New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
FRIDAY, NOVEMBER 15, 2013

Considerations When Representing a Fugitive Client

BY EVAN T. BARR

White-collar criminal defense attorneys may at some point find themselves representing an individual deemed to be a "fugitive" by the authorities. Years ago, representing such notorious characters did not necessarily involve much legal work because there were more places from which a client could successfully avoid apprehension. In today's world, however, such safe havens are rare, so defense practitioners now may be called upon to do more than simply wait. This article explores some important legal and ethical issues that counsel must consider in representing a fugitive facing charges in the federal system.

Fugitive Defined

Defense counsel need to determine as a threshold matter whether a client is actually a fugitive. The label "fugitive" is sometimes applied imprecisely by law enforcement officials to refer to anyone who has not yet surrendered to the authorities on a pending charge.

Black's Law Dictionary defines a fugitive as a person who, having committed a crime, flees from the jurisdiction of a court where the crime was committed or departs from his usual place of abode and conceals himself. The law in the Second Circuit is clear that an individual who is located outside the jurisdiction, but who has undertaken no steps to avoid arrest or prosecution within the jurisdiction, is not a fugitive for purposes of tolling the statute of limitations under Title 18, U.S. Code, Section 3290 ("No statute of limitations shall extend to any person fleeing from justice").

Specifically, the U.S. Court of Appeals for the Second Circuit has concluded that "a person's mere absence from a jurisdiction is insufficient, by itself, to demonstrate flight under §3290…[rather] there must be proof of the person's intent to avoid arrest or prosecution."[1] When an individual was not present in the jurisdiction at the time of the conduct at issue, and did not reside in the jurisdiction at any time thereafter, he may not be considered a fugitive simply because he remains outside of the jurisdiction.[2] However, an individual who receives notice of charges against him and actively resists returning from abroad to face those charges may properly be characterized as a fugitive, even when he has no control over his physical movements because of being imprisoned in a foreign country resisting extradition.[3]

Accordingly, if the client is, for example, a foreign national living outside the United States at the time of the alleged crime, who has taken no steps to conceal his location in that country, and who having been apprised of the charges has merely declined to fly to the United States to surrender, defense counsel can at least make the argument that (absent an extradition request) the client should not be considered a fugitive from justice and should therefore be accorded the same treatment as any other defendant. This may become important in the context of plea discussions, as will be addressed later in this article.

Ethical Constraints

Assuming the client is indeed properly characterized as a fugitive, defense counsel must take into account the boundaries of permissible advocacy. It bears noting that any physical act intended to harbor or conceal a fugitive so as to prevent his discovery or arrest arguably could constitute a separate criminal violation of 18 U.S.C. §1071 (Concealing a Person from Arrest) or even 18 U.S.C. §1503 (Obstruction). As a general matter, New York ethics opinions suggest that lawyers should urge a fugitive client to surrender to the proper authorities.

An attorney representing an individual who has violated the terms of bail and fled the jurisdiction arguably has an even greater obligation as an officer of the court to seek the prompt return of the client in compliance with a judicial release order. Beyond that basic obligation, however, the ethics opinions provide more generally that an attorney "may not assist the [fugitive] client in any way that the lawyer knows will further an illegal or fraudulent purpose."[4] Where an attorney believes, but does not know, conduct to be illegal or fraudulent, the attorney may act on behalf of the fugitive client, but "only after assuring him or herself that there is reasonable support for an argument that the client's intended use of the fruits of the representation will not further a criminal scheme or act."[5] Similarly, a state bar opinion[6] holds that a lawyer "is free to continue to give legal advice to [a fugitive] client and to represent him before the authorities, as long as [the lawyer] does nothing to aid the client to escape trial."[7]

From Prosecutor's Perspective

Federal prosecutors also must observe certain specific practices in fugitive matters. It is generally improper, for example, to utilize a federal grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest.[8] However, if the grand jury has a legitimate interest in the testimony of a fugitive it may subpoena other witnesses and records in an effort to locate the fugitive.[9] Under 26 U.S.C. §6103(i)(5), moreover, a federal prosecutor may apply for an ex parte order allowing for disclosure of the tax return of an individual who is a fugitive from justice, provided there is reasonable cause to believe the return contains information that may be relevant in determining the individual's location.

In the U.S. Attorney's Office for the Southern District of New York, prosecutors are prohibited from engaging in plea discussions with counsel for a fugitive. In a letter to lawyers for Marc Rich in February 2000, prosecutors in the Southern District stated that it was the office's "firm policy not to negotiate dispositions of criminal charges with fugitives." The prosecutors noted that "[s]uch negotiations would give defendants an incentive to flee, and from the Government's perspective, would provide defendants with the inappropriate leverage and luxury of remaining absent unless and until the Government agrees to their terms."[10] The policy apparently does not

preclude assistant U.S. attorneys, however, from entering into discussions relating to the terms of surrender and possible bail.

Finally as noted above, a defendant's flight from justice acts to toll the statute of limitations for bringing an indictment under 18 U.S.C. §3290. Similarly, any period of delay resulting from the "unavailability" of the defendant stops the clock for speedy trial purposes under 18 U.S.C. §3161(h). So prosecutors can gain valuable extra time in developing and bringing cases when a defendant is absent.

Impact of Client's Absence

Counsel must advise a fugitive client of the consequences of a decision not to surrender. A client should be made aware that if he is arrested overseas, perhaps based on an Interpol "Red Notice" (essentially an arrest warrant), he is likely to be incarcerated, possibly for a long time and (depending on the country in question) under harsh conditions, pending the extradition process. Evidence of flight is generally admissible at trial, subject to a Rule 403 balancing test, to prove consciousness of guilt. Furthermore, if and when such individual is returned to face trial in the United States, a federal district judge is almost certain to detain him pretrial and, if convicted, to impose a harsh prison sentence as the price for flouting the justice system. (On the bright side: in calculating a release date, the Bureau of Prisons generally gives credit for all time spent in foreign custody when the underlying basis for such custody relates exclusively to the U.S. federal charges, such as time spent resisting extradition.)[11]

Ironically, defendants who become fugitives after having initially appeared in a criminal case are likely subject to the most severe consequences. First and foremost, failure to appear (or bail jumping) is itself a separate and independent crime under 18 U.S.C. §3146 which can result in the imposition of a term of imprisonment that must be served consecutive to any prison sentence meted out for the underlying offense. Second, while trials in absentia are not permitted in the federal courts,[12] under Federal Rule of Criminal Procedure 43(c), a defendant who initially appeared for trial waives the right to be present thereafter if he is "voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial." In other words, the trial goes on even if the defendant is not physically there.

Finally, in cases where a fugitive surrenders or is otherwise apprehended long after the filing of the original charges, and the defense is hampered in locating witnesses or evidence due to the passage of time, counsel should explore the possibility of making a constitutional speedy trial argument. Generally, in analyzing such claims, courts will consider: (1) the length of delay in bringing the case to trial; (2) reasons for such delay; (3) the defendant's responsibility to assert his speedy trial right; and (4) alleged prejudice to the defense arising from the delay.[13]

With respect to the second factor, one appellate court has held that "the government has some obligation…to find a fugitive defendant and bring him to trial" though it need not "make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension."[14] There is no need to submit an extradition request if it would be futile to do so,[15] and efforts at extradition may even be informal.[16] Note that a defendant's resistance to extradition efforts will likely waive a subsequent speedy trial claim.[17]

Parallel Proceedings

Where a defendant remains at large, federal prosecutors often take advantage of the defendant's absence to initiate a parallel civil forfeiture action against any tainted assets which may be found in the United States. In other words, if they can't get the defendant, they can at least try to get his property. The law has evolved dramatically in this area. Prior to 1996, a claimant in a civil forfeiture case who failed to appear on related criminal charges was automatically barred under the so-called "fugitive disentitlement doctrine" from presenting an affirmative defense. In *Degen v. United States*, 517 U.S. 820, 827 (1996), the Supreme Court ruled that trial courts could not automatically impose "the harsh sanction of absolute disentitlement" on fugitives in civil forfeiture cases.

Then, in 2000, with the enactment of the Civil Asset Forfeiture Reform Act, Congress revived the disentitlement doctrine. Under the provision now codified at 28 U.S.C. §2466, a district court has the discretion, based on the interests of justice, to bar a fugitive claimant from litigating a civil forfeiture claim if five criteria are met: (1) a warrant or similar process must have been issued in a criminal case for the claimant's apprehension; (2) the claimant must have had notice or knowledge of the warrant; (3) the criminal case must be related to the forfeiture action; (4) the claimant must not be confined or otherwise held in custody in another jurisdiction; and (5) the claimant must have deliberately avoided prosecution by either (i) purposefully leaving the United States, (ii) declining to enter or re-enter the United States, or (iii) otherwise evading the urisdiction of a court in the United States in which a criminal case is pending against the claimant.[18]

Conclusion

Given the emphasis today on global enforcement, we can expect more criminal cases to be brought against persons (either American nationals or otherwise) who are located abroad and may be labeled as fugitives. Defense practitioners must be prepared to confront the multifaceted legal and ethical issues raised in handling such cases.

1. *United States v. Florez*, 447 F.3d 145, 149-51 (2d Cir. 2006).
2. See *United States v. Belimex*, 340 F.Supp. 466, 470 (S.D.N.Y. 1971) ("[The defendant] may not be considered to have 'fled from justice' when he was never within the jurisdiction of the United States to begin with, except at a time prior to the commission of the offenses charged").
3. *United States v. Eng*, 951 F.2d 461, 464-65 (2d Cir. 1991).
4. Association of the Bar of the City of New York Formal Opinion 1999-02 (http://www.nycbar.org/ethics/ethics-opinions-local/opinions-1999/1047-formal-opinion-1999-02).
5. Id.
6. New York State Bar Association Committee on Professional Ethics Opinion 529 (http://www.nysba.org/CustomTemplates/Content.aspx?id=7524).
7. An attorney may represent a fugitive client in a civil matter, so long as the representation would not result in the violation of a Disciplinary Rule. The city bar opinion cited above specifically allows counsel to assist with (1) sale of a fugitive client's assets and placement of the proceeds in escrow; (2) the payment of the client's creditors from the funds; and (3) forwarding the balance of funds in escrow to the client.
8. See *In re Pedro Archuleta*, 432 F.Supp. 583, 595 (S.D.N.Y. 1977); *In re Wood*, 430 F.Supp. 41, 47-8 (S.D.N.Y. 1977), aff'd sub nom *In re Cueto*, 554 F.2d 14 (2d Cir. 1977).
9. Id.
10. In the early 1990s, then-U.S. Attorney Otto Obermaier met with Marc Rich and his lawyers in Switzerland to discuss a possible resolution of the indictment pending against him. These discussions failed to resolve the matter.
11. See U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5880.30.
12. See *Crosby v. United States*, 506 U.S. 255, 256 (1993) (interpreting Rule 43 to prohibit the trial in absentia of a defendant who is not present at the beginning of trial).
13. *United States v. Sandoval*, 990 F.2d 481, 482 (9th Cir. 1993)
14. Id. at 485.
15. *United States v. Blanco*, 861 F.2d 773, 778 (2d Cir. 1988); *United States v. Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007) (requiring only good faith belief in futility by government).
16. *United States v. Fernandes*, 618 F. Supp. 2d 62, 69 (D.D.C. 2009).
17. *United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995).
18. In November 2010, Kobi Alexander, the former CEO of Comverse who fled to Namibia to avoid stock options backdating charges pending in the Eastern District of New York, entered into an agreement with the SEC and the U.S. Attorney's Office to forfeit $46 million in order to resolve outstanding parallel civil enforcement claims against him.

Evan T. Barr is *a partner at* Fried, Frank, Harris, Shriver & Jacobson LLP. *He previously served as an assistant U.S. Attorney in the Southern District of New York.* ***Jeffrey A. Novack*** *assisted in the preparation of this article.*