

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3801

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

NELSON BREVE

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-93-293-A)

(October 18, 1994)

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

PER CURIAM:*

In this direct criminal appeal, Defendant-Appellant Nelson Breve claims that the district court committed sentencing errors, to wit: miscalculating the monetary amount, for purposes of United States Sentencing Guidelines, (U.S.S.G.) §2F1.1, of "gross receipts" derived from defrauding a financial institution; denying an additional one-level reduction for acceptance of responsibility

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

under U.S.S.G. §3E1.1(b); and including "kickbacks" to Breve from third parties as relevant conduct under §1B1.3. Although we disagree with Breve regarding gross receipts and relevant conduct, we agree with his contention that the district court erred in refusing to grant the additional one-level reduction in sentence level pursuant to § 3E1.1(b). We therefore vacate Breve's sentence and remand this case to the district court for resentencing.

Having carefully reviewed the briefs and submissions of counsel, closely listened to oral argument, and considered all facts and law applicable to this case, we are satisfied that the district court did not commit reversible error in including the full amounts of all funds derived from the fraud as constituting "gross receipts" - after all, gross is gross! - or in including in relevant conduct the amount of kickbacks received by Breve for loans made to others. Therefore, on remand, the court should continue to include those elements in its sentencing calculus.

We note preliminarily that, in considering Breve's entitlement to the relatively new, additional one-level decrease provided in §3 E1.1(b) for accepting responsibility early on, neither the court nor counsel for the parties had the benefit of our opinion in United States v. Tello.¹ In Tello, we held that under subsection (b)(2) of §3E1.1, a defendant has a right to a one-level reduction for the "timely" acceptance of responsibility when the court finds that (1) the defendant's offense level is 16 or higher; (2) the

¹9 F.3d 1119 (5th Cir. 1993), decided after the district court sentenced Breve.

defendant has received or will receive a two-level reduction for acceptance of responsibility under subsection (a) of §3E1.1; and (3) the defendant's early notification of his intention to enter a plea of guilty results in (i) the government's ability to avoid trial preparation, and (ii) the court's ability to schedule its calendar efficiently.² Tello makes clear that, when those objective criteria are met, the defendant has a nondiscretionary right to receive the third one-level reduction, i.e., a right that the sentencer lacks discretion to deny.

Tello makes equally clear that the defendant's timely acceptance of responsibility for purposes of §3E1.1(b)(2) relates to the government's and court's efficiencies in connection with avoiding trial preparation and trial scheduling; that subsequent acts of the defendant which may cause additional work or delay to the probation department or to the scheduling of sentencing hearings are not conditions subsequent that divest a defendant of the third one-level decrease once he becomes entitled to it. Although, under such circumstances, the defendant might encounter other offsetting increases, such as obstruction of justice, the third one-level reduction is not defeasible once it has been earned.

As noted above, neither the court nor the parties had the benefit of Tello at sentencing; however, we do on appeal. We are constrained, therefore, to vacate Breve's sentence and remand his case with instructions to the district court to resentence him on

²Id. at 1125-26

the basis of a reduction of three, rather than two, levels in his offense level for acceptance of responsibility.³

VACATED and REMANDED for resentencing consistent with this opinion.

³Here the error resulting from denying Breve the third one-level reduction cannot be categorized as harmless. Breve was sentenced on the basis of an offense level 24 and a criminal history category of I, resulting in a sentencing range of 51-63 months in prison. Reducing Breve's offense level to 23 will produce a sentencing range of 46-57 months, see U.S.S.G. § 5, pt.A, which would result in a 5 month decrease in the sentence if the district court once again imposes a sentence at the low end of the range.