

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 3:11-cr-248-J-34TEM

DONALD MITCHELL

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S SECOND MOTION TO SUPPRESS EVIDENCE**

In his second Motion to Suppress (Doc. 55), Mitchell seeks suppression of communications that were either not privileged, or were made in furtherance of Mitchell's fraudulent activity. Mitchell also overstates the evidence in the United States' possession and overlooks the fact that he consented to law enforcement obtaining some of the communications he now seeks to exclude. As more fully set forth below, this Motion should be denied.

I. BACKGROUND

Between September 2010 and March 2011, Mitchell engaged in an investment scheme that deprived his victims of over \$95,000. Mitchell would lure victims by driving expensive automobiles and claiming to be able to yield multi-million dollar returns on small investments in a short period of time. On many occasions, Mitchell would take his victims to the Law Office of Amy Newby and in some instances, introduce his victims to Newby as his counsel for the investments. However, Mitchell was not, and never was, a licensed investor and instead only aimed to deprive the victims of their money using false pretenses.

During the course of the investigation of Mitchell, it was learned that Mitchell first encountered Newby in April 2010 when Mitchell retained her to represent him on an unrelated grand theft auto charge. Mitchell asked Newby to purchase a Mercedes for his use when he got out of jail. Newby tried to purchase the vehicle herself but her credit applications were denied. Instead, Newby had her mother, B.L., purchase the car in B.L.'s name. On June 30, 2010, Newby and B.L. purchased a 2011 Mercedes-Benz SL550 from the Brumos Motor Cars, Inc. dealership in Jacksonville. The total purchase price for the car was \$128,662.43. In order to secure the purchase, B.L. stated in her credit application that she was employed as a consultant with the Law Office of Amy Newby and earned a yearly salary of \$242,000. (However, B.L. later admitted that she never made close to that amount, she only worked part-time for her daughter and oftentimes she wasn't paid at all). Based on her misrepresentations, B.L.'s credit application was approved. Newby paid the \$30,000 down payment and the purchase was completed prior to Mitchell's release from the Duval County Jail.

After Mitchell's release from jail on bond on July 2, 2010, he drove the Mercedes SL 550 to the Mercedes Benz of South Orlando dealership (MBSO) on several occasions in July 2010. Mitchell decided that he wanted to trade in the SL 550 for a black Bentley Flying Spur located at MBSO, and brought Newby and B.L. with him to initiate the trade-in. To secure the purchase of the Bentley,

B.L. again represented that she was a consultant for the Law Office of Amy Newby, and earned an annual salary of \$260,000. This time, Newby even drafted an employment verification letter on her firm's letterhead, stating that B.L.'s salary was \$260,000 and that B.L. would likely be receiving an additional \$30,000 - \$50,000 bonus at the end of the year. Newby also provided the dealership with a letter stating that her firm was the estate manager for Mitchell, and also performed fleet management. Newby's letter went on to list ten luxury automobiles (including two Rolls Royces, a Lamborghini and a Ferrari) which Newby falsely stated were purchased by B.L. on Mitchell's behalf. Based on this false documentation, the purchase of the Bentley was approved. Documentation of the purchases of the Mercedes and Bentley, including the letter provided by Newby, were obtained from the dealerships.¹

During the course of the investigation of the fraudulent activity of Mitchell and others, Newby's mother and brother (who both worked at her law office) were interviewed. B.L. provided information regarding the fraudulent purchases of the Mercedes and Bentley, as well as Mitchell's frequent use of Newby's law office conference room to meet with who were later determined to be investment scheme victims. Newby's brother, J.J., provided information to law enforcement regarding investment scheme victims that contacted the law office looking for Mitchell. Additionally, J.J. disclosed threats Mitchell made to J.J. in an attempt to

¹ The United States is not in possession of any legal files as Mitchell contends.

prevent J.J. from cooperating with the investigation being conducted by the United States Secret Service and Jacksonville Sheriff's Office. Although J.J. was threatened by Mitchell, neither B.L. nor J.J. were threatened by law enforcement in order to get them to provide information.

As the investment scheme investigation continued, Mitchell was arrested on December 28, 2010 for two unrelated state grand theft charges. Mitchell was taken into custody as he was approaching a Maserati that he was driving at the time. Since the Maserati contained evidence of one of the grand theft cases, it was lawfully taken into evidence and a standard inventory search of the car was conducted. During the inventory search, a USAA Bank check made out to Mitchell was recovered. It was later determined that this check was issued to Mitchell on behalf of one of the investment scheme victims as funds that the victim thought were going to be used for an investment. After Mitchell's arrest on December 28, he called Newby from the jail and requested that she contact the victim, request a new check be issued, and misrepresent to the victim that the check was lost in Mitchell's luggage (despite the fact that Mitchell and Newby discuss that the check is in the Maserati).

Following these jail conversations, Newby agreed to be interviewed. Post-Miranda, Newby gave consent for the USSS to search an iPhone that was in Mitchell's possession when he was arrested, as well as two iPads that were recovered from the Maserati during the inventory search. Newby stated that both

the iPhone and two iPads were in her name. Additionally, Mitchell himself later gave USSS SA Lawrence Lomonaco consent to search the iPads.

II. DISCUSSION

The attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were indeed confidential. See United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991). In order to show that communications made to an attorney are within the privilege, it must be shown that the communication was made to the attorney confidentially, in the attorney's professional capacity, and for the purpose of securing legal advice or assistance. Id.; In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1224 (11th Cir. 1987). Further, at the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege and it can no longer be asserted. See United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987).

Protecting the privilege comes at a significant cost to the truth-seeking function of the adversarial system. United States v. Zolin, 491 U.S. 554, 561-63

(1989). Accordingly, when a client abuses the system by consulting an attorney for the purpose of furthering criminal or fraudulent activity, the application of the attorney-client privilege is overcome by the "crime-fraud exception" and such information loses its protected status. Id.; see also Clark v. United States, 289 U.S. 1 (1933).

A determination of whether the crime-fraud exception applies involves a two-part test:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Schroeder, 842 F.2d at 1226 (11th Cir. 1987) (citing In re International Systems and Control Corporation Securities Litigation, 693 F.2d 1235, 1242 (5th Cir. 1982); In re Sealed Case (Sealed Case I), 676 F.2d 793, 814-15 (D.C.Cir. 1982); In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977)). There is no requirement that the attorney have knowledge that he/she is furthering a crime or fraud in order for the exception to apply. See Schroeder, 842 F.2d at 1227 (citing In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028 (5th Cir. 1982); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981)).

A. Many of the communications Mitchell seeks to exclude do not constitute privileged communications.

Given the requirement that, in order for a communication to be considered privileged, the communication must have been made for the purpose of securing legal advice or assistance, Mitchell's argument fails. For instance, the jail call between Mitchell and Newby when Mitchell gets Newby to call a victim to request a new investment check was not a communication for the purpose of securing legal advice. Rather, the communication was merely in furtherance of the fraudulent investment scheme. Additionally, communications obtained from the iPhone and iPad are not privileged because their disclosure was authorized by both Newby and Mitchell. In order to claim the privilege, the burden is on Mitchell to establish the privilege, and he cannot.

The information provided by Newby's brother and mother were also not privileged communications. Newby's brother and mother provided information regarding the circumstances surrounding the fraudulent purchases of the Mercedes and Bentley, victims who called Newby's law office looking for Mitchell, and threats made by Mitchell. None of this information concerned confidential communications made for the purpose of obtaining legal advice. As the attorney-client privilege operates to protect confidential *communications* and not *information*, the United States may properly use the information provided by Newby's brother and mother.

B. The crime fraud exception permits the use of any alleged privileged communications between Mitchell and Newby which furthered the investment scheme.

Even if this Court were to find that the communications that the United States seeks to introduce are privileged, the crime fraud exception permits use of these communications. As previously set forth, Mitchell used the black Bentley and other luxury vehicles as a means to entice victims into believing that he was a wealthy financial advisor. Therefore, any communications with Newby regarding the acquisition and possession of luxury vehicles were made by Mitchell with an intent to use the vehicles in furtherance of the investment scheme. Moreover, the communications between Mitchell and Newby regarding the USAA check obtained from the Maserati and getting the victim to reissue the check are clearly admissible under the crime fraud exception, if not already admissible as being non-privileged communications.

III. CONCLUSION

For the reasons set forth, the second Motion to Suppress should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Clyde M. Collins, Jr., Esq.

s/ Diidri W. Robinson

DIIDRI W. ROBINSON
Assistant United States Attorney