

UNITED STATES v. STEWART
433 F.3d 273 (2d Cir. 2006)

HALL, Circuit Judge.

* * * Defendants Martha Stewart and Peter Bacanovic were charged in Superseding Indictment * * * with offenses that arose from their communications to government investigators who were probing trading activity of ImClone Systems, Inc. ("ImClone") stock on December 27, 2001, just ahead of the company's public announcement that its lead pharmaceutical product would not receive government approval. * * *

The trial lasted five weeks. At the close of evidence, pursuant to Fed.R.Crim.P. 29, the District Court granted Stewart's motion for judgment of acquittal as to Count Nine. The jury deliberated for three days and returned a verdict convicting Stewart on specifications in Counts One, Three, Four and Eight and convicting Bacanovic on specifications in Counts One, Two, Six and Seven. The jury acquitted Stewart of one specification in Count Three and one specification in Count Four and acquitted Bacanovic of falsifying a worksheet document as charged in Count Five, as well as one specification in Count Two and several specifications in Count Six. * * *

On July 16, 2004, the District Court sentenced each Defendant to five months' incarceration to be followed by a two-year period of supervised release, five months of which were to be served in home confinement. Stewart and Bacanovic were ordered to pay fines of \$30,000 and \$4,000, respectively, as well as a mandatory \$400 special assessment. Anticipating a decision from the Supreme Court addressing the United States Sentencing Guidelines, the District Court stayed execution of the sentences pending appeal. The stays were subsequently vacated and amended judgments of conviction were entered as to Stewart on September 22, 2004, and as to Bacanovic on December 29, 2004.

In this appeal, Stewart, who had already served the period of incarceration, requested immediate remand of the supervised release portion of the judgment, * * * in light of the Supreme Court's intervening decision in *United States v. Booker*, 543 U.S. 220 (2005). This Court granted Stewart's application and, on remand, the District Court declined to modify the original sentence, concluding that it would have imposed the same sentence even if the Sentencing Guidelines had not been mandatory at the time of sentencing. * * *

At trial, the Government sought to prove that Stewart and Bacanovic conspired and acted to mislead the ImClone investigation in order to deflect attention from the fact that, on December 27, 2001, Stewart sold shares of ImClone from her personal account at Merrill Lynch & Co. ("Merrill Lynch") after she learned from Bacanovic, her broker, that ImClone's CEO, Samuel Waksal, was attempting to sell all of his own shares in the company. In connection with the investigation, Stewart was interviewed twice, on February 4, 2002 and April 10, 2002, by the Securities and Exchange Commission ("SEC"), the Federal Bureau of Investigation ("FBI") and members of the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney"). Those agencies interviewed Bacanovic on January 7, 2002, and he testified before the SEC on February 13, 2002.

At trial, the Government offered the testimony of SEC attorney Helene Glotzer and FBI agent Catherine Farmer, who attended each of the Defendants' interviews, to inform the jury of what Stewart and Bacanovic said and did not say about Stewart's ImClone investment, its liquidation, and the Defendants' communications regarding those matters on and after December 27, 2001. In addition, the jury heard a tape recording of Bacanovic's SEC testimony.

To demonstrate that the story Defendants told to investigators was a cover-up of the events of December 27th, the Government called a number of witnesses to testify about their recollections of what happened that day and in the following months. Various portions of the testimony of those witnesses were corroborated by phone records, copies of emails and phone message logs.

Among those who testified in the Government's case-in-chief were Stewart's assistant Ann Armstrong, Stewart's friend Mariana Pasternak, Sam Waksal's assistant Emily Perret, Bacanovic's assistant Douglas Faneuil, who

appeared pursuant to a cooperation agreement, and Merrill Lynch compliance personnel. Both the prosecution and the defense offered testimony from securities analysts on the volume and price movement of ImClone on and around December 27th. The jury heard opinion testimony regarding Bacanovic's allegedly altered worksheet from the Defendant's ink expert and from the Government's ink expert, Lawrence F. Stewart, whose testimony later created a separate controversy * * *

* * * In the fall of 2001, Stewart was the CEO of Martha Stewart Living Omnimedia, Inc. ("MSLO"), and Bacanovic was a stock broker at Merrill Lynch. Among Bacanovic's clients were Stewart, Samuel Waksal, who was then the CEO of ImClone, and Waksal's daughter Aliza. At that time, ImClone had great expectations for its lead product, the cancer-treating drug Erbitux. The biotechnology company was anticipating that the Food and Drug Administration ("FDA") would approve its application for the drug by early 2002. With the prospect of commercialization on the horizon, Bristol-Myers Squibb made a tender offer to purchase 20 percent of ImClone's outstanding shares at a price of \$70 per share and agreed to fund ImClone's continued development of Erbitux while undertaking responsibility for sales and marketing following FDA approval.

In October 2001, the MSLO pension fund held 51,800 shares of ImClone, apparently acquired over the course of the previous decade, and Stewart owned an additional 5,000 shares personally. All of the shares in the MSLO pension fund and those held by Stewart individually were tendered in response to Bristol-Myers' offer, and all but 3,928 of the shares in Stewart's personal account were sold. Stewart's remaining ImClone stock represented approximately 10 percent of her total Merrill Lynch portfolio in November 2001. * * *

Stewart and Bacanovic both argue that we must reverse their convictions, order a new trial, or remand for an evidentiary hearing because the trial was tainted by Sixth Amendment violations, prosecutorial misconduct, juror misconduct, extraneous influences on the jury, and erroneous evidentiary rulings and jury instructions. Bacanovic also advances additional arguments pertaining solely to his conviction. None of Defendants' appellate arguments persuades us to grant the requested relief. * * *