IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1482
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY ALLEN GRUBE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(4:92-CR-106-A)

(March 31, 1994)

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

PER CURIAM:[*]

Gregory Allen Grube was charged in a superseding indictment with conspiring to commit mail fraud and related offenses, 18 U.S.C. § 371; and with ten counts of wire (telephone) fraud, 18 U.S.C. §§ 1343 and 2. After four days of his jury trial, Grube pleaded guilty on Counts 2, 4, and 5 of this indictment, pursuant to a plea agreement. The court found that Grube's total offense

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

level was 20 and that his criminal history category was I, as to which the guideline range is 33 to 41 months' imprisonment. The court sentenced Grube to concurrent 33-month terms of imprisonment, three years of supervised release, and to pay a $1500 fine.

I

The relevant facts are provided in the "stipulation of facts," which Grube testified was true and correct when he pleaded guilty. Relevant facts also are stated in the presentence report (PSR), which the district court substantially adopted. They are as follows.

Grube's federal indictment resulted from his working for Multicorp, Inc. from about May 31, 1989 to about January 5, 1990. He participated in a scheme to defraud persons throughout the United States to whom Multicorp had sent postcard solicitations guaranteeing prizes. Persons calling the telephone number on the postcard learned that receiving the prizes was conditional upon the purchase of water filtration units or home security systems. The postcards, the prepared sales scripts, and the customer service information utilized by Multicorp, Inc. were misleading, and this misleading information resulted in individuals losing money.

Multicorp hired Grube as a telephone sales representative. As such, he provided false information to individuals regarding: their chances of winning major awards; the value of awards and the water filtration unit; that their credit card accounts would not be billed until after receipt of awards and products; and that the

retail merchandise checks could be redeemed at no cost. The counts to which Grube pleaded guilty allege that he participated in such telephone calls with three different persons concerning the purchase of a water filtration unit. None of these persons lost any money.

The stipulation and PSR further indicate that Grube received paychecks totaling $14,382.55 from Multicorp; its sales during his period of employment totaled about $6.8 million. As a salesman, Grube made 509 sales for a total of $202,509.

Grube was the manager of a Multicorp salesroom from about October 9, 1989, until shortly before he resigned. For almost three months he managed the activities of the individual telephone solicitors and he assisted the sales staff in closing the sale. Managers trained Multicorp employees, monitored salespersons' performance, and set incentives for them. Grube stated that he had "very little decision making authority" and that "he attempted to reduce the potential harm of the scheme."

II

Grube contends that the district court's enhancement of his sentence based on findings of both his "aggravating role" under § 3B1.1(b) and that the offenses involved "more than minimal planning," or involved "a scheme to defraud more than one victim," § 2F1.1(b)(2)(A) and (B), constitute impermissible double-counting.

Paragraph 38 of the PSR noted that Grube "had a total of 509 sales to customers of Multicorp." Paragraph 38 also notes that

there has been "more than minimal planning . . . in any case involving repeated acts over a period of time unless it is clear each instance was purely opportune," citing § 1B1.1, comment. (n.1(f)). Thus, ¶ 38's recommendation of a two-level increase in Grube's offense level was justified under § 2F1.1(b)(2)(A) and also (B). The district court so found.

Paragraph 40 of the PSR states findings that support the three-level increase under § 3B1.1(b) on grounds that Grube was a manager relative to criminal activity that involved five or more participants. As ¶ 40 states, he managed a Multicorp phone room for almost three months, and he assisted in closing sales as one of his duties. Furthermore, he received a higher income than the salespersons; and his manager's commission was guaranteed even if a salesperson made a "bad sale" so that an amount was deducted from his salary. PSR Addendum to ¶ 40. Grube also had the responsibility of hiring, as well as firing, members of his sales force.

The district court denied Grube's double-counting objection on grounds that "[t]he status as manager has to do with the defendant's status, and the matter of planning has to do with activities." Later the court added: "Even if that were not so, absent some indication that I am not to apply the guidelines as written, I think I have an obligation to apply them as written."

Grube relies on U.S. v. Romano, 970 F.2d 164, 166-67 (6th Cir. 1992), which held that such an enhancement constituted

impermissible double-counting. The court reasoned that "if certain conduct is used to enhance a defendant's sentence under one enhancement provision, the defendant should not be penalized for the same conduct again under a separate [guideline] provision." Id. at 167. The Sixth Circuit disagreed with U.S. v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991), which allowed both enhancements. 970 F.2d at 166.

The Curtis Court relied on and quoted from this court's U.S. v. Rocha, 916 F.2d 219, 243 (5th Cir. 1990) (footnote omitted), cert. denied, 111 S.Ct. 2057 (1991), as follows: "Under the principle of statutory construction expressio unius est exclusio alterius, the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." 934 F.2d at 556. The Curtis Court observed that "[t]he Sentencing Guidelines are explicit when double counting is forbidden." Id.

In U.S. v. Willis, 997 F.2d 407, 418-19 (8th Cir. 1993), cert. denied, 114 S.Ct. 704 (1994), the Eighth Circuit agreed with the dissent in Romano, holding that both enhancements were proper. The Willis Court reasoned that "[t]he two sections consider different aspects of the defendant's conduct. Section 2F1.1(b)(2) increases the punishment where the defendant's crime evidenced planning and forethought, showing a disregard for the rule of law. . . . The Sentencing Commission based the enhancement for the defendant's role in the offense on the grounds that leaders or organizers [or

managers] `tend to profit more from [the crime] and present a greater danger to the public and/or are more likely to recidivate.' U.S.S.G. § 3B1.1 comment. (backg'd)." 997 F.2d at 419.

Furthermore, Grube's case is distinguishable on its facts from the rule applied in Romano. The § 2F1.1(b)(2) two-level increase in Grube's offense level was based on his repetitive acts, i.e., his 509 sales as a Multicorp telemarketer. The three-level increase for "aggravating role" was based on his serving for almost three months as a Multicorp salesroom manager. In that capacity, he controlled the salespersons, helped them close sales, and hired them and fired them; and he received a larger income than they did.

Even if the two adjustments are considered to be "double counting," we think that they were appropriate because the guidelines do not preclude making both of them. We held in Rocha, 916 F.2d at 244, that "a [district] court may enhance a defendant's sentence under more than one guideline section or subsection even though the two enhancements are for essentially the same conduct." This sort of enhancement is what Grube complains of; he does not argue that the relevant enhancement sections are ambiguous. "[T]his Court follows the clear, unambiguous language of the Guidelines if [as in Grube's case] there is no discernible manifestation of contrary intent." U.S. v. Vickers, 891 F.2d 86, 88 (5th Cir. 1989).

III

Grube next contends that the district court's increase in his offense level for more-than-minimal planning under § 2F1.1(b)(2) and the increase of eleven levels based on the loss to victims having been more than $5,000,000, pursuant to § 2F1.1(b)(1)(L), constituted impermissible double-counting. Grube's reliance on Romano is misplaced, as explained in our previous discussion. Furthermore, if both enhancements were held to be improper, it would be harmless error in Grube's case. The reason is that his offense level should have been increased by 14 levels for the loss in excess of $5,000,000. § 2F1.1(b)(1)(O). As we will next show, more than $6,000,000 of loss is attributable to Grube for guideline-sentencing purposes.

IV

Grube's next argument is that the district court erred by applying a loss amount of $6,860,482 to him. At sentencing, Grube did not dispute the PSR finding that Multicorp made sales totaling that amount while he worked there. The PSR Addendum to ¶ 37 notes that the actual value of the water filters delivered to customers was less then $800,000, so the net loss to customers was more than $6,000,000. Grube argues that "a participant in a large scheme with a huge dollar loss figure in which he reaps a tiny profit, should not be held accountable at sentencing for the large sums of profits reaped by others." He bases his argument on the fact that

he received income from Multicorp totaling only $14,382.55 and his total sales were only $202,509.

"Since the district court's calculation of the amount of loss [pursuant to § 2F1.1(b)(1)] is a factual finding, we review this determination for clear error." U.S. v. Brown, 7 F.3d 1155, 1159 (5th Cir. 1993). A defendant is held accountable under § 2F1.1(b)(1) for all relevant conduct, which includes all reasonably foreseeable acts and omissions of others that were in furtherance of their of their jointly undertaken criminal activity. U.S. v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992).

We recently affirmed the sentence of one of Grube's original codefendants, Jason Armsden. U.S. v. Armsden, No. 93-1355 (5th Cir. Jan. 6, 1994) (unpublished). Armsden was only a Multicorp telephone salesman for about six weeks, but we upheld the district court's attribution to him of the $2,200,000 lost by Multicorp customers during that time. Accordingly, the district court's determination of the loss attributable to Grube is not erroneous.

V

Finally, Grube contends that the district court clearly erred by increasing his offense level upon finding that he occupied an "aggravating role" in the offenses. He argues that he "did not have significant management responsibilities"; that his "managerial efforts reduced the harm of the fraudulent scheme"; that his profit was only about .2% of Multicorp's total sales; and that his not returning to the telemarketing after execution of a search warrant

on Multicorp shows that he was unwilling to recidivate. He also argues that his managerial role was far less than that of the appellant in U.S. v. Tansley, 986 F.2d 880, 887 (5th Cir. 1993).

Paragraph 40 of the PSR sets out findings in support of the three-level increase under § 3B1.1(b) as "a manager or supervisor [of a] criminal activity [which involved] five or more participants." Paragraph 40 noted that Grube "was manager of the phone room at Multicorp" for almost three months. As such, "he managed the activities of the individual telephone solicitors" and assisted them in closing sales. PSR ¶ 40. In the PSR Addendum to ¶ 40, the probation offices noted that Grube "was in control of others in his sales room, received a larger share of the fruits of the crime and was involved in the recruitment of accomplices, as he also had the responsibility of hiring, as well as firing, members of his sales force." Managers also "trained employees in Multicorp practices and policies," monitored the performance of salespersons, and set incentives for them. PSR ¶ 28.

"The district court's determination that [a defendant] was a manager or supervisor is a finding of fact reviewable under the clearly erroneous standard." U.S v. Pierce, 893 F.2d 669, 676 (5th Cir. 1990). In that case, one person testified that Pierce recruited her into the cocaine conspiracy and had "worked out... prices and means of transportation"; another coconspirator testified that Pierce had "arranged for each shipment" of cocaine. Id. We upheld the district court's finding that Pierce was a

manager or supervisor of an extensive criminal operation. Id. at 667. See also U.S. v. Liu, 960 F.2d 449, 456 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992).

The district court's finding that Grube was a manager pursuant to § 3B1.1(b) is not clearly erroneous. He had direct managerial responsibilities over the salespersons in his telephone room; he received a greater share of the profits than they did; and he recruited new employees for Multicorp. His responsibilities at Multicorp were managerial for almost three months, although different from those of Tansley, who "helped plan, design and advise [his telemarketing] scheme from the beginning." Tansley, 986 F.2d at 887.

Thus, for all the reasons we have set out in this opinion, the sentence and judgment are

A F F I R M E D.