UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8328
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LEE GRILLOS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(MO-92-CR-018)

(March 9, 1993)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Pursuant to a plea agreement, William Lee Grillos pleaded guilty to an indictment for wire fraud. After conducting a rearraignment, the district court sentenced Grillos to 30 months imprisonment, three years supervised release, $200,000 restitution to the victim, and the mandatory $50 special assessment. Grillos

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

timely appeals the procedure employed at the rearraignment, the imposition of restitution, and the calculation of his offense level. We affirm.

Background

Grillos was an oil man. He and his partners agreed to provide an independent geologic survey of strata they possessed to a group of investors interested in acquiring a lease. Grillos transmitted via FAX to the prospective buyers a survey reflecting substantial reserves. The survey had not been produced by an independent third party but, rather, was Grillos' own work product. Moreover, the survey was of strata not owned by Grillos or his partners. Relying on this survey the buyers paid $200,000 for the lease interest.

Grillos entered into a plea agreement in which he agreed to plead guilty to wire-fraud charges. The six-page typed agreement appears of record and ends with the following:

> The foregoing statement contains everything my attorney has explained to me concerning my case and the plea I wish to enter. This statement also contains all of the terms to the plea agreement between the attorney for the government and my attorney. I have read this statement carefully, and I understand it thoroughly. I wish to enter a plea of guilty. . . .

The agreement made clear that "any estimate of the probable sentencing range . . . is a prediction and not a promise." At arraignment the court reinforced that point before accepting Grillos' plea. Grillos also was made aware that he faced a term of imprisonment not to exceed five years, a term of supervised release not to exceed three years, a fine not to exceed $250,000, and the

mandatory special assessment of $50. The plea agreement also includes a waiver of Grillos' right to appeal unless the judge substantially departed from the punishment range provided by the guidelines.[1]

During the plea colloquy the court informed Grillos that he faced a fine of $250,000 but did not inform him of the possibility of an order of restitution. The government advised the court, however, in the presence of Grillos and his counsel, that it had agreed that "$200,000 would be the limit of any restitution order." Indeed, when the court questioned Grillos and his attorney about the details of the plea agreement, Grillos' attorney advised the court that "$200,000 is the limit of his restitution." The court confirmed Grillos' understanding thereof.

The PSR recommended that Grillos be ordered to pay $200,000 in restitution and that the court depart upwards from the guideline sentence for: (1) obstruction of justice; (2) more than minimal planning; and (3) use of a special skill. Grillos objected to the recommendation because he asserted that any departure from the stipulated level of injury to the victim was not warranted, that restitution was not expressly provided for in the plea agreement, and that upward departure based on a greater loss to the victim was inappropriate. At the sentencing hearing he reiterated only the objection to the potential enhancement of sentence. Notably, he

[1] Because the government failed to inform the judge of this arrangement or to obtain a waiver in open court and on the record, we will not enforce it. **United States v. Baty**, 980 F.2d 977 (5th Cir. 1992).

did not object to the recommendation that he be ordered to pay restitution nor did he seek to withdraw his guilty plea. Notwithstanding Grillos' objections, the court adopted the findings in the PSR, found that Grillos planned the crime, employed a special skill, and that the transaction took more than minimal planning. This resulted in a four-point adjustment to Grillos' base offense level. The court made an additional two-point adjustment for obstruction of justice because Grillos had taken flight to Colorado under an assumed name when he learned of the charges against him.

Analysis

Grillos contends that the court erred: (1) in ordering him to pay restitution in light of the plea agreement, (2) in failing to advise him of the possibility of such a consequence of a guilty plea, and (3) by exceeding the statutory authority to impose restitution. He also complains that the court: (4) failed to resolve factual disputes in writing or to attach them to the PSR to be forwarded to the Bureau of Prisons, and (5) erred in finding that he planned more than minimally, used a special skill, and obstructed justice. The first three contentions are substantially related; we address them together.

Rule 11 requires that the district court advise the defendant that an order of restitution is a possible consequence of a guilty

plea before accepting such a plea. In **United States v. Corn**[2] we found that the failure to so advise a defendant amounts to plain error when restitution is ordered. We frequently have faced difficult questions of sufficiency in the plea colloquy where there has been a partial or complete failure to advise a defendant of rights and the consequences of the plea. Were this a partial failure to inform Grillos of the possibility of restitution we would feel compelled, in light of this court's holding in **United States v. Bachynsky**,[3] to apply a harmless error analysis to this claim and reject it in light of Grillos' awareness that he faced a fine of as much as $250,000.[4]

We do not view this as a partial failure to inform, however; rather, we think the record demonstrates that Grillos and his attorney both knew and understood that Grillos might be ordered to pay up to $200,000 in restitution. The fact that the words were not voiced by the judge is of little consequence when one considers that the government, defense counsel, and Grillos himself expressly recognized such.[5] Thus, we find that Grillos and the government agreed that he could be ordered to pay $200,000 in restitution and

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[2] 836 F.2d 889 (5th Cir. 1988).

[3] 934 F.2d 1349 (5th Cir.) (*en banc*), cert. denied, 112 S.Ct. 402 (1991).

[4] **United States v. Fentress**, 792 F.2d 461 (4th Cir. 1986).

[5] **United States v. Hekimain**, 975 F.2d 1098 (5th Cir. 1992).

conclude that Grillos made a knowing and voluntary waiver of his right to trial.[6]

The court's failure to make and attach written factual findings to the PSR did not constitute plain error. Grillos has not identified specific factual disputes which the court failed to resolve pursuant to Fed.R.Crim.P. 32(c)(3)(D). Further, the court made findings about each adjustment to the offense level and about the amount of loss suffered by the victims. Grillos did not contest same.

Grillos also contends that the provisions of the plea agreement precluded the district court from adjusting his offense level. This argument ignores the plain language of the agreement which confirms that "no one can guarantee what sentence the judge may impose" and that Grillos understood that his sentence would be

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[6] Grillos' contention that the government breached the plea agreement by allowing the probation officer to recommend upward departures, predicting that Grillos would receive probation, and remaining silent at sentencing when Grillos objected to the PSR, lacks merit. A necessary concomitant of this argument is that the government affirmatively committed itself to seeing that no restitution would be imposed and that no departure would be made. Clearly, the agreement and the plea hearing belie such an understanding. The plea agreement made plain that the government did not "promise" anything and that the judge was not constrained to follow the government's recommendations. Nor did it make a specific prediction that Grillos would not be subjected to restitution or a departure from the sentencing guidelines. Moreover, the probation officer, in creating the PSR, is not under the prosecution's supervision. E.g., **United States v. Johnson**, 935 F.2d 47 (4th Cir.), cert. denied, 112 S.Ct. 609 (1991); **United States v. Canniff**, 521 F.2d 565 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976); **Agudelo v. United States**, 724 F.Supp. 1110 (E.D.N.Y. 1989); see also **United States v. Jackson**, 978 F.2d 903 (5th Cir. 1992).

"imposed in accordance with the . . . guidelines."[7]

Grillos finally contends that the district court erred in adjusting his offense level. We review the court's factual determinations looking only for clear error.[8] The court's conclusions are amply supported by the record.

The judgment of the district court is AFFIRMED.

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[7] The court is not bound by the prosecution's recommendations. **United States v. Bleike**, 950 F.2d 214 (5th Cir. 1991). The record reflects that Grillos was aware of this as well as the possibility of the imposition of restitution. The court did not exceed its authority by imposing $200,000 restitution pursuant to 18 U.S.C. § 3663.

[8] **United States v. Thomas**, 973 F.2d 1152 (5th Cir. 1992).