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Tax-fraud conviction voided because judge didn't stop trial to let defendant go to son's deathbed

A federal appeals court says the jurist also prejudiced the jury by not telling panelists that Garth Kloehn was absent the last day of trial because his son had died.

By Carol J. Williams, Los Angeles Times

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A federal judge's refusal to halt a businessman's tax-fraud trial so he could be at his son's deathbed was cause to overturn the businessman's conviction, an appeals court has ruled.

U.S. District Judge Dale S. Fischer also prejudiced the case against Garth Kloehn by failing to inform the jury that he was absent for the final day of trial because his son had died, the appeals panel said. Fischer told the jury that Kloehn "has a right not to be here," possibly leaving jurors with the impression that he was showing a lack of respect for the court, the judges said.

Kloehn was the sole defense witness in his 2005 trial in downtown Los Angeles on charges of failing to report \$1.2 million in income. He left the courtroom after testifying to catch a flight to Las Vegas to see his cancer-stricken son, leaving no one to rebut the prosecution's final testimony. Kloehn arrived at the Las Vegas hospital one hour before 45-year-old Kevin Kloehn died.

In a 2-1 ruling, judges of the U.S. 9th Circuit Court of Appeals said that there were "no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process" but that Fischer's action was "arbitrary and unreasonable."

Had the judge allowed Kloehn to say a final goodbye to his son and then return to court to finish the trial, "he would have been acquitted, I believe," said Kloehn's Beverly Hills attorney, David A. Katz.

Fischer did not return calls for comment on the appeals court ruling.

In the opinion written by Judge Stephen Reinhardt and joined by Judge Kim McLane Wardlaw, both appointed by Democratic presidents, the judges observed that Kevin Kloehn's doctor had sent a note to the courtroom advising the defendant that his son had suffered a seizure and was likely to die in "the next few days."

"I do accept that the situation for Kevin Kloehn is very dire, and it's very unfortunate that the matter was continued this long," Fischer, an appointee of President George W. Bush, said when asked outside the presence of the jury for a two-day delay. "Frankly, this is the way things go.

You continue things, and the situation gets worse, not better."

The appeals court said the six-week delay in starting the trial that Fischer referred to was caused at least in part by the government's having amended the indictment against Kloehn after a first trial ended with a hung jury.

The jury in Fischer's court found Kloehn guilty on all four counts of tax evasion, and the judge sentenced him to 46 months in prison, plus payment of the owed taxes and penalties. Kloehn, now 72, has been free on bail pending the appeals court decision.

Senior Circuit Judge Stephen Trott, named to the court by President Reagan, dissented from Monday's ruling, saying that even if Fischer abused her discretion, it was harmless error because the government had made a convincing case against Kloehn.