

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1152
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRITZ McMILLON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. CR3-90-264-T

- - - - -
March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

District courts are accorded broad discretion in ordering restitution. United States v. Ryan, 874 F.2d 1052, 1054 (5th Cir. 1989). A restitution order that has not been the subject of an objection in the trial court is reversed only for plain error. See United States v. Paden, 908 F.2d 1229, 1237 (5th Cir. 1990), cert. denied, 111 S.Ct. 710 (1991). To determine the amount of a restitution order, the district court "shall consider the amount of the loss sustained by any victim as a result of the offense,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." United States v. Plewniak, 947 F.2d 1284, 1289 (5th Cir. 1991)(quoting 18 U.S.C. § 3664(a)), cert. denied, 112 S.Ct. 1239 (1992). A district court is not required to make specific findings on these factors, and an appellate court need only satisfy itself that the record adequately supports the district court's order. Id.

McMillon contends that the district court's conclusion that he has funds stashed away has no evidentiary basis in the record. The Government argues that the record indicates that McMillon was a fugitive from justice for nearly a year and that the district court could logically conclude that McMillon could stash funds away during that period. The district court's conclusion that McMillon has funds stashed away is a reasonable assumption drawn from the record and the PSR. A restitution order based on such does not constitute plain error. See Paden, 908 F.2d at 1237.

The record clearly supports the restitution order notwithstanding the possible absence of stashed funds. McMillon has skills as a musician, auto body repairman, and self-employed landscaper. He worked as the general manager of an auto repair center, earning approximately \$2800 per month. McMillon does not have to begin making restitution until his release from prison, and the Probation Department is to determine a rate at which payment can be made based upon his financial condition.

McMillon asserts that the restitution order was inconsistent with the district court's adoption of the factual findings of the

PSR, including the finding that he had no ability to pay restitution if it were ordered by the court.** Present indigency is not a bar to an order of restitution. Ryan, 874 F.2d at 1054. Thus, the court could order restitution despite the its finding that McMillon had no present ability to pay.

McMillon's restitution of \$161,910 is within the fine range for the instant offense of \$6,000 to 1 million. U.S.S.G. §§ 5E1.2(c)(3) & 5E1.2(c)(4)(A). Once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is generally at an end. Ryan, 874 F.2d at 1054. The district court did not abuse its discretion amounting to plain error in ordering the restitution; therefore its decision is AFFIRMED.

** The Government's brief misquotes the Presentence Report when it states that "the figure of \$161,900 was the amount of restitution recommended by the Probation Department in the appellant's Presentence Report." In point of fact, the Presentence Report does not recommend restitution and specifically states that the defendant "does not have the ability to pay a fine or restitution if ordered by the Court." The Government is cautioned against such misstatements in future briefs.