IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3241

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAM C. BARBERA, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91 505 E)

(March 4, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

The appellant, Sam C. Barbera, Jr. ("Barbera"), was convicted of making false statements to a financial institution in connection with a loan application. He appeals the sentence imposed by the district court under the federal sentencing guidelines on several grounds. Finding no reversible 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. Background

Barbera formerly owned Barbera Pontiac-Cadillac, Inc., a car dealership in Morgan City, Louisiana. On March 14, 1990, Barbera executed a $300,000 inventory line of credit with Assumption Bank and Trust of Napoleanville, Louisiana ("Assumption Bank"). On October 25, 1990, Barbera obtained another inventory line of credit from Assumption Bank in the amount of $1,000,000. These lines were to be secured by certain automobiles Barbera owned and was to purchase for his inventory.

Over the next few months, in accordance with the terms of the lines of credit, Barbera pledged certain automobiles to Assumption Bank to secure advances of funds under the credit facilities. Assumption Bank's officers testified that they would not have loaned Barbera the money if it not been for the collateral pledged. Unbeknownst to Assumption Bank, however, the cars pledged had been previously sold to third-party purchasers. Nonetheless, Barbera retained the certificates of origin to the vehicles and submitted them to Assumption Bank as evidence that the dealership owned the vehicles. These fraudulent pledges caused Assumption Bank to disburse funds on the lines of credit. As a result of Barbera's presentment of ownership documents, the bank disbursed $231,376.85 to Barbera.

In early 1991, when Assumption Bank noticed certain discrepancies in the repayment of the amounts owing under the lines of credit, it conducted an audit which revealed that $717,748.61 worth of inventory had been sold "out of trust" --

i.e., without proper remittance of the proceeds to the bank. It then referred the case to the Federal Bureau of Investigation for further inquiry. The bank's total loss under the credit facilities was $759,987.15 -- representing $636,064.57 in unpaid principal and $123,922.58 in unpaid, past-due interest.

Barbera and a co-defendant, Ronald Gros ("Gros"), were subsequently charged in an eleven-count superseding indictment with various offenses related to a conspiracy to commit financial institution fraud, including conspiracy to commit bank fraud and to make false statements to a federally insured bank in violation of 18 U.S.C. § 371 (count 1), making false statements to a bank in violation of 18 U.S.C. §§ 1014 and 2 (counts 2-10), and bank fraud in violation of 18 U.S.C. §§ 1344 and 2 (count 11). A jury found Barbera guilty of counts 2-11 of the indictment, acquitted him of count 1, and acquitted Gros of all charges.

After Barbera's conviction, the court directed that a presentence investigation report ("PSR") be prepared. In the PSR, the probation officer found that the total loss figure for purposes of guideline section 2F1.1(b)(1) was $636,064.57, based on the bank's total loss of principal under the Barbera lines of credit. Because the total loss was more than $500,000 but less than $800,000, the PSR recommended adding ten levels to Barbera's base offense level of six. See United States Sentencing Commission, Guidelines Manual, §§2F1.1(a) & (b)(1)(K) (Nov. 1992). The PSR also suggested that the base offense level be adjusted by two levels for the more-than-minimal-planning aspect

of the offense. See U.S.S.G. §2F1.1(b)(2). Finally, the PSR advised against reducing Barbera's total offense level for acceptance of responsibility under guideline section 3E1.1 -- making the total offense level 18.

Barbera submitted written objections to the PSR, all of which were addressed and rejected by the probation officer who justified her responses in writing. Barbera renewed his objections to the report at the sentencing hearing held on March 31, 1993. The district court adopted the PSR recommendations over these objections and sentenced Barbera to serve concurrently 30 months imprisonment for each count, concurrent five-year terms of supervised release on each count, and to pay restitution in the amount of $636,064.57 and a $500 special assessment. Barbera filed a timely notice of appeal.

II. Analysis

Barbera presents several challenges to the district court's application of the sentencing guidelines in arriving at his sentence. We note that the district court's interpretations of the sentencing guidelines are questions of law subject to de novo review. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993); United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989). Subsidiary findings of fact which support the district court's conclusions under the guidelines are reviewed for clear error. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S.Ct. 2365 (1993). If a factual finding is plausible in light of the record as a whole, it is not clearly

erroneous. United States v. Watson, 966 F.2d 161, 162 (5th Cir. 1992). A sentence will be vacated only if it was imposed in violation of the law, if the guidelines were incorrectly applied, or if the sentence was outside the guideline range and unreasonable. United States v. Parks, 924 F.2d 68, 71 (5th Cir. 1991). With these standards in mind, we review each of Barbera's contentions.

A. The Amount of Loss Calculation

Barbera first contests the district court's enhancement of the offense level based on a loss calculation of over $500,000. He argues that the evidence adduced at trial indicated that he received only $231,376.85 from the financial institution as a result of the allegedly fraudulent pledges. Barbera protests that the $636,064.57 figure includes not only the false statements regarding the automobiles owned but also the sale of other collateral without repayment to the bank. Barbera claims that evidence regarding the losses resulting from the sale of the pledged cars without repayment to Assumption Bank was not presented to the jury -- nor were the acts shown to be part of the same course of conduct or common scheme or plan for inclusion in the determination of the losses.

Although the parties appear to agree that the $636,064.57 figure was not submitted to the jury, the probation officer defended her inclusion of the additional amounts by stating in the supplemental addendum to the PSR that

> [t]he loss figure of $636,064.57 represents the total unpaid amount from Barbera's lines of credit with

> Assumption Bank. Barbera's false statements and fraudulent conduct in reference to the cars listed in the indictment led to his inability to repay Assumption Bank for the balances owed on his lines of credit. Therefore, the loss figure of $636,064.57 is an accurate representation of the loss caused by the instant offense.

The district court agreed with this assessment of the evidence, specifically overruling Barbera's objection "for the reasons set forth in the supplemental addendum to the PS[R]."

In Application Note 7 to guideline section 2F1.1, the Sentencing Commission delineated "instances where additional factors are to be considered in determining the loss or intended loss."[1] Significantly, in the context of fraudulent loan applications, the Commission anticipated that the amount of loss would be "the amount of the loan not repaid at the time the offense is discovered reduced by the amount the lending institution has recovered . . . from any assets pledged to secure the loan." U.S.S.G. §2F1.1, comment. (n.7). Further, we note that Barbera was convicted by the jury on count eleven of selling cars "out of trust," and consequently the losses resulting therefrom are directly at issue in sentencing. Thus, we cannot say that the district court clearly erred in considering all uncompensated losses incurred by the bank because of Barbera's fraudulent behavior for purposes of section 2F1.1.

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[1] We note that the Sentencing Commission's commentaries to the guidelines must be given "controlling weight" by courts applying the guidelines "unless the commentary is violative of the Constitution or federal statute, or plainly erroneous or inconsistent with the guidelines themselves." United States v. McCaskey, 9 F.3d 368, 373 (5th Cir. 1993) (citation omitted).

Moreover, the burden is upon the defendant objecting to the use of information in a PSR to prove that it is "materially untrue, inaccurate or unreliable." United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991) (citation and internal quotations omitted), cert. denied, 112 S.Ct. 1677, and cert. denied, 112 S. Ct. 2290 (1992). Assumption Bank's senior vice president, Harold Templet, indicated that the bank's total losses as a result of the instant offense were $759,987.15, including $636,064.57 of unpaid principal. Additionally, FBI Special Agent Margaret G. Timko conducted an audit upon the dealership which revealed that $717,748.61 worth of cars had been sold out of trust by Barbera. Although objecting to the loss calculation prior to sentencing and again during the proceeding, Barbera offered no evidence that this information was materially untrue. In fact, he apparently concedes that he sold approximately $600,000 of inventory "out of trust." For these reasons, we cannot find that the district court's calculation of losses at $636,064.57 is based upon information that is "materially untrue, inaccurate or unreliable."

B. The District Court's Failure to Make Specific Findings

Barbera alternatively argues that the district court erred in failing to make its own findings of fact as to the amount of loss to the victim as is required by Federal Rule of Criminal Procedure 32. Instead, the district court merely adopted the factual determinations made in the PSR.

Federal Rules of Criminal Procedure 32(a)(1) and (c)(3)(D) require the district courts to make specific findings as to all contested facts contained in the PSR that the court finds relevant in sentencing or to determine that those facts will not be considered in sentencing. United States v. Sherbak, 950 F.2d 1095, 1098 (5th Cir. 1992); United States v. Hooten, 942 F.2d 878, 880-81 (5th Cir. 1991); see also U.S.S.G. §6A1.3, p.s. Rule 32 serves the two important functions of ensuring that a defendant receives a fair sentence based on accurate information and that a clear record of the resolution of disputed facts is available on review. United States v. Lawal, 810 F.2d 491, 493 (5th Cir. 1987).

The adoption of findings contained in the PSR indicates that the district court complied with Rule 32 by weighing the varying positions and crediting, at least implicitly, the probation officer's determination of the facts pertinent to sentencing. See Sherbak, 950 F.2d at 1099. The probation officer addressed and disposed of each of the objections Barbera now raises. The district court explicitly adopted the PSR, including its recommendation to overrule Barbera's objections, and specifically referred to the supplemental addendum to the PSR as the basis for its action. The express rejection of Barbera's challenges to the PSR has been held by this court to be sufficient compliance with Rule 32. See United States v. Stouffer, 986 F.2d 916, 927 (5th Cir.), cert. denied, 114 S.Ct. 115 (1993). Even more telling is the district court's adoption of the recommendation to order

restitution in the amount of $636,064.57, clearly reflecting its assessment of the losses at stake. Thus, although the court did not elaborate on its reasons for adopting the PSR, the district court satisfied Rule 32 by expressly rejecting Barbera's challenges to the victim-loss determinations in the report and by ordering restitution in the same amount.[2]

C. Acceptance of Responsibility Findings

Barbera next challenges the district court's denial of a two-level reduction for acceptance of responsibility. He argues that he was entitled to the reduction because in a letter to the probation officer, he "clearly acknowledged his remorse and regret for the result of his actions." Barbera contests the probation officer's recommendation against the reduction which he contends was based solely on the fact that he exercised his right to go to trial. He claims that he testified at trial to the

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[2] We do not believe that the cases cited by Barbera compel a different result. Barbera makes reference to United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991), in which this court remanded for specific factual findings as to whether the defendant had possessed a firearm in the commission of his offense. Notably, however, in that case, neither the PSR nor the district court's decision reflects that any factual analysis had been undertaken to determine who owned or exercised control over the gun. Id. at 881; see also United States v. Sherbak, 950 F.2d 1095, 1098-99 (5th Cir. 1992) (district court's ambiguous response to one co-defendant's objection to fact dispute raised by the PSR failed to satisfy Rule 32 requirements where district court neither made explicit finding nor adopted PSR recommendation). Moreover, in Warters v. United States, 885 F.2d 1266, 1272 (5th Cir. 1989), the government conceded that the trial court had failed to resolve certain important fact issues. By contrast, and as noted above, the probation officer in the instant case addressed the victim-loss dollar amount in detail and defended her analysis in the face of Barbera's objections, and the district court explicitly adopted the findings.

mitigating factors that caused him to commit the offense -- instead of asserting a denial or justification to his guilt -- and concludes that he should not be "punished" for having chosen to proceed with trial on that basis.

The guidelines provide for a two-level reduction in the offense level "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. . . ." U.S.S.G. §3E1.1(a). This reduction may be given whether the defendant pleads guilty or is found guilty following trial. U.S.S.G. §3E1.1, comment. (n.2). Because of the sentencing court's unique position to evaluate a defendant's acceptance of responsibility, its conclusions are entitled to greater deference on review than that accorded under the "clearly erroneous" standard. United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990); see also §3E1.1, comment. (n.5).

As Barbera himself acknowledges, the instances in which a defendant goes to trial but is still deemed deserving of the reduction are rare. For example, this provision may apply when a defendant chooses to go to trial on the basis of some matter other than guilt -- e.g., the interpretation or application of a given statute -- and indicates an acceptance of responsibility by his pretrial statements and conduct. See U.S.S.G. §3E1.1, comment. (n.2).

The district court adopted the factual findings of the PSR, including the findings that (i) Barbera had denied making any misrepresentations to the bank regarding the pledges during

the trial; (ii) no plea agreement was negotiated or consummated; and (iii) the bank officers' testimony established that an agreement for the sale of cars out of trust had not been established. Further, the letter of remorse written to the probation officer and contained in the record was offered after the trial. Attributing to these findings the deference we must, we conclude that this evidence renders plausible the district court's ultimate finding that Barbera was not entitled to a two-level reduction pursuant to guideline section 3E1.1. See U.S.S.G. §3E1.1, comment. (n.2) (providing that an adjustment for acceptance of responsibility is not to be extended to a defendant who causes the Government to meet its burden of proof at trial, denies the essential elements of the offense, and then, after a conviction, admits his guilt and expresses remorse). Accordingly, we will not disturb it.

D. Failure to Depart from the Sentencing Guidelines

In his final point of error, Barbera argues that the district court erred by not departing downwardly from the guidelines (i) pursuant to section 5K2.16, p.s., because he voluntarily disclosed the offense of conviction when he went to his bank to discuss his financial difficulties, and (ii) because certain mitigating factors -- such as his desperate financial circumstances -- were not adequately considered by the Commission in fashioning the guidelines.

As a preliminary matter, we note that a trial court must sentence a convicted defendant to a term within the range

provided for in the guidelines unless it finds "an aggravating or mitigating circumstance of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); see also United States v. Lopez, 875 F.2d 1124, 1125 (5th Cir. 1989); United States v. Lara-Velasquez, 919 F.2d 946, 955 (5th Cir. 1990) (citing 18 U.S.C. § 3553(b)). In Lara-Velasquez, this court held that, although a trial court has wide discretion in sentencing a defendant within a particular guideline range, very little authority exists to deviate from the prescribed guidelines because of the guidelines' purpose to achieve uniformity. 919 F.2d at 955-56. We do not review a district court's refusal to depart from the guidelines "unless the refusal was in violation of the law." United States v. Hatchett, 923 F.2d 369, 372 (5th Cir. 1991).

1. Voluntary disclosure

Section 5K2.16 -- the provision governing downward departures for voluntary disclosure of a crime --- does not justify a reduction if the defendant discloses the offense only because discovery is imminent. The offense must be one that would have remained undiscovered. See U.S.S.G. §5K2.16, p.s. In the addendum to the PSR, the probation officer found that Barbera's fraudulent activities and the false statements made for the pledges had been discovered by the bank prior to his "voluntary disclosure," thus prohibiting the application of

section 5K2.16. In light of the district court's adoption of this fact, its consequent refusal to grant a departure on this basis was therefore appropriate.

2. Other grounds for departure

Barbera also argues that the guidelines do not provide any meaningful way to distinguish between "offenders of the type of [Barbera] who were trying to survive hard economic times and the bank defrauder who denies schemes to put money in his pocket." Accordingly, he concludes, he is entitled to a downward departure from the guideline range recommended in the PSR because this mitigating factor could not "adequately [be] taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." U.S.S.G. §5K2.0, p.s. (quoting 18 U.S.C. § 3553(b)). Barbera relies upon United States v. Kopp, 951 F.2d 521, 528-29 (3d Cir. 1991), in arguing that the evidence that his actions were "desperate" rather than "villainous" should be considered as a mitigating circumstance "that should result in a sentence different from that described." See U.S.S.G. §5K2.0. In Kopp, the Third Circuit Court of Appeals drew a distinction between outright theft ("intent to steal") and fraudulent conduct where the offender intends eventually to return the money ("intent to defraud") for purposes of calculating the amount of loss under guideline section 2F1.1, and intimated that the less culpable behavior should be treated more leniently. Barbera contends that this reasoning "should [similarly] allow a

lessening of the offense level for those offenders who intend to repay the money taken."

In declining to depart from the guidelines in the instant case, the district court recited that "[t]he guideline range is 27 to 33 months . . . [and there is] no reason to depart from the sentence called for by the application of the guidelines, inasmuch as the facts found are of the kind contemplated by the Sentencing Commission." In so holding, the court rejected Barbera's argument that the types of circumstances surrounding his conviction had not been considered by the Commission. While we do not pass upon the reasoning in Kopp, we do agree with the government that Barbera's interpretation of Kopp actually underscores the fact that the guidelines make adequate provision for distinguishing between "true theft" and "temporary deprivation fraud" in their provisions relating to calculation of the amount of loss. See Kopp, 951 F.2d at 528-29 (concluding that the amount of loss should reflect the amount of money actually lost or the harm intended).

Even assuming that the intent distinction were applicable to the case at bar, however, the probation officer has implicitly rejected any departure from the relevant guidelines based upon Barbera's "comparative culpability" in concluding that "the failing economy is not viewed as a justification for fraudulent activity." The district court agreed and adopted this finding, and, upon this record, we cannot find that it erred in refusing to depart downwardly from the guidelines.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.