UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-7074

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DOROTHY ALEXANDER,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Mississippi
(CRD-91-36-D)

(February 18, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Dorothy Alexander pled guilty to one count of credit card fraud, in violation of 18 U.S.C. § 1029(a)(2) (1988). Alexander was sentenced to twenty-one months imprisonment and three years supervised release, and was ordered to pay restitution in the amount of $7,752.48. Alexander appeals, arguing that the district court (1) violated Fed. R. Crim. P. 11(f) by entering judgment upon her guilty plea without first satisfying itself of the factual

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[*]Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

basis for that plea; and (2) committed plain error by sentencing her under the version of the federal sentencing guidelines in effect at sentencing, rather than the version in effect at the time of the offense. We affirm.

I

A

The district court held a hearing, at which Alexander entered a plea of guilty to one count of credit card fraud in violation of 18 U.S.C. § 1029(a)(2).[1] At that hearing, the district court conducted the following colloquy:

> Q Now, Mrs. Alexander, have you received a copy of the indictment, the charges against you, and specifically Count 3, to which you agreed to plead guilty?
>
> A Yes, sir.
>
> * * *
>
> Q Count 3 of the indictment charges you with credit card fraud, in violation of Section 1029, Title 18 of the United States Code. Before you could be found guilty by a jury in this court, the government would have to prove by competent evidence beyond a reasonable doubt that you used an unauthorized access device and thereby obtained something of value aggregating at least $1,000 during a one-year period . . . . Do you understand the government would have to prove each of these elements before you could be convicted in this case?
>
> A Yes, sir.

2nd Supp. Record on Appeal at 5-6. The district court then called on the Government to state a factual basis for Alexander's guilty

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[1] *See* 18 U.S.C. § 1029(a)(2) (1988) (A person commits an offense if she "knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1000 or more during that period.").

plea, consisting of the proof against Alexander. The prosecutor stated:

> [T]he government would show that, from on or about 1985 until January 1990 . . . the defendants, John Fitzgerald Williams, Dorothy Marie Williams, Dorothy Alexander, Vickie Rogers, and Angela Scott made credit card applications to a number of companies and used credit cards issued to them from those companies.
>
> [T]he basic method behind the operation was that the five persons would fraudulently obtain credit cards or lines of credit from various corporations.
>
> * * *
>
> The government would also show that . . . each of these persons would trade cards and use cards that they had applied for.
>
> * * *
>
> [W]ith respect to Count 3 of the indictment, the government would also show specifically as follows: [A credit card] application dated November 17, 1986, in the name of Dorothy Marie Williams . . . was sent to Chevron Travel Card Corporation. The application was granted in the name of Dorothy Marie Williams . . . .
>
> The government would also show by invoices and receipts which have been traced via handwriting analysis back to Dorothy Alexander that a number, that over 70 of these sales drafts were attributed to the handwriting of Dorothy Alexander.
>
> * * *
>
> The government would further show that during this time period[2] an account balance of at least $1,775.80 was charged as to this account for which no payment has been made.

Id. at 10-13. The district court asked, "Mrs. Alexander, do you substantially agree with what the prosecutor said you did?"

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[2] The indictment alleged that Alexander committed credit card fraud "Beginning [on] or about November 1986, and continuing to on or about November 30, 1987." *See* Record on Appeal, vol. 1, at 8.

Alexander replied, "Yes, sir." *Id*. at 13. The district court then found that there was a factual basis for Alexander's guilty plea, accepted the plea, and entered judgment. *See id*. at 13-14.

B

At sentencing the district court adopted the factual statements and sentencing guideline calculations in the presentence investigative report. *See* Record on Appeal, vol. 2, at 4; PSR at 6. Alexander received a base offense level of 6, pursuant to section 2F1.1(a) of the federal sentencing guidelines. *See* United States Sentencing Commission, *Guidelines Manual*, § 2F1.1(a) (1990). Alexander received an increase of four points (resulting in an offense level of 10) because the total loss resulting from her fraudulent acts and those of her relatives exceeded $20,000. *See* U.S.S.G. § 2F1.1(b)(1); Record on Appeal, vol. 2, at 4; PSR at 5. Based on the offense level of 10 and a criminal history category of IV, the district court sentenced Alexander to 21 months imprisonment and three years supervised release, and ordered Alexander to pay restitution in the amount of $7,752.48. *See* Record on Appeal, vol. 2, at 4, 6. Alexander did not object to the PSR, *see id*. at 3, or to the sentence imposed by the district court. *See id*. at 7-9.

II

A

Alexander argues that the district court violated Fed. R. Crim. P. 11(f) by failing to satisfy itself of the factual basis

for her guilty plea.[3] Specifically, Alexander argues that there was no factual basis for two essential elements of her offense: (1) that she acquired $1000 worth of property; and (2) that she acquired $1000 worth of property within a one-year period. *See* 18 U.S.C. § 1029(a)(2) (1988).

Rule 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f). The factual basis must support every essential element of the offense. *United States v. Montoya-Camacho*, 644 F.2d 480, 485 (5th Cir. 1981); *United States v. Boatright*, 588 F.2d 471, 475 (5th Cir. 1979). The requirements of Rule 11(f) are met if the district court subjectively satisfies itself that there is a factual basis for the guilty plea. *United States v. Adams*, 961 F.2d 505, 511 (5th Cir. 1992); *Montoya-Camacho*, 644 F.2d at 486.

A district court's acceptance of a guilty plea amounts to a finding that there is an adequate factual basis for the plea.

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[3] We review Alexander's claim, even though she raises it for the first time on appeal. *See United States v. Boatright*, 588 F.2d 471, 476 (5th Cir. 1979) (finding no merit in argument that defendant waived Rule 11 claims by failing to raise them in the district court); *United States v. Clark*, 574 F.2d 1357, 1358 (5th Cir. 1978) ("[I]n reviewing an appeal from a conviction based on a guilty plea, this court has the duty of noting defects patent on the face of the record."); *United States v. Coronado*, 554 F.2d 166, 170 n.5 (5th Cir.) ("We can . . . adjudicate rule 11 challenges on direct appeal without an initial presentation of the particular arguments to the district court."), *cert. denied*, 434 U.S. 870, 98 S. Ct. 214, 54 L. Ed. 2d 149 (1977).

Adams, 961 F.2d at 509. That finding is reviewed for clear error.[4] Findings of fact are clearly erroneous when the appellate court, upon a review of the entire record, is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City, N.C.,* 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)); *United States v. Menesses,* 962 F.2d 420, 428 (5th Cir. 1992).

(i)

Alexander argues that there was no factual basis for the conclusion that she acquired $1000 worth of property. Alexander correctly points out that no evidence was introduced to show the

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[4] Panels of this Court have occasionally reviewed a district court's finding under Rule 11(f) for abuse of discretion. *See, e.g.*, *United States v. Bachynsky*, 949 F.2d 722, 730 (5th Cir. 1991) (holding that the district court did not abuse its discretion in determining that a factual basis existed for a guilty plea), *cert. denied*, ___ U.S. ___, 113 S. Ct. 150, 121 L. Ed. 2d 101 (1992); *United States v. Ammirato*, 670 F.2d 552, 555 (5th Cir. 1982) (same). However, review for abuse of discretion is contrary to our decision in *United States v. Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980), where we held that the district court's findings under Rule 11 are reviewable for clear error. *See id*. at 941. In *Dayton* we stated that "the court must determine, before accepting the plea . . . [t]hat there is a factual basis for the plea." *Id*. at 936-37. "In reviewing such proceedings, . . . we are warranted in regarding the court's acceptance of the plea as a positive finding . . . reviewable under the clearly erroneous standard." *Id*. at 940-41; *see also Frank v. Blackburn*, 646 F.2d 873, 881-82 (5th Cir. 1980) (en banc) ("The *Dayton* opinion . . . specifies that . . . we will review deviations from Rule 11 under a clearly-erroneous . . . standard . . . ."), *cert. denied*, 454 U.S. 840, 102 S. Ct. 148, 70 L. Ed. 2d 123 (1981). We are bound to follow the decisions rendered en banc in *Dayton* and *Frank*. *See United States v. Johnson*, 706 F.2d 143, 144 (5th Cir.) (holding that Fifth Circuit panel was bound to follow en banc opinion), *cert. denied*, 463 U.S. 1212, 103 S. Ct. 3548, 77 L. Ed. 2d 1395 (1983).

exact amounts of the charges that she made. Furthermore, Alexander submits that members of her family often borrowed fraudulently obtained credit cards from each other. Consequently, according to Alexander, it is possible that her relatives were responsible for over $775.80 of the $1775.80 charged to the Chevron card, and that Alexander therefore did not make charges amounting to $1000. However, this possibility does not convince us that the district court committed clear error in accepting Alexander's guilty plea.

The evidence indicated that Alexander made over seventy charges to a Chevron credit card during a period of approximately one year, and that the card's balance reached $1775.80 during that period. *See* 2nd Supp. Record on Appeal at 13 (prosecutor's statement of factual basis for plea); Record on Appeal, vol. 1, at 8 (indictment).[5] Furthermore, although the record indicates that credit cards were traded within Alexander's family, the record before us does not indicate that any of Alexander's relatives used the Chevron card. Also, the district court asked Alexander whether she understood that she could not be found guilty by a jury unless the Government proved that she "used an unauthorized access device and thereby obtained something of value aggregating at least $1000

[5] Facts contained in the indictment may be considered as part of the factual basis for a guilty plea. *See Boatright*, 588 F.2d at 475 ("[T]he indictment can, when sufficiently specific, be used as the sole source of the factual basis for a defendant's guilty plea." (*citing Jimenez v. United States*, 487 F.2d 212, 212-13 (5th Cir. 1973), *cert. denied*, 416 U.S. 916, 94 S. Ct. 1623, 40 L. Ed. 2d 118 (1974); *Sassoon v. United States*, 561 F.2d 1154, 1158 (5th Cir. 1977))).

during a one-year period." *See* id. at 6. Alexander replied in the affirmative, *see id*., and proceeded to enter her plea of guilty.

Based on these facts, the district court inferred that Alexander made fraudulent charges amounting to $1000. That inference is not so lacking in basis that we are left with the definite and firm conviction that a mistake has been committed. *Cf. Adams*, 961 F.2d at 512 (upholding guilty plea to misprision of felony where circumstantial evidence warranted inference that defendant had actively concealed money laundering). We are particularly disinclined to find clear error in the district court's acceptance of Alexander's guilty plea, in light of the well-established principle that the "test to be utilized [in applying Rule 11(f)] is based on [the] District Court's subjective satisfaction a factual basis exists for the plea." *Montoya-Camacho*, 644 F.2d at 486.

(ii)

Alexander also argues that there was no evidence to support the finding that she acquired $1000 *within a one-year period*. The evidence indicated that Alexander's mother applied on November 17, 1986 for the Chevron card. *See* 2nd Supp. Record on Appeal at 12. According to the indictment, Alexander made all of her charges to the Chevron card prior to November 30, 1987. *See* Record on Appeal, vol. 1, at 8. Since the period bracketed by these two dates exceeds one year (by thirteen days), Alexander argues that no evidence supported the conclusion that she acquired $1000 worth of property in a single year. We disagree. Because a number of days

certainly elapsed between application for and receipt of the Chevron card, the district court was entitled to infer that Alexander's use of the card commenced on or after November 30, 1986. Even if Alexander used the Chevron card for a few days prior to November 30, 1986, the district court could infer that the charges made before November 30, when subtracted from the total balance attributable to Alexander, would not reduce the amount of property acquired by Alexander below the statutory amount of $1000. That inference is further supported by Alexander's agreement with the prosecutor's rendition of the facts, and by her prior acknowledgement that she could not be found guilty unless the government proved that she had acquired $1000 worth of property within a one-year period. *See* 2nd Supp. Record on Appeal at 6, 13. Therefore, we find that the district court's acceptance of Alexander's guilty plea was not clearly erroneous.

B

Alexander argues that the district court violated the ex post facto clause of the United States Constitution[6] by sentencing her under the federal sentencing guidelines in effect at sentencing, U.S.S.G. § 1B1.3 (1990), rather than the guidelines in effect at the time of her offense, U.S.S.G. § 1B1.3 (1987). Pursuant to the 1990 sentencing guidelines, the district court increased Alexander's offense level by four points, based on the total loss caused by her entire family's fraudulent use of credit cards.

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[6] "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

Alexander claims that the 1987 sentencing guidelines (in effect at the time of her offense) did not authorize the district court to consider her family's conduct.

Because Alexander did not object at trial to the district court's application of the sentencing guidelines, we review the district court's decision only for plain error. *See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991) (allegedly erroneous determination of defendant's criminal history, not raised at trial, reviewed only for plain error); *United States v. Brunson*, 915 F.2d 942, 944 (5th Cir. 1990) (where no objection was made at trial, alleged misapplication of sentencing guidelines reviewed only for plain error). Plain error is "error so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice." *Lopez*, 923 F.2d at 50; *United States v. Bi-Co Pavers*, 741 F.2d 730, 735 (5th Cir. 1991); *United States v. Howton*, 688 F.2d 272, 278 (5th Cir. 1982).

Sentencing courts apply the version of the sentencing guidelines in effect at the time of sentencing, rather than the one in effect at the time of the offense, unless application of the later version would raise ex post facto concerns. *United States v. Ihegworo*, 959 F.2d 26, 29 n.7 (5th Cir. 1992); *see also* 18 U.S.C. § 3553(a)(4) (1988) ("The court, in determining the particular sentence to be imposed, shall consider . . . the guidelines . . . that are in effect on the date the defendant is sentenced."). An

ex post facto problem arises if the later version of the guidelines detrimentally alters the defendant's substantial personal rights. *See United States v. Suarez*, 911 F.2d 1016, 1022 (5th Cir. 1990).

The 1990 version of section 1B1.3 authorized the district court to consider the conduct of Alexander's relatives. That guideline provides that

> [S]pecific offense characteristics [such as the amount of loss resulting from credit card fraud] . . . shall be determined on the basis of . . . all acts and omissions committed or aided and abetted by the defendant, *or for which the defendant would be otherwise accountable*, that occurred during the commission of the offense of conviction . . . .

U.S.S.G. § 1B1.3(a)(1) (1990) (emphasis supplied). The application notes to section 1B1.3 state that

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" . . . includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

U.S.S.G. § 1B1.3, comment. (n.1) (1990). The credit card fraud committed by Alexander's relatives fits this definition of conduct for which Alexander would be otherwise accountable. The record demonstrates that the credit card fraud scheme was jointly undertaken by Alexander and her relatives, and that Alexander's relatives' conduct was not only foreseeable but actually known to her.[7]

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[7] *See* 2nd Supp. Record on Appeal at 11-12 (statement of Alexander's brother) ("My family has been involved in credit card fraud for approximately 12 years. . . . Everybody involved had full knowledge that the applications were falsely obtained and falsely used. I guess we all figured that we would not get

Alexander contends that the 1987 version of section 1B1.3, unlike the 1990 version, did not permit consideration of the acts of her relatives. Alexander does not point to any language *in the guideline itself* which indicates that the 1987 and 1990 versions operated differently. Rather, Alexander's argument focuses on the application notes to the 1988 version of section 1B1.3,[8] which provided: "If the conviction is for conspiracy, [conduct which may be considered at sentencing] includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant." *See* U.S.S.G. § 1B1.3, comment. (n.1) (effective January 15, 1988), *reprinted in* United States Sentencing Commission, *Guidelines Manual*, app. at C.5 (1990); Brief for Alexander at 16 n.1; Reply Brief for Alexander at 13 n.1. Alexander emphasizes that this sentence of the application note refers only to cases where the conviction was for conspiracy, and she submits that "[t]he negative pregnant of that is that if the conviction is not for conspiracy, conduct which is merely reasonably foreseeable is not to be used." *See* Reply Brief for Alexander at 13 n.1.

Alexander contrasts the 1988 application note to one which follows the 1990 version of section 1B1.3:

> In the case of criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*, the

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caught."); *id*. at 13 (Government's statement of factual basis for guilty plea) (indicating that Chevron card used by Alexander was initially acquired by Alexander's mother, Dorothy Marie Williams).

[8] *See* Brief for Alexander at 16 n.1; Reply Brief for Alexander at 13 n.1.

> conduct for which the defendant "would be otherwise accountable" . . . includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

U.S.S.G. § 1B1.3, comment. (n.1) (1990) (emphasis supplied). According to Alexander, because of the difference between these two application notes, the 1990 version of section 1B1.3 permitted consideration of her family's conduct, whereas the version in effect at the time of her offense did not. Therefore, Alexander contends, the enhancement of her sentence on account of her family's fraudulent conduct, according to the 1990 guidelines, violated the ex post facto clause of the Constitution.

Alexander's argument is flatly refuted by our decision in *United States v. Aguilera-Zapata*, 901 F.2d 1209 (5th Cir. 1990). Aguilera and two other men were arrested while driving a truck loaded with over 500 pounds of marijuana. *See id*. at 1211. One of the other men, Martinez, had a loaded pistol at the time of the arrest. *See id*. Aguilera pleaded guilty to possession of marijuana and received an upward adjustment in his base offense level on account of Martinez's possession of the pistol. *See id*. at 1212. Like Alexander, Aguilera committed his offense prior to the amendment to section 1B1.3 upon which Alexander relies. *See id*. at 1213. We held that Aguilera was accountable for Martinez's possession of the gun, under section 1B1.3, even though Aguilera was not convicted of conspiracy:

> [A]t the time of the offense in question, Application Note 1 to section 1B1.3 stated: "Conduct for which the defendant is otherwise accountable . . . [i]f the conviction is for conspiracy, . . . includes conduct in

furtherance of the conspiracy that was known to or was *reasonably foreseeable* by the defendant." (Emphasis added).

Because Aguilera was not convicted of conspiracy, former Application Note 1 might arguably suggest that he should not be held accountable for accomplices' conduct, such as Martinez' possession of a revolver. This application note, however, was amended, effective November 1, 1989, stating:

> In the case of criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the *jointly-undertaken* criminal activity that was *reasonably foreseeable* by the defendant. (Emphasis added.)

"The purpose of this amendment is to *clarify* the guideline and commentary." U.S. Sentencing Comm'n, *Guidelines Manual* app. C, at C.43 (Nov. 1989) (emphasis added). Because this amendment was intended only to clarify section 1B1.3's application and, therefore, implicitly was not intended to make any substantive changes to it or its commentary, we may consider the amended language of Application Note 1 to section 1B1.3 even though it was not effective at time of the commission of the offense in question. We conclude that although the district court dismissed the conspiracy count against Aguilera, the court was nevertheless justified in considering . . . any foreseeable conduct of Martinez (or the other participants) in furtherance of their jointly undertaken criminal activity.

Aguilera-Zapata, 901 F.2d at 1213-14. Under *Aguilera-Zapata*, a defendant such as Alexander, who committed her offense prior to the 1989 amendment to section 1B1.3, is accountable for the foreseeable acts of her accomplices, even though she is not convicted of conspiracy.[9] Consequently, the district court's consideration of

[9] Alexander points out that the Sixth Circuit held in *United States v. Tisdale*, 952 F.2d 934 (6th Cir. 1992), that prior to 1990 section 1B1.3 did not authorize consideration of the acts of co-conspirators (where the defendant being sentenced was not convicted of conspiracy), unless the defendant aided and abetted

Alexander's relatives' conduct, according to the 1990 guidelines, did not detrimentally alter Alexander's substantial personal rights, *see Suarez*, 911 F.2d at 1022, and no ex post facto concern is raised by the district court's application of the 1990 guidelines.[10]

III

For the foregoing reasons, we AFFIRM.

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the co-conspirators' acts. *See id*. at 938 ("Because Mr. Irby's conviction was not for conspiracy, [section 1B1.3] require[s] the Government to do more than show that another defendant's possession of the weapon was reasonably foreseeable; the Government must demonstrate that Mr. Irby possessed the weapon himself or that he aided and abetted the possession of the firearm by another."). We decline to follow *Tisdale*, because it is in direct conflict with our decision in *Aguilera-Zapata*.

[10] Several other cases upon which Alexander relies require only brief mention. *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990) and *United States v. Burke*, 888 F.2d 862 (D.C.Cir. 1989), are inapposite because they do not deal with consideration at sentencing of the acts of co-conspirators. *United States v. Underwood*, 938 F.2d 1086 (10th Cir. 1991) addressed the problem of section 1B1.3 and consideration of the conduct of co-conspirators; but there the Tenth Circuit held that co-conspirators' conduct must be foreseeable, and not that the defendant must have aided or abetted that conduct. *See id*. at 1090. In *United States v. Fiala*, 929 F.2d 285 (7th Cir. 1991), the Seventh Circuit addressed the issue of co-conspirators' acts and held that the defendant need only have knowledge of those acts in order for them to be considered at sentencing. *See id*. at 289.