

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1760

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONI RUST,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-203-G)

(February 24, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

After hearing about a way to make money smuggling diamonds into the United States, Toni Rust and Ricky Medack met with Kelly Dillard and Jack Spencer, who started them in a smuggling operation. Rust and Medack flew to Bangkok, Thailand, where they received suitcases with secret compartments. Soon thereafter, Rust

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and Medack flew to Vienna, Austria, and turned the suitcases over to Michael Wilson and Vincent Potts, who were arrested by Austrian authorities. The suitcases contained approximately 3.5 kilograms of heroin.

By the time of the arrests, Rust had returned to Dallas, Texas. She was indicted for conspiring with others to import in excess of one kilogram of heroin, in violation of 21 U.S.C. §§ 952(a), 960. Soon thereafter, Rust pleaded guilty to conspiring to smuggle diamonds, in violation of 18 U.S.C. §§ 371, 545. The district court sentenced her to one year and one day in prison. Rust appealed. We vacate the sentence and remand for resentencing.

I.

Rust alleges that the district court misapplied U.S.S.G. §§ 2T3.1, 2T4.1, which calibrate the base offense level to the amount lost by failure to declare revenue and evasion of import duties.¹ The court adopted the PSR, which did not calculate the

¹ This provision states, in pertinent part:

**Evading Import Duties or Restrictions (Smuggling);
Receiving or Trafficking in Smuggled Property**

(a) Base Offense Level:

(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or

(b) **5**, if the tax loss exceeded \$100 but did not exceed \$1,000; or

(c) **4**, if the tax loss did not exceed \$100.

For purposes of this guideline, the "tax loss" is the amount of the duty.

loss under section 2T3.1 in regard to diamonds, but in regard to heroin.²

Rust argues that the court should have based the loss on the greater of the actual or intended loss in regard to diamonds. As no actual tax loss was sustained because the contraband was seized in Austria, she alleges, the intended loss for attempting to smuggle diamonds is the only loss that the court should have considered. Rust argues that it was error to penalize her for a loss inconsistent with her intent.

Rust has a valid point. The introductory commentary to section 2T3.1 states:

This Subpart deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and is designed to address violations involving revenue collection or trade regulation. It is not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses.

U.S.S.G. § 2T3.1.

² The presentence report, adopted by the district court, made this analysis of the offense level:

Investigators indicate the heroin was purchased in Thailand for approximately \$25,000 per kilogram. The heroin had a retail/wholesale value in the United States of approximately \$175,000 per kilogram. The tax loss would be based on \$150,000 per kilogram times 3.5 kilograms for a total of \$525,000. The corresponding offense level in the Tax Table . . . establishes a base offense level of 16.

U.S.S.G. § 2T3.1, introductory commentary. This commentary indicates that the district court should not have calculated the loss under section 2T3.1 in regard to heroin.

Application note 2 of section 2T3.1 does not mandate a different result. That provision states:

Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.

U.S.S.G. § 2T3.1, note 2. Section 2T3.1(c) refers the district court to other sentencing provisions when calculating the cost of smuggling heroin.

Another reason for not calculating the loss under section 2T3.1 in regard to heroin is that Rust pleaded guilty to conspiring to smuggle diamonds, in violation of 18 U.S.C. §§ 371, 545, a crime covered under section 2T3.1. She did not plead guilty to conspiring to smuggle heroin, in violation of 18 U.S.C. §§ 952(a), 960. Rust should not have been sentenced based on the amount of heroin smuggled not only because it is not covered under section 2T3.1, but also because she did not plead guilty to conspiring to smuggle that drug.

It is more consistent with section 2T3.1 and Rust's plea to calculate the loss from the greater of either the actual amount of

diamonds Rust smuggled or the amount of diamonds Rust intended to smuggle.³ Rust did not smuggle any diamonds, so the loss should be calculated based on the amount of diamonds she intended to smuggle. If the district court finds no measurable way to do so, the base offense level should be 6 on the basis of a zero loss.

II.

Prior to sentencing, Rust filed a motion for a downward departure based upon her extraordinarily tragic personal background and family history. She objects that the district court failed to consider this motion. To the contrary, the court considered this motion and factored these circumstances into the sentence. We will not reverse for failure of the court to consider personal background or family history.

VACATED and REMANDED.

³ This approach comports with the way that we and other appellate courts have calculated the base offense levels in fraud, theft, and tax cases under U.S.S.G. §§ 2B1.1, 2F1.1, 2T1.1-2T1.3. See, e.g., United States v. Moore, 997 F.2d 55, 60-62 (5th Cir. 1993); United States v. Katora, 981 F.2d 1398, 1406 (3rd Cir. 1992); United States v. Wimbish, 980 F.2d 312, 315-16 (5th Cir. 1992); United States v. Kopp, 951 F.2d 521, 531-36 (3rd Cir. 1991).