UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2952
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

Donald R. Branham,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-06-2)

(November 29, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Appellant was convicted upon his pleas of guilty to bank fraud, conspiracy to commit bank fraud, and twenty counts of misapplication of funds. His appeal attacks the sentence imposed. We AFFIRM.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

According to an investigation conducted by the FBI after an RTC takeover of TexasBanc Savings of Conroe, Texas (TBS), Donald Branham (the president of Branham Industries, Inc. (BII)), and co-defendant, Gary Akin (the former president, chairman of the board, and sole shareholder of TBS), conspired to effect a series of complex financial schemes (involving fictitious borrowers, check kiting, and circumvention of bank policies) to defraud TBS of $3,400,000.

In the first offense, the proceeds of a $500,000 unsecured loan to BII were to be disbursed, pursuant to Akin's authorization, to Branham via TBS check payable to "TexasBanc Savings for Donald Branham". That same day, the TBS check was converted to a cashier's check for the same amount made payable to Don Branham, and the cashier's check (bearing Branham's endorsement) was negotiated at Fulshear State Bank (FSB) to purchase two FSB cashier's checks in the amounts of $375,000 and $125,000; the FSB checks were then deposited into Akin's personal account (covering overdrafts in the amount of $500,000) at TBS. BII's accountant informed the FBI that Branham signed the note obligating BII with the understanding that it was an accommodation for Akin. BII's comptroller confirmed Branham's explanation for the transaction.

In a second transaction, Akin induced a business customer of TBS, Jonathan Thornberry, to "free up credit" for Branham and BII by acting as a "straw borrower" on a $1,100,000 thirty-day, nonrecourse loan for which the collateral would be an oil rig owned

by BII; Thornberry was led to believe that the oil rig would be sold to him. Although the sale was never consummated, Thornberry executed the loan documents, and the proceeds were passed through Thornberry's TBS account and deposited into BII's general account at TBS. After the thirty-day repayment deadline came and went, Akin persuaded Thornberry to execute a renewal note for $1,200,000; $1,178,000 was disbursed to TBS in payment of the original indebtedness and interest accrued thereon; Akin disbursed the balance to Thornberry for "being a good customer of the bank". The loan was renewed again by Branham; then, in March 1989, Charles Lewis, another TBS customer, renewed it. Bank records reflect that the BII rig served as collateral for each of the loan renewals. The loan remained unpaid when the RTC took over TBS.

The investigation also revealed another series of offenses that began sometime in July 1987 and continued through October 1988: Branham engaged in a "checking kiting" scheme in which he directed BII employees to present drafts drawn on Branham's personal account at Clydesdale Bank of London, England, for deposit in BII's TBS account. Upon deposit, Akin instructed TBS employees to issue immediate credit and send the drafts to MBank, TBS' international correspondent, for collection. As each draft was returned by Clydesdale for insufficient funds, Branham directed BII employees to issue another draft in a large amount (to cover the returned draft plus additional amount he used for operating deficits). According to BII's accountant, Branham's explanation for the practice was that he needed the money for his business and

it was a way of getting an interest-free loan. Between February 1988 and October 1988 BII incurred overdrafts at TBS in the amount of $1,800,000.

Branham was indicted for (1) bank fraud, in violation of 18 U.S.C. § 1344 (counts 1, 4 and 8); (2) misapplication of funds, in violation of 18 U.S.C. § 657 (count 2, 5, 9-28); (3) conspiracy to commit bank fraud, to misapply funds, and to launder monetary instruments, in violation of 18 U.S.C. § 371 (count 3 and 7); and (4) money laundering, in violation of 18 U.S.C. § 1956 (count 6). In a written plea agreement, Branham agreed to plead guilty to counts 7 through 28; in exchange for the guilty plea, the Government agreed to (a) recommend that relevant conduct be determined only from counts 7-28 (the parties acknowledged that such an agreement was not binding on the court); (b) recommend that Branham be awarded an adjustment for acceptance of responsibility; (c) recommend, and move for, dismissal of counts 1-6; and (d) forego prosecution for any other offenses arising from Branham's association with TBS. At a rearraignment hearing, Branham entered his guilty plea.

Using the 1988 Guidelines Manual, the probation officer determined Branham's base offense level to be 6 under U.S.S.G. § 2F1.1(a).[1] Because the offense (a) resulted in a total loss to

[1]The PSR does not explain why the 1988 edition of the Guidelines Manual was used. It would appear that the version in effect at the time of sentencing, Dec. 15, 1993, should have been used. 18 U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.11(a), p.s. (Nov. 1993). There was no objection, and the appellant insists that he was "entitled to be sentenced under date of offense guidelines."

TBS in the amount of $3,400,000, and (b) involved a complex scheme to defraud TBS, the probation officer made a twelve-level upward adjustment in base offense level (ten levels pursuant to § 2F1.1(b)(1)(K) and two levels pursuant to § 2F1.1(b)(2)(A)); the probation officer also determined that a three-level upward adjustment was appropriate for an aggravating role under § 3B1.1(b) as Branham exercised a managerial and supervisory role over BII's accountant, comptroller, and several BII employees, and was a co-conspirator with Akin in an extensive operation to defraud TBS in multiple schemes. A two-level downward adjustment was awarded for acceptance of responsibility. Applying a total offense level of 19 to a criminal history category of I yielded a guideline imprisonment range of 30-37 months. At the sentencing hearing, the district court overruled Branham's objections to the PSR, denied his request for an evidentiary hearing, adopted the factual findings contained therein, sentenced Branham to a term of imprisonment of 30 months, and imposed restitution of $1,800,000 and an assessment of $1,100.

The Request For an Evidentiary Hearing

Branham argues that the district court committed error by denying his request for an evidentiary hearing to present evidence to rebut allegedly incorrect factual matters in the PSR and by imposing a sentence without an adequate resolution of the disputed findings. A sentencing court's decision to grant an evidentiary hearing is reviewed by this Court for abuse of discretion. U.S. v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). "When a trial court

is faced with specifically disputed facts, it must resolve them if they are used to determine the sentence." Id.; see Fed. R. Crim. P. 32(c)(3)(D). Rule 32 does not require, however, a "catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." U. S. v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). When a sentencing court expressly adopts the facts set forth in the PSR, there is an implicit determination by the court that the probation department's version of the facts should be credited. Id. If a defendant objects to the PSR but does not present rebuttal evidence to refute the facts, the district court may adopt the facts in the PSR without further inquiry. Id. at 1099-1100.

In his written objections to the PSR and at the sentencing hearing, Branham asserted conclusionally, and without allegations of specific rebuttal evidence, that (1) the probation officer erred by treating his participation in the transactions forming dismissed counts 1-6 ($500,000 Akin loan and the $1,100,000 Thornberry loan) as relevant conduct because it was "unsubstantiated conduct for which [he] has not been convicted," and (2) that the probation officer's determination that Branham exercised a managerial role in the offense was inaccurate because he did not control Akin or BII's accountant, comptroller, or other employees. The district court adopted the PSR's findings that Branham actively conspired with Akin to defraud TBS in the transactions underlying dismissed counts 1-6 and that Branham did exercise managerial and supervisory conduct over at least five participants in the other extensive

overdraft offense. Because Branham did not submit any specific rebuttal evidence to counter the PSR's findings and offered only general denials, the district court did not clearly err in adopting the PSR's findings as its own; because no further findings were required (and there were no unresolved factual matters), the district court did not abuse its discretion in denying an evidentiary hearing.

The Adjustment for Relevant Conduct

Branham also asserts that the district court erred when it adjusted Branham's offense level for relevant conduct pertaining to dismissed counts 1 through 6 (for losses to TBS arising from the $500,000 unsecured loan and the $1,100,000 Thornberry loan) because (a) Branham and the Government agreed in the plea agreement that the only conduct of Branham relevant for sentencing would be the conduct underlying counts 7 through 28, and (b) the Government did not prove by a preponderance of the evidence that Branham was responsible for the conduct.

This Court reviews the application of the Sentencing Guidelines de novo and the district court's findings of fact for clear error. U.S. v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). Under the 1988 Guidelines Manual, if an offense involved fraud or deceit, the base offense level may be increased by ten if the loss exceeded $2,000,000. § 2F1.1(b)(1)(K). In a loan fraud case, the loss is the amount of the amount of the loan not repaid at the time that the fraud is discovered, minus any recovery or expected recovery. U.S. v. Frydenlund, 990 F.2d 822, 825 (5th Cir.), cert.

denied, 114 S. Ct. 192 (1993). Calculation of loss is a factual finding that will be affirmed if it is plausible in light of the record as a whole. U.S. v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). Under the 1988 guidelines, if the conviction is for conspiracy, relevant conduct includes "conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant." § 1B1.3 comment. (n.1). The district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy." § 6A1.3, comment. A defendant who objects to consideration of information by the sentencing court bears the burden of proving that it is "materially untrue, inaccurate or unreliable." U.S. v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

Notwithstanding his agreement with the Government respecting the scope of his relevant conduct, the plea agreement provides that "such an agreement is not binding upon the court." Branham's brief concedes that "a sentencing court is not bound by any stipulation", and that "it is within the court's discretion, with the aid of the presentence report [], to determine facts relevant to sentencing". The brief also concedes that the sentencing court may rely on dismissed counts in the determination of relevant conduct.

Branham contends that the Government failed to prove by a preponderance of the evidence that he was responsible for the conduct underlying the dismissed counts, and he asserts that he was unaware that Akin made and received the proceeds of the loans. With respect to the $500,000 unsecured loan, the district court

relied on the PSR's determinations, and Branham does not challenge that (1) the $500,000 check representing the proceeds of the unsecured loan bears his endorsement, (2) Akin was listed on BII's books as the maker of the note, (3) he instructed BII's accountant to disregard payment notices from TBS, and (4) he told BII personnel that he was carrying Akin's note on BII's books as a favor to Akin. Nor does Branham dispute the PSR's findings that (1) the proceeds of the Thornberry loan were deposited into BII's account and (2) Branham was aware of the transaction because he thanked Thornberry at a social occasion for freeing up BII's credit line. Because the district court adopted the PSR's findings that Branham was aware of Akin's conduct to defraud TBS, it did not clearly err by treating Branham's facilitation as relevant conduct when sentencing him.

Adjustment for Manager or Supervisor

Branham further contends that the district court erred in assessing a three-level upward adjustment because he was not a manager or a supervisor under § 3B1.1(b) because he did not exercise control over five participants in the offense. A sentencing court's decision to increase an offense level for a defendant's aggravating role is a factual determination that this Court reviews for clear error. U.S. v. Rodriguez, 897 F.2d 1324, 1325 (5th Cir.), cert. denied, 498 U. S. 857 (1990).

Using the 1988 guidelines, a three-level adjustment is appropriate "if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or

more participants or was otherwise extensive . . . ." § 3B1.1(b). "In determining the number of participants in a criminal activity, the district court must focus upon the number of transactional participants, which can be inferentially calculated provided that the court does not look beyond the offense of conviction to enlarge the class of participants." U.S. v. Wilder, 15 F.3d 1292, 1299 (5th Cir. 1994) (internal quotation and citation omitted). The offense is not limited to the offense charged but includes the entire underlying scheme.

The record demonstrates that Branham participated in a criminal activity which involved at least five individuals and was otherwise extensive. Branham himself may be counted as a participant. Akin, Herman Poage (BII's accountant), Steve Shanks (BII's comptroller), and BII employees who prepared the fraudulent customer drafts were participants in the underlying criminal scheme. The criminal activity was extensive (the overdraft scheme involved MBank, TBS's foreign correspondent bank in Houston and Clydesdale Bank of London, England) and Branham acted as a manager and a supervisor (he instructed BII employees when to prepare the customer drafts and in what amount) of criminal activity. Because the district court's determinations that Branham played an aggravating role are supported by the record, the adjustment under § 3B1.1(b) was not clear error.

Double Counting Under § 2F1.1(b)(2) and § 3B1.1(b)

Branham argues that the district court impermissibly double counted when it increased his offense level by "two levels for more

than minimal planning under U.S.S.G. § 2F1.1(b)(2) in addition to a three-level enhancement for aggravating role in the offense under U.S.S.G. § 3B1.1(b)." In U.S. v. Godfrey, 25 F.3d 263, 264 (5th Cir. 1994), this Court recently considered the propriety of adjustments under both sections and concluded that "[b]ecause neither § 3B1.1 nor § 2F1.1 forbid double-counting with each other, increases under both of those sections are permitted." Accordingly, the district court did not impermissibly adjust Branham's offense level.

The judgment of the trial court is **AFFIRMED.**