UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8542
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAYMOND EUGENE HAWKINS,

Defendant-Appellant.

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

(A-89-CR-118-01HG)

(April 22, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Defendant-Appellant Raymond Eugene Hawkins was originally sentenced to 41 months after pleading guilty to possession of marijuana with intent to distribute under 21 U.S.C. § 841. This Court vacated Hawkins's sentence and remanded for resentencing.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

United States v. Hawkins, No. 90-8173 (5th Cir. Sept. 25, 1991) (Hawkins I) (unpublished). Hawkins I held that the district court erred by not articulating the basis for the sentence as required by Federal Rule of Criminal Procedure 32(c)(3)(D). Hawkins's PSR gave a four-point increase in offense level for his leadership role in a criminal enterprise of more than five persons, denied a two-point reduction for acceptance of responsibility, and denied a two-point reduction for minor participation. The district court neither addressed Hawkins's specific objections to the PSR nor explained how it arrived at a final offense level of 20. On appeal, we reversed, stating: "An offense level of 20 was certainly a permissible determination in light of Hawkins's specific objections, but we do not know which contested facts, if any, the district court relied on and which of the guidelines it applied." The mandate issued October 17, 1991.

Resentencing was scheduled for February 11, 1992, but it was rescheduled to April 21, 1992, then to June 26, 1992, then to July 7, 1992. The sentencing hearing was finally held on September 8, 1992. The record indicates no reasons for the delays.

At the beginning of the resentencing hearing, Hawkins's counsel stated that, after the initial sentencing, he had received additional information relevant to sentencing and he had made updated objections to the PSR. He asked permission to review those objections with the court.

The court stated that it would first make findings, which it did. The court stated:

> For the record, the Court finds that the Defendant, Mr. Hawkins, was an organizer or leader of a criminal enterprise involving five or more participants. The Court further finds the Defendant was not a minor participant in the offense conviction [sic].
>
> The Court finds Mr. Hawkins did accept responsibility for his criminal conduct, resulting in a reduction of offense level from twenty-two to twenty and reducing the sentencing guideline range to thirty-three from [sic] forty-one months in prison.
>
> Now, what is it that you wanted to let the Court know?

Counsel for Hawkins stated that his evidence showed that Hawkins was in the middle of the drug organization and that he was unaware of some of the higher levels. The defense counsel stated that he wanted to submit exhibits supporting that position. He said that the documents relate to updated objections to the PSR that were filed a short time before.

The government asserted that Hawkins was a middleman, standing in between the people that he organized and the higher echelons of the organization. The entire organization was involved in many criminal activities, the government stated, but Hawkins was the leader of the particular conspiracy charged.

The government moved for a reduction in sentence based on substantial assistance that Hawkins provided in connection with the investigation and prosecution of individuals in Florida. The court granted the motion.

Hawkins's attorney again told the court about documents that bore on Hawkins's role in the offense. He said that they show an FBI agent's view that Hawkins merely followed orders of his superiors.

The court responded that it could not evaluate the material immediately and, if counsel wanted the material to be considered, such consideration would have to wait until another time. The government said that he had not seen the material. The court then said, "They want me to go through this, and I don't have time to do it. We'll have to recess this hearing for the time being."

Defense counsel responded, "Your Honor, my problem with a recess, if I may, is that Mr. Hawkins has already served a great deal of his sentence. He's waited seven months now." Hawkins interjected that 11 months had elapsed since the remand.

The court let stand the findings announced at the beginning of the hearing and stated that, because of the reduction for substantial assistance, the 41-month sentence would not stand. The court said that it was prepared to pass sentence and asked counsel if he had any reason why sentence should not be passed at that time. Hawkins's attorney said no.

Hawkins addressed the court, saying that he had already served 38 months of his sentence and argued against the leader/organizer adjustment and against a fine. The court then sentenced Hawkins to serve 24 months in prison and two years on supervised release and to pay no fine. Hawkins appealed.

In October 1993, Hawkins moved in this Court to supplement the record and for a remand for a second resentencing. The government filed a response, to which Hawkins replied. In the motion, Hawkins's appellate counsel, who had not represented Hawkins at the resentencing, stated that she was surprised to find that, while

Hawkins's updated objections to the PSR had been delivered to the probation office and the assistant United States attorney, they had not been delivered to the district court. She stated that Hawkins had finished serving his 24-month sentence and was incarcerated in Florida on another sentence, and she moved to supplement the record with the updated objections and her own affidavit detailing the process by which she determined that no objections had been received by the district court.

A panel of this Court "provisionally granted" the motion as to the updated objections and denied the motion as to counsel's affidavit. We ordered the motion for remand carried with the case. Without leave of court, Hawkins's appellate counsel appended to her brief four documents that she claims are the exhibits that Hawkins's trial counsel unsuccessfully attempted to present to the judge at resentencing. She discusses them at length, arguing that "The updated objections . . . , coupled with the exhibits that Hawkins's attorney attempted to introduce at the resentencing . . . , provided significant support for Hawkins's contention that he was not a leader of the organization."

As a preliminary matter, we address the status of the four appended documents. Hawkins's trial counsel asked the district court to examine exhibits. The court responded that it would examine them and put off sentencing. The attorney responded that Hawkins did not want to wait. Before the court passed sentence, it asked defense counsel if he had any objection, and defense counsel declined to object. Hawkins's appellate counsel now tells this

Court that the documents appended to the brief are the exhibits that trial counsel asked the district court to examine at resentencing.

Even assuming the accuracy of the appellate counsel's assertion, the appended documents are not properly before this Court because they were not part of the district court record and counsel sought no leave to supplement the record with them. See Abbott v. Equity Group, Inc., 2 F.3d 613, 629 (5th Cir. 1993). Hawkins was specifically granted provisional leave to supplement with the updated objections; no such leave was requested or granted with respect to the exhibits.

Even if counsel had included those exhibits in her request to supplement the record, they would still be outside the scope of this Court's review. When an objection is forfeited in the district court, the Court of Appeals may correct an error that both is plain and affects a party's substantial rights. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993); Fed. R. Civ. P. 52(b). A forfeiture is different from a waiver. The former is "the failure to make the timely assertion of a right." Id. The latter is "the intentional relinquishment or abandonment of a known right." Id. (internal quotation not indicated). A forfeiture permits "plain error" analysis; a waiver does not. Id.

"The scope of a remand for resentencing includes new relevant factors proper in a de novo review." United States v. Kinder, 980 F.2d 961, 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2376

(1993). The district court offered Hawkins's trial counsel sentencing on the spot without the exhibits, or sentencing later with the exhibits. Hawkins's attorney chose the former. He intentionally relinquished Hawkins's right to have the court examine the exhibits. Any argument based on those exhibits will not be considered.

Furthermore, even if Hawkins's appellate counsel had included them in her motion for leave to supplement the record, they would have been excluded from the provisional grant of the motion. The appellate counsel's motion was based on the trial counsel's alleged unawareness that the district court did not have the updated objections before it. The resentencing transcript shows that the trial counsel was fully aware that the exhibits were not before the district court.

The status of the updated objections, which are before this Court provisionally, is more problematic. As the discussion of the merits of Hawkins's argument below shows, the updated objections, along with the waived exhibits, could have made a difference in sentencing. They make the original objections to the PSR more concrete and specific. They might have resulted in a three-point increase for Hawkins being a manager/supervisor rather than a four-point increase for being a leader/organizer. See U.S.S.G. § 3B1.1(a), (b).

Hawkins I required specific findings. New, relevant information should have been considered. Kinder, 980 F.2d at 963. The court apparently was willing to consider any information that

counsel wished to put before it, if only it could have adequate time to evaluate it. The attorney for Hawkins, however, pressed the court for a sentence immediately. As discussed below, the updated objections cite and depend on the exhibits that were not included with the updated objections. The updated objections carry some, but less, weight without the documentary support. Had the defense counsel not objected to the court's offer to recess the hearing, the factual support for the updated objections would have been considered. In light of the following discussion of the merits, which considers portions of the record that were not before us when we considered the motion to supplement, we now withdraw the provisional grant of leave to supplement the record.

The Fifth Circuit reviews sentences imposed under the Sentencing Guidelines to determine whether the district court correctly applied the guidelines to factual findings that are not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). We will freely review legal conclusions regarding the guidelines. Manthei, 913 F.2d 1133. The district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial, e.g., hearsay. U.S.S.G. § 6A1.3, comment; Manthei, 913 F.2d at 1138. The PSR itself bears such indicia. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A

defendant who objects to consideration of information by the sentencing court bears the burden of proving that it is "materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). A defendant who disputes information in the PSR without presenting rebuttal evidence fails to carry his burden. United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir.), cert. denied, 498 U.S. 857 (1990).

Hawkins argues that he should not have been found to have been a leader or organizer. The guidelines provide that if the defendant was an organizer or leader of any criminal activity involving five or more participants, the offense level should be increased by four. U.S.S.G. § 3B1.1(a). More than one person may have a leadership role in a criminal activity. Section 3B.1(a), comment, (n.3).

A leadership adjustment "must be anchored in the defendant's transaction." United States v. Mir, 919 F.2d 940, 945 (5th Cir. 1990). The Fifth Circuit takes a "common-sense view" of the scope of that transaction. Id. "It is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself." Id.

Seven factors should be considered in making a leadership finding: "(1) the exercise of decision-making authority; (2) the nature of participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5) the degree of participation in planning and organizing the offense; (6) the nature and scope of

the illegal activity; and (7) the degree of control and authority exercised over others." United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989) (quoting U.S.S.G. § 3B1.1, comment. (n.3)).

Factual Basis

Hawkins does not contest the basic facts of his offense: While in Tampa on July 11, 1989, Hawkins telephoned Norman Hassan in Austin and John Hanes in Tampa to arrange travel to Austin to purchase marijuana the following day. Hawkins flew to Austin, where he met Hassan. Hawkins and Hassan then met Hanes, who drove to Austin from Tampa in a rented car. Hassan drove Hanes's rented car to his home in Austin, where he met an unidentified man, who deposited a duffel bag containing 50 pounds of marijuana in the trunk of the car. At a restaurant in Austin, Hassan turned the car over to Hawkins and Hanes.

PSR

The PSR provided the following additional details: An undercover Tampa police officer purchased cocaine from Hawkins in June 1989 at Hawkins's home in Tampa, at which time Hawkins told the officer that he would have marijuana and/or more cocaine to sell in the future. Hawkins purchased large quantities of marijuana from Hassan, who had Mexican suppliers; they shipped the marijuana to Florida in motor homes that had concealed storage compartments. Tampa police had determined that Hawkins was the leader of a drug trafficking operation. PSR ¶¶ 7-8.

The PSR also stated that Hawkins used Landmark Travel in Tampa to make the arrangements for his trips for drug trafficking. Hanes

and Mary Meltzer were the operators of the travel agency. David Clyde Beane (spelled "Bean" at various places in the record) provided financing. James Stouffer (spelled "Stauffer" at various places in the record) and Linda Sacry transported drugs for Hawkins. Richard Kessens ran errands for him. PSR ¶¶ 9, 21.

The PSR further related that, in his July 11, 1989, phone call to Hassan, Hawkins arranged to stay at Hassan's home in Austin. In the call to Hanes, Hawkins instructed him to rent an Alamo rental car and drive to Austin. PSR ¶ 10. Hawkins recruited Hanes. PSR ¶ 21. During his detention following his arrest, Hawkins telephoned Kessens, instructing him to dispose of a quantity of illegal drugs that were in a safe at Meltzer's residence. PSR ¶ 15.

Hawkins was given $3500 for the July trip to Austin. He was to retain $2000 for himself. PSR ¶ 21.

Original objections to PSR

In his original objections to the PSR, Hawkins denied offering the undercover officer additional quantities of drugs and stated that the original quantity was small. Hawkins also asserted that he was only in the lower level of the conspiracy. He claimed to be merely a "conduit."

He also claimed that he had never purchased drugs from Hassan prior to the 50-pound quantity described above, nor did he use motor homes to transport drugs to Florida. He objected to the inclusion in the PSR of Landmark Travel's role because it is a legitimate business. He again denied being a leader, and claimed

that Beane was the one who sent him to Texas.

He stated that he was an intermediary in an organization that included Beane, Hassan, Hanes, and others. His role was to take instructions from Beane and Richard Imbert and "pass those instructions along to those who actually perform the task of running drugs." Only Hanes and Stouffer were under his direction, he said. He conceded that the organization involved five or more participants. According to the PSR addendum, the probation officer made no changes in response to these objections.

Analysis

Hawkins's objections do not demonstrate that the PSR's account is "materially untrue, inaccurate or unreliable." It merely provides allegations contradicting the PSR. The PSR reported that Hawkins exercised decision-making authority over a few individuals. He recruited or maintained management of a few individuals. He claimed a larger share of the fruits than Hassan or Hanes. The illegal activity apparently was widespread, though Hawkins apparently was not involved in the entire organization that apparently was controlled by Beane and others. Hawkins exercised control over others, though perhaps under the direction of Beane and Imbert.

Based on the PSR and the original objections, and taking all of the relevant factors together, we cannot say that the district court clearly erred in finding that Hawkins was a leader.

If the district court had had all of the updated objections and the inadequately tendered exhibits before it, it is conceivable

that the district court would have not made the finding that Hawkins was a leader. However, the court, due to defense counsel's choice, did not have such motions and exhibits before it. Counsel knew the strength of the information that he had; the court did not. As a court of error, we would be hard-pressed to say that, because of defense counsel's choice, the district court erred. The determination of whether Hawkins's trial counsel provided ineffective assistance, or merely made a tactical choice, will have to await a 28 U.S.C. § 2255 motion.[1]

Hawkins may challenge his sentence in a § 2255 motion by claiming that counsel provided ineffective assistance.

AFFIRMED.

Hawkins's motion for extension of time to file a reply brief is DENIED.

[1]We note that although Hawkins has reportedly already served his 24-month sentence, he was also sentenced to a two-year term of supervised release. Therefore Hawkins may still be "in custody" for the purpose of 28 U.S.C. § 2255.