

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-7138
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DONALD EDWARD HIPPS and PHYLLIS ELAINE HIPPS,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Mississippi

(CA J90 0421 (W))

(December 22, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges:

PER CURIAM:*

Donald Edward Hipps and Phyllis Elaine Hipps pleaded guilty to one count of conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371 and transportation of stolen monies in violation of 18 U.S.C. § 2314. They were sentenced to ten years imprisonment on one count and five years probation on the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

other. They did not file a direct appeal. Instead, they filed section 2255 motions challenging their guilty pleas.

The Hipps' § 2255 motions alleged that their guilty pleas were involuntary because their counsel misrepresented the amount of time they would serve and because they were not informed until the last moment that they would not be allowed to plead no contest. They also alleged that their counsel was ineffective because he failed to challenge factual inaccuracies in the presentence report. They argued a double jeopardy violation based on the fact that they pleaded guilty to conspiracy and the underlying substantive offense. In a supplemental motion, they alleged that there was no factual basis for the \$5,000 jurisdictional amount required by 18 U.S.C. § 2314. The district court denied their § 2255 motions.

Notice of appeal

The government alleges in its brief that the notice of appeal was not timely filed; but, the allegation is incorrect. The order denying the § 2255 motion was entered on February 19, 1992. The notice of appeal was filed on March 2, 1992. Claims brought under § 2255 are civil actions governed by the sixty-day appeal period of Fed. R. App. P. 4(a)(1). United States v. Buitrago, 919 F.2d 348, 349 (5th Cir. 1990). The Hipps' notice of appeal was timely.

Factual basis and ineffective assistance

On appeal, the only issues which the Hipps raised in their original brief was that there was no factual basis for the \$5,000 value and that their attorney was ineffective for counseling them to plead guilty. Although they did not raise these issues in a

direct appeal, the government did not raise a claim of procedural bar in the district court, and so this Court can consider these issues. See United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992).

The factual basis for the Hipps' guilty pleas was read aloud at the plea hearing. The government stated that it would prove that from May 1986 to October 1987, the Hipps conspired with each other to execute a scheme to defraud federally insured banks and to transport in interstate commerce checks of the value of \$5,000 or more, knowing that the checks had been stolen. In executing the scheme, the Hipps would go to various retail establishments, and while Donald Hipps distracted the employee of the store, Phyllis Hipps would steal blank personal or business checks and blank deposit tickets. They would then go to a branch of the bank that issued the checks which they had stolen and make a deposit into the victim's account using other stolen or forged checks to make the deposit. After the deposit was made, they would make a cash withdrawal from the victim's account using one of the stolen checks that they had taken from the victim. The government alleged that the Hipps had transported in interstate commerce checks with a value of \$5,000 or more.

The Hipps accepted the facts as stated by the government and pleaded guilty. At the sentencing hearing, their attorney argued that although they did not dispute that they had stolen about \$340,000, only \$30,000 should be used for sentencing because that

was the amount contained in the counts to which they pleaded guilty.

Now the Higgs argue that there was no factual basis for the \$5,000 value required under 18 U.S.C. § 2314 because the checks which they stole and forged were actually "worthless." They apparently got this idea from a presentence report prepared on charges against Mrs. Higgs in the Northern District of Florida, which described the checks which she deposited as "worthless checks."

The district court found that there was a sufficient factual basis for the \$5,000 value. The district court treated it as a factual issue, and did not address the legal aspect of the issue. The district court also did not address the ineffective assistance aspect because the Higgs did not really develop that part of their argument in the district court. They made the statement in their supplemental motion that they were induced to plead guilty to a charge which was not clarified to them by either their trial counsel or the district court at their plea hearing.

This court reviews a district court's factual findings in a § 2255 proceeding for clear error. United States v. Briggs, 965 F.2d 10, 12 (5th Cir. 1992). From a reading of the factual basis at the plea hearing and counsel's statements at the sentencing hearing, the district court's finding that there was a sufficient factual basis for finding that the Higgs had transported over \$5,000 in stolen checks was not clearly erroneous. However, this does not answer the legal argument. Their legal argument is that

they did not know at the time they pleaded guilty that they could not be guilty of the crime because the checks actually had no value, i.e., they were "worthless."

The Hipps have posed the issue as "whether the checks when stolen, had an individual face value of \$5,000 or more, and "whether the independent face value of each check [could] be aggregated to establish the accumulative value of \$5,000 or more." This is the same type of legal argument made in United States v. Briggs, 939 F.2d 222 (5th Cir. 1991). The Hipps' guilty pleas cannot be considered voluntary if they did not understand that their conduct did not actually constitute the crime charged.

As for the first argument, this Circuit's interpretation of § 2314 makes it clear that "value may be determined not only at the time of the theft, but at any time the stolen property was in the possession or control of the defendants." United States v. Laughlin, 804 F.2d 1336, 1339 (5th Cir. 1986). Furthermore, the fact that the checks may be described as worthless because they are forgeries does not affect the determination of their value under § 2314. In United States v. Kelly, 569 F.2d 928, 933-34 (5th Cir.), cert. denied, 439 U.S. 829 (1978), the defendant was convicted under § 2314 for obtaining cash and other valuable assets with "worthless" shares of stock in a fraudulently created mutual fund which had no assets. Under § 2314, "intrinsic value" is not the standard of value employed. One must look to the value of what the defendant was able to obtain with the forged checks. See United States v. Sarkisian, 545 F.2d 1237, 1238 (9th Cir. 1976).

Here, the defendants were able to make withdrawals of cash from the victims' bank accounts in the amount of \$209,452, as verified by their fingerprints on the checks. The Hipps' argument has no merit.

As to the second argument, the Hipps are correct that amounts charged in separate counts of an indictment cannot be aggregated to reach the \$5,000 jurisdictional amount. United States v. Markus, 721 F.2d 442, 444 (3rd Cir. 1983). However, the principle in Markus does not apply because the one of the counts to which the Hipps pleaded guilty, Count VI, did charge specifically \$5,000 or more and did not rely on aggregation of checks charged in separate counts.

Because there was a sufficient factual basis for their guilty pleas, both legally and factually, their attorney cannot be considered to have been ineffective for counseling them to plead guilty.

We AFFIRM the judgment of the trial court.