

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9058
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHEENA HELENE OWENS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CR 048 G (01))

July 29, 1993

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

PER CURIAM:*

Sheena (Sheena) Helene Owens pled guilty to theft of money from a bank and was sentenced to 13 months' imprisonment and two years' supervised release. On appeal, she challenges the sentencing determinations that she did not clearly demonstrate acceptance of responsibility and that her offense involved more than minimal planning. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On November 16, 1988, NCNB Texas National Bank (NCNB) accidentally miscoded a deposit of \$34,985, which ended up in the joint checking account of Sheena Owens, appellant, and her husband, Cecil Ray Owens. When Owens and her husband discovered the large balance in their account, they withdrew \$34,637 in a few days. In the next few weeks, they transferred this money into other financial institutions and then spent it.

On January 5, 1989, NCNB Bank discovered the error made in the Owens' account. The bank contacted them, and they contacted an attorney. On January 13, the bank notified them of the mistaken deposit made into their account and instructed them to return the money. On January 16, the Owens' attorney met with the bank's investigator and presented a list of how they had spent the money. They admitted that they had gotten the money out of the account and acknowledged that it was all gone.

Owens first argues that the facts show that she clearly accepted responsibility. She also argues that the court misapplied the sentencing guidelines by penalizing her for going to trial, an effort that resulted in a hung jury.

The sentencing guidelines provide for a two-level downward adjustment in offense level if a defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a).¹ The defendant bears the burden of proving that she is entitled to the downward adjustment. U.S. v. Kinder,

¹ Owens was sentenced on November 24, 1992, and the latest version of § 3E1.1, amended effective November 1, 1992, applies.

946 F.2d 362, 367 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677 (1992). The determination of acceptance of responsibility is a factual question, and this Court accords the district court's finding even greater deference than under the clearly erroneous standard. U.S. v. Brigman, 953 F.2d 906, 909 (5th Cir. 1992), petition for cert. filed, No. 92-5417 (Aug. 4, 1992).

The Probation Office recommended against the adjustment for acceptance of responsibility. Owens objected to the report's failure to take into account her acceptance of responsibility for the offense, arguing that she had never denied her responsibility for the offense, but that she had acted under a genuine belief that the money was an answer to a prayer. The probation office rejected that explanation as a showing of acceptance of responsibility, especially in light of the fact that the money deposited into the church's account was never used, as she said, for a building.

Owens testified at the sentencing hearing that she realized what she did was wrong and in violation of the law. When her attorney asked if she was truly sorry for her behavior, she responded that she was "sorry that it happened." She also testified that at the time of the offense, she was not thinking clearly and did not realize what she was doing. She stated that she now understood that the money was not a gift from God and that she should not have taken the money.

The district court then questioned her directly and asked her when she first realized what she did was wrong. Her answers were conflicting regarding whether she knew what she did was wrong

from the very beginning. The court also questioned her about the decision to go to trial. She stated that it was the decision of her and her attorney to take the case to trial.

The district court found that Owens had not clearly demonstrated an acceptance of responsibility. The court found her testimony equivocal. The court relied on the commentary to § 3E1.1 which states that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n.2). The court found that even though she had not been convicted, this comment applied to her, because she had originally gone to trial and had denied the factual element of guilt, that she had the necessary criminal intent to be found guilty under the statute.

Owens argues that she has never denied the facts of the offense and that the district court penalized her for going to trial. She argues that she went to trial on a legal issue on advice of counsel. Owens' characterization is incorrect. She did go to trial to put the government to its burden of proof that she intended to take the money. She sought to have the indictment dismissed on a legal issue before trial, but the district court denied the motion to dismiss, deciding the legal issue against Owens, and pointing out that the only issue was a factual one, her intent to deprive NCNB of the money. Her criminal intent was a factual issue for the factfinder to decide, not a legal issue. She

decided to take her chances with a jury to see if they would approve her "gift from God" story. She maintained throughout trial that she believed the money was from God. When the trial ended in a mistrial, she decided that she should plead guilty. The district court correctly applied the guidelines, and its finding that Owens did not clearly demonstrate acceptance of responsibility is not clearly erroneous.

Owens next argues that the district court clearly erred in finding that the offense involved more than minimal planning. She argues that the judge had the wrong impression of the facts, and that the facts do not support a finding that she attempted to conceal the offense.

U.S.S.G. § 2B1.1(b)(5) provides for a two-level increase in offense level for more than minimal planning. "More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1, comment. (n.f). Minimal planning is a factual issue reviewed for clear error. U.S. v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990).

The district court found that more than minimal planning did exist based on Owens' repeated acts over a period of time. The judge recalled from the trial that she had withdrawn the money over a period of three to four weeks in relatively small amounts, and that it took about a dozen to two dozen withdrawals to fully exhaust the funds. The court found that this conduct constituted repeated acts over a period of time. The court also found that

while it was a closer question, a finding of more than minimal planning could also be based on Owens' attempts to conceal the funds by withdrawing it in small amounts and placing it beyond the control of the bank.

Owens contends that the district court's impression of the facts was incorrect regarding the amount of time over which the activity occurred and the amounts of money withdrawn. She contends that while the court stated it believed the time period was three or four weeks, the actual period was four days. She also contends that almost all of the money was removed from NCNB by three personal checks.

During the trial, the Government proved that Owens removed the money from the account over the period of December 1, 1988 through December 5, a five-day period. The money was removed in fifteen independent financial transactions; \$11,100 in ten cash withdrawals; \$24,000 in three cashier's checks; and \$1,319.22 through two personal checks. From December 2 through the month of January, Owens and her husband placed the money in accounts at several other financial institutions and depleted the money. The district court's impression of the evidence was accurate and supports its finding of more than minimal planning. See U.S. v. Callaway, 943 F.2d 29, 31 (8th Cir. 1991).

Because this ground alone is sufficient to affirm the district court's finding, and because the district court based its finding on this ground as an alternative to, and not in addition

to, the ground of concealment, Owens' argument that she did not attempt to conceal the money need not be addressed.

AFFIRMED.