IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1793

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN K. RENSHAW,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
CR3 92 209 F

March 25, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Stephen Renshaw pled guilty to one count of bank fraud, a violation of 18 U.S.C. § 1344. The district court sentenced Renshaw to eighteen months' imprisonment to be followed by three years of supervised release and ordered him to pay restitution in the amount of $17,193.45. On appeal, Renshaw challenges 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

district court's application of the United States Sentencing Guidelines. Finding no error, we affirm.

I.

Between in February and April 1992, Renshaw and George C. Dillon, both executives employed by a failing S & L, Southwest Federal Savings Association ("Southwest"), participated in a scheme to defraud another Texas financial institution, Comerica Bank, N.A. As general counsel to Southwest, Dillon had access to nine checks payable either to the Resolution Trust Corporation, which acted as receiver for Southwest, or to Southwest itself. The checks were issued in settlement of litigation between the RTC as receiver of the Southwest and loan customers of Southwest.

Using the aliases "Jay Sonbourne" and "Allan Bryan," respectively, Dillon and Renshaw opened a checking account at Comerica in the name of "RTC Collections," a fictitious entity which had no authority to act for the RTC. Dillon and Renshaw deposited $507,907.95, consisting of the nine forged checks. They then each wrote checks on the RTC Collections account to pay personal credit card debts.

Dillon also wrote a check on the RTC Collections account for approximately $341,000, payable to a coin shop for the purchase of gold coins. Renshaw, using his alias, arranged for the coin shop to deliver the coins to him at the office of his accountant. The FBI intervened before the coin transaction was consummated.

II.

On appeal, Renshaw challenges the district court's application of the Sentencing Guidelines in two respects. First, he argues that the court erred by increasing Renshaw's offense level by two levels pursuant to U.S.S.G. § 2F1.1(b). Second, Renshaw argues that the court erred by refusing to reduce his offense level pursuant to U.S.S.G, § 3B1.2. This court reviews a Guidelines sentence to determine whether the district court correctly applied the Guidelines to factual findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985). Legal conclusions regarding the Guidelines are reviewed de novo on appeal. Manthei, 913 F.2d at 1133.

A. The district court's application of § 2F1.1

Renshaw argues that the trial court erred in increasing his offense level by two levels based on the court's finding that Renshaw engaged in "more than minimal planning" of the scheme. Such a two-level increase is appropriate in fraud cases if the offense involved "more than minimal planning." U.S.S.G. § 2F1.1(b)(2)(A). Renshaw argues that his co-defendant Dillon, with only minimal assistance from Renshaw,[1] opened the RTC Collections account and deposited the forged checks into it. At that point, Renshaw contends, the fraud was complete, and both

[1] Renshaw argues that, except for fabricating bogus articles of incorporation for "RTC Collections," providing a forged driver's license and social security card, and an fraudulently endorsing the checks, he did nothing to effectuate the deposit of the checks into the "RTC Collections" account.

his subsequent writing of checks to pay personal debts and his arranging for the delivery of the gold coins are "factually irrelevant" for purposes of § 2F1.1(b). Renshaw concedes that, after the deposit was made, he "took an active role in the disbursement and handling of the stolen funds." The district court rejected the argument and determined that the scheme was "elaborate [and] sophisticated" and that "it took both men to carry it out."

The commentary to § 2F1.1 cross-references the commentary to § 1B1.1 for a definition of "more than minimal planning." U.S.S.G. § 2F1.1, comment. (n.2). That provision of the Guidelines defines "[m]ore than minimal planning" as:

> more planning than is typical for commission of the offense in a simple form.
> . . .
> "More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.

U.S.S.G. § 1B1.1, comment. (n.1(f)). A district court's determination that a defendant engaged in "more than minimal planning" is a finding of fact reviewed only for clear error. United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990).

The Government's information charged Renshaw with violating the bank fraud statute, 18 U.S.C. § 1344, by participating with Dillon in devising the scheme, opening the RTC Collections account, making the deposit, paying personal debts with checks written on the Collections account, and attempting the purchase the gold coins. Section 1344 establishes criminal penalties for "[w]hoever knowingly executes, or attempts to execute, a scheme

or artifice -- (1) to defraud a financial institution; or (2) to obtain any of the moneys . . . under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344.

The plain language of § 1344 proscribes the execution of a fraudulent "scheme" to defraud financial institutions, without establishing the parameters of what constitutes such a "scheme." See United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987). In another § 1344 case, in which a defendant challenged his indictment as multiplicitous, this court held that the statute criminalizes an execution of fraud as a whole rather than each individual act of execution in furtherance of a bank fraud scheme. United States v. Lemons, 941 F.2d 309, 318 (5th Cir. 1991). See also United States v. Saks, 964 F.2d 1514, 1526 (5th Cir. 1992) (§ 1344 "imposes punishment only for execution of the scheme, not each act in its furtherance").

Renshaw's argument rests on the theory that his fraudulent acts leading up to the deposit constituted the charged offense and any acts thereafter were not part of the § 1344 violation. We do not agree that Renshaw's acts after the money was deposited into the "RTC Collections" account at Comerica Bank may not be considered as part of the single bank fraud scheme charged in the Government's information. As the Government correctly points out, Renshaw's subsequent acts were part of his conversion and laundering of the defrauded funds. That is, the harm caused to the defrauded institution was not simply the result of the deposit of the forged checks, but also the result of Renshaw's

use of such funds. Thus, our prior cases holding that an indictment alleging a violation of § 1344 charges a single offense -- from beginning to end of a bank fraud scheme -- disposes of Renshaw's argument. Renshaw's execution of the entire scheme was a single criminal act, which the district court properly considering in determining that Renshaw's fraud involved "more than minimal planning."

B. The district court's application of § 3B1.2

In a similar vein, Renshaw argues that his offense level should have been decreased because he was a "minimal" participant, or, alternatively, a "minor" participant, in the scheme. At the sentencing hearing, Renshaw requested either a four-level decrease for "minimal" participation or a two-level decrease for "minor" participation, pursuant to U.S.S.G. § 3B1.2. He again argued that the crime was complete when the nine checks were deposited. The court rejected the argument again and refused to decrease Renshaw's offense level.

A "minimal" participant is among the least culpable of those involved. Ignorance of the scope and structure of the criminal operation and of the activities of others are indicia of minimal participation, as is the performance of a single, isolated act of little significance. See U.S.S.G. § 3B1.2, comment. (nn.1-2). A "minor" participant is one who is less culpable than most other participants but whose role is not "minimal," see U.S.S.G. § 3B1.2, comment. (n.3); however, a person having a minor role is not merely less involved than other participants. He must be peripheral to the furtherance of illegal endeavors. United

States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 112 S. Ct. 887 (1992).

"As to mitigating or sentence-reducing factors, the defendant bears the burden of proof." United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989). A district court's determination that a defendant did or did not play a mitigating role is a factual finding subject to the clearly erroneous standard of review. United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991).

As was discussed, supra, Renshaw was integrally involved throughout the bank fraud scheme. Furthermore, the evidence is overwhelming that he was not ignorant of the scope of the scheme or of Dillon's fraudulent acts. The district court did not clearly err in refusing to grant a § 3B1.2 reduction.[2]

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[2] Renshaw also asserts that the district court made no factual findings regarding his § 3B1.2 objection. This is simply not so. When Renshaw objected to not receiving a decrease for his allegedly "minor" or "minimal" role, the court overruled the objection, stating, "I think the comments I made previously would apply here." The court was obviously referring to its previous comments in the ruling on the "more than minimal planning" increase. The court there found that Renshaw was part of "a rather elaborate, sophisticated scheme. . . . It took both men to carry it out. I don't know that one alone would have done it without the other."