

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3150

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDWARD W. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91 141 L)

(December 1, 1992)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Edward Johnson ("Johnson") was convicted of one count of unlawful possession of stolen mail matter in violation of 18 U.S.C. § 1708.¹ The presentence investigation report (PSI) recommended a

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 Pursuant to that rule, the court has determined that this opinion should not be published.

¹ Section 1708 reads as follows:

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

two-point enhancement for "more than minimal planning." The district court imposed a sentence of twelve months' imprisonment, three years' supervised release, restitution of \$153, and a special assessment of \$50. Johnson appeals the two-point enhancement. We affirm.

I.

In February 1991, Christopher and Marice Johnson, Johnson's siblings, stole mail from a parked United States postal truck. One piece of stolen mail included a check payable to Walter Persfeaux for \$153, which Marice Johnson gave to Johnson to cash. Johnson played no role in the planning or burglary of the truck.

Johnson obtained a false identification card in the name of Walter J. Persfeaux. Later that day, Johnson cashed the \$153 check, apparently forging Persfeaux's name, at a store.

II.

We review the finding of "more than minimal planning" under the clearly erroneous standard. United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990) (per curiam). We therefore will reverse

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted))

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

the district court only when we are "left with the definite and firm conviction that a mistake has been committed.'" Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Johnson's sentence leaves us with no such conviction.

Section 2B1.1(5) of the United States Sentencing Guidelines recommends an increase by two levels in the sentence if the theft offense involves more than minimal planning. The guidelines define "more than minimal planning" as "more planning than is typical for commission of the offense in a simple form." U.S.S.G. § 1B1.1 application note 1(f).

The application notes provide illustrations of activity that shows more than minimal planning. While a person about to commit an assault who waits until no witnesses are present does not engage in more than minimal planning, a person who wears a ski mask to prevent identification does. Similarly, a burglar who checks an area to be sure no witnesses are present does not engage in more than minimal planning, but one who obtains building plans to determine how to enter does. U.S.S.G. § 1B1.1 application note 1(f).

In Barndt, 913 F.2d at 204-05, we concluded that a person who had illegally cut telephone wires, sought a buyer, and transported and sold the wires had engaged in more than minimal planning for the crime of selling government property. In United States v. Beard, 913 F.2d 193, 199 (5th Cir. 1990), we held that a person who concocted a scheme involving multiple banks to conceal the

existence of funds from creditors engaged in more than minimal planning. In United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990), the court decided that a person who was convicted of fraud by unauthorized use of a credit card engaged in more than minimal planning by frequently forging a signature when using the stolen card. The First Circuit has held that "obtaining even one fraudulent loan" requires more than minimal planning because of the "chain of false information" provided)) including a false name and signature. United States v. Fox, 889 F.2d 357, 361 (1st Cir. 1989).

Johnson also engaged in more than minimal planning. He did not simply take the stolen check from his sister and immediately try to cash it, without falsely representing his identity, at the closest spot. Instead, he actively took steps to conceal his identity by first procuring a false identification card and then forging the signature. Johnson's creation of a new identity for himself, and his attendant forged signature, enabled him to cash the stolen check. This chain of false information that he provided constituted more than minimal planning.

The district court found that Johnson took several discrete steps to further his plan of cashing the stolen check. We cannot say that the lower court's determination that Johnson engaged in more than minimal planning was clearly erroneous. We therefore AFFIRM the judgment of sentence.