UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3055
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KIRK R. WASCOM,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(92-346-G-2)

(February 11, 1994)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

Convicted on his guilty pleas of conspiracy and of substantive counts of embezzlement and money laundering, 18 U.S.C. §§ 371, 666, 1956(a)(1)(A)(1), Kirk R. Wascom appeals his sentences. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Wascom was chief administrator for Northshore Hospital in Slidell, Louisiana. Randall E. Heller was the hospital's director of marketing. In 1986 and 1987 Wascom and Heller created two companies, Healthcare Communications and Media Brokers, to perform consulting and marketing work for the hospital. The two agreed that invoices for services by the two companies would be inflated and that Wascom would approve their payment. Eventually three others, Ralph Flood, John J. Coerver, and Daniel J. Himel, joined the scheme in which the hospital was billed for inflated or nonexistent services. Wascom approved the invoices and made use of the United States mail in payment. Heller opened bank accounts for the two companies, made deposits of the hospital checks therein and in other accounts he and Wascom controlled, and made cash payments to Wascom.

The PSR reflects that Heller made over a million dollars from this scheme. Wascom made between $375,000 and $395,000.[1] Flood, Coerver, and Himel made $309,092, $65,000, and $124,250, respectively. Accepting the probation officer's recommendation the district court increased Wascom's offense level: (1) under U.S.S.G. § 2S1.1(b)(2)(F) because the funds in the scheme exceeded one million dollars; (2) under § 3B1.3 for abuse of a position of trust; and (3) under § 3B1.1(c) for his leadership role in the criminal exercise.

[1]The PSR says that Wascom made approximately $571,000. Wascom objected to this finding. The government conceded that his maximum accrual was $395,000.

Wascom received concurrent prison sentences of 60 months on the conspiracy count and 90 months on each of the substantive counts, three years supervised release, the statutory assessment, and was ordered to make restitution in the sum of $135,977. He timely appealed.

Analysis

Wascom first contends that he was entitled to a hearing on the government's refusal to file a downward departure motion under section 5K1.1. Under the plea agreement the U.S. Attorney had the sole discretion to decide whether a downward departure motion based on substantial assistance to the government should be filed. Wascom does not allege a constitutionally improper motive for the prosecutor's refusal to file the motion and he is therefore not entitled to a hearing thereon.[2] His mere assertions that he provided substantial assistance to the government are not sufficient to secure such a hearing.[3]

Wascom next maintains that there was insufficient evidence that he knew the conspiracy laundered over one million dollars, contending that the largest amount which could be attributed to him for sentencing purposes was $395,000. He insists that he did not know of his coconspirators' activities. Factual findings by the district court under U.S.S.G. § 2S1.1(b) as to the amount of funds

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[2]See **Wade v. United States**, 112 S.Ct. 1840 (1992); **United States v. Urbani**, 967 F.2d 106 (5th Cir. 1992).

[3]**Wade**, 112 S.Ct. at 1844; **Urbani**, 967 F.2d at 109.

involved in a money laundering scheme are reviewed for clear error.[4] It was not clearly erroneous for the district court to conclude that the funds involved in these criminal transactions exceeded one million dollars. The commentary to U.S.S.G. § 2S1.1 explains:

> The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise.

The Guidelines do not limit the amount involved to the sums which a defendant personally received from the criminal enterprise. Wascom's contention that he did not know of his coconspirators' activities is unavailing. In a jointly undertaken criminal activity, specific offense characteristics are determined on the basis of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[5] Wascom was the chief administrator for Northshore Hospital. He used his position to approve false invoices and mail payments on these invoices to the two companies he and Heller created. Wascom also knew that Heller was drawing checks payable to "cash" and paying Wascom cash to prevent the tracing of the funds. Wascom received up to $395,000 and Heller made more than a million dollars. The

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[4] **United States v. Tansley**, 986 F.2d 880 (5th Cir. 1993).

[5] U.S.S.G. § 1B1.3(a)(1)(B).

district court made no clear error in finding Wascom accountable for a sum in excess of one million dollars under section 2S1.1(b).

Finally, Wascom challenges the application of the section 3B1.1 enhancement for his leadership role in the offense. According to Wascom there was no leader because he and Heller entered and operated the criminal enterprise jointly. Wascom further maintains that to the extent anyone was a leader, it was Heller. The commentary to section 3B1.1 provides that "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." It is clear that Wascom qualifies as a leader. Wascom then contends that although the criminal venture could not have succeeded without his acquiescence as the chief administrative officer for Northshore Hospital, the sentencing judge erred in applying enhancements for both abuse of a position of trust under section 3B1.3 and for taking a leadership role in the offense under section 3B1.1. Wascom insists that he received a double enhancement for the same activity. This argument is foreclosed by the express language of the Guidelines. Section 3B1.3 specifically provides that the abuse-of-position-of-trust enhancement may be applied in addition to an adjustment under section 3B1.1.

AFFIRMED.