IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9105
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHANIE L. FUTTERMAN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(3:92-CR-316-P)

(September 23, 1993)

Before JOLLY, WIENER and E. M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Stephanie L. Futterman was convicted on a plea of guilty to the charge of theft of money from a bank in violation of 18 U.S.C. § 2113(b). She appealed the calculation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

her sentence under the Sentencing Guidelines, claiming that the district court erred in finding that, for purposes of calculating her criminal history category, (1) the victims of her crimes were vulnerable, (2) the prior offenses for which she was sentenced were similar to the instant offense, and (3) she was on probation at the time she committed the instant offense. For the reasons set forth below, we find no reversible error by the district court and therefore affirm Futterman's sentence.

I

FACTS AND PROCEEDINGS

Pursuant to a plea agreement, Futterman pleaded guilty to one count of theft of money from a bank. The district court sentenced her to a prison term of 37 months. Following sentencing, the district court granted the government's motion to dismiss the remaining count contained in the indictment.

According to the factual basis for Futterman's plea, she stole money from Mr.and Mrs. George Rosebrock's two federally insured bank accounts. Futterman, who was the Rosebrocks' bookkeeper, forged Mrs. Rosebrock's signature on bank-issued checks, cashed the checks, and used the money for her (Futterman's) personal benefit. Futterman also appropriated funds represented by certificates of deposit belonging to the Rosebrocks without their knowledge or consent. In total, Futterman embezzled over $189,000 from the RosebrockssQthe presentence report (PSR) set the final figure at over $200,000.

Futterman made several objections to the PSR that are relevant

to the analysis which follows. She objected to the probation officer's recommendation of a two-level upward adjustment to her offense level for targeting vulnerable victims. She also argued that inclusion of two prior convictions in the computation of her criminal history category was improper. Finally, she asserted that she was not on probation at the time she committed the instant offense.

Except to the extent it decreased Futterman's offense level by one on an issue not implicated in her appeal, the district court adopted the PSR's findings of fact and recommendations concerning application of the guidelines. The court found that the victims were vulnerable by virtue of their advanced age and Mrs. Rosebrock's impaired vision. The court also found proper the inclusion of the two disputed prior convictions in Futterman's criminal history category; and it concluded that she was in fact on probation at the time of the instant offense. Futterman timely appealed.

II

ANALYSIS

A. Standard of Review

The district court's factual findings in connection with sentencing issues are reviewed for clear error. Its application of the sentencing guidelines, a question of law, is reviewed de novo. United States v. Howard, 991 F.2d 195, 199 (5th Cir. 1993).

B. Vulnerability of Victims

Futterman argues that the district court erred in finding the

vulnerable victim guideline applicable. She insists that the Rosebrocks were not vulnerable, and that the factors considered by the court should have triggered only the abuse of trust guideline, not both. U.S.S.G. §§ 3A1.1, 3B1.3.

A defendant who "knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct," is assessed an increase of two in her offense level. § 3A1.1. The "adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." § 3A1.1, comment. (n.1).

The determination that a victim is vulnerable is a factual finding which the district court is best suited to make, as the district court can observe the victim in court. United States v. Rocha, 916 F.2d 219, 244-45 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991). As such, the clear error standard applies. Id. at 245. In this case only Mr. Rosebrock testified at the sentencing hearing, but Mrs. Rosebrock was present.

The clearly erroneous standard requires affirmance if the district court's account of the evidence is plausible in light of the record viewed in its entirety, notwithstanding that the court of appeals might have weighed the evidence differently or reached a different conclusion had it been sitting as the trier of fact. Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

Here the district court found that both victims were elderly

and that Mrs. Rosebrock had "some physical limitations," albeit the extent of those limitations was disputed. The court was not specific about whether it thought the Rosebrocks were "unusually vulnerable" or "particularly susceptible," but the court found that they were vulnerable victims on the basis of their ages and Mrs. Rosebrock's vision problems. According to the court, Futterman knowingly took advantage of the Rosebrocks' "situation."

Futterman does not deny that the Rosebrocks were elderly or that Mrs. Rosebrock had surgery for cataracts and glaucoma. She asserts, however, that inasmuch as Mr. Rosebrock ran a business with several employees and Mrs. Rosebrock could drive a car at some point during the offense, and examined each forged check following the offense, the Rosebrocks were not vulnerable.

The vulnerable victim guideline does not require that the victim be completely incapacitated or incapable of performing certain functions. See § 3A1.1. Futterman testified that Mrs. Rosebrock could drive but that her family was afraid to let her do so. Mr. Rosebrock testified that his wife could not see out of her left eye, that she often used a magnifying glass to read, and that she did not read newspapers or books. Futterman's citation of cases in which the offense was more heinous, United States v. Pearce, 967 F.2d 434 (10th Cir.), cert. denied, 113 S.Ct. 341 (1992), or the victim more vulnerable, id.; Rocha, 916 F.2d 219, does not nullify the applicability of the guideline to this case.

Futterman's reliance on United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990), is misplaced, as there we held that a

condition which is a prerequisite to the crime cannot constitute an enhancing factor under § 3A1.1. Id. In this case, the Rosebrocks' limitations were not such prerequisites to Futterman's commission of the crime. Contrary to Futterman's argument, her offense did display "the extra measure of criminal depravity which § 3A1.1 intends to more severely punish." Moree, 897 F.2d at 1335. The district court's determination that the Rosebrocks were vulnerable, based on their age and Mrs. Rosebrock's limited eyesight, was not clearly erroneous.

C. Double Counting

Futterman also argues that an amendment to the guideline commentary that changed the languagesQfrom "any offense where the victim's vulnerability played any part in the Defendant's decision to commit the offense" to a focus on the targeting of a particular vulnerable victimsQreflected the Sentencing Commission's intent to narrow the scope of the rule. We disagree. Even if the application note supports Futterman's interpretation, it does not affect the guideline's applicability to the Rosebrocks.

The commentary is designed to prevent the guideline from being applied to certain types of crimes in which the criminal has no knowledge that he has committed an offense against a vulnerable victim. For example, "it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile." § 3A1.1, comment. (n.1). Futterman knew her victims and their weaknesses before she began to steal from them. That she might not have initially

befriended the Rosebrocks in order to steal from them, and thus might not have "targeted" them ab initio, does not negate the fact that she was in a position to take advantage of them because of their limitations. That she "targeted" them subsequently does not immunize her from the applicable guideline provision.

The application note explains that the vulnerable victim guideline should not be applied if the offense guideline "specifically incorporates this factor." § 3A1.1, comment. (n.2). Neither the theft guideline, § 2B1.1, nor the abuse of position of trust guideline, § 3B1.3, accounts for the vulnerability of the victim. There was no impermissible "double-counting" in the court's determination.

D. Counting Prior Offenses

Futterman argues that the district court erred by counting two prior state theft by check offenses in her criminal history computation. We find her argument inapposite.

The two prior offenses for which she was sentencedSQtheft by check of over $20SQoccurred in 1984 and 1991. Under § 4A1.1(a) the district court adds three points for each prior sentence of imprisonment over a year and one month; two points for each prior sentence of imprisonment of at least 60 days not counted in subsection (a), § 4A1.1(b); and one point for each prior sentence not counted in subsection (a) or (b). § 4A1.1(c). Futterman pleaded guilty to each of the two earlier theft by check offenses. In both cases the court deferred her sentence, placed her on probation for six months, and subsequently dismissed the case.

A prior sentence is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." § 4A1.2(a)(1). A conviction resulting in a suspended or stayed sentence is counted under § 4A1.1(c). § 4A1.2(a)(3). A sentence for insufficient funds check is only counted in the calculation of a defendant's criminal history if it is similar to the offense under consideration. § 4A1.2(c)(1)(B). Both sides agree that the Texas offense of theft by check is the same as the offense of insufficient funds check. The issue is whether Futterman's instant offense of theft of money from a bank is similar to her prior theft by check offenses for § 4A1.2 purposes.

We employ a "`common sense' approach" to determining whether offenses are similar under § 4A1.2. United States v. Moore, ___ F.2d ____ (5th Cir. June 30, 1993, No. 92-2536), at 5722 (citation omitted). "This approach considers `all possible factors of similarity, including a comparison of punishments . . ., the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.'" Id. (citation omitted). This standard has been described as "consistent with the purpose of this section of the Guidelines: to screen out past conduct which is of such minor significance that it is not relevant to the goals of sentencing." United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991).

In Moore we compared the offenses of evading arrest and assaulting a police officer. Moore shot at two officers, wounding one of them. The district court imposed consecutive sentences of 54 months for assaulting an officer and 60 months for using a firearm, and a three-year period of supervised release. Id. at 5720-21. He had earlier been sentenced to 25 days for evading arrest. Id. at 5721 n.2.

We found that "the differences between the elements, punishments, and the degrees of culpability," id. at 5723, do "not outweigh the factual similarities that both of Moore's offenses involved flight from justice." Id. In Moore we also justified affirming the district court's application of § 4A1.2(c) by noting that Moore had twice attempted to evade arrest and indicated a likelihood of recurring criminal conduct by his willingness to shoot a police officer, Moore, ____ F.2d ____, at 5723.

Theft of a check over $20 in Texas requires that the actor have the specific intent to deprive the owner of property or avoid payment for services. See Tex. Penal Code Ann. § 31.06(a) (West 1989); Martinez v. State, 754 S.W.2d 799, 801 (Tex. Ct. App. 1988) (felony theft). The offense is a Class B misdemeanor. Tex. Penal Code Ann. § 31.03(e)(2)(A) (West 1989). Class B misdemeanors are punishable by a fine not to exceed $1,000, a jail term not to exceed 6 months, or both such a fine and a jail term. Tex. Penal Code Ann. § 12.22 (West 1988).

The federal offense of theft from a bank of property or money valued at over $100 is also a specific intent crime. 18 U.S.C.

§ 2113(b). The offense is punishable by a maximum of ten years in prison, a $5,000 fine, or both. Id. As in Moore, there are significant differences in the punishments and degrees of culpability between the two offenses. Under the logic of Moore, however, the similarities here outweigh the differences: The offenses involve comparable elements; and factual similarities between the two offenses are present. Both involve stealing money in the possession of a bank by use of a negotiable instrument. Additionally, Futterman's behavior indicated a likelihood of recurring criminal conduct. This was her third offense involving fraud through use of financial instruments. The magnitude of the instant offense suggests a brazenness not evident in her earlier offenses. The district court did not err in augmenting her criminal history category by two points.

E. Probation

Finally, Futterman argues that the district court erred in increasing her criminal history category by two levels on a finding that she was on probation at the time of the instant offense.

Futterman was placed on probation for six months, starting in March 1991, for her second offense of theft by check of over $20. Under § 4A1.1(d) the district court adds two levels to a defendant's criminal history category "if the defendant committed the instant offense while under any criminal justice sentence, including probation."

The offense conduct took place between January 1990 and March 1992. Futterman was on probation for the second theft by check

offense from March 1991 to September 1991. Futterman's contention that she did not know that she was on probation is belied by her signature on the order granting her probation which clearly states that the probationary period was to last six months. Even if her probation was unsupervised, as she claims, an unsupervised probationary period is counted under the guidelines. § 4A1.1, comment. (n.4). To the extent that Futterman reasserts her earlier argument that this offense was not applicable under § 4A1.2(c) and thus should not trigger the probation enhancement, her position is untenable for the reasons explained above. The district court did not err in adjusting her criminal history category by two levels for being on probation during the time she committed the offense. AFFIRMED.