

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8421
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES EARL TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
EP 91 209 2 (B) CR

June 30, 1993

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

PER CURIAM:*

James Earl Taylor pleaded guilty to possession with intent to distribute more than 100 kilograms of marijuana. Taylor was sentenced to a term of imprisonment of 70 months, five years supervised release, a \$7,500 fine, and a \$50 special assessment. Taylor has appealed the imposition of the \$7,500 fine.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"Review of sentences imposed under the guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was outside of the applicable guideline range and was unreasonable." United States v. Matovsky, 935 F.2d 719, 721 (5th Cir. 1991) (citing 18 U.S.C. § 3742(e)). Findings of fact are reviewed for clear error. Id.

District courts are directed to impose a fine in all cases, unless the defendant establishes that he will be unable to pay. U.S.S.G. § 5E1.2(a). In determining the fine, the guidelines list seven factors for consideration, including "any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources[.]"

United States v. Fair, 979 F.2d 1037, 1040 (5th Cir. 1992) (quoting U.S.S.G. § 5E1.2(d)(2)). In this circuit, district courts are not required to make express findings with respect to the defendant's ability to pay. Id.; Matovsky, 935 F.2d at 722.

The defendant has the burden of proving the inability to pay the fine. Fair, 979 F.2d at 1041. "If the defendant makes such a showing, the court may impose a lesser fine, or waive the fine altogether." Id. (citing U.S.S.G. § 5E1.2(a) and (f)). The defendant "may rely on the PSR to establish his inability to pay a fine." Id.

Under the guidelines applied to this case, the district court could have imposed a fine of between \$12,500 and \$2,000,000. With respect to Taylor's ability to pay a fine, the Probation Officer noted that Taylor's assets included two automobiles valued

at \$5,000, jewelry, and jewelry manufacturing equipment valued at \$14,000. Taylor owed his attorneys \$8,200 and had outstanding tax liabilities of approximately \$17,000. His average annual income during 1989 and 1990 was approximately \$30,000, and he had maintained self-employment for 15 to 20 years. Taylor is an accomplished silversmith and has operated a successful landscaping business. Accordingly, the Probation Officer concluded, Taylor is "fully capable of maintaining legitimate and stable employment," and is "fully capable of paying a fine." In his confidential recommendation, the Probation Officer suggested that a fine in the amount of \$12,500 be imposed.

Taylor filed objections to the PSR claiming that he is \$30,000 in debt to the Internal Revenue Service and to his attorneys and that the Probation Department erred by construing his ability to pay on the basis of his prior income as a drug smuggler. Apparently persuaded by Taylor's argument, the district court imposed a \$7,500 fine, which was lower than the Probation Officer's recommendation and the minimum guidelines range.

Taylor repeats the same objections to a fine in this court. He argues that the PSR did not contain an analysis of the manner in which his talents as a silversmith could be translated into future income and that the district court failed to make express findings with respect to Taylor's ability to pay the fine out of future income. In the PSR, however, the Probation Officer reported, based upon information supplied by Taylor himself, that Taylor had averaged \$2,000 per month from his jewelry and

landscaping businesses prior to his arrest. As was previously noted, the district court was not required to make express findings on the defendant's ability to pay. Fair, 979 F.2d at 1040.

Taylor also complains that the Probation Officer did not attempt to analyze his net worth. The Court rejected a similar argument in United States v. O'Banion, 943 F.2d 1422 (5th Cir. 1991). In O'Banion, the Court refused to engage in a balancing of the defendant's assets and liabilities and affirmed the district court's imposition of a fine because the record revealed that the fine could be satisfied by liquidating some of the defendant's assets. Id. at 1432 n.11. The Court reasoned, "even if O'Banion had a negative net worth at the time of sentencing, the sentencing judge could base his sentencing determination on O'Banion's future ability to earn." Id. at 1432 n.11.

Finally, Taylor contends that the district court should have held an evidentiary hearing on the ability-to-pay issue. Whether to grant an evidentiary hearing lies within the discretion of the trial judge. United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). The facts which formed the basis of the district court's decision are not in dispute. The district court did not abuse its discretion by failing to hold an evidentiary hearing.

for these reasons, the judgment of the district court is AFFIRMED.