

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-2369  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RONALD MESSNER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

(CR-H-92-171-01)

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(February 28, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

BACKGROUND

A grand jury indicted Ronald E. Messner on six counts of bank fraud, three counts of pledging counterfeit securities, and two counts of making false statements to financial institutions. A jury found Messner guilty on all eleven counts.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

According to the presentence report (PSR), Messner obtained loans from six different financial institutions between September 5, 1986 and December 4, 1987. PSR ¶ 4. In a typical transaction, Messner would sign a security agreement pledging stock as collateral for the loan. He also would sign a Federal Reserve Form U-1, which certified that the pledged stock certificate was not counterfeit. Id. Rather than pledging authentic certificates, however, Messner pledged 34 counterfeit certificates at the six institutions to collateralize loans, resulting in a loss to the institutions of \$1,154,851. Id. at ¶ 5. The counterfeit certificates represented the stock of LEV Scientific Industries Limited (LEV), a medical research company traded on the Vancouver Stock Exchange. Id. at ¶ 6. In his defense, Messner testified that he received counterfeit certificates representing 450,000 shares of LEV from Sam Margolis, a Minneapolis stock broker, and that he did not know the certificates were counterfeit.

The PSR recommended increasing Messner's offense level for obstruction of justice because Messner caused Timothy Kohn, a stock broker with May & O'Connor Capital, Inc., Investment Bankers, to testify untruthfully to the grand jury. The PSR indicated that Kohn told the grand jury that he received certificates representing 120,000 shares of LEV stock from Margolis through the mail and that he delivered the certificates to Charles Neff at Texas Capital Bank-Westwood (TCB), to secure Messner's loan. The certificates were counterfeit.

At trial, however, Kohn testified that he received the certificates from Messner rather than Margolis. Kohn stated that before he gave his grand jury testimony, he contacted Messner to find out why he had been subpoenaed. Messner told him the investigation concerned the LEV stock Kohn had delivered to TCB. Kohn said that he did not remember the transaction at the time and that Messner told him the transaction involved stock certificates Kohn had received from Margolis.

The PSR also noted that Messner left a recorded message for Kohn shortly before trial in which he told Kohn "keep your chin up, don't crater, everything is fine." When asked at trial what significance this remark had, Kohn stated that it indicated to him that it would be better for Messner if Kohn remembered that the certificates came directly from Margolis, not from Messner. Both Messner and the Government objected to the PSR. Among other things, Messner argued that the obstruction of justice increase was not warranted because Kohn did not lie to the grand jury and his telephone message to Kohn was simply an attempt to provide support to an associate. The Government contended it had established two grounds for the obstruction increase: (1) Messner encouraged Kohn to lie to the grand jury and tried to convince Kohn to lie at trial; and (2) Messner testified falsely at trial in an attempt to blame Margolis for his crimes and continued to lie to the probation officer who prepared the PSR. The Government requested an upward departure based on Messner's continuous prevarications, and because it claimed that, after trial, Messner committed a new crime by

providing a false social security number to a bank when he cashed a \$43,202.50 check.

An addendum to the PSR indicated that there was insufficient evidence to establish that Messner had committed a new crime with respect to the check. The probation officer recommended rejecting Messner's objection to the obstruction increase because Messner had influenced Kohn's grand jury testimony and had attempted to influence his trial testimony. Regarding the Government's contention that Messner testified falsely at trial, the probation officer observed that the court, having heard his testimony, would have to evaluate this claim.

At sentencing, the district court overruled Messner's objection to the obstruction increase, stating:

I'm going to adopt the findings of the [PSR] as to the facts and I'm going to adopt the application of the Guidelines to the facts, and that includes a finding that Mr. Messner obstructed justice when he testified repeatedly on the stand to things that were not correct, that were obviously lies, . . . --he fabricated a story to try to make excuses for what he had done. In addition, it was very clear to me, from watching Mr. Cohn [sic] on the stand, that his testimony was completely believable to me that he had been mistaken in his testimony to the grand jury because Mr. Messner had talked to him about it and had refreshed his memory incorrectly, that when he had subsequently thought about it and talked to his secretary, it occurred to him that this little point, what might seem like a little point to him or anybody else was in fact a big point and, yes, he had remembered it incorrectly. And he received a phone call, a tape of which was played in the courtroom, which indicated very clearly Mr. Messner was indicating to Mr. Cohn [sic] he should stick with the testimony he had given at the grand jury. So, I think there are two instances of obstruction of justice which I think takes it well beyond simply getting on the stand and saying I didn't do it. So, I'm going to give the two points for obstruction of justice . . . .

The court sentenced Messner to a total of 37 months in prison and ordered him to pay restitution of \$1,154,871.70.

OPINION

On appeal, Messner argues that the district court erred by imposing the obstruction enhancement because: (1) his statements to Kohn were ambiguous; and (2) Messner's inaccurate testimony at trial concerning the origin of the stock certificates resulted from a mistake or faulty memory rather than a willful intent to provide false testimony. Messner also argues that the district court erred by failing to make a specific finding as to the materiality of his testimony as required by United States v. Dunnigan, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993).

This Court reviews "the sentencing court's factual finding of obstruction of justice for clear error." United States v. Tello, 9 F.3d 1119, 1122 (5th Cir. 1993) (footnote omitted). A finding is clearly erroneous when, even though there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. Id.

Section 3C1.1 of the Guidelines provides: "If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level . . . by **2** levels." U.S.S.G. § 3C1.1.<sup>1</sup> The guideline commentary

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<sup>1</sup>Sentencing took place in 1993, but the probation officer applied the 1988 edition of the Guidelines. PSR at ¶ 87. Though the probation officer did not explain why, it appears that he was motivated by Ex Post Facto Clause concerns because the conduct for which Messner was being prosecuted occurred between September 5,

identifies as an illustration of the type of conduct to which the increase applies, "testifying untruthfully or suborning untruthful testimony concerning a material fact, . . . during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding." Id., comment. (n.1(c)).

The record supports the district court's finding that Messner's statements to Kohn prior to his grand jury appearance caused Kohn to testify untruthfully. At trial, Kohn testified that before his grand jury appearance, he spoke with Messner, and Messner "indicate[d] it would be better for his side if the stock that I delivered to Mr. Neff came from Sam Margolis as opposed to coming from him." Accordingly, at the grand jury proceeding, Kohn testified that he received the LEV stock certificates from Margolis rather than Messner. At trial, however, Kohn testified that Messner had delivered the stock to him at his office and that his testimony to the grand jury was incorrect. Kohn explained his mistake by stating that early in 1988, Messner "planted a seed in my mind . . . [t]hat the stock came from Sam." He further testified that he had not prepared before his grand jury appearance, that he had not thought about the events for four years, and that he had spoken with Messner just before he testified. After reviewing his files, speaking with his former secretary, and reflecting on the events, Kohn testified that he recalled what actually transpired. The question of where the stock certificates came from was material because Messner claimed that he

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1986 and December 4, 1987.

had unknowingly used counterfeit securities which he had received from Margolis.

This evidence is sufficient to support the increase. In United States v. Graves, 5 F.3d 1546, 1555 (5th Cir. 1993), petition for cert. filed, (U.S. Jan. 18, 1994) (No. 93-1212) this Court affirmed a § 3C1.1 increase based on evidence that the defendant met with his accountant after the accountant testified before the grand jury to learn the substance of that testimony. The defendant then contacted an associate and instructed him to relay the information concerning the accountant's testimony to his brother, who was also involved in the crime and likely to be called to testify to the grand jury. The defendant wanted to ensure that the associate's brother's testimony would be consistent with the accountant's. Though the record did not indicate whether the brother testified falsely in his grand jury appearance, this Court determined that the district court could have reasonably inferred that defendant was attempting to suborn perjury. Id. The Court observed that the district court could have surmised that the purpose of the defendant's action was not to ensure that the brother's testimony was consistent with the accountant's on truthful matters. Id.

Here, Messner's statements to Kohn caused him to testify untruthfully to the grand jury. Therefore, the case for the increase is stronger than in Graves. Moreover, because the finding concerning Kohn's grand jury testimony is sufficient to support the enhancement, the Court need not address Messner's remaining

contentions. See United States v. Goldfaden, 959 F.2d 1324, 1331  
(5th Cir. 1992).

AFFIRMED.