

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1487
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH L. HIRD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR3-91-100-H)

(February 5, 1993)

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

EDITH H. JONES:*

Appellant Hird pled guilty to one count each of bank fraud and money laundering in connection with an elaborate scheme to prop up the capital position of Caprock Savings & Loan Association in Lubbock, Texas. He has appealed his sentence. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

It is unnecessary to recite here all the details of the bank fraud scheme in which Hird actively participated. Under the Guidelines, his base offense level was set at 20 and was enhanced in two ways by the probation officer's report. The PSR found that the participants laundered a total of \$1.5 million, although Hird had personally received only about \$176,000, to facilitate his purchase of stock in the savings and loan's holding company. Holding Hird responsible for the full amount laundered added five levels to his base offense score. The PSR also concluded that Hird was a manager or supervisor in Caprock's criminal transactions, thus adding three more levels to the base offense level. U.S.S.G. § 3B1.1(b). Hird's total offense level became 26, however, because the probation officer subtracted two levels for acceptance of responsibility.

Interestingly, the government objected to the characterization of Hird as a manager or supervisor and hence to this three-level increase. At sentencing, the district court agreed with the PSR that Hird was a manager or supervisor and found the entire \$1.5 million relevant to Hird's activity. Nevertheless, the court granted the government's motion for downward departure because of Hird's substantial cooperation, departed from level 26 to level 22, and accordingly sentenced Hird to a 45-month term of imprisonment.

On appeal, Hird continues to contest the three-level increase for being a manager or supervisor of the criminal activity and the five-level increase for the full amount of money laundered.

To the extent that Hird challenges the district court's factual determination as to the applicability of these guideline provisions, his appeal must fail, because the findings are not clearly erroneous. United States v. Mejia-Orosco, 867 F.2d 216, 221-22 (5th Cir.), clarified, 868 F.2d 807, cert. denied, 492 U.S. 924 (1989) (managerial role in criminal activity is a factual finding); United States v. Ponce, 917 F.2d 841 (5th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991). (sentence may be based on reasonably foreseeable conduct of co-conspirators, and this is a factual finding). We acknowledge that the finding concerning manager or supervisor status was a close call, but the court's decision is supported by the PSR, which Hird did not take the stand to challenge at sentencing, and by a plausible reading of Hird's factual resume accompanying the guilty plea.

Hird asserts various procedural challenges to the sentence, which also lack merit. First, the fact that the government initially objected to the three-level managerial status increase suggested in the PSR did not prevent the court from assessing it nonetheless, because the court's responsibility is to enforce the Guidelines. Second, the court made a sufficiently specific finding that Hird was a manager or supervisor. See Mejia-Orosco, 867 F.2d at 221. Third, the PSR bore sufficient indicia of reliability to support the district court's decision that Hird was a manager or supervisor, and in any event it tracks the factual resume signed by Hird in connection with his guilty plea. Finally, the court did not decide Hird's sentence by reference to evidence

that developed in the trial of his co-defendants. Properly read, the transcript reference to "the testimony which I heard" related only to the sentence the district court would have imposed had it not downwardly departed for Hird's cooperation with the government.

For these reasons, the sentence imposed by the district court is AFFIRMED.