Appellate Court Gives Defendant Who Pled Guilty to Bank Fraud and False Tax Return Counts Rare Opportunity to Withdraw Guilty Plea by Showing Her Lawyer's Incompetence Led Her to Plead Guilty

By Evan J. Davis and Sandra R. Brown

Prosecutors have nearly unchecked power to decide who to bring charges against and what charges to bring. Grand Juries almost always return a "true bill" when asked by federal prosecutors and 90+ percent of defendants plead guilty when charged with federal tax crimes. Once a defendant signs a plea agreement, there's little analysis of the charges because the judge, prosecutor, and defense attorney turn their attention to sentencing. That means the defense counsel's analysis of the law and strength of evidence and advice to plead guilty is often the sole check on prosecutors' charging overreach. The Tenth Circuit Court of Appeals recently overruled a district court's denial of a defendant's attempt to undo her guilty plea after arguing her lawyer failed to inform her that her actions might not be illegal under a bank fraud statute and that the government had to prove she <u>*knew*</u> *her failure to report certain income on her tax returns was illegal.*

Background

"Nancy Martin embezzled millions of dollars from her employers over the course of years [and] the federal government indicted Martin, accusing her of committing bank fraud and failing to report the embezzled money on her tax returns. Pursuant to the advice of counsel, Martin pleaded guilty to two counts, one for each offense charged [and was sentenced] to prison."

Reading that quotation from *United States v. Martin*, No. 24-30140 (10th Cir. September 8, 2026), you'd be excused for wondering how a defense counsel's advice to Ms. Martin, a then-78-year-old who admitted to the embezzlement and the failure to report the embezzled funds on her tax returns, to plead guilty could be anything but good advice. But as is true in many criminal cases, things are not as they seem on the surface, and the devil is in the details, or more specifically, in the jury instructions that might be given if a defendant doesn't plead guilty and instead puts the government to its high burden and proceeds to trial.

Importance of the Trial Record

Normally, communications between a lawyer and client are privileged and can't be disclosed. One exception is when, as here, the client asserts that the lawyer was ineffective in representing the client, which in criminal cases can result in a do-over of a trial or rescinding a guilty plea. Then, the lawyer has every interest in convincing the court that the lawyer acted competently, because a court finding of incompetence is reported to the relevant State Bar authorities for potential discipline. Normally, the attorney fires back at incompetence allegations with a specific and compelling declaration that rebuts every allegation and explains why the client's decision to plead guilty was based on good advice. Normally, but not here.

Ms. Martin said that her lawyer was ineffective—effectiveness is generally a pretty low bar, meaning that few trials and guilty pleas are set aside for this reason—first because although embezzlement is a crime of some type, the bank fraud statute that the enthusiastic prosecutors chose was a square peg to the round hole of her act of writing checks to herself from business accounts. Bank fraud carries a longer statute of limitations and higher statutory maximum sentence than traditional wire or mail fraud that would often be implicated in an embezzlement scheme, so aggressive prosecutors looking for additional leverage often try to upgrade charges to bank fraud. However, Supreme Court and Tenth Circuit law at the time made it very unlikely that Ms. Martin's conduct—as immoral and illegal as it obviously was—fit the elements of bank fraud. Second, she also said her lawyer was ineffective in explaining that she needed to <u>know she was violating tax law</u> when she was submitting her return without including the embezzled funds as income. When she pled guilty, she in fact told the judge she <u>didn't</u> know her conduct was illegal, but her own lawyer and the prosecutor inaccurately told the judge that she would be guilty if she simply intended to commit the act of filing a false return. That's not the law, thankfully (read the Supreme Court's decision in *Cheek* for why tax cases get this heightened element compared to other fraud charges that carry the intent element erroneously used in Ms. Martin's tax plea), but the district court accepted the guilty plea anyway. Notably, unlike the plea agreements that we've seen in cases throughout the nation, Ms. Martin's plea agreement didn't include the elements of each statute that she was pleading guilty to, and this case is a great example of why that was a huge mistake by the prosecutor or the prosecutor's office.

Because she said her lawyer was ineffective, the prosecutor was allowed to get a declaration from her lawyer. Instead of defending himself and his representation with specifics and demonstrating he had acted competently, he vaguely asserted that he had believed that his client understood the elements and was pleading guilty because she was guilty.

Despite the record before the district court being at best equivocal on what the lawyer had said to the client about the bank fraud and whether she was prejudiced by the obviously inaccurate description of the willfulness element for the false-return count, the district court denied the habeas corpus petition and she appealed to the Tenth Circuit.

Tenth Circuit Decision

The Tenth Circuit, in a 2-1 decision, sent Ms. Martin's case back to the district court to develop the record concerning whether her attorney researched case law concerning how to interpret the bank fraud, whether the attorney applied the facts of the case to that law, and how the attorney advised his client on the elements of bank fraud before she pled guilty. In addition, because the district court erred in accepting a plea from a defendant who said she did not know that omitting the embezzled income was illegal, and the record did not demonstrate how the government could prove Ms. Martin's knowledge of the illegality of her tax return, the Tenth Circuit remanded the case for development of the government's evidence of her willfulness (as opposed to intent, which is a lower standard applicable in most non-tax fraud cases) of her expressed preferences regarding going to trial, to evaluate whether she was prejudiced by her lawyer's performance.

Regarding bank fraud, the Tenth Circuit cited Supreme Court and its own cases to conclude that it is unlikely that the act of embezzlement by an authorized signer writing checks to herself qualifies as bank fraud. While the case law makes clear that the government should have found a different fraud charge, if available, and was too aggressive in choosing bank fraud to address the embezzlement, the government nonetheless continued to argue otherwise on appeal. The panel made short work of the government's argument.

Regarding the false-return charge, the Tenth Circuit's decision rested on the prosecutor's, the defense counsel's, and the trial court's failure to crack open and read the pattern jury instructions (the Tenth Circuit publishes one for false tax returns) that make clear that tax crimes require a heightened element—willfulness—that necessitates the government show the defendant knew she was violating the law by filing her tax returns that omitted embezzled funds. One possible defense is that she viewed herself as merely borrowing the funds without authorization and knew she had a legal obligation to pay them back, so they didn't belong on her tax return. The government's evidence may rebut that defense and any other she might have raised, but the Tenth Circuit required that the government cough up the evidence it would use to show willfulness instead of assuming the government could prove it.

The dissent took a narrower approach, stating that Ms. Martin didn't ask for an evidentiary hearing (the remedy granted by the majority) and the record was insufficient for her to meet her burden to show her lawyer was incompetent. The dissenting judge didn't find the law of bank fraud to be as obviously helpful to Ms. Martin as the majority did, and would have upheld the district court's decision on this basis. Regarding the false-return count, the dissenting judge asserted that the defendant's decision to accept the plea agreement came with many benefits so it wasn't obviously irrational for her to accept the agreement notwithstanding the inaccurate statement of the willfulness standard.

The 2-1 vote is just another example of the makeup of the appellate panel determining the outcome. The dissenter took a rather common approach of not going out of his way to rule for a litigant, compared to the majority that saw an apparent injustice and ordered a remedy not requested by the defendant.

Conclusion

What are the takeaways from this rare decision remanding this defendant's case for further hearings on whether she should be allowed to withdraw her guilty plea?

First, the now-81-year-old Ms. Martin has a great shot at getting the bank fraud guilty plea vacated, and if that happens the government should dismiss those counts to avoid cementing a decision that bank fraud doesn't cover this embezzlement conduct. Whether that would result in a lower sentence is unknown, as the impact on the federal sentencing guidelines where two different types of crimes are charged can be complicated.

Second, as defense counsel, you can't assume that merely because your client committed some crimes, that the prosecutors picked the right charge to match up with your client's criminality. Prosecutors often stretch boundaries, sometimes without knowing they are doing so, because charging discussions amongst prosecutors can sound like an echo chamber instead of the probing, questioning process that we all hope would occur if we were in the crosshairs of a federal investigation. After many senior prosecutors left the Department of Justice in the last two years, apparent mistakes like this one—which occurred under the last administration—are more likely to occur, because the supervisors who are supposed to spot mistakes may lack the experience to recognize such errors.

Third, there's no excuse for a plea agreement to omit the elements of the crime, especially when your circuit publishes pattern jury instructions on the crimes being charged. However, this isn't just a problem for the prosecutors; if a defense counsel fails to inform a client of the proper elements of the crime, the lawyer could face discipline for being ineffective.

Fourth, you need to do some level of research—AI is making this much easier—when you are dealing with statutes that you may not know inside and out. Boutique firms tend to stay on top of important developments in their areas of expertise, but in this case the defense counsel appears to have been more familiar with state/local prosecutions, as evidenced by his declaration referencing that he hadn't shown his client the Kansas state jury instructions (which are inapplicable to federal charges). If, as it appears, the lawyer ventured into an unfamiliar area, he was assuming the risk of becoming sufficiently familiar not just with the statutory language—what he pointed to in explaining why he'd recommended the bank fraud guilty plea—but also with case law interpreting the relevant statute.

And fifth, tax crimes are treated differently than other fraud crimes, with the heightened willfulness standard emanating from *Cheek v. United States* that requires the government to prove the defendant knew she was violating the law, and that distinction matters.

Of courses, this could be a case of "be careful what you wish for," because the best-case scenario for Ms. Martin is that she will face a jury trial for multiple tax charges, and the historical conviction rate after trial is north of 80 percent, with a 100 percent conviction rate in 2021.

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