

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8472

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELIZABETH ANN SCAGGS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
M 92 CR 33

May 10, 1993

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:¹

Elizabeth Ann Scaggs (Scaggs) was charged with eight counts of mail fraud, in violation of 18 U.S.C. § 1341. Following a guilty plea, she was convicted on count one. The district court sentenced her to 15 months of imprisonment, two years of supervised release, and an order to pay restitution in the amount of \$99,522.93. Scaggs appeals her sentence. We dismiss her appeal.

I.

Scaggs was a volunteer at the Texas Department of Human

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Services (TDHS). Her scheme involved using the TDHS computer system to set up eight phony public assistance cases. She rented post office boxes at which she received correspondence related to the cases.

In her plea agreement, Scaggs stipulated that she would make full restitution in an amount no less than \$47,000 and no more than \$102,000. She also agreed to waive her right to appeal her sentence unless the judge departed upward from the guidelines. This occurred in three paragraphs of the agreement. Paragraph 3(e) of the agreement said: "I understand by pleading guilty, I give up . . . the right to appeal all issues relating to the sentencing guidelines unless there is a substantial departure upwards." Later, paragraph 15 said that Scaggs "expressly waives the right to appeal her sentence, including, any appeal right conferred by 18 U.S.C. § 3742, unless the judge makes a substantial departure upwards from the Sentencing Guidelines." Finally, paragraph 16 said "the defendant knowingly waives her right to appeal the sentence unless a substantial upward departure occurs or to contest it in any post-conviction proceeding in exchange for the concessions made by the government."

The Probation Office calculated the amount of loss at \$99,522.93. It attributed \$3,978.00 to food stamps, \$35,047.00 to AFDC benefits, and \$60,497.93 to Medicaid benefits. Scaggs objected to this amount, claiming that TDHS never "lost" the \$60,497.93 attributable to medicaid benefits. The district court overruled her objection and adopted the amount used in the PSR.

II.

Scaggs argues that the district court erred in finding that the amount of loss was \$99,522.93. She contends that the Government did not prove the entire amount of loss and that the loss should only be \$39,025. The government argues that Scaggs waived her right to appeal her sentence and that her appeal should be dismissed.

We have held that "a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." **United States v. Melancon**, 972 F.2d 566, 568 (5th Cir. 1992). The waiver must be informed and voluntary. **Melancon**, 972 at 567. Moreover, "a defendant's waiver of her right to appeal deserves and, indeed, requires the special attention of the district court." **United States v. Baty**, 980 F.2d 977, 979 (5th Cir. 1992). The district court must "insure that the defendant fully understands her right to appeal and the consequences of waiving that right." **Baty**, 980 F.2d at 979. We review voluntariness and knowingness of the waiver under a de novo standard. **Melancon**, 972 F.2d at 567.

In her statement of issues, Scaggs asks for a determination of her right to appeal her sentence without being in breach of the plea agreement. However Scaggs does not expressly argue that her waiver of her right to appeal was involuntary or uninformed. She simply says that she "does not wish to violate the terms of the plea agreement, but believes that the evidence does not support" the district court's loss determination. Therefore, she argues, "the guideline range is unlawful and the restitution is excessive."

Referring to her view of the restitution provision, Scaggs says that the upper and lower limits were estimates only, and that

she "did not intend to agree to pay more than the lawful amount of restitution established by the evidence." She adds that it was not her intention "to relieve the government of its burden to prove the amount of the loss, but rather to permit the government to hold the Appellant accountable for proven losses relating to all of the AFDC cases." Although Scaggs only discusses her view of the restitution provision, we construe her argument to be that she was not fully informed about the consequences of the waiver regarding a dispute over the amount of restitution. Scaggs has raised no question of whether she voluntarily entered into the plea agreement.

We conclude that the district court adequately insured that Scaggs's waiver of her right to appeal was informed. At Scaggs's arraignment, her attorney told the district court that he had reviewed the agreement with Scaggs, and that he was satisfied that she was competent. Scaggs confirmed that she had signed the plea agreement voluntarily and after consulting with her attorney. She added that she was satisfied with her attorney's representation. The U.S. Attorney, Mr. Torrey, stated in open court the "essence" of the terms of the plea agreement. During his summation, he said: "Ms. Scaggs has agreed to waive appellate issues as to the guidelines, except, of course, if the Court . . . upwardly departs." He explained that the agreement called for the court to determine the amount of restitution, within the lower limit of \$47,500 and the upper limit of \$102,000. The court asked Scaggs if Mr. Torrey's summation of the agreement matched her understanding of the agreement. She answered, "yes." The court also asked Scaggs if she understood "that under some circumstances [she] or

the government [might] have the right to appeal any sentence" that he imposed. Scaggs responded, "Yes, sir." At the beginning of the rearraignment, the court told Scaggs: "If you don't understand my question, please ask me to repeat myself." At no time did Scaggs express confusion about her right to appeal.

In **United States v. Sierra**, No. 91-4342, we held that the defendant's waiver of her right to appeal was informed where the record established that she

was represented by counsel and was satisfied with that representation; . . . that her counsel stated on the record that Sierra understood the terms of the plea agreement; that the district court went through the plea agreement with Sierra, paragraph by paragraph, to ensure that she understood the agreement; and the district court explained to Sierra that as part of the plea agreement she waived her right to appeal her conviction and sentence.

Sierra, No. 91-4342 (attached to **Melancon**, 972 F.2d at 569-70). The defendant in **Sierra** was also entitled to withdraw her plea agreement if sentenced to more than 36 months of imprisonment. However in **Melancon**, where the plea agreement lacked a similar provision, we held that "the uncertainty of Appellant's sentence does not render his waiver uninformed." **Melancon**, 972 F.2d at 567-68. We viewed as "most important," the fact that the defendant "knew that he had a 'right to appeal his sentence and that he was giving up that right.'" **Melancon**, 972 F.2d at 567 (quoting **United States v. Rutan**, 956 F.2d 827, 830 (8th Cir. 1992)). Notably, **Melancon** did not require the district court to engage in a searching inquiry into whether the defendant fully understood the consequences of the waiver regarding particular disputes that might

arise.

On the other hand, in **Baty** we held that a defendant's waiver of her right to appeal was uninformed where "[o]n more than one occasion," the defendant "specifically asked the court to explain" the plea agreement paragraph containing the waiver; the district court, not knowing the contents of the plea agreement, could not answer her questions; the government volunteered only that the provision "provides that the defendant waives her appeal right basically on conviction;" and defendant's counsel told the court only that she "explained to my client as best I could how I reviewed her choices." **Baty**, 980 F.2d at 978-79.

Like the defendants in **Melancon** and **Sierra**, Scaggs was represented by counsel and satisfied with that representation; her counsel told the court that he had reviewed the agreement with her and that she was competent; she heard the terms of the agreement stated in open court and told the court that the explanation matched her understanding of the agreement. Unlike the defendant in **Baty**, Scaggs expressed no confusion about the meaning of the provisions in which she waived her right to appeal. We therefore hold that Scaggs's waiver of her right to appeal her sentence was informed.

III.

For the reasons stated above, we dismiss Scaggs's appeal.

DISMISSED.