UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5227

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES DAVID BYRD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:92 CR 34)

(October 15, 1993)

Before GOLDBERG, JONES and DUHÉ, Circuit Judges.[*]

PER CURIAM:

The appellant James Byrd pled guilty to a wire fraud violation and conspiracy to commit bank fraud. He was sentenced to 40 months in prison followed by three years of probation. He was also ordered to pay $797,719 in restitution. He appeals his sentence on numerous grounds. Because we find that his sentence is in accordance with the Federal Sentencing Guidelines, we affirm.

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[*]Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

While president and owner of Willow Bend Leasing, a company located in Plano, Texas that sold and leased cars, Byrd became involved in schemes to defraud car dealers, car purchasers, and financial institutions. These schemes caused losses to their victims in excess of $1.5 million.

For example, in a scheme designed to defraud car dealers and purchasers, the appellant used fraudulent auto drafts[1] to purchase new luxury cars from various dealers throughout the United States. He then sold the cars to his Willow Bend customers, who paid his company directly. As Byrd's company had not paid the dealers for the cars, however, the buyers would not receive good title.

Byrd also schemed to obtain credit and money from financial institutions. For example, he created auto drafts that represented fictitious auto sales by Willow Bend Leasing to a co-conspirator's company, Buddy Vaughan Motors. When the drafts from Buddy Vaughan Motors, purporting to show that Buddy Vaughan Motors was paying Willow Bend Motors for a car, were deposited into Willow Bend Leasing's account at a particular financial institution, Willow Bend Leasing was given immediate credit for the deposits. After their deposit in that financial institution, the drafts would

[1] An auto draft is an envelope whose outside, like a check, contains the information necessary to negotiate the draft and receive payment together with a description of the vehicle. The inside of the sealed envelope contains the title and transfer documents pertaining to that vehicle.

be sent to a second financial institution where they were paid with a cashier's check drawn on the first financial institution. The appellant directed his secretary to go to the first financial institution three times a day to conduct Willow Bend Leasing's banking and to purchase the cashier's checks needed to pay off the second financial institution that day. Other examples of Byrd's creative devices to part banks, dealers, and customers from their money without financial risk to himself are numerous but unnecessary to recite.

Byrd was ultimately charged with a wire fraud violation and conspiracy to commit bank fraud. In his plea agreement, appellant pled guilty to the information, waived the indictment, and agreed to pay restitution to all victims of his offenses, whether or not charged in the information. He was sentenced to 40 months in prison and was ordered to pay $797,719 in restitution.

DISCUSSION

A.

Byrd first asserts that he is entitled to a three-level reduction for acceptance of responsibility rather than the two-level reduction that he was given. The Federal Sentencing Guidelines ("guidelines") provide for a reduction of a defendant's offense level if the defendant demonstrates acceptance of responsibility for his offense. The appellant was given a two point reduction pursuant to United States Sentencing Commission, Federal Sentencing Guidelines Manual ("U.S.S.G.") § 3E1.1(a)

(Nov. 1, 1992).[2] The appellant argues that he is entitled to an additional reduction of one point pursuant to subsection (b) of this guideline.

This circuit has stated that a trial court's determination of acceptance of responsibility is entitled to great deference on review and is not to be disturbed unless the determination is without foundation. United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992). In appellant's case, the trial court did not make a determination without foundation. Although Byrd suggests several reasons why he might be entitled to an additional one point reduction, the record supports the district court's determination. The FBI investigation began in December 1991. Byrd cooperated with the government only after he was caught and did not sign a plea agreement until eight months later. Instead of taking responsibility for his actions, he characterized himself as an unfortunate business manager who received bad advice, attributing much of his legal difficulties to others, including his business associates, attorney, and management consulting firm. The

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[2] Section 3E1.1 of the Federal Sentencing Guidelines provides:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
(1) timely providing complete information to the government concerning his own involvement in the offense; or
(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
decrease the offense level by 1 additional level.

U.S.S.G. § 3E1.1.

appellant emphasizes the fact that he entered a plea agreement within days after being contacted by the Assistant United States Attorney, but he neglects to point out that it was imperative at that time to resolve the issue as soon as possible because of a co-conspirator's declining health.

In short, the district court's determination of the appellant's acceptance of responsibility was not without foundation.

B.

Byrd next argues that the district court improperly adjusted his offense level based on his role in the criminal activity. The guidelines provide for a defendant's offense level to be increased depending on his role in the offense:

> [i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

U.S.S.G. § 3B1.1(b) (emphasis added).

The appellant argues that the crime for which he was convicted did not involve five or more participants so as to fall within this guideline provision. Rather, Byrd argues that his offense level should have been increased by only two levels pursuant to § 3B1.1(c):

> [i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1(c).

What Byrd ignores is that § 3B1.1(b) is not applicable only when there are five or more people involved, but also if the defendant's behavior was "otherwise extensive." See U.S.S.G. § 3B1.1(b). The commentary to the guideline provides:

> [i]n assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

U.S.S.G. § 3B1.1 (comment 2). The Supreme Court has ruled that commentary to the Federal Sentencing Guidelines "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, ___ U.S. ___, ___, 113 S.Ct. 1913, 1915 (1993). Applying this commentary as Stinson requires, the district court properly found that Byrd was involved in "otherwise extensive" activity within § 3B1.1(b) rather than § 3B1.1(c). Byrd's offense consisted of complex schemes utilizing the services of the appellant's secretary and other employees to defraud car dealers, purchasers, and financial institutions. The district court's factual decision was not clearly erroneous.

C.

Byrd contends that the district court improperly ordered him to pay restitution to victims who were not victims of conduct for which he pled guilty or was even charged. The appellant argues that under Hughey v. United States, 495 U.S. 411 (1990), he cannot

be ordered to pay restitution for losses related to conduct for which he was not convicted. The appellant was sentenced in 1992, after the enactment of the Crime Control Act of 1990, 18 U.S.C.A. § 3663(a)(3) (West Supp. 1993), which dictates the result on this issue. As this court stated in United States v. Arnold, 947 F.2d 1236 (5th Cir. 1991), the Crime Control Act has changed the law enunciated in Hughey, and therefore, the appellant's arguments relying on Hughey are inappropriate.

The Crime Control Act empowers the sentencing judge to order restitution "in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C.A § 3663(a)(3) (West Supp. 1993). See Arnold, 947 F.2d at 1237-38 (5th Cir. 1991). In this plea agreement, the appellant agreed to pay restitution totalling $797,719 to all victims of the wire fraud and bank fraud conspiracy regardless of whether the victims were victims of charged conduct. The district court's order of restitution in accordance with the plea agreement was proper.

D.

Byrd complains that the district court erred in several ways in its calculation of total loss in determining the appellant's base offense level. Under the guidelines, the sentencing court must and did consider all relevant conduct of the appellant in order to determine the appropriate guideline range. Section 1B1.3(a)(2) provides that relevant conduct for fraud shall include all acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction."

U.S.S.G. § 1B1.3(a)(2).[3] Further, according to its commentary, § 1B1.3(a)(2) does not require the appellant to have in fact been convicted of multiple counts. The only requirement is that the offenses would have been required to be grouped if the appellant had been convicted of multiple charges. Finally, the guidelines require the use of intended rather than actual loss if the intended loss caused by the defendant is greater. U.S.S.G. § 2F1.1, Application Note 7; see U.S. v. Cockerham, 919 F.2d 286 (5th Cir. 1990).

Here, the conduct that the sentencing court included as relevant conduct was part of Byrd's common scheme of defrauding individuals and financial institutions. The sentence of the district court must be upheld unless the appellant shows that the sentence was imposed in violation of law. United States v. Maseratti, slip op. 6461, 6471 (5th Cir. Aug. 27, 1993). This court is to give due deference to the district court's application of the guidelines to the facts. Id. The factual findings of the district court are not to be disturbed unless they are clearly erroneous. Id. We have reviewed the transactions of which Byrd complains. The district court's determination of the amount of

[3] The guideline provides that "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction" are to be included as relevant conduct. U.S.S.G. § 1B1.3(a)(2). Section 3D1.2(d) specifically provides that the guideline under which the appellant was sentenced, § 2F1.1 Fraud and Deceit, is to be grouped under the guidelines. See U.S.S.G. § 3D1.2(d). Therefore, the appellant's sentencing procedure falls within § 1B1.3(a)(2).

loss intended in each of the disputed transactions was neither clearly erroneous nor in violation of law.

E.

Finally, Byrd argues that the district court erred in refusing to depart downward from the guidelines. This claim will succeed only if the court's failure to depart violated the law. United States v. Peters, 978 F.2d 166, 170 (5th Cir. 1992). Under 18 U.S.C. § 3553(b) and U.S.S.G. § 5K20.0, the district court may only depart from the recommended guideline sentence when (1) the guidelines expressly permit departure based on specified aggravating or mitigating factors or (2) the district court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration in the guidelines' recommended sentence. United States v. Ives, 984 F.2d 649, 651 (5th Cir. 1993).

In the instant case, the behavior for which the appellant requests a downward departure, including the large amount of restitution to which he agreed, is conduct adequately taken into consideration in the guidelines through a reduction of offense level for acceptance of responsibility. See U.S.S.G. § 3E1.1. There was no ground for departure.

CONCLUSION

Because the district court imposed Byrd's sentence in accordance with the requirements of the Federal Sentencing Guidelines, we affirm its decision.

AFFIRMED.