UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2717
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHAD GODFREY,

Defendant-Appellant.

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

(June 24 1994)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

WISDOM, Circuit Judge:*

Defendant/appellant Chad Godfrey pleaded guilty to one count of conspiracy to commit bank fraud and misapplication of funds by a bank officer in violation of 18 U.S.C. § 371. The district court, after departing downward from the sentence range suggested by the Sentencing Guidelines, sentenced Godfrey to 21 months in

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* Most of this opinion merely decides this particular case based on well-settled principles of law and is unworthy of publication. *See* Loc. R. 47.5. The appeal raises one question of precedential significance. We direct that only the first and last paragraphs of the opinion and all of parts II.A and II.B be published, with omissions in the published text to be indicated by asterisks. *See, e.g.*, *Garcia v. Wash*, 20 F.3d 608 (5th Cir. 1994).

prison. On three grounds, Godfrey challenges the district court's calculation of his sentence. We AFFIRM.

I.

Chad Godfrey and several co-conspirators[1] devised a scheme to siphon money from failing financial institutions. We summarized the scheme in a recent opinion disposing of the appeal of one of Godfrey's co-conspirators:

> 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 [James Barrus, Jr., a co-conspirator]. 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.[2]

Several examples illustrate Godfrey's involvement in the conspiracy. In 1987, Godfrey and some of his co-conspirators devised a plan to take over an offshore and a domestic bank, and then to siphon funds from the domestic bank to the offshore bank. At Godfrey's instruction, Allan Swan purchased First London Bank, an institution of the British West Indies. Godfrey then recruited Jedd Jones to borrow $650,000 from Imperial Savings Association

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[1] Those indicted along with Godfrey were James Barrus, Jr., Elliot Bernstein, James Trodden, Gloria Manchester, and Fred Leroy Harwood. *See United States v. Harwood*, 20 F.3d 469 (5th Cir. 1994) (table) (no. 93-2282, manuscript opinion at 2).

[2] *Id.*, manuscript opinion at 2.

("Imperial"). The conspirators planned to use that $650,000 to purchase the domestic bank. Jones, following Godfrey's instructions, falsely represented to Imperial that he intended to purchase a house with the $650,000. Instead of purchasing a house, however, Jones transferred the loan proceeds to New Horizons Financial, a group formed by Godfrey, Barrus, and other conspirators. New Horizons Financial attempted unsuccessfully to purchase a bank with the loan proceeds. A later attempt by Barrus, Godfrey, and the other conspirators to purchase First Bank of Balch Springs, another Texas bank, also failed.

In August 1988, the conspirators planned to purchase the Bank of Kerrville. Godfrey set up a meeting between co-conspirators Manchester and Bernstein to arrange for escrow. At the meeting, the conspirators agreed that the purchaser would be Metric Financial ("Metric"), a shell corporation created by the conspirators of which Godfrey was listed as the vice-president. Godfrey attended what was to have been the closing on the sale. The closing fell through when the Bank's representatives discovered that a financial statement for one of the conspirators' shell corporations had been falsified.[3]

[3] The conspirators sought to make the Bank of Kerrville's purchase, for $28 million, of a $35-million-face-value debenture from Land Corporation of America ("Lancor"), a shell corporation, a condition of the sale. The Bank of Kerrville's representatives asked for a financial statement from Lancor. Barrus provided a financial statement that falsely represented that Lancor had some $1.3 billion in assets. Upon investigation, the Bank of Kerrville's agents discovered that the accounting firm that had purportedly prepared the financial statement did not exist.

The conspirators tried again a month later. This time their target was Texana National Bank ("Texana"). Godfrey and Bernstein arranged for James Epley and Jere Sink to purchase Texana for $250,000. Texana, once under their control, was to purchase a $1.55 million debenture from Interim Financial Network ("Interim"), a shell corporation co-owned by Godfrey. The purchase was closed on September 23, 1988, following which Epley arranged for Texana to purchase the debenture from Interim. The proceeds of the debenture sale were funnelled through various shell corporations to Manchester, Bernstein, and Godfrey. Godfrey's personal share was approximately $326,000.

In October 1988, Godfrey negotiated the purchase of Resource Bank for $611,000, and arranged for the bank to purchase a debenture from Land Corporation of America ("Lancor"), another shell corporation. To finance the purchase, Epley caused Texana to purchase a new debenture for $2.5 million, of which $650,000 was wired to Manchester, who used it to pay the stockholders of Resource Bank. Godfrey, Barrus, and Harwood attended the closing of the sale of Resource Bank. Resource Bank then purchased for $16 million a $20 million face value debenture from Lancor. Barrus wired a portion of the funds to the conspirators' shell corporations.

A handful of other financial transactions occurred before the Office of the Comptroller of the Currency (OCC) stepped in and issued a temporary cease and desist order against the conspirators. Godfrey and his co-conspirators were then charged on a multiple-

count indictment with a variety of federal crimes. Godfrey reached a plea agreement with the prosecutors whereby he pleaded guilty to the conspiracy charge in exchange for the dismissal of the other counts. Godfrey also provided substantial assistance to the government following his plea bargain.

Godfrey's sentence was calculated as follows. To the base offense level of six,[4] the court added ten levels because it determined that Godfrey was responsible for a loss between $2,000,001 and $5 million.[5] It then added two levels for Godfrey's more than minimal planning and involvement in a scheme to defraud more than one victim,[6] added four levels for Godfrey's role as a leader or organizer,[7] and subtracted two levels for Godfrey's acceptance of responsibility.[8] With a total offense level of 20 and a criminal history category of I, the guideline range was 33-41 months imprisonment. The district court overruled Godfrey's objections to the sentencing recommendations of the presentence investigation report (PSR). The government moved for a downward departure on the grounds that Godfrey had provided substantial

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[4] *See* U.S.S.G. § 2F1.1(a) (1988 Manual).

[5] *Id*. § 2F1.1(b)(K). The district court accepted the probation officer's recommendation of a ten-level increase, but noted that even a thirteen- or fourteen-level increase would have been appropriate.

[6] *Id*. § 2F1.1(b)(2)(A), (B).

[7] *Id*. § 3B1.1(a).

[8] *Id*. § 3E1.1(a).

assistance to the prosecution.[9] The district court departed downward and sentenced Godfrey to 21 months imprisonment. Godfrey appealed his sentence to this Court.

II.

A. Standard of Review

When reviewing a sentence, we ask whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous.[10] The district court's application and interpretation of the Sentencing Guidelines are matters of law subject to *de novo* review.[11]

B. "Double Counting" for Leadership and Planning

Godfrey first contends that the district court improperly "double counted" in adjusting his sentence level upward by four levels for being a leader or organizer under U.S.S.G. § 3B1.1(a) and by two levels for more than minimal planning and for involvement in a scheme to defraud more than one victim under § 2F1.1(b)(2).

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[9] *See id.* § 5K1.1.

[10] *United States v. Montoya-Ortiz*, 7 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. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985).

[11] *Montoya-Ortiz*, 7 F.3d at 1179.

We have previously noted that the Sentencing Guidelines do not forbid all double counting.[12] Double counting is impermissible only when the particular guidelines in question forbid it.[13] Because neither § 3B1.1 nor § 2F1.1 forbid double-counting with each other, increases under both of those sections are permitted. This is also the conclusion reached by most of the other circuits to address this question.[14] Previous unpublished decisions of this Court agree.[15]

We consider Godfrey's reliance on the Sixth Circuit's decision in *United States v. Romano*[16] misplaced. In *Romano*, the Sixth Circuit reversed a sentence that the district court had enhanced under both sections 3B1.1(a) and 2F1.1(b)(2) of the Sentencing Guidelines. The majority in *Romano* concluded that "by its very nature, being an organizer or leader of more than five persons

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[12] *United States v. Gonzales*, 996 F.2d 88, 93 (5th Cir. 1993).

[13] *See id*. at 93-94.

[14] *See United States v. Myerson*, 18 F.3d 153, 163-64 (2d Cir. 1994); *United States v. Smith*, 13 F.3d 1421, 1429 (10th Cir. 1994); *United States v. Aideyan*, 11 F.3d 74, 76 (6th Cir. 1993); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993), *cert. denied*, --- U.S. ---, 114 S. Ct. 704, 126 L. Ed. 2d 670 (1994); *United States v. Kelly*, 993 F.2d 702, 704-05 (9th Cir. 1993); *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991); *United States v. Boula*, 932 F.2d 651, 654-55 (7th Cir. 1991).

[15] *See United States v. Grube*, 20 F.3d 469 (5th Cir. 1994) (table) (manuscript opinion at 3-6); *United States v. Walker*, 981 F.2d 1255 (5th Cir. 1992) (table) (manuscript opinion at 3).

[16] 970 F.2d 164 (6th Cir. 1992).

necessitates more than minimal planning",17 but the Sentencing Commission did not intend to punish the same conduct cumulatively under more than one provision of the Guidelines.18 Therefore, the majority concluded, adjustments under both §§ 3B1.1(a) and 2F1.1(b)(2) were impermissible.

Even if we thought the rule of *Romano* could be squared with the jurisprudence of this Circuit (and we have serious doubts that it can), we find *Romano* distinguishable from Godfrey's case. Section 2F1.1(b)(2) allows a two-level increase if the defendant (A) engaged in more than minimal planning *or* (B) engaged in a scheme to defraud more than one victim. Only the first of those two options was at issue in *Romano*. The district court found, however, that Godfrey's conduct fitted *either* of the two options under § 2F1.1(b)(2). In such circumstances, even the Sixth Circuit does not follow the *Romano* rule, but instead permits cumulative increases under §§ 2F1.1(b)(2) and 3B1.1(a).19 The enhancement in Godfrey's case plainly was permissible.

C. Godfrey's Role as an Organizer or Leader

We next review for clear error the district court's finding that Godfrey acted as an organizer or leader of a criminal activity involving five or more participants, warranting a sentence level increase under U.S.S.G. § 3B1.1(a).

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[17] *Id*. at 167.

[18] *Id.*

[19] *See Aideyan*, 11 F.3d at 76.

The evidence amply supports the district court's finding. Godfrey helped organize the planned 1987 takeover of a domestic bank and an offshore bank, recruiting and directing Allan Swan and Jedd Jones to accomplish the task. Godfrey helped organized the planned takeover of the Bank of Kerrville in August 1988. With Bernstein, he led the planned purchase of Texana National Bank the following month, directing the actions of James Epley and Jere Sink. He was a co-owner of the shell corporation from which Texana was induced to purchase a worthless debenture, and pocketed almost a third of a million dollars from the proceeds. He led the conspirators' purchase of Resource Bank in October 1988. On these facts, we cannot conclude that the district court's finding that Godfrey acted as a leader or organizer was clearly erroneous.[20]

D. The Amount of the Loss Attributable to Godfrey

Finally, Godfrey challenges the district court's finding that a loss of $2,867,952 was attributable to his conduct, warranting a ten-point increase in his sentencing level under U.S.S.G.

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[20] The commentary to U.S.S.G. § 3B1.1(a) suggests several factors for the courts to consider in making the determination of whether a particular defendant was an organizer or leader. We consider the evidence that Godfrey acted as an organizer or leader so overwhelming that there would be no point in testing it against each of the enumerated factors, but of course we approve of their use by the district court.

To the extent Godfrey's argument can be read as a challenge to the district court's reliance on the findings of fact in the Presentence Investigation Report (PSR), we reject it. We have previously held that "a presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations required by the Guidelines". *United States v. Robins*, 978 F.2d 881, 889 (5th Cir. 1992).

§ 2F1.1(b)(K). The district court calculated this amount by adding the $650,000 loss suffered by Imperial Savings to the $2,217,952 net loss to Resource Bank.[21] Godfrey contends that he could not reasonably have foreseen these losses.

We consider this challenge frivolous. The Guidelines provide that a conspirator is accountable for the reasonably foreseeable actions of his or her co-conspirators.[22] Foreseeability, however, is not at issue when the defendant is held responsible for his own conduct, rather than the actions of his co-conspirators.[23] Both of the financial transactions for which Godfrey was held accountable were organized and carried out by Godfrey himself. We see no clear error in the district court's finding that a loss of $2,867,952 was attributable to Godfrey.

Godfrey's sentence is AFFIRMED.

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[21] Resource Bank originally disbursed approximately $31.2 million to buy worthless debentures from the conspirators, but all but $2,217,952 of that amount was later recovered when the Office of the Comptroller of the Currency stepped in.

[22] *See* U.S.S.G. § 1B1.3(a)(1)(B) & cmt. 2; *United States v. Devine*, 934 F.2d 1325, 1337 (5th Cir.), *reh'g denied*, 943 F.2d 1315 (5th Cir. 1991), *cert. denied*, --- U.S. ---, 112 S. Ct. 349, 116 L. Ed. 2d 288 (1991), --- U.S. ---, 112 S. Ct. 911, 116 L. Ed. 2d 811 (1992), --- U.S. ---, 112 S. Ct. 952, 117 L. Ed. 2d 120 (1992), --- U.S. ---, 112 S. Ct. 954, 117 L. Ed. 2d 121 (1992), --- U.S. ---, 112 S. Ct. 1164, 117 L. Ed. 2d 411 (1992), --- U.S. ---, 112 S. Ct. 1197, 117 L. Ed. 2d 437 (1992).

[23] *Compare* U.S.S.G. § 1B1.3(a)(1)(B) *with id.* § 1B1.3(a)(1)(A).