

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1333
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRADLEY HUFF,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

(2:92 CR 17 01)

(October 8, 1993)

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Pursuant to a plea agreement, Bradley Huff pleaded guilty to a charge of assessory after the fact on the violation of failure to appear, 18 U.S.C. § 3. The Presentence Report (PSR) indicated that Huff knowingly assisted his father in order to prevent his arrest.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

His father had skipped bond by failing to appear before a magistrate judge on various federal offenses. Huff met with his father secretly to deliver a federal express package addressed to him and warned him by telephone that United States' Marshals were looking for him. Huff also attempted to obtain license plates for his father by using a false name and was apprehended when he went to pick them up from a car dealer. At the plea hearing, Huff admitted as true the acts set forth in the PSR.

Huff was sentenced to six months imprisonment, three years supervised release, and ordered to pay a fine of \$25,000, exceeding the fine range of \$250 to \$5,000 "because of the nature of the offense." Huff filed a timely notice of appeal. This Court vacated and remanded as to the fine imposed, holding that the district court's reason that the fine was warranted "due to the nature of the offense" was insufficient as an explanation for the upward departure. On remand and after a resentencing hearing, the district court imposed an \$18,000 fine. The amount included \$5,000 as a punitive fine and \$13,000 as cost of incarceration and supervised release. Huff filed a timely notice of appeal.

OPINION

Huff's sole argument focuses on the fine imposed by the district court as part of his sentence.

"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. Id.; § 5E1.2(a). But cf. United States v. Voda, 994 F.2d 149, 154 n.13 (5th Cir. 1993) (the inability to pay does not preclude the imposition of a fine). "The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is *punitive*." Section 5E1.2(e) (emphasis added). A fine may be appropriate even if it constitutes a "significant financial burden." See Matovsky, 935 F.2d at 723 (citation omitted).

In determining the fine, the guidelines list seven factors for consideration as follows: (1) the seriousness of the crime and the need for punishment and deterrence; (2) evidence presented regarding the defendant's ability to pay the fine (including the ability to pay over a period of time) based on his earning capacity and financial resources; (3) the burden the fine creates for the defendant and his dependents relative to alternative punishment; (4) any restitution the defendant has made or must make to victims; (5) collateral consequences such as other obligations resulting from the offense; (6) previous fines for similar offenses; and (7) any other pertinent equitable consideration. See § 5E1.2(d)(1-7).

The defendant has the burden of proving his inability to pay the fine. United States v. Fair, 979 F.2d 1037, 1041 (5th Cir.

1992). "If the defendant makes such a showing, the court may impose a lesser fine, or waive the fine altogether." Id. (citing § 5E1.2(a) and (f)). District courts are not required to make express findings with respect to the defendant's ability to pay. Id. at 1040; Matovsky, 935 F.2d at 722. An exception exists when the district court "adopts a PSR's findings, but then decides to depart from the PSR's recommendation on fines or cost of incarceration," in which case "specific findings are necessary." Fair, 979 F.2d at 1041. The defendant "may rely on the PSR to establish his inability to pay a fine or cost of incarceration." Id.

When a sentencing court adopts a PSR which recites facts showing limited or no ability to pay a fine the government must then come forward with evidence showing that a defendant can in fact pay a fine before one can be imposed. For example, the government can point to evidence of assets concealed by the defendant, evidence of the future earning potential of the defendant, and even evidence of the wealth of the defendant's family. Once such a showing has been made, it is within the trial court's discretion to . . . determine if a fine should be applied, and if so, the proper amount within the applicable guideline range. The trial court should give its reasons for departing from the PSR's recommendations on fines and costs of incarceration.

Id. at 1041-42 (internal citations omitted).

Under § 5E1.2(i), in addition to the ranges set forth under § 5E1.2(c), in this case \$250 to \$5,000, the district court must impose costs to the Government for "imprisonment, probation, or supervised release," subject to § 5E1.2(f), which provides that the fine may be reduced or waived if the defendant establishes his inability to pay the fine--even by a reasonable installment schedule--and that the fine would unduly burden his dependents. In

order to impose a fine to reflect the cost of incarceration, an initial punitive fine must also have been imposed. See Fair, 979 F.2d at 1041-42.

With an offense level of 4, Huff does not dispute that the district court's \$5000 punitive fine, imposed at the top of the guideline range, was error. See PSR at ¶ 45 & Sentencing Recommendation; § 5E1.2(c)(3); Rather, Huff argues that the district court erred when it imposed an additional \$13,000 for the costs of incarceration because the "uncontradicted evidence" showed that he was unable to pay that amount, i.e., that he was indigent. The evidence, however, is not contradicted.

The PSR indicated that Huff had net assets consisting of his home equity of \$30,000 and liabilities of \$75,260, resulting in a negative net worth of \$45,260. The net-worth calculation was incorrect, however, because Huff's only listed asset, his home equity of \$30,000, was offset mainly by his home mortgage balance of \$72,660, which failed to factor in the gross value of his home. The PSR reported further that Huff's necessary monthly living expenses were \$799.70 and his average monthly earnings, \$1000.¹ The PSR concluded that Huff "does not possess the ability to pay a court ordered financial obligation."

At the resentencing hearing, the Government corrected Huff's net-worth calculation by introducing the probation officer's testimony that his net assets totaled \$102,000, the value of his

¹ The necessary living expenses, however, listed only his mortgage payment (\$689.70) and his utilities (\$110).

home, rather than his home equity, \$30,000, resulting in a net worth of over \$27,000 after considering the mortgage and other debts. The Government indicated that Huff's correct net-worth calculation reflected only his financial status at the time the report was made. Because the Government's correction of the PSR's calculations, taken together with the PSR's other findings, rebutted any presumption from the PSR that Huff was unable to pay the fine, the burden shifted to Huff to prove that he could not pay it. See Fair, 979 F.2d at 1041-42.

Huff testified that, since his release five months earlier, he had difficulty finding employment because of his federal conviction. He testified that he had a wife and two children and that, after losing his home and business, he had exhausted the resulting \$22,000 home equity to pay for bills and living expenses for his family. Huff testified further that his wife was a full-time student and his sole source of income was from her educational grants. He stated that he still owed money to creditors and concluded that the payment of a significant fine would "create a tremendous burden on me and my family." Huff also testified that he believed the chances of being able to pay the fine in the future were "pretty slim." Huff provided no other proof that he had exhausted the equity in his home or that he had sought employment since his release. The Government declined to present any further argument.

The district court determined the following:

The [c]ourt has set an \$18,000 [fine]. That fine is within the guidelines. The guidelines provide that the

[c]ourt, subject to your ability to pay, should impose an amount to pay for your incarceration and also to pay for the term of supervised release. Under the present calculations for that, the cost of imprisonment would be \$8,952. The cost of supervised release, of supervision for you, would be \$13,102.80. The maximum under the guidelines is \$5,000, so what I have imposed is slightly less than the maximum the guidelines provide when you consider the cost of supervision and the cost of incarceration.

The fine was thus within the applicable guideline range. The district court continued:

The [c]ourt has set [the fine] simply because of the systematic manner in which you proceeded in connection with the offense with which you are charged, in the deliberate manner in which you did it. And the [c]ourt is of the opinion that you caused great expense to the government and that you should pay a fine because of that. Since you are on a period of three years supervised release, the [c]ourt sees no reason why someone of your abilities and your background could not pay the fine, because you will have a period of time in which to seek employment and do that.

The district court's findings were not clearly erroneous. Huff failed to establish his contention that he could not pay the fine in the future. The PSR indicated that Huff completed his GED and had attended three semesters of college, receiving average grades. The PSR further indicated that Huff had business experience, having owned a business from which he earned about \$30,000 in 1991. Because the PSR, together with the Government's corrections at the resentencing hearing, did not support Huff's allegation that he could not pay the fine, specific findings as to Huff's ability to pay were not necessary. See Fair, 979 F.2d at 1041. "[E]ven if [a defendant] had a negative net worth at the time of sentencing, the sentencing judge could base his sentencing determination on [the defendant's] future ability to earn." See

United States v. O'Banion, 943 F.2d 1422, 1432 n.11 (5th Cir.
1991).

AFFIRMED.