San Diego State University

Basic Trial Advocacy Training Program

San Diego, California

04 July – 03 August 2020

COURSE PROBLEM: The Trial of a Federal Criminal Case (Draft 01 Nov 19)

Introduction

 A Chinese exchange student, Buxing Yang, working at an American bank is suspected of taking $255,000. He is one of three persons using the computer suspected of making the illegal transfer. The FBI searched his home and found on his computer a wire transfer of $255,000 made to a Bahamian bank. An FBI agent questioned him, and he told him he obtained the money through gambling in Las Vegas. He is later arrested on federal charges of bank embezzlement and making a false statement to the FBI. He then meets with his defense counsel, and the prosecutor meets with his agent. The court holds a hearing to determine if Yang should be released. Before trial the court hears a defense motion to suppress evidence obtained by unlawful searches or improper interrogation. Then the jury trial starts with the opening statement made first by the prosecutor and then defense counsel. The prosecutor will examine the agent, and defense counsel the defendant or a defense witness. The prosecutor and defense counsel will cross-examine a witness. Each will make a closing argument to the jury. At a sentencing hearing the court will sentence him after hearing from the prosecutor and defense counsel. In the appeal before a three-judge court, each side will argue for either the affirmance of the judgment and sentence or the reversal of the trial judgment. Because of constitutional irregularities at the trial, the defense will file a postconviction petition, and after argument by both sides the court will decide. While Yang is on probation, there will be a revocation hearing to seek to place him in confinement, and both sides will argue.

 As an advocacy student you will be a prosecutor and defense counsel in his case. You will proceed through these 13 phases of a federal criminal case. In about three to five minutes you will present your arguments. Each evening in advance of your presentation you will be separated into groups of about four or five (either as prosecutors or defense counsel) and discuss your presentations the following day. You will be mixed with students from different universities and are expected to develop team work.

 During the court proceedings new facts and information will be provided as in a real trial, and you must adjust your strategy accordingly.

The Defendant

In 1998 Buxing Yang was born in Zhengzhou, China. His father is a college professor, and his mother is a doctor. In 2019 with a scholarship he enrolled in a graduate course in finance at SDSU. In early 2020 he went to work for the Bank of America, a federally insured bank. He has no criminal record, and has been living near SDSU since his arrival. He is considered a good student and is well liked by his teachers, fellow students, and fellow workers.

Facts Giving Rise to the Charges

 In March 2020 a bank audit revealed discrepancies in a series of bank transfers from 2018 to 2020 that amounted to a total loss of $255,000. The investigation revealed that only three employees using the same computer could have made these specific computer transfers, and one of them was Buxing Yang. Based on this information the FBI secured a general warrant to search the homes of these three individuals for evidence of the bank theft. The warrant did not expressly authorize a search of their computers or cell phones. The FBI searched Yang’s home, found no relevant evidence, but took his computer and cell phone to their forensic lab for examination. The search of Buxing Yang’s computer revealed a single transaction of $255,000 in March 2020 to the Caribbean Bank of the Bahamas, outside the U.S., in a secret numbered account. Thereafter the FBI verified that this transaction had been made by use of secret national security monitoring of international wire transfers. The examination of the cell phone revealed all his cell phone calls, text messages, and cell phone call locations for the last three months. The search of the homes of the other employees revealed no relevant evidence and additional research indicated no recent increase in income. Neither their computers nor cell phones were taken because they were long time employees of the bank. Yang was on scholarship, and his parents, other than ownership of a modest home, did not have more than $50,000 in cash. Based on an administrative request rather than a subpoena (easily obtained court order to produce evidence) Yang’s bank account and credit card records and cell location records were obtained. His indicated worth was not more than $10,000. The FBI now focused on Yang as the principal suspect.

On 1 April 2020 at SDSU FBI Agent Catchum interviewed Yang about the bank transfer to the Caribbean Bank. Agent Catchum was alone and did not record the conversation, but took notes. At the beginning of their conversation, Catchum gave Yang a Miranda warning that he need not speak to him, and if he did, he had a right to an attorney. Yang stated that he thought he should have a lawyer before speaking to him. Agent Catchum responded that he would be fired from the bank if he did not make a statement. At this time Yang was on paid leave from the bank and still attending classes. When Yang asked for a lawyer, the agent stated the lawyer would not be of any help. Catchum stated, “What do you need a lawyer for, if you are innocent?” Yang asked, “May I get a lawyer.” Catchum was silent. Then Yang told him that it was money that he won in gambling at Las Vegas in February or March. When Catchum continued to question him about the source and circumstances of the money, he refused to answer and left. The interview lasted about ten minutes. Yang had secretly recorded their conversation on his cell phone.

 The FBI established that at the time Yang stated he won the money in Las Vegas, no casino had a record of his win. After the interview the FBI later learned from his cell phone, the cell company records and credit card reports that he had not been in Las Vegas for the last three months.

Report of Agent Catchum (30 Apr 20)

In March 2020 he investigated the loss of $255,000 to the Bank of America as a result of unauthorized transfer of funds between accounts and from the bank. Only three employees could have been involved in the 17 transactions, because each employee had access to the same computer upon which these transactions occurred. Search warrants for the home of all three users were executed. The two long term employees had no recent increase in their funds, but Buxing Yang made a wire transfer of $255,000 the same sum that was missing from the bank. When Yang was interviewed on 1 April 2020, he was given his Miranda warning, even though he was not in custody. He inquired about the idea of a lawyer, but did not make a formal request for one. During the interview he stated that he obtained $255,000 during gambling one evening in Las Vegas at one of the major casinos. During the 45-minute interview, Yang became evasive and continued to deny any connection with the bank theft. All the casinos in Las Vegas were canvassed for recorded wins during the first three months of 2020, and none recorded any gambling win over $10,000 made to Buxing Yang. A review of his credit card transactions and his cell phone call location records revealed that for January through March 2019, Yang was not in Las Vegas. Catchum recommended that an indictment be filed against Yang for the theft and false statement.

Arrest and Detention

 On 1 July 2020 pursuant to a grand jury indictment charging embezzlement and false statement, Buxing Yang was arrested and transported to the federal jail in San Diego. The FBI notified Immigration and Customs Enforcement that his student visa should be cancelled. On 3 July 2020, when the defendant appeared in the San Diego federal court, the magistrate ordered that he be detained as a flight risk.

Yang’s Version of Events

 In consultation with his defense lawyer Buxing Yang denies that he was involved in any embezzlement at the bank and does not remember handling any of the unauthorized transactions. He stated that two fellow office workers had equal access to the computer from which the unauthorized transactions were made, and he felt he was singled out because he was Chinese and a temporary employee. He asked for a lawyer when first questioned at SDSU by the FBI, and he only made the statement because he did not want to lose his job, which was the principal source of his income. Yang gave his attorney the tape he recorded of the interview. He first told his lawyer that he transferred this gambling money to the Caribbean Bank because he was scared of the amount of taxes, almost half of his winnings, that he would have to pay the U.S. Government. He later admitted to only his lawyer that he got the money from “Red Hat,” whom he believed might possibly be a dope dealer. He expected to receive a commission of $50,000. He does not wish to implicate “Red Hat,” who might harm him if he does give back to him $205,000 or causes him to be investigated by the FBI or police.

Pretrial and Trial Phases of the Case

 Role as Defense Counsel: The family has retained you as the defense attorney to represent him in this criminal case. You have been provided with the report of Agent Catchum (above) and will seek to have the detention reviewed and ask that the court set conditions for his pretrial release. You will meet with the prosecutor at his (her) office and discuss a possible settlement of the case for your client in which your client might reach a disposition on an administrative or civil basis, might plead to a lesser offense (misdemeanor), or some predetemined charge or sentence. In preparing for trial you will appear before the court and move to suppress the searches and statement for various constitutional violations. At the beginning of the jury trial you will make an opening statement of what the evidence will be. During the trial you will cross-examine the Agent Cathum, conduct a direct examination of Yang if decides to testify or a character witness, and make a closing argument. After the trial, you will make a presentation at sentencing on Yang’s behalf seeking the best possible result for him. At sentencing you will have to address the impact of his conviction on his immigration status. On appeal you will seek to have the conviction overturned and the sentence reduced. Learning new facts after the trial, you will represent him at a postconviction hearing. After he served his confinement, you will represent him at supervised release/probation violation.

 In this case the defense has serious problems for the client’s possible exposure for money laundering, which is a more serious charge than bank theft or false statement. The client to his lawyer only finally admits his involvement in money laundering. The focus of the defense will have to develop a defense to the bank charge, false statement charge, and possible money laundering charge. The FBI agent has misstated what occurred at the interview, and the defense will have to decide whether to turn over that evidence to the prosecutor or hold it back until the motion to suppress or trial.

 The defense will have to address four search issues: (1) search of the computer based upon a general search warrant that did not specifically address a search of the computer, (2) search of the cell phone without a warrant and what evidence the police might have derived from it, (3) the cell company records without a warrant indicating that he was not in Las Vegas, and (4) the administratively obtained credit card records to the same effect.

 The defense will have to argue that his statement was not voluntary because Yang was not allowed to talk to a lawyer and threatened with the loss of his job.

 Role of the Prosecutor: You are an assistant U.S. attorney working with the FBI agents on the prosecution of this case. You will meet with Agent Catchum and discuss the case and how it will be presented. Is there a sufficient basis for an investigation or charge of money laundering? At the bail hearing you will seek to have the defendant detained or kept in custody, for he is a flight risk. You will focus on his danger of flight and that he is now held in immigration (administrative) custody. You will oppose the motions to suppress the search and interrogation. You will make an opening statement in which you will describe the prosecution’s expected evidence, will conduct a direct examination of Agent Catchum and cross-examination of the defendant or a character witness. You also will make a closing argument to the jury. At sentencing you will seek that the Court, consistent with the Sentencing Guidelines, impose a substantial sentence of confinement. On appeal you will seek to sustain the search, interrogation, conviction, and sentence. At the postconviction hearing you will argue that the failure to disclose information to the defense was not material to the case and that the defendant was not provided ineffective assistance of counsel. On the supervised release/probation violation hearing, you will seek to have him imprisoned.

Federal Charges and Law

 The defendant Buxing Yang was charged with embezzlement of funds belonging to a federally insured bank from 2018 through 2020 and with making a false statement to FBI agents in April 2019. These charges arise from the following federal statutes:

18 U.S.C. § 656.  Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1001.  Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
   (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
   (2) makes any materially false, fictitious, or fraudulent statement or representation; or
   (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years . . . .

 The facts of this case give rise to a potential money laundering problem. Money laundering can be caused by an unlawful transfer of money by wire within or without the U.S.

18 U.S.C. § 1956. Laundering of monetary instruments

(a)

 (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

 (A) (i) with the intent to promote the carrying on of specified unlawful activity; or

 (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [attempt to evade or defeat any income tax]; or

 (B) knowing that the transaction is designed in whole or in part--

 (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

 (ii) to avoid a transaction reporting requirement under State or Federal law,

 shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Sentencing Guidelines

 Within the statutory limits of the punishment for the offense, the judge at sentencing will use the Sentencing Guidelines to calculate a sentence. The judge has discretion to deviate from the Guidelines.

Bank Embezzlement

 § 2B1.1.  Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States [This Guideline applies to both the embezzlement and the false statement (fraud).]

(a) Base Offense Level:
   (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
   (2) 6, otherwise.

(b) Specific Offense Characteristics
   (1) If the loss exceeded $ 6,500, increase the offense level as follows:

-------------------------------------------------------------------
   Loss (Apply the Greatest)                    Increase in Level
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     (A) $ 6,500 or less .............................  No increase
     (B) More than $ 6,500 ...........................  add 2
     (C) More than $ 15,000 ..........................  add 4
     (D) More than$ 40,000 ..........................  add 6
     (E) More than $ 95,000 ..........................  add 8
     (F) More than $ 150,000 .........................  add 10
     (G) More than $ 250,000 .........................  add 12

False Official Statement: Same Guidelines as for Larceny 2B1.1

Money Laundering

§ 2S1.1.  Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:
   (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
   (2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

If the amount involved was $255,000, the base offense level would 8 plus 12 or Level 20

Use the Sentencing Table Below to determine the range of sentence for each of the three offenses. Yang has no criminal history.

