UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1291
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT H. WALKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR 3 90 143 R 01)

(December 16, 1992)

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

EDITH H. JONES, Circuit Judge:*

Appellant Robert H. Walker pleaded guilty to Count 21 of a 29-count superseding indictment charging him with numerous acts of mail and wire fraud in connection with his operation of an insurance company and related interests. On appeal, he asserts five challenges to the sentence of 60 months imprisonment, the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

statutory maximum, imposed by the district court. Finding no reversible error, we affirm.

The factual resume accompanying Walker's guilty plea exposes a five-year course of conduct whereby Walker and others caused premiums and other money belonging to National County Mutual Fire Insurance, which he controlled, to be diverted into other Walker-controlled businesses and his own pockets. The count to which he pled guilty charged Walker with the wire transfer of $100,000, including funds belonging to National County, from Walker General Agency to a bank in Barbados to pay for refurbishing Walker's yacht.

Two of Walker's challenges to his sentence are fact-based and reviewed under the clearly erroneous standard. 18 U.S.C. § 3742(e). He asserts that the district court erred in attributing $55 million of NCM losses to Walker's activities. At the sentencing hearing, the court heard testimony of a CPA who had reviewed the books and records of NCM for its receivership proceeding and of a postal inspector involved in the investigation of NCM. Walker did not rebut the $55 million figure except by his unsworn allegations, which are repeated in his brief. He presented no evidence to rebut the government's contention concerning the amount of loss. The district court was entitled to rely on the PSR and the government's evidence at the hearing instead of Walker's unsworn assertions. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). Walker has not demonstrated that its finding was clearly erroneous.

Similarly, the district court credited the testimony of postal inspector Thomas supporting the PSR's statement that Walker was an organizer or leader of criminal activity involving five or more participants. U.S.S.G. § 3B1.1(a). Thomas identified Gene Hardin, Jack Coleman, James Johnston, Frank Jackson and Walker's son as participants in his illegal activities involving transferring monies out of NCM. This finding, which resulted in a four-level increase in his base offense level, is not clearly erroneous. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). Walker objected that these people were not under his direction, but at no time has he submitted evidence to that effect. Further, there is no "double counting" under the guidelines between the four-level increase for organizer status and the separate two-level increase assessed under U.S.S.G. § 2F1.1(b)(2) for more than minimal planning. These provisions address separate, and separately cognizable, features of Walker's criminal activity.

Walker also objects to the district court's departure upward from a guideline range on the count of conviction of 37-46 months imprisonment to the statutory maximum of 60 months. The court found that the guidelines at the time of his offense only considered losses of up to $5 million and that Walker had caused losses of $55 million, eleven times higher than the maximum then considered by the guidelines. The court compared the guideline range that Walker would have received if he had committed these crimes after the amendments to § 2F1.1 and found that his range would have been 70-87 months, higher than the statutory maximum.

This analysis and reasoning have been specifically approved by our court in United States v. Bachynsky, 949 F.2d 722, 731-35 (5th Cir. 1991), cert. denied, 1992 U.S. Lexis 5106 (October 5, 1992) (No. 91-8600). Walker's brief does not mention Bachynsky, which is controlling.

Walker also asserts that the court erred in failing to conduct an evidentiary hearing on Walker's challenges to the PSR. On the contrary, the sentencing hearing was held on appropriate notice, and Walker had every opportunity to present evidence at that hearing. He did not do so, preferring instead only to make an unsworn declaration to the court. The court then offered Walker a chance to submit rebuttal evidence, but Walker never did so. This challenge lacks merit.

In a final challenge to his sentence, Walker asserts that the district court had no authority to order, if he could do so by oral pronouncement alone, that his federal sentence will run consecutive to any future state sentence that may be imposed. The government argues, erroneously, that this issue is moot because "the sentencing court failed to incorporate its oral order on this issue into the judgment entered into this case." In this circuit, however, "it is well settled law that where there is any variation between the oral and written pronouncements of sentence, the oral sentence prevails." United States v. Shaw, 920 F.2d 1225, 1231 (5th Cir.), cert. denied, 111 S. Ct. 2038 (1991). Noevertheless, as the government did not move in the district court or in this court to reform the judgment to reflect the court's error, see Shaw

id., it has waived any objection to the written judgment that the court entered. The sentences will thus run concurrently to any state court sentence.

The written judgment and sentence of the trial court are accordingly AFFIRMED.