New York Law Journal An ALM Website

Convictions Upset Over Lack of Intent To Harm Bank

BY MARK HAMBLETT

1030 words
15 November 2012 | New York Law Journal | NYLJ | p.1, col.5 | Volume 248; Issue 95 | English

A DEFENDANT must intend to harm a bank if he is to be convicted of bank fraud, the U.S. Court of Appeals for the Second Circuit has ruled.

Vacating two convictions of a man charged in an identity theft, conspiracy to file and cash phony income tax returns, the circuit held that there is no bank fraud where the bank is only the incidental vehicle for the crime.

The ruling in United States v. Nkansah, 10-2441-cr, was made by Judges Ralph Winter, Gerard Lynch and Susan Carney.

Winter wrote the decision and Lynch issued an opinion concurring in the result as required by the court's prior decisions but lamented that those decisions "are predicated on an unwarranted and unwise judicial injection of an offense element that has no basis in the statute enacted by Congress."

Felix Nkansah was part of a group charged with stealing names, dates of birth and Social Security numbers from foster care, hospital and child care databases from 2005 to 2008, and then filing thousands of fraudulent tax returns in the victims' names.

He and his coconspirators filed for $2.2 million in "refunds" and ultimately obtained $536,167, forged the payees' signatures along with an endorsement to another member of the group who would deposit the money in the bank only to withdraw it soon after.

Nkansah used the alias "William K. Arthur" to open accounts at Bank of America and other institutions. He was arrested in 2008 and fled to Canada while on bail, was arrested again and returned to the United States.

After a plea deal fell apart, Nkansah went on trial before Southern District Judge Jed Rakoff and was convicted by a jury in January 2010 of conspiracy, filing false claims with the IRS, bank fraud, aggravated identity-theft related to the bank fraud and identity theft. Rakoff sentenced him to four years and three months in prison.

Represented by Ross Bagley and Robert Ray of **Pryor Cashman**, Nkansah appealed to the Second Circuit, where oral argument was held on Oct. 14, 2011.

Assistant U.S. Attorney Telemachus Kasulis argued for the government.

Winter's opinion explained that the circuit was vacating Nkansah's convictions for bank fraud and aggravated identity-theft related to the bank fraud because of the statute itself, 18 U.S.C. §1344.

Section 1344 makes it illegal to knowingly execute a scheme "(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution" by false or fraudulent means.

"Appellant is correct that the bank fraud statute is not an openended, catch-all statute encompassing every fraud involving a transaction with a financial institution," Winter wrote. "Rather, it is a specific intent crime requiring proof of an intent to victimize a bank by fraud."

Therefore, he said, "The Government had to prove beyond a reasonable doubt that appellant intended to expose the bank to losses," but there was no direct evidence that Nkansah intended to victimize the banks when he opened accounts under the names of others or under his fictitious name.

The government had argued that his intent could be inferred from conversations between Nkansah and his coconspirators about setting up the accounts and making quick withdrawals and the actual exposure to losses to the bank.

But Winter said that evidence, while possibly leading to an inference of the desire to avoid detection, was in no way probative of a desire to harm the bank.

As for conversations with his coconspirators, Winter said, "A bank's detection of appellant's depositing a fraudulently obtained tax refund check would lead to his arrest whether or not the bank was exposed to a loss."

He added, "If the Treasury detected the fraud first, it would notify the bank, and the bank's efficiency at detection would be irrelevant."

As for the bank's claimed exposure to losses, Winter said the cases where the Second Circuit has upheld bank fraud convictions absent direct evidence of a defendant's state of mind "all involved a defendant who fraudulently sought to cause a bank to pay out to the defendant some of a depositor's account in that bank, e.g., cashing a forged check."

A check forger may well believe that only the account holder will suffer a loss but the "widely understood exposure" of the bank is enough to support an inference in those cases that he has the requisite state of mind, he said.

But that permissible inference, he said, "cannot be extended to cases in which evidence of the state of mind is absent and the actual exposure of a bank to losses is unclear, remote or non-existent."

In Nkansah's case, "there is no clear, much less well-known, exposure of the banks to loss."

"Indeed, until alerted by the Treasury to the scheme, the banks may well have been holders in due course with the risk of loss borne entirely by the Treasury," he said.

In his concurrence, Lynch said the root of the problem was United States v. Blackmon, 839 F.2d 900 (1988), the first Second Circuit case to interpret the statute after its enactment in 1984. Blackmon was the first case in a line that ended with the circuit adopting a rule that intent to harm the bank was a required element of §1344.

"On a plain reading of the second section of the statute," he said, "one would think it fits Nkansah's behavior like the proverbial glove."

"Indeed, the naïve reader would think that the statute's drafter had carefully worded the second section to avoid creating any technical issues about whether the money that a fraudster obtained actually belonged to the bank, or whether the bank itself would suffer a financial loss," he said, adding later, "The majority rules today, however, that the naïve reader is wrong."

Nkansah's case is now remanded for resentencing because his other convictions stand.

@| Mark Hamblett can be contacted at mhamblett@alm.com.