

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10526

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRI LEE HOFFMAN,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas
(3:93 CR 216 D)

(May 9, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit
Judges.

REAVLEY, Circuit Judge:*

Hoffman appeals her conviction of eight counts of making
false declarations in conjunction with a bankruptcy proceeding,
in violation of 18 U.S.C. § 152. We find the evidence
insufficient to support the conviction, and we reverse and
render.

*Local Rule 47.5 provides: "The publication of opinions
that have no precedential value and merely decide particular
cases on the basis of well-settled principles of law imposes
needless expense on the public and burdens on the legal
profession." Pursuant to that Rule, the Court has determined
that this opinion should not be published.

BACKGROUND

Hoffman filed for bankruptcy under Chapter 13 of the Bankruptcy Code on October 22, 1991 and prepared the required schedules and statement of financial affairs. Hoffman later amended her schedules several times, but Hoffman omitted from the schedules and amendments information about certain of her credit card accounts and about a friend's bank accounts over which she had power of attorney.

A jury found Hoffman guilty of committing ten counts of perjury in relation to her bankruptcy schedules and amendments, in violation of 18 U.S.C. § 152. Hoffman filed a post-verdict motion for judgment of acquittal and a motion for a new trial. The district court granted the motion for judgment of acquittal as to two of the counts and denied all other aspects of Hoffman's motion. Hoffman appeals.

DISCUSSION

Section 152 provides for prosecution of any person who "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury" in relation to a bankruptcy case. Hoffman argues that there exists insufficient evidence that she acted "knowingly and fraudulently" in omitting certain items from her schedules and amendments. The Fifth Circuit has stated that to establish the intent element necessary for a section 152 conviction, "it is necessary to show a false representation of a material fact made with knowledge of its falsity with the intent to deceive."

United States v. Nill, 518 F.2d 793, 800 (5th Cir. 1975)

(citation omitted).

Considering the evidence in the light most favorable to the Government, the evidence at trial was insufficient to allow a rational jury to find that Hoffman "knowingly and fraudulently" made false declarations on her bankruptcy schedules and amendments. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

a. Counts 1-3

Counts one through three charged that Hoffman made a false declaration by failing to list four credit card creditors (NationsBank, Associates National Bank, American Express and Lord & Taylor) on Schedule F (Creditors Holding Unsecured Nonpriority Claims) of the original bankruptcy schedule (count 1) and two subsequent amendments (counts 2 and 3). The Government proved that Hoffman did not list these four credit cards on her bankruptcy schedules and amendments.

The problem is with the evidence that Hoffman made the omission knowingly "with the intent to deceive." Nill, 518 F.2d at 800. Hoffman and the Government dispute whether any balance remained with Associates National Bank at the time the bankruptcy petition was filed. If any balance remained, it was in an amount of less than \$20.00. At the time of the filing of the bankruptcy petition, Hoffman owed a balance on her NationsBank bill in the amount of \$24.95 in finance charges assessed as a result of a late payment of the principal balance. The American Express account was fully current at the time of the filing of the

bankruptcy petition and thus American Express was not even a creditor. A Lord & Taylor clothing purchase in the amount of \$140.29 was made before the filing of the bankruptcy petition and was unpaid as of October 22nd.

We conclude that the mere failure to list a clothing purchase does not support a conviction for acting fraudulently in the context of a bankruptcy case involving a claimed \$352,560 in assets and claimed liabilities of \$256,686. The omission of items from bankruptcy schedules, without more, does not constitute proof of knowledge and intent to defraud. See Friendly Finance Discount Corp. v. Humphries, 469 F.2d 643, 644 (5th Cir. 1972) (omissions which result from "oversight and misunderstanding" cannot support a conviction under section 152).

b. Counts 4-6

Counts four through six of the indictment charged Hoffman with perjury relating to Hoffman's response to a question on the schedules which asks for all payments on debts, aggregating more than \$600 to any creditor, made within the 90 days preceding the commencement of bankruptcy. Hoffman omitted a \$1,922 payment to NationsBank which she made on September 13, 1991 to clear the principal balance on her NationsBank credit card. Hoffman was convicted of failing to include the payment in the original schedule and two subsequent amendments.

The evidence showed that Hoffman wished to clear the NationsBank card and then continue to use it after she entered Chapter 13 bankruptcy and that she requested a higher limit on

the card after paying the \$1922.00 debt. The evidence also showed that Hoffman acted on the advice of her bankruptcy attorney in clearing the NationsBank credit card before bankruptcy. Chapter 13 bankruptcy law does not prohibit a debtor from clearing debts with creditors before the initiation of the bankruptcy process. There is nothing nefarious in Hoffman's course of conduct. No reason is shown why Hoffman would be interested in concealing the legitimate payment or how Hoffman committed any deceit. See United States v. Ellis, 1995 WL 115861 (7th Cir. 1995) (sufficient evidence of fraudulent intent where debtor had "strong motive" to conceal certain information from the bankruptcy court).

c. Counts 10-11

Counts ten and eleven charged Hoffman with omitting information in response to a question in the bankruptcy financial statement which asked whether she held or controlled property owned by another. Hoffman did not disclose the fact that her friend Roger Simon had asked her to pay his bills from his bank accounts while he was away at medical school. Simon added Hoffman's name to his accounts and provided her with a power of attorney. Hoffman was convicted of having failed to include the information about the Simon accounts in two amendments to her financial materials.

Hoffman did not obtain control over the Simon accounts until after the date of the filing of the bankruptcy petition.¹ The evidence at trial showed that various bankruptcy experts, including Hoffman's bankruptcy lawyer, believed that the schedules and amendments should reflect the condition of a debtor's financial affairs on the petition filing date. The Government provides no evidence that Hoffman knew of a different rule about control acquired postpetition. At the least, the law is unclear as to whether postpetition control must be revealed. There is insufficient evidence that Hoffman knew that the information about the Simon accounts was required to be revealed and that she thus acted with intent to deceive in failing to disclose the information about the accounts.

The district court held that the jury could have found that the relevant question on the bankruptcy forms required disclosure of postpetition situations involving control of another's property. A reasonable jury could not have found that Hoffman acted fraudulently simply by reading the question. Even if the

¹ Hoffman argues that, as a legal matter, she did not "control" the Simon accounts. She asserts that she therefore could not have committed perjury by not listing the Simon accounts in response to the question about property which she controlled. She also argues that even if she did "control" the accounts under the law, the definition of control is sufficiently vague that she could not be expected to understand that she controlled Simon's accounts. She notes that she could not have developed fraudulent intent to conceal control of which she was not aware. We need not reach these questions relating to "control," because we hold on other grounds that the government failed to provide evidence sufficient to support her conviction of these two counts.

jury could have found that a reasonable person would read the question to require postpetition disclosure, no evidence existed to support a conclusion that this defendant actually knew that she was required to disclose her control over Simon's accounts and that she fraudulently chose not to make the disclosure.

d. Course of Conduct

Intent to defraud in bankruptcy cases may be proved by circumstantial evidence, including all of the facts and circumstances of a case and the bankrupt's "course of conduct." United States v. West, 22 F.3d 586, 595 (5th Cir.) (quoting In re May, 12 B.R. 618, 627 (N.D.Fla. 1980)), cert. denied, 115 S.Ct. 584 (1994); accord First Texas Savings Assoc., Inc. v. Reed, 700 F.2d 986, 991 (5th Cir. 1983). The Government suggests that a pattern of deception shows Hoffman's fraudulent intent even if there is insufficient evidence of her fraudulent intent in relation to each of the individual counts of conviction.

The Government's claimed evidence of intent to defraud consists of a laundry list of alleged wrongdoing by Hoffman. For example, the Government alleges that Hoffman concealed her income amounts and falsely claimed payment of attorney's fees of \$200,000 to conceal a transfer of her assets to her attorney. The Government also asserts that Hoffman intended to conceal several Audubon paintings from her husband's family who wished to sue her and that she misrepresented her yearly salary to NationsBank when seeking a credit line increase.

The Government does not present evidence in support of its allegations. The Government cannot cure its failure to provide sufficient evidence on the counts of conviction in this case by bootstrapping onto other alleged wrongdoing not adequately supported by the evidence.

Nor has the Government succeeded in linking Hoffman's alleged wrongdoing to the convictions involved in this case. Although the Government may prove intent to defraud by showing a fraudulent course of conduct, the acts of conviction must relate to and fit into that pattern of conduct. Thus, fraudulent intent to conceal assets may be inferred from a course of conduct in which the debtor transfers the assets gratuitously or to a family member and the debtor maintains control over the assets. See Pavy v. Chastant, 873 F.2d 89, 91 (5th Cir. 1989).

But, the Government attempts to support a finding of intent by alleging that Hoffman committed various acts which do not relate to or form a course of conduct with the acts for which Hoffman was convicted. The Government's allegations that Hoffman misrepresented facts to NationsBank and that she sought to conceal assets from her husband's family do not tend to prove that she committed intentional perjury in her bankruptcy proceedings. Even if Hoffman were shown to have concealed \$200,000 in assets through her attorney during the bankruptcy or had otherwise concealed assets in the course of the bankruptcy, such a showing would not necessarily support a conviction for failure to list small amounts owed to creditors or for failure to

list payment of a credit card debt. The Government may not suggest an inference of fraudulent intent in this case based on claims that Hoffman has generally acted fraudulently in her financial dealings and in her bankruptcy.

To support a finding of fraudulent intent, the Government emphasizes the fact that Hoffman made various amendments to her schedules. Yet, a debtor has the right and duty to amend her schedules. The amendments do not indicate fraudulent intent. The Government asserts that the amendments were only made after meetings of the creditors in which further undisclosed assets were brought out. This fact does not support an inference that Hoffman had intended to conceal the assets. If anything, it indicates that Hoffman placed information on her schedules as it became clear.

REVERSED; CASE DISMISSED.