UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4674

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BILLY G. KECKLER,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana
(CR-91-50095-01)

(March 4, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant, Billy Keckler, was convicted of willfully aiding and assisting in the preparation of a false Form W2-G (Statement for Recipients of Certain Gambling Winnings) to the Internal Revenue Service ("IRS"), in violation of 26 U.S.C. § 7206(2) (1988). Keckler was sentenced to twelve months imprisonment. He challenges his conviction and sentence on several grounds, but finding no abuse of discretion or 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

In June 1989, Keckler approached Lloyd Wilkins, the holder of a Super Six winning ticket at the Louisiana Downs racetrack, and asked to cash the winning ticket. After obtaining Wilkins's consent, Keckler cashed the ticket and completed the required IRS form in his name. Based upon the information contained in the form, racetrack personnel issued a W2-G form in Keckler's name, reflecting winnings of $108,792.80 and that $21,248 had been withheld to pay the federal income tax due on the winnings. Keckler attached the W2-G form to his 1989 federal income tax return to support a portion of a deduction for previously paid federal income taxes.

Keckler was originally indicted for assisting in the presentation of a false Form W2-G to the IRS in April 1991 and made his initial appearance before a magistrate in May 1991. Keckler filed a motion to dismiss the indictment for a violation of the Speedy Trial Act[1] in October 1991, and the district court dismissed the indictment without prejudice. Keckler was re-indicted for the

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[1] In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1) (1988).

same offense and was convicted by a jury. Keckler was sentenced to twelve months imprisonment, along with one year supervised release and a special assessment of $50.00.

Keckler appeals his conviction and sentence, arguing that the district court: (1) abused its discretion in dismissing without prejudice the first indictment filed against him; (2) abused its discretion in admitting evidence of other bad acts under Fed. R. Evid. 404(b); (3) erred in not instructing the jury of a lesser-included offense; and (4) erred in calculating his base offense level under the sentencing guidelines.

II

A

Keckler first argues that the district court abused its discretion in dismissing without prejudice the initial indictment filed against him based on a violation of the Speedy Trial Act. *See* Brief for Keckler at 5-9. We review a district court's dismissal of a case, with or without prejudice, pursuant to the Speedy Trial Act, for abuse of discretion. *United States v. Melguizo,* 824 F.2d 370, 371 (5th Cir. 1987), *cert. denied,* 487 U.S. 1218, 108 S. Ct. 2870, 101 L. Ed. 2d 906 (1988). "[W]hen the statutory factors[2] are properly considered, and supporting factual

[2] In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this

findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed." *United States v. Taylor,* 487 U.S. 326, 333, 108 S. Ct. 2413, 2420, 101 L. Ed. 2d 297 (1988).

At the hearing on Keckler's motion to dismiss the indictment, the district court, for reasons given orally, dismissed the indictment without prejudice. *See* Supplemental Record on Appeal at tab. 2. Keckler has not provided us with a transcript of that hearing, or a statement of the oral reasons given by the district court. At a later hearing held on a motion to dismiss the second indictment, the district court stated that it was relying on the same reasons given at the previous hearing in denying the motion. *See* Record on Appeal, vol. 2, at 22-23. The district court's ruling at that time suggested that it had considered the relevant statutory factors, but the court did not articulate how it evaluated each of the factors with respect to the particular circumstances of this case. *See id.*

Because Keckler contends that the district court improperly weighed the factors under § 3162(a)(2) in dismissing the indictment without prejudice, *see* Brief for Keckler at 5-9, he had the burden of providing us the transcript of the hearing on his motion to dismiss the indictment.[3] If a transcript was unavailable, Keckler

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chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2) (1988).

[3] "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the

had the option of preparing a statement of the proceedings from the best available means, serving the same on the appellee, and obtaining an approval of the statement by the district court. *See* Fed. R. App. P. 10(c). Because Keckler has not filed a transcript or some record of the district court's reasons for the dismissal of the indictment without prejudice, we decline to review the issue. *See Alizadeh v. Safeway Stores, Inc.,* 910 F.2d 234, 237 (5th Cir. 1990) (refusing to consider issue on appeal where party))who contended that trial court's finding not supported by the evidence))failed to provide appellate court with a transcript of the proceedings).

B

Keckler next argues that the district court erred in admitting evidence that he sought to cash other person's winning tickets and that he tried to obtain large losing tickets of others, because that evidence had no probative value and was highly prejudicial.[4] *See* Brief for Keckler at 10. Keckler further argues that the

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record a transcript of all evidence relevant to such finding or conclusion." *See* Fed. R. App. P. 10(b)(2).

[4] Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

district court erred in admitting his 1989 Form 1040. *See id.* at 11. We review a district court's determination as to the admissibility of Rule 404(b) evidence for abuse of discretion. *See United States v. Moye,* 951 F.2d 59, 61 (5th Cir. 1992).

To be admissible, Rule 404(b) evidence "must be relevant to some issue other than the defendant's character, and . . . its probative value must be greater than its potential to unfairly prejudice the jury." *United States v. Gonzalez-Lira,* 936 F.2d 184, 189 (5th Cir. 1991) (citing *United States v. Beechum,* 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979)). The evidence admitted was relevant[5] because it reflected Keckler's modus operandi, that he intentionally executed the false document, and his motive for doing so. *See Gonzalez-Lira,* 936 F.2d at 189 (holding that Rule 404(b) evidence is admissible "to establish the defendant's knowledge or intent, or a particular *modus operandi* of the defendant"). Furthermore, the probative value of the evidence as proof of Keckler's intent and lack of mistake and knowledge, was not substantially outweighed by any prejudice to Keckler, and thus, the district court did not abuse its discretion in admitting the evidence.

C

Keckler also contends that the district court erred in not

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[5] The government had to prove that Keckler willfully aided and assisted in the preparation of a fraudulent document, reflecting income and withholdings not attributable to him, for presentation to the IRS. *See* 26 U.S.C. § 7206(2) (1988).

instructing the jury that it could find him guilty of a lesser-included offense. Brief for Keckler at 13-14. Whether a defendant is entitled to a lesser-included jury instruction is a question of law which we review de novo. *See United States v. Doyle,* 956 F.2d 73, 74 (5th Cir. 1992) (reviewing de novo whether defendant entitled to lesser-included offense instruction).

"A defendant is entitled to a lesser-included offense instruction when the elements of the lesser offense are a subset of the elements of the charged offense and the evidence would permit the jury to rationally conclude that the defendant was guilty of the lesser offense but not guilty of the charged offense." *Doyle,* 956 F.2d at 74. Keckler contends that the elements of the offense contained in 18 U.S.C. § 7207 (1988), are a subset of the elements of the charged offense. We disagree. Section 7207 requires proof of "the willful filing of a document known to be false or fraudulent in any material manner." *Sansone v. United States,* 380 U.S. 343, 352, 85 S.Ct 1004, 1010, 13 L. Ed. 2d 882 (1965); *see* 26 U.S.C. § 7207. In contrast, § 7206(2))the charged offense))requires that the government prove that the defendant willfully assisted another in the preparation or presentation of a false tax return or other documentation required under the internal revenue laws. *United States v. Williams,* 809 F.2d 1072, 1095 (5th Cir.), *cert. denied,* 484 U.S. 896, 108 S. Ct. 229, 98 L. Ed. 2d 187 (1987); *see* 26 U.S.C. § 7206(2) (stating that the person presenting the return need not know of its falsity). Because the elements of the offense contained in § 7207 are not a subset of the elements of

the charged offense, Keckler was not entitled to a lesser-included offense instruction.

D

Lastly, Keckler claims that the district court erred in calculating his base offense level because it considered his tax return from 1988 as part of his relevant conduct.[6] We review de novo the district court's interpretation of the sentencing guidelines. *United States v. White,* 945 F.2d 100, 101 (5th Cir. 1991). We construe the district court's decision to consider Keckler's 1988 tax return in its base offense calculation as an interpretation of the guidelines, and therefore apply the de novo standard of review. *See id.*

"In determining the total tax loss attributable to the offense . . . all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." U.S.S.G.§ 2T1.3, comment. (n.3). The §2T1.3 commentary also makes

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[6] In preparing the Presentence Report ("PSR"), the probation officer noted that the base offense level for a § 7206(2) offense is determined by the tax loss resulting from the defendant's assisting another in the submission of false documentation to the IRS. *See* PSR ¶ 12; U.S.S.G. §2T1.4. The probation officer noted that under the guidelines the tax loss is calculated as 28% of the taxable income understated by the defendant. *See* PSR ¶ 12; U.S.S.G. §2T1.3. Because Keckler reported $97,872 in gambling losses on his 1989 return, the probation officer calculated the 1989 tax loss for sentencing purposes to be $27,404.16. *See* PSR ¶ 12. Keckler claimed $217,553 in race track losses in 1988 resulting in a tax loss of $60,914.84. Based on a total tax loss of $88,319, the probation officer recommended a base offense level of 12. *See id.* ¶ 15; U.S.S.G. §2T4.1(G). The district court adopted that recommendation at Keckler's sentencing hearing. *See* Record on Appeal, vol. 3, at 13.

reference to application note 3 following § 2T1.1. *Id.* Note 3 sets out examples of illustrative conduct to be considered in determining a tax loss, which includes the use of a consistent method to evade or camouflage income and repeated violations involving false or inflated claims of a similar deduction. U.S.S.G. §2T1.1, comment. (n.3).

The PSR revealed that Keckler obtained losing tickets of others to use as deductions on his income tax returns and cashed winning tickets of others in order to inflate the amount of income tax withheld from his income during the 1988 and 1989 racing seasons. PSR ¶¶ 7, 9. Keckler did not rebut the evidence in the PSR that he engaged regularly in tax fraud in order to reduce his taxable income. Accordingly, the district court was free to adopt the findings in the PSR without further inquiry. *See United States v. Sherbak,* 950 F.2d 1095, 1099-1100 (5th Cir. 1992). Thus, his conduct in 1988 constituted relevant conduct which was properly considered by the district court in determining the tax loss attributable to Keckler. Accordingly, the district court did not err in determining that the tax loss generated by Keckler's activities exceeded $70,000 and sentencing him on the basis of an offense level of 12.

III

For the foregoing reasons, we **AFFIRM.**