IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2499
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY STRANGE ROME
and
ALLISON SPINDELLE CLOVER,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 91 70)

(September 7, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Anthony Rome and Allison Clover were convicted of conspiracy to defraud a federal savings and loan association, in violation of 18 U.S.C. § 371 (Rome only); making false entries in books of the same, in violation of 18 U.S.C. § 1006 (Rome only); and misapplica-

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 Pursuant to that rule, the court has determined that this opinion should not be published.

tion of monies and credits, in violation of 18 U.S.C. §§ 2 and 657 (both defendants). Rome appeals his conviction and sentence; Clover appeals only his sentence. We affirm Rome's conviction but vacate and remand for resentencing as to both defendants.

I.

In February 1986, the Federal Bureau of Investigation began investigating possible fraudulent activities at Park National Bank in Porter, Texas, revealing that Clover owed approximately $500,000 on various loans and was "kiting" checks by depositing checks drawn on the Exxon Baytown Credit Union ("Exxon Credit") into an account at the bank. When some of these checks did not clear because of insufficient funds, the bank's president contacted Rome, then a vice-president at Exxon Credit, who would inform him that Clover's checks were good. The checks, however, subsequently would be returned for insufficient funds.

After the bank president would contact Clover personally, Clover would send more checks from Exxon Credit. These, however, would be backed by sufficient funds. This cycle apparently continued for three or four years.

In June 1987, Rome left Exxon Credit to become president of Century Savings and Loan Association ("Century") in Baytown, Texas. Almost immediately upon assuming his duties there, Rome resumed the practices he had begun at Exxon Credit: writing loans to nominee borrowers, with or without their knowledge, and using the proceeds of the loans to repay the then-delinquent Exxon Credit nominee

loans. Rome also directed bank personnel at Century to withdraw funds from a Century cash account to pay on Clover's overdrawn checking account.

II.

In May 1991, Rome and Clover were indicted in a fourteen-count indictment. Count 1 charged both Rome and Clover with conspiracy to commit bank fraud, to misapply an insured institution's funds, and to make false entries in an insured bank's books and records. In counts 2 through 7, Rome was charged with seven offenses of knowingly making false entries in the books, reports, and statements of a federally insured institution. In counts 8 through 14, Rome and Clover were charged with aiding and abetting one another in the misapplication of the funds of a federally insured institution.

On pleas of not guilty, the case proceeded to a jury trial, which began on March 2, 1992. Testimony was taken though March 3, 1992. On March 4, 1992, Rome and Clover withdrew their pleas of not guilty; Rome pleaded guilty to counts 1-3, 5-9 and 11-14; and Clover pleaded guilty to counts 1 and 8-12.

The district court sentenced Rome to fifteen years in prison, $1,455,798.06 in restitution, and a $250,000 fine. Clover was sentenced to twelve years in prison and $666,370.59 in restitution. On July 2, 1992, Rome filed a combined motion for new trial[1] based

[1] Because the district court accepted Rome's guilty plea, Rome waived the right to a trial. See FED. R. CRIM. P. 11(c)(4) (valid guilty plea waives (continued...)

upon newly discovered evidence, for an evidentiary hearing on coercion of plea and ineffective assistance of counsel, for delay of reporting date to federal correctional institution, and alternatively for release pending appeal. This motion was denied.

III.

A.

Rome argues that the district court erred in not granting him an evidentiary hearing based upon his motion in which he alleged that his plea was coerced. Before the district court accepted Rome's plea, Rome admitted that he had had a full opportunity to discuss the case with his attorney, that he understood the indictment and all its counts, and that he understood the possible punishments. In addition, the court asked Rome whether his plea was voluntary; Rome responded affirmatively. He also admitted that no one used any threats or force against him to make him plead guilty and that no one had made any promises to him encouraging him to plead guilty.

A defendant's solemn declarations in court carry a strong presumption of truth. Blackledge v. Allison, 431 U.S. 63, 74 (1977). Accordingly, the general rule is that "a defendant will not be heard to refute his testimony given under oath when pleading guilty." United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985) (citation and internal quotation omitted). "If, however, the

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(...continued)
right to a trial). Accordingly, Rome's motion for a "new trial" was technically a request to withdraw his guilty plea.

defendant offers specific factual allegations supported by the affidavit of a reliable third person, then he is entitled to a hearing on his allegations." Id.

As support for his motion, Rome offered factual allegations in affidavits that he and his wife had prepared, stating that his trial counsel, David Cunningham, and his assistant met with Rome, Rome's wife, and Clover after a chambers meeting Rome did not attend. At the meeting, Cunningham informed Rome that they "needed" to "cut our losses and enter a guilty plea." Cunningham stated that the judge's mind "was made up."

Rome then allegedly informed Cunningham that he wanted to continue the trial and that he wanted to testify.

> At this David [Cunningham] got out of his chair, pointed his finger in my face and asked when was I going to grow up; I was so naive; this was not about right or wrong, justice or anything else but win or lose and we were going to lose. He said if I continued with my trial, [Judge] DeAnda would stop me in the middle of my testimony and instruct the jury that "he" thought I was lying. Further, he would charge the jury to return a guilty verdict. Basically I had no choice.

The affidavit further reflects that Rome believed he had no choice "because David [Cunningham] said if I continued, I would only further anger the judge and he would take it out on me at sentencing." In addition, Rome asserted in his affidavit that before making his plea, he "had doubts about the adequacy of the preparation of the case."

Rome also presented the affidavit of his wife, stating that after the second day of trial, the judge called all the attorneys into his chambers. Mrs. Rome, Rome, Cunningham, Clover, Clover's

trial counsel, and Cunningham's assistant met after the chambers meeting. Mrs. Rome then provides in her affidavit that Cunningham made the following remarks to her husband:

> This is not about truth and justice, it's about a conviction. This is not what you learned in high school civics class. Even if the Judge lets you get into your testimony he is going to stop you in the middle, tell the jury he thinks you're lying and instruct them to return a guilty verdict. Skip, he thinks you're guilty. What you have to do now is cut your losses . . . . If you don't end this now, at sentencing he's going to take it out on you by giving the maximum.

The affidavit further provides that "at some point" Cunningham "stuck his finger in [Rome's] face" and informed Rome that the judge "wants this ended unless you have some secret weapon you're going to pull out."

The government presented affidavits in its response to Rome's motion. Cunningham's affidavit provides that during the meeting he had with Rome after the chambers meeting, he tried to explain to Rome the overwhelming evidence against him and recommended to Rome to plead guilty. During the meeting, he informed Rome that Rome should plead guilty only if he was guilty; that the judge would not punish Rome if he continued the trial; and that the judge would punish Rome more severely if he thought Rome had lied.

The government also presented an affidavit from Cunningham's assistant, stating,

> . . . Mr. Cunningham advised Skip [Rome] in no uncertain terms that he should not plead guilty if he was not guilty. Mr. Cunningham again told Skip that the evidence was more overwhelming than anticipated and that he should consider pleading guilty. At no time during that meeting or any meeting, did Mr. Cunningham tell Skip (1) that he would be punished by Judge DeAnda for going to trial; (2) that Judge DeAnda would stop his testimony

> and call him a liar; (3) or that the Judge would instruct the jury to find Skip guilty. Mr. Cunningham did tell him that if he did testify and the Judge found his testimony to be incredible, the Judge could comment on his testimony and whether it was believable or not. Mr. Cunningham did tell Skip that if he testified, and the jury found him guilty that Judge DeAnda could impose a much stiffer sentence if he felt Skip had lied to the jury. Mr. Cunningham always told Skip that it was his job to advise and Skip's job to decide.

In addition, the affidavit of Clover's attorney provides that during the chambers meeting, the judge "wondered aloud if the defendants had a `secret weapon' defense that wasn't obvious from the testimony up to that time. The judge suggested that if the defense did not have such a weapon that working out a plea agreement with the government may be best for our clients." That affidavit further provides that after the chambers meeting, the attorneys met with their clients and with Mrs. Rome, and

> Cunningham explained to the Romes what the judge had said regarding the need for the defense to have a strong defense, which did not exist. Mr. Cunningham went on to explain that in federal court the judge could take over the questioning of a witness at any time if he chose. He also informed them that a federal judge can comment on the testimony of any witness and can give explicit instructions to a jury panel relating to the credibility of a witness. At no time did Mr. Cunningham say that Judge DeAnda would do anything to or make any comments about Mr. Rome if he were to take the stand during the trial.

The district court's order reflects that the court did not find Mrs. Rome a reliable third person: According to the district court, the allegations in the affidavits were "completely unworthy of belief," "inherently unbelievable," and "incredible." The court specifically found that "it did not make the statements allegedly attributed to it . . . ."

A district court's factual findings are generally reviewed for clear error. See, e.g., United States v. Castaneda, 951 F.2d 44, 47 (5th Cir. 1992) (motion to suppress); United States v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991) (applying sentencing guidelines); see also Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). Based upon the record, the court's findings that Mrs. Rome was not a reliable third person and that Rome was not coerced are not clearly erroneous. Accordingly, an evidentiary hearing was not warranted. See Fuller, 769 F.2d at 1099.

B.

Rome argues that the district court erred in not granting him an evidentiary hearing on his allegation that his attorney was ineffective because he convinced Rome to plead guilty without making it clear to him that "the judge could not instruct a guilty verdict or tell the jury [Rome] was a liar, or hold it against [Rome] if he exercised his constitutional right to a jury trial . . . ." To prevail on a claim of ineffective assistance, a defendant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strick-land v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). To prove deficient perfor-mance, the defendant must show that counsel's actions "fell below an objective standard of reasonableness." Washington, 466 U.S. at 688.

There is a strong presumption that an attorney's performance

"falls within the wide range of reasonable professional assistance" and that the challenged action constitutes "sound trial strategy." See id. at 689 (citation omitted). In the context of a guilty plea, a defendant must demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have gone to trial. Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (citing Hill v. Lockhart, 474 U.S. 52, 58-59 (1985)).

In his affidavit, Cunningham provided that he spent a significant amount of time preparing his case. The government presented a letter Cunningham had sent Rome before trial explaining how "overwhelming" and "strong" the evidence was against him. The letter further says that Cunningham was not "optimistic about [Rome's] chances in this trial" and that Cunningham had a practice of ensuring that "each step taken by an accused is an informed and intelligent one." Cunningham also asked, in the letter, that Rome telephone him if Rome had any questions.

The record also includes a letter from Cunningham, informing Rome that "each day your case becomes more and more indefensible" and requesting a "heart to heart talk" with Rome. Cunningham's legal assistant provided an affidavit reflecting the adequate assistance Cunningham had provided Rome and an affidavit by Clover's attorney further disputes the Romes' account of what occurred during the meeting in which Rome allegedly was coerced. Rome admitted to the district court, before making his plea, that he was satisfied with his attorney's services.

Because the district court could fairly resolve the ineffective-assistance-of-counsel claim with the record it had before it, no evidentiary hearing was necessary. See United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990) (per curiam) (motion to vacate or set aside sentence under 28 U.S.C. § 2255). Furthermore, Rome has failed to show that his counsel's actions "fell below an objective standard of reasonableness," Washington, 466 U.S. at 688, or that, but for his counsel's alleged errors, he would not have pleaded guilty, Nelson, 989 F.2d at 851.

C.

Rome contends that the district court did not comply with FED. R. CRIM. P. 11 in that the court did not examine the issue of coercion in depth before accepting his guilty plea. Rome specifically complains of the court's failure to tell him what had occurred during the chambers meeting between the court and Rome's trial counsel. Rome also contends that the district court should have questioned him about "abandoning the specific defenses outlined by his lawyer in the opening statement to the jury."

"[W]hen an appellant claims that a district court has failed to comply with Rule 11, we shall conduct a straightforward, two-question "harmless error" analysis: (1) Did the sentencing court in fact vary from the procedure required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?" United States v. Johnson, No. 92-8057, 1993 U.S. App. LEXIS 21633, at *3 (5th Cir. Aug. 26, 1993) (en banc). Relying upon United

States v. Corbett, 742 F.2d 173, 178-79 (5th Cir. 1984) (per curiam), Rome asserts that the district court made a "naked inquiry." In Corbett, we found that "[a] naked inquiry into whether the accused understands the charges against him, unaccompanied by a reading or explanation of those charges, will not suffice." Id. at 180. Here, however, no such "naked inquiry" took place: The court personally read and explained each charge against Rome.

Even if, arguendo, we were to extend Corbett's "naked inquiry" analysis to the matter of coercion, Rome has not shown that the district court engaged in such an inquiry. The district court also asked Rome about his health and education; whether he had had a full opportunity to discuss the case with his attorney; whether he had read and understood the indictment; whether he understood the possible punishments; whether he was pleading guilty because he was guilty; whether the plea was completely voluntary; whether anyone had made any threats or used any force against him to make him plead guilty; and whether anyone had made any promises encouraging him to plead guilty.

In light of the district court's questioning, its failure to tell Rome what occurred during the chambers meeting did not violate rule 11. In addition, it was not necessary for the district court specifically to have questioned Rome about, as Rome puts it, "abandoning the specific defenses outlined by his lawyer in the opening statement to the jury." Rome has not shown a failure on the part of the district court to address possible coercion.

Even if Rome has shown a partial failure, any omission to address the coercion issue reasonably could not have been a material factor affecting the decision to plead guilty. Accordingly, we need not vacate Rome's sentence to allow him to plead anew.

D.

Rome argues that the district court erred in not personally informing him that it could impose restitution as part of the sentence. Before the district court accepted Rome's plea, the government explained that the plea agreement between the government and Rome provided in part that the district court could order restitution regardless of Rome's financial condition. The district court then asked Rome whether he understood the agreement, whether he was satisfied with the agreement, and whether he wanted the court to proceed under the agreement. Rome responded affirmatively to all three questions.

Rule 11 requires that, before accepting a guilty plea, the district court advise the defendant that an order of restitution is a possible consequence. United States v. Grillos, No. 92-8328, at 4-5 (5th Cir. Mar. 9, 1993) (unpublished). As in Grillos, here there was no partial or complete failure to inform. See id. at 5. The record demonstrates that Rome and his attorney knew and understood that Rome might be ordered to pay restitution "regardless of his financial condition." "The fact that the words were not voiced by the judge is of little consequence when one considers

that the government, defense counsel, and [defendant] himself expressly recognized such." Id.

E.

Rome and Clover challenge the amount of restitution. We review the amount of a restitution award for abuse of discretion. United States v. Chaney, 964 F.2d 437, 451-52 (5th Cir. 1992).

A district court may order "restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3). In the plea agreement, Rome and Clover agreed to cover losses for all of their criminal activity)) not just losses stemming from the counts to which they pled guilty.

Both presentence reports (PSR's) reflect the following paragraph:

> The Government has alleged that Rome's and Clover's actions at Century caused an overall loss of $777,447.35. However, the probation office recently received a letter from the Resolution Trust Corporation indicating that the Fidelity and Deposit Company, a blanket bond insurance company, paid $1,035,000 to Century Savings and Loan on a claim for $1,452,000 in losses caused by Anthony Rome. The Resolution Trust Corporation, as receiver for Century Savings and Loan, has requested restitution in the amount of $417,000, which represents the unreimbursed portion of losses caused by Mr. Rome on the transactions to which he has pled guilty.

During the sentencing hearing, Rome objected to the amount of restitution and raised the issue of a possible offset. Despite the objection, the district court did not resolve that dispute. See United States v. Hurtado, 846 F.2d 995, 998 (5th Cir.) (if defendant challenges factual assertion in PSR, district court must make a finding or determine that no finding is necessary), cert.

denied, 488 U.S. 863 (1988).

Instead, the court indicated to Rome and Clover that if they disagreed with the restitution amounts, it would entertain a motion under FED. R. CRIM. P. 35. Rome subsequently filed a motion under rule 35(a), which provides that a district court shall correct a sentence that is determined on appeal to be improper. The district court, acting through a different judge, denied the motion for lack of jurisdiction.

The government now concedes that the issue of whether Rome and Clover are entitled to an offset by virtue of Century Savings' insurance recovery was raised by the PSR. The government further acknowledges that before it imposed sentence, the district court did not resolve the offset issue. Accordingly, we must vacate the order of restitution and remand with instructions that the district court expressly determine whether the defendants are entitled to an offset. If so, the amount of the restitution that was ordered would be an abuse of discretion, as it would overstate the losses caused by the defendants' criminal activity. See Chaney, 964 F.2d at 451-52; 18 U.S.C. § 3663(a)(3).

F.

Rome avers that the district court erred in imposing a fine of $250,000. Prior to imposing a fine, a district court must consider the following factors: (1) the defendant's income, earning capacity, and financial resources; (2) the burden that the fine will impose on the defendant, any person who is financially

dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; (3) any pecuniary loss inflicted upon others as a result of the offense; (4) whether restitution is ordered or made and the amount of such restitution; (5) the need to deprive the defendant of illegally obtained gains from the offense; and (6) whether the defendant can pass on to consumers or other persons the expense of the fine. 18 U.S.C. § 3572(a). The court's power to impose a fine also is limited by the defendant's obligation to make restitution: The fine or other monetary penalty must not impair the defendant's ability to make restitution. 18 U.S.C. § 3572(b).

A defendant may rely upon a PSR to establish his inability to pay a fine or cost of incarceration. United States v. Fair, 979 F.2d 1037, 1041 (5th Cir. 1992). When a district court adopts a PSR that recites facts showing limited or no ability to pay a fine, the government must come forward with evidence showing that a defendant in fact can pay a fine before one can be imposed. Id.

The PSR reflects that Rome has a limited ability to meet the demands of the order of restitution as well as the fine. Under Fair, it is incumbent upon the district court to make express findings as to a defendant's ability to pay when a fair reading of the record indicates that the defendant cannot meet his financial obligations under the court's judgment. Id. at 1041-42.

The record does not affirmatively support a finding that Rome

can pay a $250,000 fine. The government, moreover, concedes that the district court's order imposing a fine of $250,000 should be set aside and the case remanded with instructions that the district court determine whether Rome can pay such a fine.

G.

Rome contends that the five false-entry counts and the five misapplication counts are multiplicious as alleged in the indictment. Because Rome failed to file a pretrial motion pursuant to FED. R. CRIM. P. 12(b), he may not challenge the convictions on multiplicity grounds. United States v. Galvan, 949 F.2d 777, 781 (5th Cir. 1991). Nevertheless, Rome may challenge any consecutive sentences. See id.

Rome's sentence was combined into three parts to be served consecutively: five years on the conspiracy count; concurrent five-year sentences on the false-entry counts; and concurrent five-year sentences on the misapplication counts. He argues that the sentences for the false-entry convictions and the sentences for the misapplication convictions should be concurrent)) not consecutive)) because the false-entry counts and the misapplications counts concern the same loan transactions.

To decide whether two statutory offenses may be punished cumulatively, we apply the test enunciated in Blockburger v. United States, 284 U.S. 299, 304 (1932). See Galvan, 949 F.2d at 781. In doing so, we determine whether each statute requires proof of a fact that the other does not. See id. (citations omitted).

Misapplication of funds (18 U.S.C. § 657) and fraudulent entries (18 U.S.C. § 1006) satisfy this test and are separate offenses for purposes of double jeopardy and multiplicity. United States v. Rochester, 898 F.2d 971, 980 (5th Cir. 1990). Even though the false-entry charges and the misapplication charges are based upon similar conduct, the two offenses are separate. See id.

As Rome points out, the false-entry counts stem from the "misrepresentation in the Century records of who is the `true borrower,'" and the misapplication counts stem from the misapplication of "making loans to persons who were not the `true borrower[s].'" Rome, therefore, could be charged, convicted, and sentenced for both offenses, even though they arise from the same conduct.

H.

Clover argues that certain comments by the district court during the sentencing hearing amount to an abuse of discretion. He specifically complains of the following remarks:

> I feel that you were just)) you were involved also over a long period of time with Mr. Rome on this. It is true that your)) you were not an officer in any of these companies)) but I think that you were)) you were in it up to your neck and you were fairly well aware of what Mr. Rome was doing.

Clover suggests that these comments indicate that the court improperly considered conduct outside the indictment to sentence him in this pre-guidelines case.

In determining a particular sentence, a district court has wide discretion to consider all relevant matters, including a

defendant's past conduct and character. United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986) (pre-guidelines case). The comments about which Clover complains merely reflect these considerations.

Clover's reliance upon United States v. Bakker, 925 F.2d 728 (4th Cir. 1991), is misplaced. That case is not controlling in this circuit, and it is distinguishable. There, the district court stated during sentencing, "`He had not though whatever about his victims and those of us who have a religion are ridiculed as being saps from money-grubbing preachers or priests.'" Id. at 740. The Fourth Circuit was "left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed." Id. at 741. Here, however, the judge did not portray himself as a victim of Clover's offenses.

IV.

Rome's judgment of conviction is AFFIRMED. The judgments of sentence are VACATED, and this matter is REMANDED for resentencing in accordance herewith.