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Johnson, 964 F.2d at 129*. Accordingly, Barclay is granted a three-level departure to mitigate the deleterious effects of Barclay's imprisonment upon her daughter. Barclay's adjusted offense level is therefore 15.

Criminal History

According to the FBI and the New York State Division of Criminal Justice Services, Bureau of Identification, Barclay has no prior criminal convictions. Therefore, Barclay has zero criminal history points and a Criminal History Category of I.

Applicable Guidelines Range

The maximum term of imprisonment for Count One is 5 years, pursuant to *18 U.S.C. § 371* and 30 years for Count Two, pursuant to *18 U.S.C. § 1344*. Based on a total offense level of 15 and a Criminal History Category of I, the guideline range for imprisonment is 18

[*16] to 24 months.

If a term of imprisonment is imposed for Count One, a term of supervised release of not more than 3 years may also be imposed, pursuant to *18 U.S.C. § 3583(b)(2)*, and at least two years but not more than three years, pursuant to § 5D1.2(a)(2). If a term of imprisonment is imposed for Count Two, a term of supervised release of not more than 5 years may also be imposed, pursuant to *18 U.S.C. § 3583(b)(1)*, and at least three years but not more than five years, pursuant to § 5D1.2(a)(1). Pursuant to *18 U.S.C. § 3624(e)*, multiple terms of supervised

release run concurrently.

The defendant is not eligible for probation on Count One, because she is being sentenced at the same time to a term of imprisonment for a different offense, pursuant to *18 U.S.C. § 3561(a)(3)*. The defendant is not eligible for probation on Count Two because the instant offense is a Class B felony, pursuant to *18 U.S.C. § 3561(a)(1)*. Because the applicable guideline range is in Zone D of the Sentencing Table, the defendant is also not eligible for probation pursuant to § 5B1.1, application note 2

[*17] .

The maximum fine for Count One is twice the pecuniary gain from the offense, \$441,226, pursuant to *18 U.S.C. § 3571(d)*. The maximum fine for Count Two is \$1,000,000, pursuant to *18 U.S.C. § 1344*. The fine range for the instant offense is from \$6,000 to \$1,441,226, pursuant to § 5E1.2(c)(3)(A) and (c)(4). A special assessment of \$200 is mandatory, pursuant to *18 U.S.C. § 3013*.

Subject to the defendant's ability to pay, in imposing a fine the Court shall consider the expected costs to the

government of any imprisonment, probation, or supervised release pursuant to § 5E1.2(d)(7). The most recent advisory from the Administrative Office of the United States Courts suggests a monthly cost of \$1,931.97, to be used for imprisonment, a monthly cost of \$292.21, for supervision, and a monthly cost of \$1,590.66, for community confinement.

Full restitution to the victim is required under *18 U.S.C. § 3663A* and *18 U.S.C. § 3664*. Pursuant to § 5E1.1(a)(1), in case of an identifiable victim, a restitution order shall be entered for the full amount

[*18] of the victim's loss if such order is authorized under *18 U.S.C. § 3663A*.

Restitution in the amount of \$220,224, may be made payable to the U.S. District Court Clerks Office for disbursement to the following victim:

J.P. Morgan Chase
2 Chase Manhattan Plaza, 15th Floor
New York, N.Y. 10081
Attn: Cheryl Butler (212) 552-2290

The Sentence

In light of the foregoing, Barclay will be sentenced to eighteen months imprisonment, to be followed by three

years supervised release. Barclay is also ordered to make full restitution to the victim.

The following conditions are mandatory: 1) the defendant shall not commit another federal, state, or local crime; 2) the defendant shall not illegally possess a controlled substance; 3) the defendant shall not possess a firearm or destructive device. The mandatory drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The standard conditions of supervision (1-13) are imposed with the following special conditions: a) the defendant shall provide the probation officer with access to any requested financial information; and

[*19] b) the defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant is to report to the nearest Probation Office within 72 hours of release from custody, and is to be supervised by her district of residence.

Barclay shall pay a mandatory special assessment of \$200, which shall be due immediately.

This sentence is subject to further hearing on June 7, 2004, at 4:30 PM.

It is so ordered.

New York, NY

June 4, 2004

ROBERT W. SWEET

U.S.D.J.