IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3606
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STANLEY J. GAUDET,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-89-523-G-5)

(April 6, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Stanley J. Gaudet, a federal prisoner, appeals the denial of his motion to reduce or correct his sentence pursuant to the version of Federal Rule of Criminal Procedure 35

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

applicable to offenses committed before November 1, 1987. Gaudet urges that his sentence was imposed in an illegal manner and that the district court abused its discretion in denying his motion to reduce the sentence. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Gaudet pleaded guilty to 22 counts of embezzling from employee pension plans in violation of 18 U.S.C. § 664, and to one count of embezzling union funds in violation of 29 U.S.C. § 510(c). See United States v. Gaudet, 966 F.2d 959, 960 (5th Cir. 1992), cert. denied, 113 S.Ct. 1294 (1993) (Gaudet I). He was the president and business agent of Local Union 11 of the Sheet Metal Workers International Association, AFL-CIO, and served as trustee for several of its employee benefit funds. Id. at 961. He engaged in at least 23 separate acts of embezzlement between 1983 and 1989, stealing approximately 2.7 million dollars from Local 11's employee benefit plan and $40,000 from union funds. Id.

District Court Judge Marcel Livaudais applied pre-Sentencing Guidelines law to Counts 1-18 of the indictment, and applied the Sentencing Guidelines to Counts 19-23 of the indictment. Id. Gaudet was sentenced to a total term of imprisonment of 221 months. Id.

In Gaudet I, Gaudet appealed his sentence to us, arguing that (1) the Guidelines should have governed all 23 counts of the indictment; (2) the district court erred in using the total dollar amount embezzled to arrive at his offense level; and (3) the

district court's order divesting him of his pension plan to satisfy the restitution award was erroneous.[1] Id. We determined that (1) we had never before addressed the issue whether embezzlement is a "straddle offense" so that Gaudet's sentences for offenses committed prior to November 1987 would be governed by the Guidelines, but determined that the district court's failure to treat Gaudet's crimes as "straddle offenses" did not amount to plain error; (2) the district court was within its discretion in using the total dollar amount embezzled for sentencing; and (3) the district court's order that Gaudet relinquish his personal pension to satisfy the restitution order was not plain error. Id. at 962-64.

Gaudet filed a motion to disqualify Judge Livaudais from further participation in the case. Gaudet alleged numerous reasons for disqualification, including that Judge Livaudais' partiality should be questioned because his daughter, Julie, an attorney at a New Orleans law firm, had defended Gaudet in a civil suit by a casino for gambling debts. Judge Livaudais granted Gaudet's motion to disqualify, stating that Gaudet "sincerely, though erroneously, perceives some degree of impartiality of the undersigned."

Gaudet also filed a motion for correction and reduction of sentence. He argued that (1) his sentence should be corrected because Judge Livaudais operated under a conflict of interest when

[1] Gaudet also argued that his counsel was ineffective at sentencing for failing to object to the PSR. Gaudet states that the district court failed to address this issue; however, Gaudet himself fails on appeal to raise the issue of ineffectiveness.

sentencing him; (2) the Guidelines should have governed all 23 counts of the indictment; (3) the statute of limitations barred punishment on counts 1-14 of his indictment; (4) his pension could not be used to satisfy the restitution order; and (5) he was not advised of the possibility of restitution at the plea hearing. Gaudet argued in the alternative that the district court should reduce his sentence.

A different judge of the district court considered and denied Gaudet's motion, determining that Judge Livaudais had disqualified himself, not because of any conflict of interest, but because Gaudet perceived Judge Livaudais to lack impartiality. The new judge also determined that Gaudet's remaining reasons for claiming that his sentence should be corrected had already been considered and dismissed by this court in Gaudet I. Finally, the new judge determined that there were no circumstances warranting a grant of Gaudet's alternative motion for a reduction of sentence.

II

ANALYSIS

Before reaching the merits of Gaudet's argument, we must consider whether the former version of Fed. R. Crim. P. 35, applicable to offenses committed prior to November 1987, or the current version of Fed. R. Crim. P. 35, should have been applied to Gaudet's offense. As stated previously, we have not yet determined whether an embezzlement offense such as Gaudet's should be deemed to be a "straddle offense." See Gaudet I, 966 F.2d at 962.

The district court determined that the version of Fed. R.

Crim. P. 35 that applied to offenses committed prior to November 1987 applied in this case. Gaudet does not argue otherwise and, as Gaudet's motion was timely under former Rule 35,[2] the district court's application of the former version was equitable.[3] Thus, we agree that former Rule 35 was proper to apply in this case and to apply for purposes of this appeal.

A. Correction of Sentence for Imposition in Illegal Manner

The version of Rule 35 applicable to offenses committed before November 1, 1987, provided that: "The court may correct an illegal sentence[4] at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Gaudet challenges the district court's denial of his motion under Rule 35(a) on three grounds.

1. Sentencing Judge's Alleged Conflict of Interest

Gaudet argues that his sentence should be corrected because Judge Livaudais failed to disqualify himself from the sentencing proceedings. He argues that the judge's "partiality would be

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[2] Under former Rule 35(b), a motion to reduce a sentence must have been made within 120 days after entry of an order or judgment of the Supreme Court denying review. See Fed. R. Civ. P. 35(b) (version applicable to offenses committed prior to Nov. 1, 1987). Gaudet's petition for certiorari was denied on February 22, 1993, and his motion under Rule 35 was filed on March 22, 1993.

[3] A government motion is required to trigger the current Rule 35(b). See United States v. Doe, 940 F.2d 199, 202 (5th Cir.), cert. denied, 112 S.Ct. 201 (1991). The government does not argue, however, that Gaudet's motion should be governed by current Rule 35(b).

[4] The "illegality" referred to in this rule is one disclosed by the record such as a sentence in excess of statutory provision or in some other way contrary to applicable statute. 3 Wright et al., Fed. Prac. & Proc. § 582 at 381.

reasonably questioned because his daughter, Julie, worked at Chaffe/McCall in New Orleans, the very firm that represented the Union from which Appellant embezzled; the very firm and the very lawyer that represented Appellant in a suit by a casino where Appellant spent much of the embezzled money; the very firm that was being sued by the Union for representing Appellant and the Union at the same time[.]"[5]

A judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Under § 455(a), the inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality. Matter of Johnson, 921 F.2d 585, 587 (5th Cir. 1991). In cases in which a familial relationship is the suggested basis for charging impartiality, disqualification is mandated when "a relative with a close relationship to the judge has been an important participant in key transactions forming the basis of the indictment." See In re Faulkner, 856 F.2d 716, 721 (5th Cir. 1988).

Ms. Livaudais was not a participant in the transactions forming the basis of Gaudet's indictment. Gaudet neither alleges, nor proves, that Ms. Livaudais was even aware that Gaudet was embezzling money from the Union.

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[5] Although the new judge noted that Judge Livaudais had found Gaudet's allegations to be erroneous, Judge Livaudais did not specifically refute Gaudet's allegations regarding the judge's daughter's representation of Gaudet in the gambling debt or the allegations regarding dual representations of Chaffe/McCall. The record supports Gaudet's assertions on these matters.

Gaudet also alleges that Judge Livaudais should have disqualified himself because his daughter had both a financial and a non-financial interest in the outcome of the criminal proceeding.[6] Gaudet insinuates that Ms. Livaudais did not declare to her firm that the money he paid her to represent him was income to the firm; and that, therefore, Judge Livaudais sentenced him to a harsh sentence to protect the judge's daughter from being implicated in any criminal wrongdoing. Gaudet also insinuates that Judge Livaudais imposed the 2.7 million dollar restitution award "to please the Union in the hope that it would settle or dismiss its suit against Chaffe/McCall[.]"

Disqualification is mandated when a person within the third degree of relationship to the judge is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. 28 U.S.C. § 455(b)(5)(iii). A remote or speculative interest, however, is not one which reasonably brings into question a judge's partiality. In re Billedeaux, 972 F.2d 104, 106 (5th Cir. 1992). Gaudet's allegation that Julie Livaudais had an interest in the outcome of Gaudet's criminal proceedings is purely speculative. Judge Livaudais' failure to disqualify himself did not result in Gaudet's sentence being imposed in an illegal manner; therefore, the district court did not err in denying

[6] Gaudet also argues that disqualification was mandated because Ms. Livaudais acted as a lawyer in a related proceeding and could have been called as a material witness in the proceeding. Under § 455(b)(5), disqualification is mandated only if the relative acted as a lawyer in the instant proceeding or if it is likely that the relative would be called s a material witness. Neither of those circumstances is here present.

Gaudet's motion to correct his sentence based on the alleged impartiality of Judge Livaudais.

2. Delayed Disclosure of the Presentence Report

Gaudet also argues that his sentence was imposed in an illegal manner because his presentence report (PSR) was not mailed to his attorney until five days before sentencing.[7] He states that counsel had only one day to review and object to the PSR, and that he himself did not read and review the PSR until the day of trial. He argues that the sentencing court's delayed production of the PSR violated Fed. R. Crim. P. 32(c)(3)(A) and 18 U.S.C. § 3552(d), which provide that the defendant be furnished the PSR at least 10 days before sentencing.

Rule 35 permits a court to correct a sentence imposed in an illegal manner as a result of failing to comply with the procedural requirements of Rule 32(c)(3). See United States v. Velasquez, 748 F.2d 972, 974 (5th Cir. 1984). Here, however, the district court did not address Gaudet's allegation regarding the production of the PSR.

The requirement, under Rule 32, that the defendant be provided with the PSR 10 days before sentence is imposed was added by the 1987 amendment to Rule 32(c)(3)(A).[8] The 10-day requirement

[7] In support of his allegation, Gaudet has attached to his appellate brief a letter from the probation department dated July 18, 1991. The letter purports to require a response by July 19, 1991; however, that date appears to have been altered.

[8] The version of Rule 32(c)(3)(A) applicable to offenses committed prior to Nov. 1, 1987, provided only that the PSR be disclosed to the defendant "[a]t a reasonable time before imposing sentence." See Fed. R. App. P. 32(c)(3)(A) (version applicable to

mandated by 18 U.S.C. § 3553(d) was enacted in 1984. Gaudet cannot avail himself of the 10-day requirement for the offenses he committed prior to the enactment of the relevant statutes and, as to these offenses, the district court did not err by not releasing the PSR less than 10 days before sentencing.

Insofar as Gaudet is entitled to avail himself of the 10-day requirement for the offenses he committed after the enactment of the requirement, he has not established error warranting disturbance of the district court's judgment. Gaudet failed to object at sentencing to the delayed production of the PSR. A defendant who fails to object at sentencing to the district court's failure to comply with Rule 32(c)(3)(A) is relegated to the plain error standard of review. See United States v. Dickie, 775 F.2d 607, 611 (5th Cir. 1985). An error is plain if it is clear or obvious. United States v. Olano, ____ U.S. ____, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993).

At sentencing, the court asked Gaudet if he and his attorney had received the PSR, and Gaudet replied that he had. The court also asked Gaudet before he was sentenced whether he had anything he wished to say, and Gaudet replied that he did not. Gaudet's solemn declarations in open court carry a strong presumption of verity. United States v. Navejar, 963 F.2d 732, 734 (5th Cir. 1992). The production of the PSR five days prior to sentencing was not plain error. Olano, 113 S.Ct. at 1777.

Gaudet devotes a significant portion of his brief to arguing

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offenses committed before Nov. 1, 1987).

that the sentencing court's failure to provide him with the PSR more than 10 days prior to sentencing was not harmless error. He asserts that he was unable to object effectively to the PSR at sentencing, which in turn resulted in this court's rejection of his arguments on appeal because they did not amount to plain error. Even assuming that Gaudet has shown error, he has failed to establish that the alleged failure to produce the PSR sooner was plain error.

3. Restitution Order in Violation of ERISA; Failure to Group All Counts Under the Sentencing Guidelines; First 14 Counts Barred by the Statute of Limitations

Gaudet argues that, had his counsel been given the proper amount of time in which to review his PSR, counsel "surely would have objected" to the PSR on the following grounds: (1) that the district court's restitution order was prohibited by ERISA; (2) that all 23 counts of the indictment should have been "grouped" under the Guidelines; and (3) that the first 14 counts of the indictment were barred by the Statute of Limitations. Gaudet acknowledges that on direct appeal in Gaudet I we rejected these arguments, but states that he raises them now in the context of a Rule 35(a) motion; therefore, they are raised with a "different twist." See Gaudet I, 966 F.2d at 962-64 & n.3.

As discussed above, even assuming that Gaudet has established some temporal error in producing the PSR, his assertions are reviewed for plain error in the context of this Rule 35(a) motion. See Dickie, 775 F.2d at 611. Thus, our prior rejection of the arguments under the plain error standard on direct appeal

constitute the "law of the case." See Chevron v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993). The "law of the case doctrine" teaches that legal issues decided by an appellate court must be followed in all subsequent proceedings unless: (1) the evidence in a subsequent trial is substantially different; (2) controlling authority has since made a contrary decision of law; or (3) the decision was clearly erroneous and would work a manifest injustice. Paul v. United States, 734 F.2d 1064, 1066 (5th Cir. 1984) (internal quotations and citation omitted). None of these factors are present in this case; therefore, Gaudet's arguments on these contentions are barred by the "law of the case doctrine."

4. Restitution Order in Violation of Consumer Credit Protection Act

Gaudet also argues that the sentencing court's restitution order violates the garnishment provisions of the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1671-77, because the order requires the withholding of more than 25% of his pension. Gaudet did not raise this argument at sentencing or in his direct appeal. See Gaudet I, 966 F.2d at 959. As discussed above in connection with other such deficiencies, we need not consider this argument beyond the plain error level. See Dickie, 775 F.2d at 611.

A reading of the CCPA does not indicate that its provision would apply to court-ordered criminal restitution. See 15 U.S.C. § 1671 (declaration of purpose discusses the predatory extensions of credit.). Even assuming that it did, however, the district court's error was not obvious or "plain." See Olano, 113 S.Ct. at

1777; see also Gaudet I, 966 F.2d at 964 (concluding that, even assuming that Gaudet was correct about ERISA precluding the use of his pension to satisfy his restitution obligation, the district court's error is not an obvious one reversible under the plain error standard).

5. No Notice of the Possibility of Restitution

Gaudet also argues that his sentence was illegal because he was not notified of the possibility of restitution at the time he entered his plea of guilty. He asserts that the court violated Fed. R. Crim. P. 11(c)(1) by not informing him that it may order restitution to any victim of the offense.

The imposition of an order of restitution is legal for the crime to which Gaudet pleaded guilty. See 18 U.S.C. § 644. Thus, although Gaudet's motion is styled as a Rule 35(a) motion and although Gaudet argues that his sentence should be modified, Gaudet is actually contesting the validity and voluntariness of his guilty plea. See United States v. Stumpf, 900 F.2d 842, 844 (5th Cir. 1990) (defendant pleaded guilty to embezzlement in violation of 18 U.S.C. § 657). Accordingly, we construe this portion of Gaudet's motion as a collateral attack on his conviction under 28 U.S.C. § 2255. Id. at 844-45.

Failure to comply with the formal requirements of Rule 11 cannot be considered in a collateral attack under § 2255 unless the defendant shows that the error resulted in a complete miscarriage of justice. Id. at 845. At his guilty-plea hearing, Gaudet was warned that he might have to pay fines totaling five million

dollars. Given such warning, the district court's subsequent order to pay restitution of 2.7 million dollars was not an error of the magnitude requiring collateral relief. See Stumpf, 900 F.2d at 845.

B. Denial of Motion to Reduce Sentence - Abuse of Discretion

Gaudet argues alternatively that the district court abused its discretion in denying his motion to reduce his sentence under Fed. R. Crim. P. 35(b). A district court's ruling under Rule 35(b) will be reversed only for illegality or gross abuse of discretion. United States v. Tooker, 747 F.2d 975, 980 (5th Cir. 1984), cert. denied, 471 U.S. 1021 (1985).

Gaudet urges that the following factors justify a reduction in his sentence: 1) the loss to the pension funds was covered by insurance; therefore, none of the pensioners suffered any loss; (2) the sentence was extreme; (3) he is in poor health; and (4) his crimes were caused by his addiction to gambling. The district court determined that none of the factors offered by Gaudet warranted a reduction of sentence. A district court may summarily deny a defendant's motion for a reduction in sentence when the defendant fails to allege facts to show the sentence he received to have been produced by a gross abuse of discretion by the district court. Tooker, 747 F.2d at 980. We conclude that the district court's denial of Gaudet's motion to reduce his sentence was not such an abuse of discretion.

III

APPOINTMENT OF COUNSEL ON APPEAL

Gaudet has filed a motion for the appointment of appellate counsel. He acknowledges that briefs have already been filed, but states that counsel should be appointed for oral argument. As this case is being disposed of on our summary calendar, without oral argument, Gaudet's motion is hereby DENIED as moot.

IV

CONCLUSION

For the reasons expressed above, we affirm the district court's denial of Gaudet's motion to reduce or correct his sentence under Fed. R. Crim. P. 35, and the district court's discretionary denial of his motion to reduce sentence. We also deny as moot Gaudet's motion for appointment of counsel on appeal.

AFFIRMED.