*548 F.2d 1194, *; 1977 U.S. App. LEXIS 14234, **;*
77-1 U.S. Tax Cas. (CCH) P9278; 39 A.F.T.R.2d (RIA) 1138

UNITED STATES of America, Plaintiff-Appellee, v. Amos P. BROWN, Sr., Defendant-Appellant

No. 75-3503

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

548 F.2d 1194; 1977 U.S. App. LEXIS 14234; 77-1 U.S. Tax Cas. (CCH) P9278; 39 A.F.T.R.2d (RIA) 1138; 1 Fed. R. Evid. Serv. (Callaghan) 847

March 18, 1977

OPINION BY: BROWN

OPINION: [*1196] JOHN R. BROWN, Chief Judge:

This case, one of the very few n1 in the recorded annals of the 85 year history of the Fifth Circuit, involves not the trials and tribulations, attempted frauds [**2] and other derelictions of taxpayers, which are common grist for our mill. Rather, it involves fraud by a tax preparer, one whose Twentieth Century occupation is now almost indispensable to all save those taxpayers who can use, or risk the use of, a short form with standard deductions. In this Bicentennial foray we see the hazards both to the system and to the protection of rights of the public and the individuals concerned. [*1197] To be remembered is that it is the fraud or false misstatement of the preparer, not the taxpayer, which counts. Indeed, the tax properly due may be of no, or only secondary, significance.

n1 *See* *United States v. Burks*, 5 Cir., 1975, 508 F.2d 672, *cert. denied*, 421 U.S. 1012, 95 S. Ct. 2418, 44 L. Ed. 2d 681; *United States v. Dobbs*, 5 Cir., 1975, 506 F.2d 445; *United States v. Johnson*, 5 Cir., 1974, 495 F.2d 1097; *United States v. Miller*, 5 Cir., 1974, 491 F.2d 638, *reh. denied*, 493 F.2d 664, *cert. denied*, 419 U.S. 970, 95 S. Ct. 236, 42 L. Ed. 2d 186; *United States v. Washburn*, 5 Cir., 1973, 488 F.2d 139; *Hull v. United States*, 5 Cir., 1966, 356 F.2d 919; *Hull v. United States*, 5 Cir., 1963, 324 F.2d 817; *Kaplan v. United States*, 5 Cir., 1957, 241 F.2d 521, *cert. denied*, 354 U.S. 941, 77 S. Ct. 1406, 1 L. Ed. 2d 1539.

Defendant-Appellant Amos P. Brown, Sr., a part-time income tax preparer, was convicted by a jury on 12 counts of counseling, procuring and advising the preparation and presentation of fraudulent and false United States Individual Income Tax Returns for others in violation of 26 U.S.C.A. § 7206(2), Internal Revenue Code. n2 The District Court subsequently denied Brown's motions for judgment of acquittal and for new trial and sentenced Brown to 11 concurrent terms of three years each, followed by three years probation. Brown appealed, asserting insufficiency of the evidence, the improper admission of prejudicial evidence, the Trial Court's failure to investigate possible jury misconduct and ineffective assistance of counsel. We find that the Trial Judge committed plain error by improperly admitting certain evidence which was highly prejudicial to the defendant. Accordingly, we reverse and remand for a new trial.

In A Nutshell

Amos P. Brown, Sr., is a school teacher who has taught in Florida public schools since 1947. His educational background includes a bachelor's degree in Agricultural Education from Florida A. & M. University and an H. & R. Block course in income tax preparation. Except for the H. & R. Block course, he has had no formal courses in accounting. He has no prior criminal record.

After taking the H. & R. Block course in 1970, he began helping friends and neighbors, most of whom had low incomes and many of whom had little or no formal education, n3 prepare their income tax returns. n4 In preparing the returns, defendant relied on both written and oral evidence n5 of expenses furnished him by the taxpayer. Rarely, if ever, would the defendant double-check the information given him by the taxpayer by seeking information from a bank or other source concerning the proper amount of taxpayer's deductions. n6

n3 *See e.g.*, R. V, at 106, 110.

n4 He charged approximately $10.00 for this service. R. IV, at 48.

n5 *See, e.g.*, R. V, at 183.

n6 *See* R. I, at 20.

In 1973, an IRS audit of approximately 163 returns which had been prepared by Brown revealed that many contained substantially over-stated deductions. n7 Of these returns, 17 n8 were culled out to serve as the basis of the present case. n9 The evidence does not reveal whether the IRS agent asked for, or received, supporting documents for deductions claimed by *both* spouses in each case, or by only one taxpayer of the pair. The evidence also does not reveal the grounds on which the IRS agent disallowed deductions. The evidence does disclose that the agent did not ask whether the taxpayer gave the same or different information to defendant before defendant prepared the audited return.

When the case was tried, the Government primarily based its proof on the testimony of *one* spouse taxpayer for each of the counts (the count witnesses) and on the testimony of the IRS agent who, prior to trial, conducted an audit of most of the returns prepared by Brown. Almost all of the count witnesses n11 testified that, with respect to challenged items, their true deductions were less than the figures stated on their returns. In addition, some testified that they did not tell or authorize the defendant to put down the higher figure on the return. In only three counts did the prosecutor inquire about deductible expenses incurred by or known to the non-testifying spouse. The evidence in the other counts does not reveal whether the figures given by the taxpayer include other such expenses incurred by or known to the non-testifying spouse.

n11 The testimony of the count witnesses is summarized, *infra*, at note 17.

The testimony most damaging to the defendant was given by the IRS agent, [**7] Adrienne Peacock. Witness Peacock testified that about 160 returns prepared by the defendant had been audited by the IRS and that between 90% and 95% of these returns contained overstated itemized deductions. She did not have a list of the taxpayers, their names, or their records with her, nor did she have access to the documents for the purpose of refreshing her memory before she testified. She did not audit all of the tax returns in question. Because she was testifying solely from her recollection of these audits, the tax returns were not introduced into evidence and the taxpayers concerned (save for the 17 count taxpayers) were not called as witnesses, Peacock was not able to tell why the IRS considered the various deductions to be overstated, n12 and was further unable to supply direct proof of the overstatements.

There could be no doubt that her testimony played a substantial part in the jury's finding that the defendant possessed the intent required by § [**12] 7206(2). Of the 17 counts originally brought by the Government, five were dismissed for insufficiency of the evidence. Since the remaining counts did not present particularly strong evidence of willfulness on the part of the defendant n17 (although sufficient to place the matter before [*1204] the jury), Peacock's testimony was particularly devastating.

If Peacock's testimony was admissible, we might affirm this case. *See* note 31, *infra*. If the testimony was not admissible, however, we must vacate the conviction and remand for a new trial, in light of the prejudicial nature of the evidence and especially since it permeated all the counts, both probatively weak and strong, and the cumulative effect of numerous counts of repetitive acts could serve to meet the element of willfulness.

We conclude, however, that Peacock's testimony was inadmissible under *Broadway* (as well as its modern counterpart, F.R.Evid. 403 and 404(b)), and, more important, was independently inadmissible under the hearsay rule. Because the ultimate underlying defect in Peacock's testimony was its hearsay character, we proceed to a discussion of that issue first.

Hearsay

This trial, conducted after July 1, 1975, was governed by the federal rules of HN4"TYPE=PICT;ALT=GotothedescriptionofthisHeadnote." Evidence. Under F.R.Evid. 801, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." n18

n18 Most definitions are substantially similar. In *United States v. Williamson*, 5 Cir., 1971, 450 F.2d 585, 589, *cert. denied*, 405 U.S. 1026, 92 S. Ct. 1297, 31 L. Ed. 2d 486, we defined "hearsay" as

> any out-of-court statement introduced in evidence for the purpose of proving the truth of the matter contained in the statement. [Citing McCormick, Evidence (3d Ed.) § 228; 5 Wigmore, Evidence (3d Ed.) § 1361]. Most if not all of the mystery and fog enshrouding this traditionally enigmatic rule of evidence evaporate if that textbook definition, well entrenched in our case law, is kept in mind. Most significantly, . . . it demolishes the fairly wide-spread misconception that somehow *words alone*, if they are not the words of the person testifying, must automatically be excluded. Words are not hearsay unless they constitute statements, and out-of-court statements are themselves not hearsay unless they are introduced for the purpose of proving facts contained in, or asserted by, those statements.

See also ALI, Model Code of Evidence, Rule 501.

In this case, Peacock's testimony that between 90% and 95% of the returns she audited contained substantially overstated itemized deductions was introduced for the sole purpose of proving, circumstantially, the "willfulness" requirement of § 7206(2). In order to arrive at the conclusion that the deductions in these returns were overstated, Peacock's perusal of the 160 tax returns was not sufficient, since the returns obviously do not show on their face which deductions are overstated. The record shows that Peacock must have gotten her "proof" of the overstatements through conversations with each of the taxpayers audited. Presumably, the proof consisted either of statements by these taxpayers to Peacock that they all gave different information to the defendant tax preparer than defendant put down on their returns, or that they were unable to substantiate their deductions, because they did not have any (or had inadequate) supporting records. The proof might also have consisted of the fact that the IRS had legitimate disagreements with all or some of the deductions claimed. However, a prerequisite to this form of proof would be the initial conversation between Peacock and each taxpayer, so that Peacock could determine the bases for the deductions claimed.

The point to be emphasized, therefore, is that the information obtained by Peacock from the out-of-court statements made by the 160 taxpayers whose returns she audited, was absolutely vital to her ultimate in-court conclusion that between 90% and 95% of the 160 returns she audited contained substantially overstated itemized deductions. Because her testimony had to have been based directly on the out-of-court statements of these taxpayers, defendant had no opportunity to

test their ultimate assumptions through cross-examination. He obviously could not cross-examine the taxpayers concerned, because they were not in court. He could not even cross-examine Peacock adequately, because she did not have with her any of the records of conversations she had had with these taxpayers, but was testifying solely from memory, in the most general, amorphous terms. Thus, the jury had no way to examine the trustworthiness of Peacock's testimony, because it could not examine the statements of the declarant taxpayers or others on which Peacock's testimony was directly and substantially founded. Given the rationale [**18] of the hearsay rule, n19 a clearer case of hearsay testimony would be difficult to imagine. n20

n19 Twenty-five years ago, Professor Morgan analyzed the hearsay rule and identified its rationale as based on the untrustworthiness of hearsay statements: "[Should] we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception?" Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 218 (1948).

n20 Peacock's testimony also inescapably presented by implication the facts leading to her conclusion which she got from other nontestifying declarants, such as the taxpayers concerned. The implication was strong that she satisfied herself from talking to others that what the preparer entered was not what the taxpayer told him. It was an implied assertion that the defendant was responsible for the repetitious acts or practices from which the jury could infer the requisite willfulness. It was an assertion, in other words, of the ultimate fact that these faulty returns were due to defendant's acts.