IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1675
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SUNDAY IDOWU MORDI,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR4 92 035 A)

(April 21, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Sunday Idowu Mordi was convicted on a plea of guilty to charges for unauthorized use of an access device in violation of 18 U.S.C. §§ 1029(a)(2) and 2. In this appeal, Mordi

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

challenges the sentence imposed following his plea of guilty, specifically arguing that the sentencing court erred (1) in refusing to adjust Mordi's base offense level downward for acceptance of responsibility, and (2) in determining the amount of "loss intended." Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Mordi pleaded guilty to unauthorized use of an access device. According to the factual resumé submitted by the government, U.S. Postal Inspector K. Tyner received information from an Arlington (Texas) Police Detective that Mordi had been arrested in Arlington, and had on his person a Discover credit card issued in the name of Anthony T. Pacia. Tyner contacted a Discover card representative who advised that the subject card had been mailed to Pacia at an address in Irving, Texas. Tyner's investigation revealed that the Anthony Pacia to whom the card was issued lives in New York, and that the address listed for the card's delivery was that of a private mailbox establishment in Irving, Texas.

Tyner and other agents set up surveillance and observed Mordi's two co-defendants as they drove to several private mailbox facilities in the Fort Worth area. The agents later observed Mordi and his co-defendants in a Sears store in Arlington. The defendants selected merchandise in the electronics department and presented a Sears credit card in the name of Taewon Moon to pay the purchase price of $1,935.56 for the merchandise. The defendants then went to a Fort Worth Sears store and again used the company

credit card to purchase more electronics for $603.37. Mordi and one of his co-defendants also used the card to purchase shoes for $134.67. Tyner contacted Taewon Moon, who lives in New Jersey, and was advised that Moon had not authorized anyone to apply for a Sears card in his name.

The presentence report (PSR) indicated that Mordi had not accepted responsibility for his criminal conduct. The probation officer's conclusion was based on Mordi's statement regarding his involvement in the offense. He stated that "I was not stealing mail. I found the Discover card in the trash. I knew they had a card and I was with them. I was dumb and pretty stupid. I shouldn't have done it."

The PSR also indicated that the actual loss and intended loss in the case totaled $90,768, which increased Mordi's base offense level by six levels. The $90,768 figure was calculated by adding the loss due to the actual use of the credit cards, $45,368, to the additional intended loss due to the credit line amounts of $45,400.

Mordi filed written objections to the PSR and argued at sentencing that he should receive a two-level reduction for acceptance of responsibility. The district court denied the reduction, concluding that even though Mordi may have expressed regret in his statement he did not "fess up" to what he had done. Mordi's counsel then asked whether it was Mordi's statement that led to the court's conclusion. The court responded, "Well, it is obvious from what we know about this that he did more than he said he did there."

Mordi also objected to the six-level upward adjustment based on the PSR's calculation of $90,768 as the amount of actual and intended loss. Mordi did not dispute the actual loss figure, but argued that the unexpended balance of the authorized amount of credit on the credit cards should not be taken into account in calculating the intended loss figure. Inspector Tyner testified that the scheme was that once a credit line had been established by a credit card company and the card was used to the maximum dollar amount, the defendants would send an "NSF" check in as a payment to reduce the balance on the credit card, thereby allowing the perpetrator some additional time in which to continue charging on the card. The probation officer who prepared the PSR testified that the potential loss figure was the total of the credit line amounts listed for each fraudulent credit card.

Inspector Tyner testified that he thought the intended loss consisted of the amount of NSF checks which had been submitted to the credit card companies in order to increase the available credit balance on the fraudulently obtained credit cards.[1] The NSF checks totaled $30,645. The government argued that the $30,645 should be added to the $45,400 credit line amount and the $45,368 actual loss amount, for a total of $121,413.

The district court concluded that the $90,368 figure listed in the PSR should be used to determine Mordi's offense level

[1] In United States v. Deutsch, ____ F.2d ____ (2nd Cir. Feb. 11, 1993, Nos. 92-1174, 92-1319), 1993 WL 32685, the court overruled the district court's calculation of probable or intended loss which paralleled that suggested by Tyner. The court ruled that such a calculation was pure speculation.

adjustment. The court determined that the defendants intended to use the unexpended credit on the credit cards; therefore, the intended loss figure of $45,400 was the appropriate one to add to the actual loss figure. The court did not include the $30,645 written in NSF checks.

II

ANALYSIS

A. Acceptance of Responsibility

Mordi argues that his guilty plea and his statement to the probation officer show that he accepted responsibility for his actions. The Guidelines provide for a two-point reduction in the offense level "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. . . ." U.S.S.G. § 3E1.1(a). Given the sentencing court's unique position to evaluate a defendant's acceptance of responsibility, its conclusions are entitled to greater deference on review than that accorded under the "clearly erroneous" standard. United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990); see also § 3E1.1, comment. (n.5).

Under the applicable deferential standard of review, we cannot say that the district court erred in concluding that Mordi's statement to the probation officer falls short of clear recognition and affirmative acceptance of the nature of his criminal involvement in the offense. Conduct of the defendant that is inconsistent with an acceptance of responsibility may outweigh the significant evidence of acceptance of responsibility provided by

entry of a guilty plea. § 3E1.1, comment (n.3). Mordi's statement that he found the credit card in the trash is clearly inconsistent with any acceptance of responsibility that may have been demonstrated by his pleading guilty.

Mordi argues that his statement about finding the credit card in the trash relates to an uncharged state case and that the source of the card should not be controlling because he admitted its illegal use to the probation officer. He also argues that the district court considered matters outside the record in order to withhold the two-point reduction. Mordi cites the district court's statement that "[I]t is obvious from what we know about this that he did more than he said he did there."

For sentencing purposes, the district court may consider any relevant evidence "provided that the information has sufficient indicia of reliability to support its probable accuracy." United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992) (quoting U.S.S.G. § 6A1.3). Mordi's statement regarding the source of the card is relevant because it shows a refusal to acknowledge his actions. Thus, the district court could properly consider the statement, regardless of the context in which it was given. The district court's statement regarding Mordi's culpability does not establish that the court considered matters outside the record. The court appears to have been referring to Inspector Tyner's testimony regarding the fraudulent use of the Sears credit card, and was entitled to consider that testimony as well as Mordi's statement regarding the use of the Discover card.

The defendant has the burden of establishing that he has accepted responsibility for his criminal conduct. United States v. Perez, 915 F.2d 947, 950 (5th Cir. 1990). Mordi does not offer any evidence of acceptance of responsibility other than his statement to the probation officer, which is not an affirmative recognition of responsibility. The district court did not err by refusing an adjustment for acceptance of responsibility.

B. Quantum of Intended Loss

Mordi argues that the district court incorrectly determined that the credit line could be used to determine the probable or intended loss amount of his unauthorized use of an access device scheme. He insists that, although economic loss may include probable or intended loss, it does not include all possible or potential losses.

A defendant's base offense level may be increased by six levels if the defendant was involved in a fraud or deceit offense with a loss of more than $70,000. § 2F1.1(b)(1)(G). If the defendant is determined to have been attempting to cause a loss greater than the actual loss, the intended loss should be used in determining the value of the loss. § 2F1.1., comment. (n. 7). We review the application of the Sentencing Guidelines de novo and the district court's findings of fact for clear error. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991).

Mordi also argues that the court erred in basing its calculation on the cumulative credit limits of all the cards because some of the credit cards were likely canceled, transferred,

or destroyed. He bases his argument on Inspector Tyner's statement that a defendant will generally get rid of the card before the scheme is uncovered. He argues further that some of the credit cards were probably not usable because the insufficiency had already been uncovered.

For the purposes of § 2F1.1(b)(1), the loss need not be determined with precision. § 2F1.1., comment. (n. 8). The district court concluded that Mordi intended to use the maximum limits available on the credit cards, $45,400. When added to the actual losses of $45,368, the total value of loss is $90,368. Mordi's base offense level would be increased by six levels for any amount over $70,000; thus, even assuming that some of the cards were not usable, it cannot be said that the district court's determination was clearly erroneous.

We have not previously applied § 2F1.1 to a case involving credit card fraud. In United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), we applied § 2F1.1 to a bank fraud case, holding that the district court had correctly used the face amount of the checks that Wimbish had forged when the court determined the amount of loss, despite the fact that Wimbish's scheme was such that he received only a portion of the face value of the checks from the banks. Id. at 316. We nevertheless determined that Wimbish had put his victims (the banks) at a risk of losing the full amount of the checks; therefore, he could be held accountable for the entire amount of the checks. Id. at 316. Similarly, in United States v. Hooten, 933 F.2d 293, 294-95 (5th Cir. 1991), a credit union

employee offered to sell a borrower's $1.5 million note back to the borrower for $150,000. We held that $1.5 million was the correct value of the loss because it represented the potential loss to the credit union. Id. at 298.

Here, Mordi put his victims at risk for the aggregate amount of the unused balances of all of the credit cards' limits. Under our analyses in Wimbish, 980 F.2d at 316, and Hooten, 933 F.2d at 298, the fact that Mordi did not actually use the entire credit limit is not dispositive. As we find that the district court's conclusion was not clearly erroneous, Mordi's sentence is AFFIRMED.