IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-8300

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL L. PRICE,

Defendant-Appellant.

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Appeal from the United States District Court for the Western District of Texas

(MO 92 CR 24)

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(March 12, 1993)

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

PER CURIAM:

Defendant-appellant Daniel L. Price (Price), convicted on his plea of guilty to a charge of violating 18 U.S.C. § 1030(a)(4), appeals his sentence. We affirm.

Pursuant to a plea agreement, Price pleaded guilty to a one-count information charging that in June 1991 he knowingly and with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

intent to defraud Mobil Oil Corporation (Mobil) accessed a federal interest computer without authorization, and by means of such conduct furthered the intended fraud and obtained something of value in furtherance thereof in violation of section 1030(a)(4). Price also waived prosecution by indictment. The presentence report (PSR) reflected that Price was an employee of Mobil and entered into an informal arrangement with other individuals some time beginning in 1990 whereby Price would access Mobil's confidential computer information concerning production and operating costs data with respect to oil properties that it was thought Mobil would likely be willing to sell. If the conspirators acquired the property, it was the understanding that Price would receive money and/or employment from them. Two attempted purchases were made using Mobil proprietary information furnished by Price, but neither was successful. In one of these the conspirators offered $2.2 million, but Mobil rejected the offer and later sold the property to others for $2.6 million.

The PSR calculated the offense level using section 2F1.1 of the guidelines, which provides for a base offense level of 6 for offenses involving fraud. Calculating the probable loss intended to be inflicted as more than $350,000SQthe difference between the $2.2 million offer and the $2.6 million arms length sale to third partiesSQthe PSR increased the offense level by nine under section 2F1.1(b)(1)(J). Two points were also added because the offense involved more than minimal planning, and another two points were added because Price abused a position of trust, while two points

were deducted for acceptance of responsibility, resulting in a net offense level of 17. Price had no previous convictions and so this offense level produced a guideline confinement range of 24-30 months (the statutory maximum term of imprisonment being 5 years).

Price objected to the PSR on diverse grounds, the only one that is relevant to the single issue raised on this appeal being his objection to the nine-level enhancement because of the size of the intended probable loss. Price's objection in this connection was that he did not intend to inflict any loss on Mobil and that Mobil did not in fact suffer a loss, and that the amount of any loss it might have suffered was too speculative. Price did not, however, challenge the underlying facts relied on by the PSR in this connection. Prior to sentencing, the government wrote the district court a letter requesting that the court make a downward departure of some unspecified extent in light of Price's cooperation with the authorities. At sentencing, the district court overruled all of Price's substantive objections to the PSR and found that the guideline sentencing range was 24-30 months, on the basis calculated in the PSR, but granted the government's request for a downward departure and sentenced Price to 18 months' confinement to be followed by a two-year term of supervised release. No fine was imposed.

Price appeals, raising the same challenge that he did below to the nine-level enhancement of the base offense level. He contends that no such enhancement should have been imposed and that thus his offense level should have been 8 instead of 17, and that with an

offense level of 8 the guideline confinement range would have been 2-8 months, substantially less than the 18 months imposed.

The government argues, first, that the nine-level enhancement was appropriate and, alternatively, that Price waived his right to appeal because the plea agreement includes the statement that "the defendant knowingly waives his right to appeal the sentence unless a substantial upward departure occurs." Price responds to this alternative argument by stating that a substantial upward departure did occur because under a correct calculation his guideline range maximum would have been eight months.

We pretermit the waiver-proper construction of the plea agreement question, because Price's only issue on appeal is whether the district court's nine-level offense level enhancement was erroneous, and we hold it was not.[1]

Under Appendix ASQStatutory Index of the Sentencing Guidelines, the applicable guideline for violation of section 1030(a)(4) is section 2F1.1, which applies to fraud and deceit offenses. Under section 2F1.1(b)(1)(J), nine levels are added if the loss exceeds $350,000. Under Application Note 7 to section 2F1.1, "if a probable or intended loss that the defendant was

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[1] We observe, however, that arguments of this kind are more likely to be avoided if the plea agreements are written to more clearly or expressly state the precise circumstances in which the right to appeal is waived. We also note that there was no mention whatever of the appeal waiver in the Rule 11 hearing, and that at the conclusion of sentencing the district court advised Price that he had the right to appeal. Certainly, it would be the better practice for the district court to make sure at the Rule 11 hearing that the defendant understands just what appeal rights he is waiving.

attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell $40,000 in worthless securities, or implying that a forged check for $40,000 was genuine, the 'loss' would be treated as $40,000 for purposes of this guideline." Application Note 8 states, "The amount of loss need not be precise."

We reject Price's contention that because there was no actual loss, in that Mobil ended up selling the property to someone else for more money, therefore section 2F1.1(b)(1) cannot be invoked. This position was rejected in our decision in *United States v. Hooten*, 933 F.2d 293, 298 (5th Cir. 1991). There the defendant bank officer offered to return to the borrower the latter's unpaid $1.5 million note to the bank, with the note to be marked paid, in return for $150,000 to be paid defendant. The transaction was never consummated and the bank never suffered any loss. We held that the district court did not err in calculating the potential loss for sentencing guidelines purposes as $1.5 million, the amount outstanding on the note, rather than $150,000, the amount solicited by the defendant. In *United States v. Lghodaro,* 967 F.2d 1028, 1031 (5th Cir. 1992), we held that for purposes of section 2F1.1 the sentence should be calculated on the basis of the total dollar amount of the false claims submitted, some $58,000, rather than on the amount that the defendants actually collected on the false claims, approximately $27,000. We stated that "the intended loss should be used, not the actual loss." *Id*. The district court did

not clearly err in concluding that the purpose of the scheme here was to use the confidential Mobil information in order to be able to purchase Mobil assets for a lower price than might have been required otherwise. The amount of the loss was reasonably calculated with reference to the subsequent sale to third parties, who presumably would not have such inside information, for $400,000 more than the Price group offered. We note that the offer in question by the Price group, as reflected in the PSR, was an unsolicited one, and that the property was not put out for competitive bidding.

Price relies on section 2X1.1 of the guidelines. However, this section applies to attempts, solicitations, or conspiracies, and here Price was convicted of the completed substantive offense of computer fraud under section 1030(a)(4). Moreover, with reference to the three-level reduction for attempts called for by section 2X1.1(b)(1), we note that it is inapplicable where "the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense" or "was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendants' control." *Id.* Similar provision is made in section 2X1.1(b)(2) in respect to conspiracy ("unless . . . completed all the acts the conspirators believed necessary on their part"). Again, here Price completed the charged act of computer fraud. Moreover, the Price group completed everything they intended to do in the sense that they submitted their $2.2 million offer. It was only an event beyond their

control, Mobil's rejection of the offer, that prevented completion of the scheme.

While we do not endorse the use of speculative loss amounts, we agree with the district court here that the subsequent third party offer was a sufficiently nonspeculative benchmark against which the amount of the probable loss could be calculated.

The cases relied upon by Price do not convince us otherwise. In *United States v. Whitehead*, 912 F.2d 448 (10th Cir. 1990), the defendant used fraudulent documents to lease a residence with an option to purchase. In calculating the offense level under section 2B1.1, the district court included the entire fair market value of the house, $168,000. The evidence showed that the value of the option was only $2,000. The Tenth Circuit held that the value of the option, rather than the entire value of the house, should be used, noting that there was no showing that the defendant would have ever succeeded in exercising the option or that the full value of the home would have been lost. *Id.* at 451-452. This case would be more comparable to *Whitehead* if the district court had used the full value of the property in question, $2.6 million, rather than the difference between that figure and the $2.2 million offered by the Price group. We think the $2,000 option value in *Whitehead* is analogous to the $400,000 price differential here. Nor is *United States v. Schneider*, 930 F.2d 955 (7th Cir. 1991), supportive of Price. There the defendant submitted bids to the government to do contracting work for it, and in supporting documents falsely stated his criminal history. Before any performance was begun or payment

made, the government discovered the fraud and cancelled the contracts, thereafter letting them out to third parties for a higher amount. The Seventh Circuit held that it was not proper to base the amount of the loss on the face amount of the defendant's contracts, noting that there was no indication that the defendant did not intend to perform the contracts or would be unable or unlikely to do so. Here, of course, the loss is not based on the amount of the Price group's bid, which was $2.2 million. The Seventh Circuit in *Schneider* also rejected the approach of basing the sentence on the difference between the defendant's bid and the next higher bid. But that is not analogous to the situation here because in *Schneider* the higher bid would cause the victim, the government, to pay out more money; while here, the higher bid was a higher amount paid to the victim, Mobil. We see nothing in the approach in *Schneider* that is inconsistent with what the district court did here.

We conclude that the district court did not err in its calculation of the sentencing guideline confinement range applicable to Price's offense. Price's conviction and sentence are accordingly

AFFIRMED.