

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4154  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR TULLY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(3:92cr12(1))

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(November 19, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.\*

EDITH H. JONES, Circuit Judge:

Appellant Arthur Tully was sentenced to concurrent terms of 24 months imprisonment followed by supervised release and other penalties after he was found guilty of conspiracy to possess goods stolen from interstate commerce and stealing goods that had been transported in interstate commerce. On appeal, he argues that the evidence was insufficient to support his convictions, the district court erroneously introduced coconspirator testimony, and the trial

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court erroneously increased his offense level by three for being a manager or supervisor in the illegal scheme. We find merit only in his attack on the sentence and accordingly vacate and remand for resentencing.

Tully was clearly connected to the theft of a 40-foot ocean container with 775 cases of Reebok athletic shoes that had been stored on the premises of Southwest Freight in Dallas, Texas. Tully was an independent contractor working at Southwest Freight, he was seen around the gate at closing time the night of the theft, and the next morning, he appeared to be concealing a pair of bolt cutters that had been borrowed from a Southwest Freight employee and were probably used in the theft. Tully arranged with his father-in-law to place a trailer on the relative's land in Weaver, Texas, where the container was ultimately discovered. Carol Graham, a relative of Tully, recognized his voice amid the commotion concerning a large tractor-trailer on that land in the early morning hours following the theft. Finally, the jury could have believed J.C. Witherspoon's testimony that seemed to implicate Tully in the "mess" involving the stolen shoes. These facts, and others that led the district court to conclude an overwhelming case had been made against defendant, were sufficient to convict him of the offenses charged. That the facts are circumstantial does not mean they were unworthy of a jury's credence.

Additionally, the court did not err in admitting testimony of co-conspirator Ronald Williams, who borrowed the bolt cutters. An adequate foundation was laid for the existence of the

conspiracy and Williams's part in it. Contrary to appellant's contention, it appears that bolt cutters were necessary to open the seals of the trucks at Southwest Freight as well as the company gate. The court did not err in admitting this testimony.

We are mystified, however, by the trial court's assessment of a three-level increase to Tully's base offense level under U.S.S.G. § 3B1.1(b). This guideline counsels a base offense increase if the defendant was a "manager or supervisor . . . and the criminal activity involved five or more participants or was otherwise extensive. . . ." Id. The trial court did not clearly adopt the PSR, which in any event does not directly address the number of participants involved in the conspiracy. Other than Tully and Williams, the pertinent part of the PSR refers to the five individuals who stole the shoes from the trailer but who were not involved in the underlying theft from Southwest Freight. (PSR ¶ 25 and Response to Government Objection #2). The government appears to concede that Witherspoon and others indicated for the sale of the shoes stole those from Tully and were not part of the original theft conspiracy. Further, the PSR suggested that Tully had knowledge of the Southwest Freight yard's operations and the contents of the trailers that was not held by the other defendants and that he controlled the final destination of the trailer. While the latter fact may be accurate, the evidence at trial showed that Tully was not an employee of Southwest and did not have access to inside information concerning the contents of the container. In short, the PSR is bereft of evidence connecting Tully to five or

more individuals involved in the theft from Southwest Freight. Additionally, as the district court observed at sentencing, Tully's arrangements to store the trailer hardly indicate "otherwise extensive" planning. Because the PSR furnishes inadequate support for the district court's three-level increase, and the reasons for that increase are not otherwise apparent in the record, we must vacate and remand for resentencing.

Tully's convictions are **AFFIRMED**; sentence **VACATED** and **REMANDED** in accordance herewith.