IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1950
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES R. JAMES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-162-G)

(May 19, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Charles R. James was convicted, following a plea of guilty, of filing false claims for payment of tax refunds in violation of 18 USC §§ 2 & 287. In connection with his plea agreement James entered into a cooperation agreement which provided, inter alia, that certain information and statements made

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

by James or his counsel during cooperation thereunder could not be used as evidence in any civil or criminal trail. In appealing his sentence, James complains of violation of those provisions and of other sentencing errors. For the reasons set forth below, we affirm in part, vacate in part, and remand for re-sentencing.

I.

FACTS AND PROCEEDINGS

James pleaded guilty to preparing and presenting false claims for tax refunds. James and his codefendant initiated a scheme in which they and other individuals would electronically file false tax returns claiming nonexistent tax refunds.

James pleaded guilty pursuant to a plea agreement and entered into the "cooperation agreement" with the government. The cooperation agreement stated in part that:

> All discussions with you [counsel] and Charles R. James on or about June 17, 1992 are governed by Rule 410 of the Federal Rules of Evidence as statements made in the course of plea discussions. No statements that either you or Charles R. James make during these discussions can be used as evidence against him in any civil or criminal trial. However, the government is free to use as admissible evidence against Charles R. James any information directly or indirectly derived from such statements.

James met with IRS officials and provided information about certain tax returns which the IRS suspected were fraudulent. James identified tax returns that he personally filed, and identified the signatures on tax returns filed by other individuals in the scheme.

The presentence investigation report (PSR) recommended a

seven-level increase because the amount of loss in the offense was in excess of $120,000 but less than $200,000. See § 2F1.1(b)(1)(H). The PSR also recommended a three-level increase because James was a manager or supervisor of a criminal activity involving five or more participants. See § 3B1.1(b). And the PSR recommended no adjustment for acceptance of responsibility.

James filed written objections to the PSR. He argued that the calculation of the amount of loss was determined from information he provided to the government, and that the government agreed in the cooperation agreement not to use such information against him. James also argued that a three-level adjustment for his role in the offense was unwarranted, as was the PSR's determination that he had not accepted responsibility for his role in the offense.

At the sentencing hearing, the district court determined that it would resolve James's objections to the PSR in the manner proposed by the probation officer in the Addendum to the PSR. Addressing James's claim that the "amount of loss" was incorrect, the court questioned whether the relevant language in the cooperation agreement would exclude the disputed evidence from consideration during sentencing.[1] The court asked the government for its interpretation of the agreement, and the government insisted that none of the information used to sentence James came exclusively from James. The government also argued that the indirect use of James's information to obtain an amount of loss was

[1]The court noted that under Fed. R. Evid. 1101, the Rules of Evidence do not apply in a sentencing hearing.

not prohibited by the agreement because the agreement specifically provided that any admissible evidence obtained as a result of James's cooperation could be used against him directly or indirectly.

The district court concluded that even if the government learned of James's connection with the other tax returns through James's own statements, the information was not excludable. The court asked the government if it wished to clarify the factual record for appeal purposes as to whether the loss figure had been derived in violation of the cooperation agreement. The government declined, stating that the existing record was sufficient.

II.

ANALYSIS

A. Cooperation Agreement

If a defendant agrees to cooperate with the government by providing information concerning the unlawful activities of others, and the government agrees that any self-incriminating information thus revealed will not be used against the defendant, such information shall not be used in determining the applicable guideline range. U.S. v. Shacklett, 921 F.2d 580, 584 (5th Cir. 1991); U.S.S.G. § 1B1.8(a). This restriction does not apply to information known to the government before the defendant enters into the agreement with the government. Shacklett, 921 F.2d at 584; § 1B1.8(b).

In U.S. v. Kinsey, 917 F.2d 181, 184 (5th Cir. 1990), we determined that, based on the language of the defendant's plea

agreement, § 1B1.8(A) "seemed inapplicable." As the government stipulated in its appellate brief that the agreement implied a promise not to use the defendant's statements against him, however, we declined to resolve the issue by determining that § 1B1.8(A) was inapplicable. Id. We stated that "[i]n the light of the parties' mutual understanding of the meaning of their plea agreement, [this court] cannot resolve the problem by concluding that the literal language of the agreement renders section 1B1.8(a) inapplicable." Id.

In its instant appellate brief, the government states that it agreed that "statements furnished pursuant to the cooperation agreement could not be used against [James]." Thus, although the language of the cooperation agreement may not render § 1B1.8(a) inapplicable, we shall not abrogate the mutual understanding of the parties.

The key inquiry thus becomes whether the information was known to the government before the defendant entered into the agreement. See Shacklett, 921 F.2d at 584; § 1B1.8(B)(1). In making this determination, a court may consider any relevant information that has sufficient indicia of reliability. See § 6A1.3(a). In Shacklett, 921 F.2d at 584, we determined that a probation officer's bald assertions, made without factual documentation, that the government knew of the amount of loss prior to the defendant's cooperation involved no indicia of reliability.

In its appellate brief, the government concedes that it has failed to meet its burden of showing that the amount of loss was

not calculated using evidence obtained in violation of the cooperation agreement. The government expressly acknowledges that the case must be remanded so that the district court may hear evidence concerning the source of the facts supporting the loss figure. The government likens the present situation to that of Shacklett, 921 F.2d at 584, in that the government made only bald assertions that the information was from other sources without producing evidence to support its assertion.

The government's concession is well-founded. In response to James's objection to the PSR, the probation officer stated that "[F]urther verification by the government indicates that the Internal Revenue Service actually paid out $125,365 as determined by the IRS Service Center, Austin, Texas." The officer also stated that "the IRS investigation revealed that 100 false tax returns claims refunds in excess of $120,000 were filed by James' and his codefendant. No documentation of the IRS investigation was provided. At the sentencing hearing, the government simply stated that "[T]he information provided to the Probation Office was based on information already in possession of the government, obtained by the Internal Revenue Service through its Service Center or Criminal Investigation or codefendants involved with the conspiracy with the defendant." The district court did not resolve the issue, stating that, even if it assumed that the information came from James, the information was admissible for sentencing purposes.

James argues that the district court made evidentiary errors regarding his attempt to offer proof of what the amount of loss

should be. As it cannot be determined from the record what information the government already possessed from other sources and what information should not be considered in light of the plea agreement, we must vacate the sentence and remand to the district court for further proceedings on this issue. See Kinsey, 917 F.2d at 184. Accordingly, we need not consider at this time James's arguments regarding the evidentiary errors made in connection with the determination of the amount of loss.

B. Manager or Supervisor

James argues that the district court erred by determining that he was a manager or supervisor of the criminal activity under U.S.S.G. § 3B1.1(b). A district court's determination that a defendant played an aggravating role is a factual finding subject to the "clearly erroneous" standard of review. U.S. v. Alvarado, 898 F.2d 987, 993 (5th Cir. 1990). A factual finding is not clearly erroneous so long as it is plausible in light of the record read as a whole. U.S. v. Fields, 906 F.2d 139, 142 (5th Cir.), cert. denied, 498 U.S. 874 (1990).

If the defendant is found to have been a manager or supervisor of a criminal activity that involved five or more participants, or that was otherwise extensive, his base offense level is increased by three levels. See § 3B1.1(b). A participant is a person who is criminally responsible for the commission of the offense; however, he need not have been convicted. But person who is not criminally responsible for the commission of the offense is not a participant. See id., application note 1.

James asserts that the government did not establish that the activity involved five participants. He argues that the alleged fifth participant, Michael Knight, was identified in the PSR only as a "runner" and there is no indication that Knight was a criminally-responsible participant.

In U.S. v. Pierce, 893 F.2d 669, 676 n.3 (5th Cir. 1990), we held that innocent or "duped" participants cannot be considered in determining whether the activity involved "five or more participants." We reasoned that, although others of our decisions had held that innocent or "duped" participants could be considered in determining whether the activity was "otherwise extensive," a party must be criminally responsible to be counted as a participant in the criminal activity. Id. at 676-77 n.3, 4. (citing U.S. v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir), cert. denied, 109 S.Ct. 3257 (1989)).

The PSR in the instant case does not state whether Knight was criminally responsible. Moreover, the government did not argue that the activity was "otherwise extensive." On the record before us on appeal, therefore, we have no choice but to find that the district court's determination that James played an aggravating role is clearly erroneous. This issue too must be remanded to the district court. On remand, the government may wish to develop the record regarding Knight's criminal culpability.

James raised other arguments concerning the district court's determination that he played an aggravating role. In light of the disposition of this appeal, however, we need not address those

issues at this time.

C. Acceptance of Responsibility

Finally, James argues that the district court erred by not adjusting his offense level for acceptance of responsibility. The PSR stated that, although James admitted his involvement in the offense, he continued to prepare and file fraudulent income tax returns after he was released on bond. The PSR concluded that James's conduct of returning to the scheme was inconsistent with his declared acceptance of responsibility.

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. U.S. v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990); see § 3E1.1, comment. (n.5). The defendant bears the burden of proving entitlement to the reduction. U.S. v. Lghodaro, 967 F.2d 1028,1031 (5th Cir. 1992).

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. See U.S. v. Sanchez, 893 F.2d 679, 680-81 (5th Cir. 1990); § 3E1.1, comment (n.3). James's conduct of returning to the unlawful scheme after his first arrest was inconsistent with his alleged acceptance

of responsibility. He displayed an affirmative recognition of his conduct only after he was caught a second time. In determining whether a defendant qualifies for a reduction of offense level for acceptance of responsibility, the sentencing court should consider, inter alia, the timeliness of the defendant's conduct in manifesting the acceptance of responsibility. § 3E1.1, comment. (n.1(h)).

James also argues that the superseding indictment was written in such a way as to make impossible his acceptance of responsibility. The first indictment against James alleged conduct occurring from January 1991 to March 1992. The superseding indictment included James's conduct of April 1992, after he returned to the scheme. James argues that, inasmuch as the superseding indictment included his conduct of re-entering the scheme, such conduct should not be taken into account in determining whether he has accepted responsibility. In furtherance of this argument, he asserts that, as the PSR stated that he returned to the scheme after being arrested for the "instant offense," the district court may have believed that James returned to the scheme after being arrested a second time.

James's argument is without merit. Regardless of the timing of James's return to the scheme, such conduct could have been considered by the court in determining whether James had accepted responsibility for his crime. The district court's determination was not clearly erroneous.

James also alleges that the district court, in its effort to

save time, "completely ignored" his written objections to the PSR's conclusion that he had not accepted responsibility. In resolving controverted matters in the PSR, the district court must make a finding as to each matter controverted. See Fed. R. Crime. P. 32(c)(3)(D). The sentencing court satisfied this requirement by rejecting James's objection and orally adopting the PSR's statements. See U.S. v. Puma, 937 F.2d 151, 155 (5th Cir. 1991), cert. denied, 112 S.Ct. 1165 (1992).

At the sentencing hearing, the district court asked James whether his written objections to the PSR contained all of his factual objections to the accuracy of the report. After James replied that it did, the district court stated that it would resolve James's objections to the PSR in the manner proposed by the addendum. When defense counsel pursued her objection, it was noted by the court but overruled. James's assertion that his objection was "completely ignored" is simply wrong in light of the record.

III.

CONCLUSION

For the foregoing reasons, James's sentence is affirmed in part but vacated in part, and his case is remanded for re-sentencing consistent with this opinion.