

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3482
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICKEY MIXON,
a/k/a Jerome Washington, Jr.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-93-0002-L-3)

(September 12, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:¹

The sole issue in this case is the propriety of the district court's restitution order. Because Mixon did not object to the order, we review for plain error, and finding none, we affirm.

Mickey Mixon pled guilty to one count of filing a false credit application and one count of mail fraud. In addition to a term of

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment and supervised release, the district court ordered Mixon to pay restitution to his victims.

Mixon's convictions arose out of a scheme to use car dealerships' College Graduate Incentive Program to obtain new cars for himself and others. Using an alias, Mixon obtained a 1992 Infinity M-30 convertible from Bob Mandal Infinity in Mobile, Alabama. The car was financed by World Omni Financial Corporation. Later, Mixon and a friend used the same scheme to obtain a 1993 Ford Probe from Charlie Henderson Ford in Waveland, Mississippi. This car was financed by Ford Motor Credit Corporation. Next, Mixon obtained a 1993 Ford Taurus from Tanga-Lena Motors in Kentwood, Louisiana, again financed by the Ford Motor Credit Corporation. To effect these purchases, Mixon filed a false credit statement with the Bank of Louisiana and used the United States Mail to deliver the falsified documents.

Mixon argues that the district court erred in ordering him to pay restitution in the amount of \$31,440.27 without making a finding as to his ability to pay. Mixon maintains that he cannot comply with the order now, nor will he be able to do so on release. Mixon has only a high school education and an employment history which shows a maximum annual income of \$15,000. In addition, he suffers from a physical condition that will cause him to be permanently disabled.

The district court ordered Mixon to begin restitution while incarcerated and ordered that any unpaid balance be paid at a rate

determined by his parole officer. The court declined to assess a fine because Mixon did not have the ability to pay one.

Because Mixon did not object to the restitution order at sentencing or in objections to the PSR, we review his argument under the "plain error" standard. When a defendant in a criminal case has forfeited an error by failing to object, we may remedy the error only in the most exceptional case. **See United States v. Rodriguez**, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to use a two-part analysis in determining whether a case is exceptional. **See United States v. Olano**, 113 S. Ct. 1770, 1777-79 (1993).

First, an appellant who raises an issue for the first time on appeal must show that there is actually an error, that it is plain, and that it affects substantial rights. **See id.** at 1777-78. Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." **Id.** at 1778.

Restitution under the circumstances of Mixon's case is authorized by 18 U.S.C. § 3663. The Sentencing Guidelines require that the court order restitution unless full restitution has been made or the court determines that the complications arising from restitution outweigh the need for it. U.S.S.G. § 5E1.1. In determining the amount of restitution, the court considers "the amount of loss the victim suffered as a result of the offense, the

financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate." **Id.**

The PSR noted that Mixon is unmarried and has no dependents. The PSR also detailed the losses sustained by Mixon's victims as well as his employment record. According to the PSR, Mixon has a high school education and has worked as an assistant manager at grocery stores, as a car salesman whose salary was based on commission, as a self-employed private automobile broker earning \$15,000 per year, and as an employee for a telemarketing company with a salary based on commissions. Finally, the PSR noted that Mixon had no income since he was incarcerated, that he had no viable assets, and that he owed \$500 to Saks' Fifth Avenue.

Sentencing judges are accorded broad discretion in ordering restitution. **See United States v. Ryan**, 874 F.2d 1052, 1054 (5th Cir.), **cert. denied**, 489 U.S. 1019 (1989). Mixon's present indigence is not a bar to an order of restitution. **Id.** Not even a negative net worth or negative cash flow renders a restitution order illegal. **See United States v. Stafford**, 896 F.2d 83, 84 (5th Cir. 1990). The district court's restitution order, which has a factual component, is not plain error. Nor does it "seriously affect the fairness, integrity or public reputation of judicial proceedings." **See Olano**, 113 S. Ct. at 1779. We therefore affirm the district court's restitution order.

AFFIRMED.