UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2282
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED LEROY HARWOOD,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
(CR-H-92-97-2)

(March 31, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Fred Harwood (Harwood) was convicted, pursuant to his plea of guilty, of conspiracy to commit bank fraud and misapplication of funds in violation of 18 U.S.C. § 371, and was sentenced to serve a twenty-one month term of imprisonment. Harwood now appeals the district court's application of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Sentencing Guidelines claiming the court improperly considered (1) the intended rather than the actual losses and (2) the acts of other conspirators. Finding that the district court properly applied the Sentencing Guidelines, we affirm.

Facts and Proceedings Below

On April 10, 1992, Harwood was indicted, along with James Barrus, Jr. (Barrus), Elliot Bernstein, Chad Godfrey, James Trodden, and Gloria Manchester, on eleven counts of conspiracy to commit bank fraud and various substantive charges. The conspirators concocted an elaborate scheme whereby they would create shell companies to purchase controlling interests in several ailing Texas banks with small amounts of money, then cause the management of the target banks to purchase worthless debentures issued by companies owned by Barrus. The proceeds from the debenture sales would be deposited in accounts held by Barrus-controlled entities and used to purchase additional distressed banks. The conspirators created counterfeit certificates of deposit and phony financial statements prepared by nonexistent accounting firms to create the appearance of financial assets and fraudulently obtained loans to produce "show money" for the acquisitions.

As part of this scheme, the conspirators created Liberty Financial, another shell corporation, for the sole purpose of acquiring ResourceBank, N.A., of Houston. Harwood attended the closing of the acquisition as president of Liberty Financial, and afterwards he became the sole director of ResourceBank. On October 21, 1988, Harwood entered an agreement with his co-conspirators in

which ResourceBank would pay sixteen million dollars to purchase a debenture with a face value of twenty million dollars from a Barrus-controlled company. The debenture itself was worthless, and was never backed by more than $2.8 million in bonds. Harwood also agreed to purchase additional debentures for more than a million dollars from various dormant companies in which Harwood served as an officer.

Pursuant to a plea bargain agreement, Harwood pleaded guilty to a single count of conspiracy to commit bank fraud and misapplication of funds of a federally insured financial institution in violation of 18 U.S.C. § 371. The Presentence Investigation Report (PSI) estimated the total amount of money involved in the illegal transactions covered by the entire criminal scheme to be four hundred million dollars. In connection with the ResourceBank purchase, the PSI found that a total of $31.2 million was disbursed to the various shell corporations and that the use of these funds was foreseeable to all conspirators.[1] Once the conspiracy had been uncovered, ResourceBank was able to recover all but $2,217,952 of its losses. Afterwards, the FDIC brought a civil suit against the conspirators (including Harwood) and received a default judgment for the remaining amount (hereinafter, the Civil Judgment). A portion of this judgment has since been collected,

[1] Harwood maintains that the only money he received from the entire venture was $10,000 and a car as payment for his services. This fact is irrelevant for sentencing purposes because the Sentencing Guidelines calculate the magnitude of the offense based on what the victim lost rather than simply what the criminal gained. *See* United States Sentencing Commission, *Guidelines Manual* (U.S.S.G.) § 2B1.1, comment. (n.2) (1988).

leaving an unpaid amount of $1,672,757.

The PSI assessed Harwood's base offense level at six under the 1988 version of the Sentencing Guidelines and applied a ten point increase for an amount of loss between $2,000,001 and $5,000,000. U.S.S.G. § 2F1.1(b)(1)(K) (1988).[2] The PSI also assessed a two point enhancement under U.S.S.G. § 2F1.1(b)(2) for more than minimal planning and a three point enhancement under U.S.S.G. § 3B1.1(b) for Harwood's role as a manager in the conspiracy. After a two point reduction for acceptance of responsibility, Harwood's total offense level was nineteen. Responding to Harwood's written objections to the PSI, the district court found that he was not a manager and consequently lowered his offense level to sixteen. However, the court rejected Harwood's objection to the computation of the foreseeable loss and adopted the PSI's calculation of $2,217,952. With no prior criminal record, Harwood's criminal history category was I, resulting in a sentencing range of twenty-one to twenty-seven months' imprisonment. The court sentenced Harwood to twenty-one months' imprisonment followed by three years' supervised release, but did not impose restitution since Harwood was already required to pay ResourceBank in accordance with the Civil Judgment.

Discussion

We review the sentence to determine whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous. *United States v. Montoya-Ortiz*, 7

[2] Unless otherwise noted, all references to the Sentencing Guidelines refer to the 1988 version.

F.3d 1171, 1179 (5th Cir. 1993). A factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. *Anderson v. City of Bessermer City*, 105 S.Ct. 1504 (1985). We review the court's legal conclusions regarding the Sentencing Guidelines *de novo*.[3] *Montoya-Ortiz*, 7 F.3d at 1179.

Harwood claims the district court erred in holding him accountable for a loss of $2.2 million in determining his offense level. He argues that because he never intended to inflict any loss, he should only be held accountable for the bank's actual losses. He also argues that because he was a mere pawn in the conspiracy and did not substantially profit, he should not be punished for the deeds of his co-conspirators. We do not find either of these arguments persuasive.

I. Intended Loss

Harwood admits that the measure of loss for sentencing purposes is usually the extent of the intended fraud rather than the actual loss suffered. For instance, the Guidelines state:

> "[I]f a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the 'loss' would be treated as $40,000 for purposes of this guideline."

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[3] The government argues that we should limit our review to plain error because Harwood did not raise these objections at sentencing. We tend to disagree because Harwood's written objections to the PSI were so closely related to the arguments raised on appeal that our ordinary standard for reviewing the application of Sentencing Guidelines arguably should apply. However, we need not resolve this because even under the more lenient standard of review where claimed error has been properly preserved, we find Harwood's contentions are ultimately unavailing.

U.S.S.G. § 2F1.1, comment. (n.7).

Harwood claims, however, that he believed entering into the arrangement with Barrus was the only way to save the failing ResourceBank. It follows, so he argues, that because he never intended the bank to incur any loss, the intended amount of loss could not exceed the actual losses.[4] The record, however, supports the conclusion that Harwood *did* intend to cause a loss to the bank. Sworn admissions made by Harwood in conjunction with his plea agreement indicate that when he signed the debenture purchase agreement as the president of ResourceBank he knew the debenture was worth no more than $2.8 millionsQa fraction of the 16 million

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[4] To support this argument, Harwood asserts that in situations where the defendant uses fraudulent means to obtain a contract, but intends to perform, the loss should be measured by the extent of the actual loss suffered. Although he seems to rely on commentary note eleven of section 2F1.1, his argument seriously mischaracterizes the position taken by the Guidelines. Note eleven provides that:

> "In a few instances, the total dollar loss that results from the offense may overstate its seriousness. [Such as] when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay; . . . and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices, but where the value of the securities subsequently declined in substantial part for other reasons. In such instances, a *downward departure* may be warranted." (Emphasis added).

Nowhere do the Guidelines state that actual losses should be used under these circumstances. Harwood's interpretation of this note leads to untenable results. For instance, suppose a bank officer fraudulently withdraws funds from his bank to use for his own purposes while intending to repay the illegally obtained money before it is discovered missing. Should his scheme succeed, he would not be held accountable for *any* losses because no actual loss would have been incurred.

dollars paid by ResourceBank. These admissions contradict any claim that Harwood thought he was acting in the best interests of the bank. Thus, the court's findings are not clearly erroneous.

Moreover, we fail to see any relevance in Harwood's contention because the amount of loss used by the district court does *not* appear to exceed the actual loss suffered by ResourceBank. The court relied on the amount of damages listed in the Civil Judgment as evidence of the amount of loss resulting from the ResourceBank transaction. We do not find reliance on such material to be clearly erroneous because the Guidelines provide that the amount of "loss need not be determined with precision, and may be inferred from any reasonably reliable information available . . . ." U.S.S.G. § 2B1.1, comment. (n.3).[5] As president of ResourceBank, Harwood caused the bank to disburse approximately sixteen million dollars for a debenture worth less than three million dollars. Arguably, the district court was being generous in limiting the measure of loss to the amount stated in the Civil Judgment. Since the disparity between the funds dispersed from ResourceBank and the value of the securities backing the debentures was roughly $13.2 million, the court could have calculated Harwood's "intended loss" significantly above $2.2 million.

Similarly, the fact that the FDIC subsequent to the Civil

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[5] Although this commentary refers to losses caused by "larceny, embezzlement, and other forms of theft," it is incorporated into the provision covering "fraud and deceit" by U.S.S.G. § 2F1.1, comment. (n.7). Similarly, commentary note eight adds that "[t]he court need only make a reasonable estimate of the range of loss, given the available information." U.S.S.G § 2F1.1, comment. (n.8).

Judgment has been able to recover a portion of the ResourceBank losses does not alter the amount of loss caused by the conspirators' activity. *United States v. Frydenlund*, 990 F.2d 822, 826 (5th Cir.), *cert. denied*, 114 S.Ct. 192 (1993); *United States v. Carey*, 895 F.2d 318, 322-23 (7th Cir. 1990). In *Carey*, the district court granted a downward departure because the defendant had paid all but $20,000 of the $220,000 he had defrauded from the bank in a check kiting scheme. The Seventh Circuit reversed, holding that the downward departure "is warranted only in the rare situation where the defendant should not be held responsible for the entire loss due to extrinsic reasons beyond his control." *Carey*, 895 F.2d at 323. As we noted in *Frydenlund*, a defendant's paying "restitution of the lion's share of the money, though commendable, [does] not decrease the seriousness of the crime he ha[s] committed." *Frydenlund*, 990 F.2d at 826. The district court specifically noted that had there been no Civil Judgment, it would have imposed an order of restitution for a like amount as part of Harwood's sentence.[6]

II. Foreseeable Acts of Co-conspirators

Harwood also argues that he should not be held accountable for the entire amount of loss caused by the conspiracy because he was no more than Barrus's pawn. Under the Sentencing Guidelines, a

[6] While restitution neither reduces the magnitude of the loss, nor alleviates the seriousness of the crime, we do not wish to imply that a defendant's voluntary payment of restitution is entirely irrelevant for sentencing purposes. It may be taken into account in sentencing within the guideline range. In certain instances, it might arguably be relevant to downward departure.

defendant is liable for his own conduct as well as all reasonably foreseeable acts of his co-conspirators committed in furtherance of the jointly-undertaken criminal endeavor. U.S.S.G. § 1B1.3(a)(1) & comment. (n.1); *United States v. Puma*, 937 F.2d 151, 159 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1165 (1992). The Guidelines provide the following example to illustrate the scope of a co-conspirator's liability in the context of mail fraud:

> "Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount ($55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire $55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable." U.S.S.G. § 1B1.3, illus. (d) (added Nov. 1, 1989).

In sentencing Harwood, the district court did not hold him accountable for the entire conspiracy but only for the loss caused by his dealings with ResourceBank. The acquisition of ResourceBank and the agreement to purchase worthless debentures were not merely in furtherance of the conspiracySQthey were the primary purpose of the conspiracy (or this portion of it in which Harwood was so involved). The extent of Harwood's involvement in these matters is not in dispute. Thus, the district court's finding that the activities of the conspirators were foreseeable to Harwood was not clearly erroneous.

Conclusion

The district court properly applied the Sentencing Guidelines. Accordingly, we

AFFIRM.