UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1928

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARY ELIZABETH FORSYTHE and R.P.H. CONSULTING, INC., d/b/a The Apothecary,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CR-414-G)

(February 23, 1994)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and LITTLE, District Judge.[1]

DUHÉ, Circuit Judge:[2]

BACKGROUND

The United States Department of Health extended grant money to individual states to provide azidothymidine ("AZT") to indigent and uninsured AIDS patients. After receiving the grant money, the Texas Department of Health ("TDH") contracted with drug companies and pharmacies. The drug companies provided AZT without charge to

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[1] District Judge of the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pharmacies, which in turn dispensed the AZT to qualified AIDS patients for a nominal administration fee.[3] TDH reimbursed the drug companies from federal grant funds for the AZT provided to the participating pharmacies.

In March 1988, R.H.P. Consulting, Inc. d/b/a/ The Apothecary ("The Apothecary"), a small clinic owned by Mary Elizabeth Forsythe, contracted with TDH to serve as one of the participating pharmacies. As a result of complaints received about The Apothecary's dispensation of AZT, the government began an investigation in November 1989. The investigation revealed that The Apothecary profited by selling state provided AZT to ineligible patients rather than dispensing it free of cost to indigent patients.

In December 1991, a grand jury indicted Forsythe and The Apothecary (collectively referred to as "Appellants") for conspiracy (Count 1), wire fraud (Counts 2 through 6), mail fraud (Counts 7 through 12), theft of federal program funds (Count 13), procurement fraud (Count 14), and theft of government property (Count 15). Appellants defended that they had unintentionally mismanaged the program and did not intend to defraud anyone. The jury found Appellants guilty on all counts. Appellants appeal their convictions and sentences.

[3] Appellants waived this fee.

DISCUSSION

I. Sufficiency of the Evidence

Appellants contend that the evidence was insufficient to support their convictions under all of the counts in the indictment. The standard of review is whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir. 1988) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). In making this determination, we "must consider the evidence in the light most favorable to the government, giving the government the benefit of all reasonable inferences and credibility choices." Id. (citing Glasser v. United States, 315 U.S. 60, 80 (1942)). We will not review the evidence here. But after a careful review of the record, we conclude that, viewed in the light most favorable to the government, the evidence sufficiently supported all of the convictions.

II. Conviction Under Both § 666 and § 641

The jury convicted Appellants under both 18 U.S.C. § 666, theft of federal program funds (Count 13), and 18 U.S.C. § 641, theft of government property (Count 15). Appellants contend that both convictions cannot stand because a defendant can only be convicted under the more specific statute when both a specific and a general statute apply. In support of their contention, Appellants cite Simpson v. United States, 435 U.S. 6 (1978), and Busic v. United States, 446 U.S. 398 (1980). Contrary to Appellant's assertions, Simpson and Busic do not stand for that

general proposition. See United States v. Gibson, 820 F.2d 692, 695-96 (5th Cir. 1987).

Simpson and Busic addressed whether Congress intended for courts to apply the sentence enhancement of 18 U.S.C. § 924(c) for use of a firearm during a felony to statutes that already contained enhancement provisions for use of a firearm. After studying the legislative history of § 924(c), the Court in Simpson and Busic concluded that the general enhancement could not be applied with the more specific enhancements.[4] Here Appellants point to nothing in the legislative history suggesting that Congress did not intend for a defendant to be convicted under both § 666 and § 641.

Furthermore, the test for determining whether one transaction provides the basis for convictions under two different statutes is "whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Section 666 requires that over $10,000 be received under the federal program in any one year, and that the property embezzled or stolen be worth $5,000 or more. Conversely, § 641 requires that the crime involve property of the United States, or a department, or agency thereof. Each provision requires proof of facts independent of the other.

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[4] Congress amended § 924(c) in 1984 to overrule the Supreme Court's statutory interpretation. See S. Rep. No. 225, 98th Cong., 2d Sess. 312-14 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3490-92.

III. Evidentiary Ruling

Next, Appellants argue that the district court erred in admitting the testimony of government rebuttal witnesses, Gay Dotson and Maria Testori. Dotson, Director of Compliance for the Texas State Board of Pharmacy, testified about complaints of fraud lodged against The Apothecary in 1989 and that she notified Appellants of the complaints. Testori, an HMO auditor, testified that she conducted an audit of the Apothecary in 1989 as a result of its unusually high AZT dispensation rate. Additionally, Testori testified about discrepancies that she discovered during the audit. Appellants claim that the testimonies were evidence of extrinsic acts admitted in contravention of Rule 404(b).[5]

The government responds that Rule 404(b) does not apply because the testimonies were not extrinsic evidence. The government contends that the testimonies were offered to rebut the defense that Appellants unintentionally mismanaged the AZT program and that they took corrective measures when the mistakes were discovered. The government alleges that the complaints and audit were the catalyst for the corrective measures and that Appellants instituted the corrective measures to conceal their fraud.

We examine a district court's ruling on the admissibility of evidence for abuse of discretion. United States v. Shaw, 920 F.2d

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[5] Fed. R. Evid. 404(b), provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...."

1225, 1229 (5th Cir.), cert. denied, 111 S. Ct. 2038 (1991). "Evidence that is 'inextricably intertwined' with the evidence used to prove a crime charged is not 'extrinsic' evidence under Rule 404(b)." United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992) (quoting United States v. Randall, 887 F.2d 1262, 1268 (5th Cir. 1989)), cert. denied, 113 S. Ct. 1258 (1993). "Such evidence is considered 'intrinsic' and is admissible 'so that the jury may evaluate all the circumstances under which the defendant acted.'" Id. The complaints of fraud and the results of the fraud audit were inextricably intertwined with the offenses contained in the indictment and directly probative of intent. Accordingly, we find no abuse of discretion in the admission of this evidence.

IV. Pre-indictment Delay

Appellants claim that the government's delay in securing the indictment[6] violated their due process rights. They contend that the district court erred in denying their motion to dismiss for pre-indictment delay. To prevail Appellants must show that (1) the prosecutor intentionally delayed indicting them to gain a tactical advantage and (2) they incurred actual prejudice as a result of the delay. United States v. Amuny, 767 F.2d 1113, 1119 (5th Cir. 1985). Appellants have not sustained their burden on either of the elements. Therefore, the district court properly denied Appellant's motion.

[6] The criminal investigation began in November 1989, and the indictment was filed in December 1991.

V. Acceptance of Responsibility

Forsythe argues that the district court erred by refusing to give her credit for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. "The sentencing judge's factual determinations on acceptance of responsibility are entitled to even greater deference than that accorded under the clearly erroneous standard." United States v. Maseratti, 1 F.3d 330, 341 (5th Cir. 1993). We will uphold the district court's decision unless it is "without foundation." United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990).

The application notes to the sentencing guidelines explain that credit for acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1 n. 2. A reduction may be allowed following trial if the trial was for the purpose of testing the constitutionality of a statute or its applicability to the conduct at issue. Id. This case went to trial because Forsythe denied that she intended to commit fraud. And she continued to deny criminal intent until the sentencing hearing. Thus, the district court's refusal to grant the reduction was not without foundation.

VI. Victim Loss

The presentence report ("PSR") computed Forsythe's offense level using a victim loss amount of more than $800,000 but not more than $1,500,000. See U.S.S.G. § 2F1.1(b)(1). This loss amount was

based on the following: (1) a loss to the government of $615,995;[7] and (2) a loss to individuals or insurance companies who purchased state AZT of $851,616.[8] In her objections to the PSR, Forsythe argued that the loss to the government was less than $400,000.[9] Forsythe also argued that the loss to the individuals and insurance companies was zero because they would have paid the same prices for the AZT regardless of her crime. At the sentencing hearing, the district court adopted the findings of the PSR except with respect to the government's loss. The court reduced the government's loss from $615,995 to $581,702.[10] The court also ordered Appellants to make restitution of $581,702, jointly and severally.

First, Appellants contend that the district court erred by denying their request for an evidentiary hearing regarding the loss incurred by the government. The decision to grant or deny an evidentiary hearing is within the district court's discretion. United States v. Mueller, 902 F.2d 336, 347 (5th Cir. 1990). The

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[7] The PSR concluded that The Apothecary dispensed 408,648 capsules of program AZT to ineligible patients and that the government paid $615,995 for these capsules.

[8] The PSR determined that The Apothecary sold 369,050 capsules of state AZT to patients who paid cash or who requested that The Apothecary bill their insurance companies. Based on an average charge per capsule of $2.31, the total cost to individuals and insurance companies was $851,616.

[9] She argued that the total improper dispensations amounted to only 317,848 capsules. She also argued that the average per capsule cost to the government was $1.19.

[10] The judge reduced the numbers of improperly dispensed capsules from 408,648 to 385,898. He computed a per capsule cost by dividing $615,995 by 408,648. See supra note 7. He then multiplied that per capsule cost by 385,898 capsules.

district court denied Appellant's request reasoning that, given the evidence already in the record, an evidentiary hearing was not necessary to resolve the Appellants' objections. Because Appellants have failed to show otherwise, we conclude that the court did abuse its discretion.

Next, Appellants argue that the district court's calculation of the government's loss, which was used to determine Forsythe's offense level and Appellant's restitution, was not supported by any factual basis. If the court erred by reducing the government's loss, it was harmless error because it benefitted the Appellants. Accordingly, we affirm the district court's findings as to the amount of the government's loss.

Finally, Forsythe contends that there was no loss to the individuals and insurance companies that purchased the state supplied AZT. We agree that the individuals and insurance companies did not incur a loss by purchasing state AZT. Although Forsythe misrepresented the source of the AZT purchased, this misrepresentation did not result in a loss (actual or intended) to the individuals and insurance companies who would have paid for the drug in any event. We do not, however, agree that the insurance companies suffered zero loss. The record contains evidence that some insurance companies were double billed for the AZT. Therefore, the loss to the individuals and insurance companies should be redetermined.

We note that the figure in the PSR denominated loss to insurance companies and individuals in fact represents the

Appellants' financial gain from the fraud. Therefore, the victim loss, as redetermined on remand, will not reflect the Appellant's unlawful enormous gain. The sentencing guidelines provide that when the victim loss "does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted." U.S.S.G. § 2F1.1 n.10; see also U.S.S.G. § 5K2.0. Because the victim loss in this case when recalculated may not reflect the enormity of Appellants' gain, the court may wish to consider upward departure.

CONCLUSION

We vacate both sentences and remand for resentencing. Convictions are affirmed.

Convictions AFFIRMED. Sentences VACATED and REMANDED.