IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1996
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RUSSELL MINOR FAGAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
3:92 CR 095 P

(September 2, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Russell Fagan appeals his conviction of, and sentence for, copyright infringement and disobedience of a court order in violation of 17 U.S.C. § 506(a) and 18 U.S.C. §§ 401(3) and 2319(b). Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Fagan operated a video sales and rental store in Dallas called "Make your Own Tape." In October 1989, the Motion Picture Association of America (MPAA) filed a civil suit against him, alleging that he was making unauthorized copies of video cassettes and either renting or selling them to customers. The district court enjoined Fagan from continuing the practice and ordered that the United States Marshal seize the illegally copied tapes. Fagan and the MPAA eventually settled the suit, with Fagan paying the MPAA damages and promising to abide by the injunction.

In 1991, Bee Romanoff, an investigator for the MPAA, received a complaint that Fagan was continuing to pirate video cassettes. Romanoff employed Kevin Hardin to assist her in investigating Fagan's operation. Hardin purchased several counterfeit tapes from Fagan and provided Romanoff with detailed descriptions of Fagan's operation. The information was turned over to the FBI and used to support the issuance of the search warrant.

II.

On February 26, 1992, Fagan was indicted for copyright infringement of audio and video cassettes. He filed a motion to suppress the evidence seized during the searches. The district court denied that motion.

On May 15, 1992, another search was executed at Fagan's business. Fagan was charged in a seven-count superseding indictment. A jury found him guilty of two counts of criminal copyright

infringement of motion pictures, a violation of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319(b); one count of criminal copyright infringement of sound recordings, a violation of 18 U.S.C. § 2319(b)(1); and criminal contempt for willfully disobeying a previous federal civil injunction, a violation of 18 U.S.C. § 401(3).

The government filed a motion for enhanced punishment pursuant to 18 U.S.C. § 3147. Fagan raised several objections to the presentence report ("PSR"), most of which were overruled by the district court.

III.

A.

Fagan objected to the jury charge, arguing that the jury should be charged that a violation of § 2319(b) occurs when a defendant "reproduces and distributes" copyrighted material. He contended that the conjunctive charge was proper because the language in the indictment alleged that he "reproduced and distributed" the copyrighted material. The district court overruled Fagan's objection and charged that a violation of § 2319(b) arises by a defendant's "reproducing or distributing" copyrighted materials.

The refusal of a defendant's requested jury instruction is reviewed under an abuse-of-discretion standard. United States v. Turner, 960 F.2d 461, 464 (5th Cir. 1992). Such a refusal constitutes reversible error only if the instruction (1) is substantively correct; (2) was not substantially covered in the

charge actually delivered to the jury; (3) concerns an important point in the trial, and failure to give the instruction seriously impaired the defendant's ability to present his defense. Id.

Section 2319(b) makes either the "reproduction or distribution" of copyrighted works a crime. Fagan's proposed jury charge that a violation of § 2319(b) occurs when a defendant "reproduces and distributes" copyrighted works is not substantively correct; therefore, the district court's refusal to give the instruction did not constitute error.

Fagan also argues that the indictment against him was constructively amended by the district court's use of disjunctive language in the jury charge. A constructive amendment occurs when the jury is permitted to convict a defendant on a factual basis that effectively modifies an essential element of the offense charged. United States v. Green, 964 F.2d 365, 373 (5th Cir. 1992), cert. denied, 113 S. Ct. 984 (1993).

A disjunctive statute may be pleaded in the conjunctive and proved in the disjunctive. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 111 S. Ct. 2064 (1991) (citing United States v. Haymes, 610 F.2d 309, 310 (5th Cir. 1980)). In Haymes, the defendant argued that the indictment was constructively amended because it charged conduct in the conjunctive, yet the jury charge used disjunctive language. Haymes, 610 F.2d at 310. We rejected Haymes's argument, concluding that such did not amount to a constructive amendment.

B.

Fagan argues that the affidavit supporting the warrant to search his business was not supported by probable cause; therefore, evidence obtained during the search should not have been admitted in evidence at trial. Specifically, Fagan argues that the affiant did not sufficiently corroborate the credibility and veracity of the "source" used in the affidavit.

We review a denial of a motion to suppress premised on a lack of probable cause to determine (1) whether the good-faith exception to the exclusionary rule applies and (2) whether the warrant was supported by probable cause. United States v. Pofahl, 990 F.2d 1456, 1473 (5th Cir. 1993). Unless the defendant's motion involves a novel question of law, it is unnecessary to address the probable cause issue if the good faith exception applies. Id.

Citing United States v. Jackson, 818 F.2d 345, 348 (5th Cir. 1987), Fagan argues that the good faith exception is not applicable in this case because the warrant is supported by a mere "bare bones affidavit," which is one "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Pofahl, 990 F.2d at 1474 (quoting United States v. Leon, 468 U.S. 897 (1984)). In determining whether a warrant is supported by only a "bare bones" affidavit, the totality of the circumstances must be examined. Illinois v. Gates, 462 U.S. 213, 239 (1983). The focus is on whether there were sufficient facts as a whole to support a determination of probable cause. United States v. Daniel, 982 F.2d 146, 151 (5th Cir. 1993).

The search warrant was supported by the affidavit of Special Agent Randall Harris, stating that he received information from Bee Romanoff, the MPAA's investigator, that Romanoff had purchased several pirated video cassettes from Fagan through a "source," later identified as Kevin Hardin. Harris stated that he had worked with Romanoff in the past; Hardin provided Agent Harris with detailed information about Fagan's activities; Harris also ascertained that Fagan had engaged in copyright infringement in the past.

Unlike the affidavit in Jackson, 818 F.2d at 348, the affidavit here does not rely completely upon the information provided by the "source" but was sufficiently corroborated by other facts to support a good-faith reliance on the warrant. See United States v. Broussard, 987 F.2d 215, 222 (5th Cir. 1993). The district court properly denied Fagan's motion to suppress.

C.

Fagan challenges the two-level increase in his offense level for obstruction of justice. Fagan's offense level was increased pursuant to U.S.S.G. § 3C1.1[1] for his failure to obey the injunction. The standard of review with respect to increases pursuant to obstruction of justice is "clearly erroneous." United States v.

[1] Fagan was sentenced on November 4, 1992, and therefore the guidelines that became effective on November 1, 1992, should have been applied. See 18 U.S.C. § 3553(a)(4). Fagan's sentence was calculated under the November 1, 1991, guidelines, however. This has not been raised as an issue on appeal, nor does it appear that the result would have been different. Therefore, all references to the guidelines are to the November 1, 1991, version.

Winn, 948 F.2d 145, 161 (5th Cir. 1991).

Fagan argues that, because he was convicted, by a separate count of the indictment, of criminal contempt for disobeying the injunction, the enhancement for obstruction amounts to double counting. When a defendant is convicted of both an obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under § 3D1.2(c); see § 3C1.1, comment. (n.6). The offense level for that group of closely related counts will be the offense level for the underlying offense (increased by the two-level adjustment specified by this section) or the offense level for the obstruction offense, whichever is greater. § 3C1.1, comment. (n.6); Winn, 948 F.2d at 162.

Section 3D1.2(c) is designed to prevent double-counting. § 3D1.2(c) comment. (n.5); United States v. Kleinebreil, 966 F.2d 945, 954 (5th Cir. 1992). Fagan's multiple counts were grouped together, and the two-level adjustment for obstruction was given only because the offense level for the underlying offense was greater than the offense level for his contempt offense. The district court properly applied the guidelines.

D.

A defendant's base offense level for copyright infringement is determined by the value of the infringing items. See §§ 2B5.3(b)(1), 2F1.1. The district court determined that Fagan had infringed 569 videotapes prior to the 1989 civil seizure and

939 videotapes prior to the 1992 seizure. The court then based Fagan's offense level upon the value of the infringed items, 1,508 videotapes valued at $20 each. See § 2F1.1(b)(1)(F). Fagan argues that the 569 infringing tapes that were the object of the 1989 civil suit should not have been included in the calculation, because that conduct was not relevant conduct.

Relevant conduct is determined on the basis of acts that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of trying to attempt to avoid detection or responsibility for that offense. See § 1B1.3(a)(1). The determination of what conduct is "relevant" under the guidelines is reviewed for clear error. United States v. Bethley, 973 F.2d 396, 400 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993).

To determine whether certain prior conduct qualifies as relevant conduct under § 1B1.3(a)(2), the prior conduct must pass the test of similarity, regularity, and temporal proximity. Id. at 401 (citing United States v. Hahn, 960 F.2d 903, 910 (9th Cir. 1992)). When the conduct alleged to be relevant is temporally remote from the conduct underlying the conviction, and the relevance of the extraneous conduct depends primarily upon its similarity to the conviction, it is not enough that the extraneous conduct merely amounts to the same offense as the offense for which the defendant was convicted. Hahn, 960 F.2d at 910. Rather, a district court must consider whether specific similarities exist between the offense of conviction and the temporally remote

conduct. Id. at 911.

At trial, Fagan admitted that his conduct prior to the 1989 seizure was the same as that for which he was indicted. The similarity of the prior conduct was considerable; thus, the district court's determination that it was relevant, despite its temporal remoteness, was not clearly erroneous.

Further, attenuated conduct may be considered "relevant" under § 1B1.3(a)(2) when there is direct evidence of a common scheme or plan and the conduct is of a character for which § 3D1.2(d) would require grouping of multiple counts.[2] In United States v. Lokley, 945 F.2d 825, 840 (5th Cir. 1991), we held that the district court's finding, that all of Lokley's drug transactions from 1984 to 1989 were relevant because they were part of a common scheme or plan, was not clearly erroneous.

In the present case, Fagan's conduct involved a common scheme to pirate video cassettes. Although Lokley, 945 F.2d at 840, Bethley, 973 F.2d at 400, and Hahn, 960 F.2d at 910, involved drug transactions, the guidelines provide that a similar analysis can be made with other offenses, such as embezzlement. § 1B1.3(a)(2), comment. (n.10).

Fagan also argues that the 1989 and 1992 conduct was interrupted by the intervening civil judgment and therefore should not be considered relevant. Conduct associated with a sentence

[2] The applicability of § 1B1.3(a)(2) does not depend upon whether multiple counts are alleged. See § 1B1.3(a)(2), comment. (n.10). Thus, the fact that the prior conduct was not charged in the indictment is not dispositive.

imposed prior to the acts or omissions constituting the instant federal offense is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction. § 1B1.3(a)(2), comment. (n.8). Fagan argues that although he was not convicted and sentenced as in a criminal case, he was "sentenced" by the civil judgment for fine, forfeiture, and other restrictions.

The district court rejected this argument, concluding that the guidelines' reference to "sentence" was that imposed pursuant to a criminal conviction. The district court's conclusion is supported by our often-quoted statement that "[t]he Guideline allow consideration of relevant conduct of which the defendant has not been convicted." United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990) (emphasis added). The district court's conclusion that Fagan's prior conduct was relevant was not clearly erroneous.

E.

Fagan argues that the government's motion to enhance his sentence for commission of an offense while on release was not timely. The government filed its motion for enhanced punishment prior to the preparation of the PSR, thus allowing Fagan to protest the lack of notice of enhancement in his objections to the PSR.

The district court agreed that Fagan was entitled to notice of the proposed enhancement but concluded that the government's motion, filed shortly after the guilty verdict, was sufficient notice. The district court noted that its own research revealed

nothing to indicate that Fagan was entitled to notice prior to trial or prior to enhancement and that the enhancement would not "come into play" unless there was a conviction.

Before enhancing a defendant's sentence pursuant to § 3147, the sentencing court must ensure that the releasing judge advised the defendant of the penalties for violating a condition of release. United States v. Onick, 889 F.2d 1425, 1433 (5th Cir. 1989); 18 U.S.C. § 3142(h)(2)(A). The release order signed by Fagan states that "[t]he commission of any offense while on pretrial release may result in an additional sentence upon conviction for such offense . . . . This sentence shall be consecutive to any other sentence and must be imposed in addition to the sentence received for the offense itself." Thus, Fagan was notified, prior to his release on bail pending trial, of the possibility of an enhanced punishment under § 3147.

We are aware of no authority supporting Fagan's assertion that he should have been "renotified," after his arrest, of the possibility of an enhanced punishment, nor do any provisions of the Bail Reform Act of 1984 support Fagan's argument. See 18 U.S.C. §§ 3147-3161. As noted by the district court, the enhancement is not apposite until a defendant has been convicted.

Finally, Fagan argues that an enhancement pursuant to § 3147 and an increase in his offense level for obstruction of justice amount to double counting. The enhancement pursuant to § 3147 was imposed because Fagan committed the offense of conviction after he was released on bond after his first indictment. The obstruction

of justice enhancement was given because Fagan disobeyed the previous civil court injunction. The punishments were given for two separate transgressions; therefore, the sentence did not amount to double counting.

AFFIRMED.