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Phone solicitor's 90-month sentence affirmed

The Eleventh Circuit Court of Appeals has affirmed a sentence of 90 months in prison for a telephone solicitor convicted of conspiracy and mail fraud after a nine-day jury trial. It has rejected the defendant's claim that the government failed to present sufficient evidence to support his conviction, had introduced evidence materially different from the charges in the indictment, and had improperly considered his lack of remorse during sentencing.

Gary R. Tomey, II, operated several nonprofit entities that engaged in telemarketing to collect donations from the public. Using a script that Tomey had prepared, the solicitors told prospective donors that they were volunteers with a local charity, that all the money would be donated to the charity, and that the money would stay within the donor's state. The solicitors were actually paid employees, they called from another state, and only about \$58,000 of \$2 million raised was actually donated to charities that served the public.

To help convince donors that the charities were local, Tomey would send materials from Florida, where the solicitors operated, to a UPS office in the state of the solicitation. The materials carried the name of a local organization and emphasized that all solicitation was "done by members of the charity." The return mailer had an in-state address, which was actually a UPS mailbox from which the envelopes were forwarded to Tomey.

Tomey ran his solicitations in Ohio, Arkansas, Alabama, and Mississippi before he got caught for criminal prosecution. Prior to his federal trial, he did sign a consent decree with the Attorney General of Arkansas in which he was barred from future solicitations in the state. He agreed that he had collected \$50,907 in donations and had donated only \$325 to charities.

The Court recognized that there was no direct evidence of a conspiracy between Tomey and the head of one of the charities for which he solicited, but said there was "ample circumstantial evidence" that the other person knew of the fundraising practices and had reached an agreement with Tomey. The other person had received about \$263,000 from the operation.

The Court also rejected his argument that there was no substantial evidence of mail fraud because he followed generally accepted practices in the telemarketing industry and he had no intent to defraud. The Court said he had spent more than \$100,000 of the donations on his personal expenses and that the jury "was entitled to disbelieve his

testimony.”

The Court said there was no material variance between the indictment and the testimony and that the trial court was within its rights to consider his lack of remorse when he “voluntarily addressed the court during trial and at sentencing.” ([U.S. v. Tomey, 11th Circuit Court of Appeals, No. 17-10634, 7/26/19.](#))