UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1444
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SCOTTY LEON ROLLINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-505-R)

(January 3, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:[1]

Rollins pled guilty to purchasing a stolen vehicle knowing that its identification number had been altered. In this appeal, Rollins challenges his sentence. We affirm.

I.

Count One of an indictment filed in December 1992, charged appellant Scotty Rollins, Rudy Orozco, and others with conspiring

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to alter vehicle identification numbers (VINs) and to purchase, with the intent to sell, motor vehicles and vehicle parts of which the VINs had been altered. Count Three alleged that Rollins bought a stolen Ford Mark III van with intent to sell or otherwise distribute it, knowing that its VIN had been altered, in violation of 18 U.S.C. § 2321. Pursuant to a plea agreement, Rollins pled guilty to Count Three and the district court dismissed Count One.

Rollins filed several objections to the presentence investigation report, (PSR) which the court overruled at the sentencing hearing. The court sentenced Rollins to 20 months of imprisonment and three years of supervised release. The court also ordered Rollins to pay restitution in the amount of $19,572.10 to the insurance company which had paid claims to the vehicle owner. The court stated that the amount of restitution due would be reduced by the amount the insurance company received upon selling the van involved in Count Three. During the pendency of this appeal, the court reduced the amount of restitution to $11,505.85 after the insurance company sold the van.

Rollins admitted that in December 1991, he bought the Ford Mark III van involved in Count Three from Steve Cardwell, a vehicle dealer, who told him that the van had been stolen. Rollins then switched the VIN from a wrecked van he had purchased earlier to the stolen van. He admitted that he subsequently purchased other stolen vehicles from Cardwell and that Cardwell told him that those cars also were stolen. The PSR states that Cardwell was the suspected leader of a conspiracy and ties Rollins to the

conspiracy. Despite Rollins' denial that he was a member of the conspiracy, the court adopted the PSR.

In March 1992, Rollins and his co-conspirators used parts from a salvaged vehicle to rebuild a Chevrolet Silverado truck stolen by one of Rollins' co-conspirators. An insurance company paid a claim to the Silverado's owner totaling $8,408.87.

In April 1992, a search of Rollins' property produced three additional stolen vehicles. Insurance companies had paid $13,500 to owners of two of the vehicles; the estimated value of the third vehicle was $4,500.

The PSR valued the loss of these three vehicles, the stolen Silverado, and the Ford Mark III van involved in Count Three at $45,980.97. Because the total loss was more than $40,000 but less than $70,000, the court added five levels to Rollins' base offense level of eight, pursuant to U.S.S.G. §§ 2B6.1(b)(1) and 2F1.1(b)(1)(F). As recommended by the PSR, the court added two levels because Rollins "was in the business of receiving and selling stolen property." U.S.S.G. § 2B6.1(b)(2). The court reduced his offense level by two for acceptance of responsibility and further reduced it by two for substantial assistance to the government, arriving at a base offense level of 11 and a sentencing range of 18 to 24 months.

II.

A.

Rollins contends that his total offense level should be reduced one level because the district court erred in attributing $19,572.10 as the amount of loss to the victims, making the total

loss more than $40,000. Rollins relies on the uncontradicted testimony of a vehicle dealer who stated that when the van was stolen, it was worth between $11,000 and $12,500. Rollins argues that because the total harm to victims in this case was only the insurance company's net loss of $11,875.75, the value of the van for determining the loss amount should have been $12,500 at most.

Rollins relies principally on **United States v. Thomas**, 973 F.2d 1152, 1159 (5th Cir. 1992) wherein, he asserts, this court held that the loss amount under § 2F1.1 is the market value of the items stolen and "**only** where ascertaining market value is impractical, **may** a court measure loss in some other way." The **Thomas** court also noted, however, that the commentary to § 2B1.1 provides that "[w]here the market value is . . . inadequate to measure the harm to the victim, the court may measure loss in some other way." 973 F.2d at 1159 n.9.

In Rollins' case, the district court found that the insurance company was the victim and that the harm to it consisted of its payment of $19,572.10 in claims relative to the vehicle involved in Count Three. This ruling is consistent with the comment to § 2B1.1 that "[i]n the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately." **See United States v. Cockerham**, 919 F.2d 286, 289 (5th Cir. 1990). Accordingly, Rollins is not entitled to a reduction in the loss amount under § 2B1.1 by the amount the

insurance company later received for the stolen Mark III van.[2]

B.

Rollins argues next that the district court reversibly erred by overruling his objection to the two-level increase in his offense level because he was "in the business of receiving and selling stolen property" as provided by § 2B6.1(b)(2). He argues that no evidence indicates that he regularly engaged in the fencing business. Rollins also points out that he derived most of his income from a legitimate business and that the PSR stated that he bought **and** sold only one vehicle, the Ford Mark III van.

The record supports the district court's finding that Rollins was "in the business of receiving and selling stolen property [ITB]." § 2B6.1(b)(2). About four months after he sold the Mark III van, investigators found three stolen vehicles on his property. Two of them had been stolen only a month before the search, and there was no evidence concerning when Rollins acquired the third vehicle, which had been stolen in 1986. Rollins also admitted that after he sold the van, he purchased other vehicles from Cardwell, knowing that they had been stolen.

The PSR stated, and the district court found, that Rollins was a member of a large and sophisticated conspiracy engaged in stealing vehicles, altering their VINs, and selling stolen vehicles and their parts to innocent purchasers. At least 29 stolen vehicles were recovered in connection with this conspiracy. The

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[2] In fact, Rollins was fortunate that his offense level was not determined by the total value of the 29 stolen vehicles which were connected to the conspiracy.

district court did not err in finding that Rollins was in the business of receiving and selling stolen property.

C.

Rollins contends next that the district court erred by ordering him to pay restitution because the loss in his case was not caused by the conduct that formed the basis for his conviction--the resale of the van--but solely by the initial theft of the Ford Mark III van.

Rollins recognizes that because he makes this contention for the first time on appeal, the court "will only review the restitution order for plain error." He relies on **United States v. Herndon**, 982 F.2d 1411, 1420 (10th Cir. 1992), which held that an imposition of restitution which is illegal constitutes reversible plain error.

In **Herndon**, the court overturned the restitution order on grounds that the appellant had been convicted only of altering VINs in violation of 18 U.S.C. § 511, and that "[t]he damage suffered by the victims here, insurance payouts and loss of the use of the stolen pickup truck over time, could have occurred regardless of whether Herndon altered its VIN." 982 F.2d at 1422. The court reasoned that the government had failed to carry its "burden of demonstrating that [the] defendant's conduct resulted in a loss that would not have otherwise occurred." **Id**. at 1421, 1421-22.

Rollins' case is distinguishable from the **Herndon** case because Rollins was convicted of violating 18 U.S.C. § 2321 by buying and receiving with intent to sell or otherwise dispose of the Mark III

van, knowing that its VIN had been altered. The specific conduct upon which the offense was based was his buying the van with knowledge that it had been stolen, altering its VIN, and selling it to an innocent purchaser. The court was entitled to conclude that Rollins' actions constituted a continuation of the scheme to steal the vehicle, as stated in ¶ 3 of the PSR.

Because ordering Rollins to pay restitution to the insurance company does not "`seriously affect[] the fairness, integrity or public reputation of [the] judicial proceedings'" relative thereto, **Olano**, 113 S.Ct. at 1779, we decline to disturb the district court's restitution order.

D.

Rollins contends finally that the restitution order is erroneous because it impermissibly included consequential damages in the form of the insurance company's lien payoff. The $19,572.10 award was based on the total of the lien payoff plus the "Balance due to Insured on Custom Van Replacement." Rollins contends that the amount of restitution should be only $4,113.65, which represents the $12,500 value of the van at the time of loss less the $8,386.35 which the insurance company received upon selling it. Because Rollins did not present this contention to the district court, we also review this argument for plain error.

The day before Rollins' counsel mailed a copy of his appellate brief to the prosecutor, he filed in the district court a motion to reduce the amount of the restitution award. Rollins' motion requested that it be reduced to $11,505.85, the net loss to the

insurance company, including $319.70 it paid for a rental car provided to its insured, the van owner. The district court filed an order granting Rollins' motion on September 13, 1983, the day his brief was filed in this Court.

In **United States v. Mitchell**, 876 F.2d 1178 (5th Cir. 1989), the court held that 18 U.S.C. § 3663(e)(1) permits the court to award restitution to the insurance companies who compensated [their insureds] for their losses." Section 3663(e)(1) provides, in relevant part, that "the court may . . . order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation." Rollins does not now contend that the restitution award should not include the amount the insurance company paid for the rental car, and there is no indication that this expense was not required by the insurance policy. Accordingly, the district court's September 13, 1993, restitution order reflects no plain error.

AFFIRMED.