UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1621

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHELBY DANIELS,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

June 21, 1993

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

PER CURIAM:*

Shelby Daniels was convicted of one count of bank fraud, pursuant to his guilty plea, in violation of 18 U.S.C. § 1344 (1988). Finding that Daniels's fraudulent scheme involved an intended loss of over $350,000.00, the district court increased Daniels's base offense level by 9, resulting in a final offense level of 17. Daniels contends that the district court erred in determining the amount of the intended loss. Finding no clear error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Daniels entered into a scheme in which he obtained a "point of sale" credit card terminal belonging to Sammy Aycock, one of the proprietors of a pawn shop located in Dallas, Texas. Normally, Harbridge Merchant Services ("Harbridge") would accept credit card transactions from Aycock for payment by Mastercard and Visa, and then deposit the dollar amounts in Aycock's bank account at East Park National Bank. Daniels's scheme involved entering numerous fraudulently obtained credit card access numbers in order to make fraudulent credit card transactions.[1] Daniels planned to have the money deposited in Aycock's account and have Aycock withdraw the money and deliver it to him. Harbridge discovered the scheme before Daniels could obtain the money.

Daniels pled guilty to one count of bank fraud, in violation of 18 U.S.C. § 1344 (1988). In determining Daniels's offense level for the purpose of sentencing, the probation officer recommended that the district court increase Daniels's base offense level by 9, based on his finding that Daniels intended to cause a loss of $359,117.62. *See* Presentence Report ("PSR") at 4, 6; *see also* U.S.S.G. § 2F1.1(b)(1)(J) (directing courts to increase a defendant's offense level by 9, if the loss exceeds $350,000.00); § 2F1.1, comment. (n.7) (directing courts to use intended loss figure, if it is greater than the actual loss).[2] Daniels objected

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[1] The credit card numbers were apparently obtained through the use of a formula, beginning with a known active card number. *See* Record on Appeal, vol. 1, at 61.

[2] *See* United States Sentencing Commission, *Guidelines Manual* (Nov. 1991).

to this intended loss figure, arguing that he only intended to cause a loss of $115,711.52, which should have resulted in only a 6-level increase to his base offense level. The district court overruled Daniels's objection, and sentenced Daniels to 27 months imprisonment and 5 years supervised release based upon the amount of intended loss contained in the PSR.[3]

Daniels's sole argument on appeal is that the district court erred in determining the amount of the intended loss. *See* Brief for Daniels at 6-10. We review the district court's factual finding for clear error. *United States v. Shipley,* 963 F.2d 56, 58 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S. Ct. 348, 121 L. Ed. 2d 263 (1992). The district court may rely upon information contained in the PSR in making factual sentencing determinations "so long as the information has some minimum indicium of reliability." *Id.* (quoting *United States v. Vela,* 927 F.2d 197, 201 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 214, 116 L. Ed. 2d 172 (1991)).

In determining the amount of the intended loss, the district court relied upon information contained in the PSR, which stated that Daniels intended to cause a loss of $359,117.62. This figure was reported by David Clark, a Secret Service agent who investigated Daniels. *See* PSR at 4. Clark also reported that Harbridge could have submitted verification documents proving that

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[3] The PSR's calculations, as adopted by the district court, produced an offense level of 17, which together with a criminal history category of I, yielded a sentencing guideline range of 24-30 months imprisonment. *See* Record on Appeal, vol. 3, at 6; PSR at 6-7.

$359,117.62 was approved and ready to be released to Daniels, through Aycock. *See* Addendum to PSR at 2.[4] We therefore conclude that the intended loss amount contained in the PSR had more than a minimum indicium of reliability, and could therefore be used by the district court in making factual sentencing determinations.

Daniels maintains that he did not intend to cause a loss of $359,117.62 because: (a) some of the transactions he submitted through the terminal were done only to check the validity of the credit card numbers; and (b) some of the credit cards had limits well below the amounts indicated by the transactions. *See* Brief for Daniels at 7-8. We reject these arguments because we have previously held that courts may look at the victims' "risk of loss" in determining the amount of the intended loss, pursuant to U.S.S.G. § 2F1.1, comment. (n.7). *United States v. Mordi,* No. 92-1675, slip op. at 8-9 (5th Cir. April 21, 1993) (citing *United States v. Wimbish,* 980 F.2d 312, 316 (5th Cir. 1992), *cert. denied,* ___ U.S. ___, ___ S. Ct. ___, 61 U.S.L.W. 3732 (May 17, 1993) and *United States v. Hooten,* 933 F.2d 293, 298 (5th Cir. 1991)). Here, a Harbridge representative indicated that $359,117.62 was approved and ready to be released to the defendant. *See* Addendum to PSR at 2. Therefore, the risk of loss was for the entire $359,117.62.

Because the information relied upon by the district court judge))which indicated that the risk of loss from Daniels's scheme

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[4] Moreover, the factual resume submitted by the Government, and signed by Daniels, stated that Daniels engaged in 95 fraudulent credit card transactions in the amount of $359,117.62. *See* Record on Appeal, vol. 1, at 56-58.

exceeded $350,00.00))had sufficient indicia of reliability to support its use during sentencing, we hold that the district court did not clearly err in determining the intended loss. Accordingly, the district court's judgment is **AFFIRMED.**