UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1338
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM E. GIBSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-075-R)

(March 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

William E. Gibson was charged in a twenty-five count indictment with wire fraud and bank fraud and was convicted by a jury on twenty-two of those counts.

He was sentenced to concurrent terms of thirty-three months imprisonment on each count; concurrent three year terms of supervised release; restitution in the amount of $53,218.92; a fine of $113,386.80 consisting of a $60,000 punitive fine, $49,236 for the cost of his imprisonment, and $4,150.80 for the cost of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

supervision. A special assessment of $1,100 was also imposed. He appeals both his conviction and his sentence. We find no reversible error and affirm.

As part of his pay, the bank by which Gibson was employed reimbursed him for one first class round trip airline ticket between Dallas and Chicago each week. Basically, Gibson's practice was to purchase a full fare ticket, call the airline for a first class upgrade because he was a frequent flyer, substitute an invalid coupon from a restricted ticket for the actual flight coupon and later return his full fare ticket to the airline for a refund. He also obtained full reimbursement from his employer. All reservations and changes of reservations were originated in Dallas and were processed through the airline's reservation computer operations in Tulsa.

Gibson first argues that the district court erred in denying his motion to suppress the evidence seized from his brief case when he was arrested. The district court held a hearing on the motion and dictated its reasons for denial of the motion into the record. Appellant has failed to provide us the transcript of that hearing so we are unable to consider this issue. Fed. R. App. P. 10(b); United States v. O'Brien, 898 F.2d 983, 985 (5th Cir. 1990).

Next Appellant complains that the district court in this criminal case prevented him from undertaking discovery in a civil suit which he filed against the airline. He has dismissed his civil suit, and it is unclear from his brief what relief he seeks. His dismissal of the civil suit renders the issue moot. The

district court's order has no bearing on the outcome of this criminal appeal.

Gibson next argues that the Government's evidence was insufficient to prove that he knowingly used a wire communication to execute a scheme to defraud, and that he had a specific intent to commit fraud. We review the evidence in the light most favorable to the verdict. United States v. El-Zoubi, 993 F.2d 442, 445 (5th Cir. 1993).

The Government must prove that Gibson used, or caused to be used, a wire communication in furtherance of his scheme. United States v. St. Gelais, 952 F.2d 90, 95 (5th Cir.), cert. denied, 113 S.Ct. 439 (1992). Neither of Appellant's arguments has merit. He claims that he simply spoke by telephone with the reservations agent who then transmitted the change of reservation data from Dallas to Tulsa. He argues that the nexus between his fraud and the wire communication is too slight to constitute the crime. However, it is obvious that an experienced traveler like Appellant knew that his call to an airline reservation agent to change some status of the reservation would require the agent to use the airline's national computer system in the ordinary course of making the change. See United States v. Dula, 989 F.2d 772, 778 (5th Cir.), cert. denied, 114 S.Ct. 172 (1993).

Likewise, Gibson's argument that he believed that his conduct was condoned by the airline and that he, therefore, lacked the specific intent to defraud is meritless. The jury heard evidence concerning twenty-four examples of Appellant's activities. For

each of these flights, he purchased a full fare ticket, obtained a boarding pass with a valid ticket, and substituted an invalid coupon before boarding the flight. It is clear that he intentionally planned to deceive the airline by this substitution, and his testimony that he openly presented restricted tickets which the airline accepted was clearly refuted. There is no showing that he gave the airline the opportunity to make an exception by accepting an invalid ticket. Intent to defraud another for one's own financial gain constitutes the specific intent to defraud required by the statute. St. Gelias, 952 F.2d at 96. At the sentencing hearing, the district court found that "[t]he defendant did not tell the ticket agent, he didn't tell the gate person, he didn't tell anyone at American what he was doing." Moreover, there was evidence that Appellant intended to defraud for his own financial gain. He received a refund from the airline for the tickets and reimbursement from his employer for the same tickets.

Appellant's argument on the sufficiency of the evidence is really a contest of the credibility of the Government's evidence and the jury has already made that determination to Appellant's detriment. United States v. Greenwood, 974 F.2d 1449, 1458 (5th Cir. 1992), cert. denied, 113 S.Ct. 2354 (1993).

Gibson contends that his sentencing was improper for several reasons. First, he claims that the "trip value" and the "free ticket" components were overstated by inclusion of flights which did not exist, and by duplication between the "trip value" and "free ticket" amounts. Our review of the record does not show

clear error on the part of the district court in the values used. See United States v. Sowels, 998 F.2d 249, 251 (5th Cir. 1993), cert. denied, 1994 U.S. Lexis 1567, 62 U.S.L.W. 3551 (U.S. 1994); United States v. Robichaux, 995 F.2d 565, 571 (5th Cir.), cert. denied, 114 S.Ct. 322 (1993).

The district court calculated the intended loss at $45,500 based upon the unused tickets found in Appellant's brief case. He claims this is excessive because it assumes that he would have used all of the tickets to further his scheme to defraud and that if that number of tickets is used, it should be reduced by what he actually paid for the tickets. The district court specifically found that the calculation could not be done with mathematical precision and that the $450 average figure per ticket was reasonable. We find no error in that conclusion. United States v. Wimbish, 980 F.2d 312, 316 (5th Cir. 1992), cert. denied, 113 S.Ct. 2365 (1993).

Likewise, Appellant complains of the calculation of the loss to the employer-bank which he claims should have been based upon the estimated value of the coupons he actually used. In fact the evidence established that he submitted at least forty-four airline ticket receipts for full reimbursement from his employer-bank and was reimbursed a total of $43,663.92. The district court correctly found that the defendant defrauded his employer bank by getting reimbursement for tickets that had already been refunded to him by the airline. We find no clear error in the district court's findings.

Appellant's base offense level was increased two levels pursuant to United States Sentencing Guidelines Section 3B1.3 because of a finding by the district court that he abused a position of trust. Relying upon Application Note 2 of that section, Appellant claims error. Gibson argues that his position of trust with the bank did not contribute in any substantial way to facilitating his crime because any bank employee could have done the same thing. On the contrary, the district court found that his position as a senior official at the bank put him in a position where he felt he could carry out his fraud and never be indicted because of his position. In short, the district court found that he was routinely able to do something that only employees deemed trustworthy and highly responsible would have been able to do. See United States v. Ehrlich, 902 F.2d 327, 330 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). There was no clear error in this finding.

Finally, Appellant contends that it was error to impose a fine for the purpose of recovering the costs of his incarceration under United States Sentencing Guidelines § 5E1.2(i). He relies on United States v. Spiropoulos, 976 F.2d 155 (3rd Cir. 1992). As the Spiropoulos court recognized, however, that decision is in tension with the reasoning of this Court in United States v. Hagmann, 950 F.2d 175 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992), wherein we concluded that, by a combination of calculating under the fine table to determine the initial range and then looking to the cost of imprisonment, the sentencing commission realized the

goals of § 3553. We continue to adhere to our reasoning in Hagmann, that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment--an indicator of the actual harm each has inflicted upon society--is a rational means to assist the victims of crime collectively." 950 F.2d at 187.

AFFIRMED.