

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2476
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUDITH FRYE HOUSE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CRH 91 123 01

March 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

From 1988 to 1990, Judith House entered into a complex set of loan transactions with seven commercial banks in Texas, from which she borrowed a total of approximately \$3.5 million. The scheme involved counterfeited stock certificates of widely-held public

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

companies, which House would pledge as security for loan proceeds to be invested in various ventures, or use to pay her debts. Unsurprisingly, House ultimately defaulted on all of the loans. Although she accounted to the government for approximately \$2.5 million of the proceeds, she claims that memory loss prevents her from accounting for the remaining \$1 million.

House pleaded guilty to two counts of bank fraud in violation of 18 U.S.C. §§ 1344(1), (2). The district court computed her offense level as 23 with a criminal history category of I, yielding a sentencing range of 46-57 months. The court then departed upward by five points under U.S.S.G. § 5K2.0, citing, as factors, the multiplicity of victims and the seriousness of their losses, as well as the unusual sophistication of House's scheme. The offense level thus increased to 28, House's sentencing range became 78-97 months, and the court imposed a sentence at the high end of the range. House was sentenced to serve two concurrent 97-month prison terms and two concurrent three-year terms of supervised release and to pay \$3.6 million in restitution.

II.

House argues that the government breached the terms of her plea agreement by referring at sentencing to offenses other than those for which she was sentenced, and by failing to recommend a two-level downward departure for acceptance of responsibility under U.S.S.G. § 3E1.1. In her plea agreement, House stipulated that, should she persist in her plea of guilty,

(1) The Government and I may recommend any lawful sentence to the Court at time of sentencing.

(2) The Government will stipulate at sentencing to my acceptance of responsibility as it relates to the application of Sentencing Guidelines in my case.

(3) The Government will move to dismiss Counts One, Three, Four, Six and Seven of the Indictment in this case after sentencing.¹

In Santobello v. New York, 404 U.S. 257, 262 (1971), the Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." We apply an objective standard to determine whether the government's conduct is consistent with the defendant's reasonable understanding of the terms of his plea agreement. United States v. Chagra, 957 F.2d 192, 194 (5th Cir. 1992). We therefore look to the terms of House's plea agreement to determine whether the government's conduct in this case accorded with House's reasonable understanding of what she agreed to in her plea.

III.

House first contends that the government breached the plea agreement by moving for an upward departure and, to that end, pointing out to the court that she had avoided arrest and had failed to cooperate in locating the remainder of the money. House argues that she reasonably understood that the agreement limited

¹ The plea agreement included a fourth stipulation to the effect that House would pay any remaining restitution to the seven financial institutions she had defrauded.

the government's right of allocution to facts relevant to the charged offenses and that the government was bound not to recommend a sentence unless it involved a downward departure.

We find ourselves at a loss as to how the terms of the instant plea agreement may be deemed ambiguous as to the matters House contests. Although the government did stipulate to recommending a downward adjustment for House's acceptance of responsibility, both parties expressly reserved the right to "recommend any lawful sentence to the Court at the time of sentencing." (Emphasis added.)

Moreover, in the recital of facts preceding the plea, House stated under oath that "I further understand that regardless of the specific terms and conditions of this plea agreement the Government may provide all relevant sentencing information to the Court, either directly or through the presentence investigation. Relevant sentencing information includes all the facts and circumstances of my case and information concerning my background." (Emphasis added.) Given the absence of any promise or understanding to the contrary, it thus was not reasonable for House to believe that the government had limited either its right of allocution or its ability to recommend any sentence, so long as it stood by its stipulation to recommend a two-level reduction for acceptance of responsibility. Because the government did so here, it did not breach the terms of the plea agreement.²

² House's objections to the plea agreement under U.S.S.G. § 6B1.4(a) & (b) are inapposite, inasmuch as the plea agreement contains no written
(continued...)

IV.

Next, House disputes the district court's decision to depart upward from her recommended guidelines sentence on the ground that the factors cited by the court as warranting departure were invalid. Because House did not object to the departure in the district court, our review is for plain error only. United States v. Pigno, 922 F.2d 1162, 1167 (5th Cir. 1991).

A sentencing court has the power, under 18 U.S.C. § 3553(b), to impose a sentence outside the range established by a proper application of the guidelines, provided it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G. § 5K2.0 (citing 18 U.S.C. § 3553(b) (Supp. 1992)). Our determination on appeal follows a two-pronged inquiry:

First, was the sentence imposed either in violation of law or as a result of an incorrect application of the Guidelines? If so, a remand is required under § 3742(f)(1). If the court concludes that the departure is not the result of an error in interpreting the Guidelines, it should proceed to the second step: is the resulting sentence an unreasonably high or low departure from the relevant guideline range? If so, a remand is required under § 3742(f)(2).

Williams v. United States, 112 S. Ct. 1112, 1120 (1992). We review findings of fact that underlie the court's sentence under a clearly

(...continued)
stipulation of facts. Where such is the case, the requirements for written stipulations contained in the guidelines section do not apply. See U.S.S.G. § 6B1.4 commentary.

erroneous standard. 18 U.S.C. § 3742(e) (Supp. 1992).

House urges that the district court incorrectly assessed a five-level upward departure under U.S.S.G. § 5K2.0 based upon factors already adequately considered by the guidelines, namely the unusual sophistication of her scheme, the existence of multiple victims, and the large amount of money involved. House correctly notes that the applicable guidelines provision, section 2F1.1, accounts under its specific offense characteristics for the amount of money involved (up to and exceeding \$80 million), more than minimal planning, and multiple victims. See U.S.S.G. § 2F1.1(b)(1), (2). At first glance, it appears House is correct in claiming that the district court departed on the basis of factors already addressed by the guidelines.

A deeper understanding of the guidelines, however, reveals that the district court committed no error. Application note 9 to section 2F1.1 states that "[d]ollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted." It thus was not plain error for the court to depart on the basis of the amount of money involved, even though the applicable guideline already had accounted for that factor.

The district court also concluded that House's scheme involved both more than minimal planning and an attempt to defraud more than one victim, and it departed upward in part on that basis. Under section 2F1.1(b)(2), a two-level upward adjustment may be imposed if either one of these offense characteristics is present.

Following the recommendation of the probation officer contained in the presentence investigation report ("PSI"), the district court reasoned that when both are present, an upward departure may be warranted. Such a departure is permitted under section 2F1.1(b)(3) because its adjustments, like section 2F1.1(b)(2)'s, are alternative rather than cumulative. See U.S.S.G. § 2F1.1 application note 1. We conclude that it was not plain error for the court to analogize to section 2F1.1(b)(3) and depart upward. Nor can we say that the extent of the departure, less than double the original guidelines range (from 46-57 months to 78-97 months), was unreasonable. Cf. United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989) (upholding sentence more than three times guidelines-recommended maximum).

v.

Lastly, we address House's contention that the district court erroneously failed to conduct a hearing to resolve disputed factual issues, namely whether House avoided arrest and whether she failed to cooperate in locating the remaining \$1 million of missing funds. While House correctly cites U.S.S.G. § 6A1.3 as authority for her right to a resolution of disputed sentencing factors, that section does not entitle her to all she claims. Specifically, it does not necessarily entitle her to a hearing on all factors in dispute. The language of the commentary makes this evident:

When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of

counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.

U.S.S.G. § 6A1.3 commentary (emphasis added).

Here, House had and took ample opportunity to object to the sentencing factors she disputed. House objected to the PSI's conclusions, both by written objections filed prior to the sentencing hearing and orally at the hearing. We are satisfied that, under the circumstances, these procedures provided House with "an adequate opportunity to present relevant information" disputing the findings contained in the PSI. Moreover, House's continuing objections are not grounded so much upon disputed issues of fact as upon the interpretation of agreed facts. The district court did not err in resolving those questions of fact against her.

We therefore AFFIRM the sentence of the district court.