UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1812
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAROLD RAY BAILEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(4:92-CR-60-A)

(April 27, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges

POLITZ, Chief Judge:[*]

Convicted on a guilty plea of conspiracy to transport, sell, possess, and receive stolen vehicles in interstate commerce, Harold Ray Bailey appeals his sentence. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Bailey and his confederates sold 14 stolen vehicles to Federal Bureau of Investigation undercover agents between November 18, 1991 and April 30, 1992. All of the vehicles were stolen in Texas. Some were sold in Texas with the intent that they be transported to Oklahoma; others were transported to Oklahoma and then sold. A grand jury handed up a 14-count indictment. Bailey pleaded guilty to one count: conspiracy[1] to transport stolen vehicles in interstate commerce in violation of 18 U.S.C. § 2312, and to sell, possess, and receive stolen vehicles which have crossed state lines in contravention of 18 U.S.C. § 2313. The government dismissed the remaining counts. The district court imposed a 24-month term of imprisonment. Bailey timely appealed.

Analysis

We review the district court's factual findings in sentencings under the clearly erroneous standard and examine its application of the guidelines *de novo*.[2] Applying those standards we find no merit in Bailey's assignments of error.

Bailey objects to the enhancement of his base offense level because a codefendant stole a handgun from one of the vehicles. Using U.S.S.G. § 2B1.1, the guideline for larceny, embezzlement,

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[1] 18 U.S.C. § 371.

[2] **United States v. Wimbish**, 980 F.2d 312 (5th Cir. 1992), petition for cert. filed (U.S. Mar. 17, 1993) (No. 92-7993).

and other forms of theft, to determine Bailey's base offense level, the district court applied the adjustment directed by section 2B1.1(b)(2): "If a firearm, destructive device, or controlled substance was taken, increase by one level." Bailey contends that the enhancement was erroneous because the district court should not have applied section 2B1.1 and because it was not reasonably foreseeable that a coconspirator would steal a gun during the theft of a car in which he, Bailey, personally did not participate. We are not persuaded.

Bailey objects to the use of section 2B1.1 because it is the guideline for the substantive offense of theft whereas he was convicted of conspiracy. Section 2X1.1, however, instructs that the base offense level for a conspiracy not covered by a specific offense guideline is to be derived "from the guideline for the substantive offense." In addition, "any adjustments from such guideline [are to be applied] for any intended offense conduct that can be established with reasonable certainty." Application Note 1 lists those guidelines expressly covering conspiracies; none cover conspiracy to violate 18 U.S.C. § 2112 or § 2113. Section 2B1.1 and section 2B1.2 are the applicable guidelines for the substantive offenses before the court. As they are identical in all pertinent respects, the district court's selection of section 2B1.1 was not error.[3]

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[3] Nor is there any question as to the "reasonable certainty" of the theft of the gun. Bailey's codefendant was videotaped showing the gun to an undercover agent.

Equally groundless is Bailey's argument that it was not reasonable for him to anticipate that his coconspirators would find and steal a gun from one of the cars they stole. Bailey knew that items of value routinely were taken from the stolen cars. The district court found it reasonably foreseeable that one of the many stolen vehicles[4] would contain a gun. Bailey contests this finding by noting that Tex. Penal Code Ann. § 46.02 prohibits carrying handguns in automobiles. Tex. Penal Code Ann. § 46.03(a)(3), however, exempts persons who are traveling from this prohibition. Many people travel in Texas; many carry weapons. The district court's finding of reasonable foreseeability was not clearly erroneous;[5] indeed, it was manifestly reasonable.

The sentence is AFFIRMED.

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[4] The Presentence Report lists 30 vehicle thefts committed by some or all of the coconspirators.

[5] Cf. **United States v. Mitchell**, 964 F.2d 454 (5th Cir. 1992) (finding as to quantity of drugs that were reasonably foreseeable to defendant reviewed for clear error).