UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-4342
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WESLEY GODFREY, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana
(92 CR 50055 01)

(September 3, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges:

PER CURIAM:*

BACKGROUND

A four-count indictment charged Wesley Godfrey, Jr. (Godfrey), former president of Security National Bank in Shreveport, La. (SNB), and his mother, Clevester Godfrey, with conspiracy to commit

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

bank fraud (Count I) and bank fraud (Count II). Godfrey was also charged with counterfeiting a security (Count III) and with making a false statement to a federally insured bank (Count IV). On the day of trial, Godfrey entered into a plea agreement in which he agreed to plead guilty to Counts II and III, and the Government agreed to dismiss Counts I and IV, to dismiss all charges against Clevester Godfrey at Godfrey's sentencing, and not to prosecute Godfrey for other offenses known to the Government. Almost three months later, Godfrey dismissed the attorney who had jointly represented Godfrey and his mother. His new attorney moved to withdraw the guilty plea, but the district court denied the motion.

Prior to sentencing, Godfrey filed detailed objections to the Presentence Report (PSR). The district court overruled most of the objections and sentenced Godfrey to concurrent terms of twenty-four months imprisonment on each count, concurrent two-year terms of supervised release on each count, and a fifty-dollar special assessment on each count.

The following facts are relevant to Godfrey's appeal. Godfrey became president of SNB in connection with his May 1989 purchase of notes secured by a large block of SNB stock. Joseph Adrey was the broker who arranged the transaction. According to Godfrey, Adrey agreed to help Godfrey obtain a position on the board of Tuskegee University and to provide to Godfrey a home mortgage of up to $200,000. Godfrey insisted that this agreement had been memorialized in writing, but he was unable to produce the document. After Godfrey became president of SNB, Bancor Capital Group, Inc.,

a company controlled by Adrey, opened a checking account at the bank. Bancor frequently moved large sums of money through the account.

In May 1989, Godfrey signed a contract to purchase a house at 2045 Pepper Ridge Drive. The sale was scheduled to close on July 13, 1989. Adrey never fulfilled his alleged promise to procure a mortgage for Godfrey. Godfrey testified, however, that Adrey instructed Godfrey to debit $190,000 from the Bancor account and to use the funds to purchase the house. Adrey also allegedly instructed Godfrey that, after the act of sale had been completed, Godfrey should go to the office of Adrey's attorney to execute a mortgage on the property in favor of Adrey. Robert England, a former assistant cashier at SNB, testified that Godfrey had instructed him to debit $190,000 from the Bancor account and to use the funds to purchase a bank money order for $190,000 payable to Louisiana Title Company. England stated that he "most likely" gave the original of the bank money order to Godfrey. Godfrey told England that Godfrey was going to use the $190,000 to purchase the house on Pepper Ridge. Later the same day, Adrey called SNB, and England told Adrey what had occurred. Adrey was "flabbergasted" and he reacted with disbelief. He wanted to know "who the hell" had authorized the transaction and how it was going to be cleared. England told Adrey that Godfrey had initiated the debit, but Adrey insisted he had not authorized the transaction.

Adrey was not present at the sentencing hearing. Walter Clawson,[1] Adrey's attorney, testified that in early July 1989, Adrey asked Clawson whether he could loan money to Godfrey, and Clawson advised Adrey not to do so. On July 13, 1989, Adrey called Clawson and informed him that he had just learned of the $190,000 debit. He told Clawson that he had not authorized the debit, and that he had found out that Godfrey had already used the money to purchase a house. Clawson advised Adrey to try to obtain a mortgage from Godfrey. Later that day, Godfrey came to Clawson's office and executed a note secured by a mortgage on the house.

The $190,000 debit caused an overdraft in Bancor's account. Bancor subsequently made deposits that cleared the overdraft, but he also wrote checks (which SNB paid) that created a second overdraft of approximately $150,000. SNB eventually charged off a loss of $150,553 related to the Bancor account.

The purchase price of the house was $300,000. At the closing, Godfrey paid the seller $200,000 and gave him a personal note for $100,000, which the seller then sold back to Godfrey for $86,000 cash. Godfrey does not dispute that he used the $190,000 from Bancor's account to pay the seller or that he obtained the $86,000 with which he purchased the note by approving a fraudulent $90,050 loan in his mother's name. Count II is based on the fraudulent loan to Clevester Godfrey.

[1] The attorney's name is spelled Clausen in the record, but the correct spelling is Clawson.

Godfrey also does not dispute that he forged a $5,000 SNB certificate of deposit and gave it to R. L. Cooper in payment of a pre-existing debt. Godfrey never entered the certificate of deposit on SNB's books or deposited any money to fund the certificate. Count III is based on this offense.

OPINION

Calculation of Loss

The PSR recommended a seven-level increase above Godfrey's base offense level of six because the total loss exceeded $200,000.[2] The probation officer determined that Counts II and III involved a total loss of $285,050. This amount is the sum of the $90,050 fraudulent loan, the $5,000 certificate of deposit, and the $190,000 debit.[3]

Godfrey objected that the $190,000 should not have been included because the debit was not relevant conduct. The district court concluded that the debit was relevant because it had been caused by Godfrey's misuse of his position at the bank. Godfrey also objected that the $190,000 should have been excluded because the debit was covered by subsequent Bancor deposits.[4] Godfrey

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[2] Godfrey's offense level actually should have been increased by eight. See U.S.S.G. § 2F1.1(b)(I). The Government has not raised this issue, however, and Godfrey's sentence is within the guideline range for the correct offense level.

[3] The probation officer also noted, but did not include in the loss calculation, $28,833 in lost interest on the fraudulent loan and $150,553 written off by SNB as a result of the second overdraft on the Bancor account.

[4] The PSR states that Bancor actually lost $190,000. A more correct statement is probably that Bancor and SNB have together lost a total of $190,000. Bancor recouped some of the $190,000

argued that Adrey was solely responsible for the eventual loss to SNB because he continued to write checks on the Bancor account after he learned that Godfrey had removed the $190,000. The court rejected this argument, informing Godfrey that "the reason there wasn't the money in the account was because of the unauthorized debit."

Godfrey next argued that the loss figure should not include the entire principal amount of the fraudulent loan because that loan was secured by a mortgage on the Pepper Ridge house. The district court noted the existence of superior mortgages and took judicial notice that real estate values in Shreveport have declined since 1989. The court determined that any allowance for potential recovery on the loan would be speculative. The court also rejected Godfrey's argument that the $5000 forged certificate of deposit should be excluded from the loss figure because it represented a pre-existing debt.

On appeal, Godfrey has reurged all of the arguments that he made in the district court.

This Court reviews the application of the Sentencing Guidelines de novo and the district court's findings of fact for clear error. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). If an offense involves fraud or deceit, the base offense level may be increased by eight if the loss exceeded $200,000.

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when SNB continued to honor its checks after the account was overdrawn, resulting in a $150,553 loss to SNB. Bancor, however, would be liable to the FDIC for the amount that SNB charged off.

U.S.S.G. § 2F1.1(b)(1)(I). In a loan fraud case, the loss is the amount of the loan not repaid at the time that the fraud is discovered, minus any recovery or expected recovery. United States v. Frydenlund, 990 F.2d 822, 825 (5th Cir. 1993), petitions for cert. filed (Aug. 2, 1993) (No. 93-5444) and (Aug. 3, 1993) (No. 93-186); see § 2F1.1, comment. n.7(b). Calculation of loss is a factual finding that will be affirmed if plausible in light of the record as a whole. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). Under the guidelines, conduct is relevant to an offense if there is "sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct." United States v. Bethley, 973 F.2d 396, 401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1323 (1993) (internal quotations and citations omitted); see also § 1B1.3(a)(2) (conduct is relevant if it is "part of the same course of conduct or common scheme or plan as the offense of conviction").

We affirm the district court's finding that the loss exceeded $200,000. At sentencing, the unpaid principal balance on the fraudulently obtained loan was $89,567. The district court was informed that the FDIC had intervened in the various foreclosure suits to assert an allegedly superior $325,000 mortgage on the Pepper Ridge house. Additionally, Bancor and/or SNB lost over $190,000 as a result of the unauthorized debit. The debit is relevant to the offense of conviction because both the debit and the fraudulent $90,050 loan were part of Godfrey's scheme to obtain

money to purchase the house. Bethley, 973 F.2d at 401; § 1B1.3(a)(2); see also United States v. Cockerham, 919 F.2d 286, 289 (5th Cir. 1990) (other fraudulent transactions by bank officer as to which charges were dismissed properly included as relevant conduct). The Cockerham court noted that "[t]he broad scope of [the bank officer's] wrongful actions [did] not make them any less related to one another." Id. The district court did not clearly err by refusing to reduce the amount of loss by any potential recovery from the sale of the house. See Sanders, 942 F.2d at 897.

Godfrey's other arguments concerning calculation of loss are irrelevant. The $150,553 overdraft was not included as a "loss" for purposes of determining his sentence. The inclusion of the $5000 face value of the forged certificate of deposit as loss is immaterial to Godfrey's offense level. See § 2F1.1(b)(1)(H)(I) and (J).

Minimal Planning

Godfrey urges that the district court should not have imposed a two-level increase because his offense involved more than minimal planning or a scheme to defraud more than one victim. According to Godfrey, his offense was typical of "bank fraud in simple form."

The probation officer recommended a two-level increase because the offense involved more than minimal planning. See § 2F1.1(b)(2)(A). The probation officer noted that the offense involved more than one victim, but he did not recommend an increase on that basis.

The guidelines define minimal planning as "more planning than is typical for commission of the offense in a simple form." U.S.S.G. § 1B1.1 comment (n.1(f)). As an example, the guidelines explain that an embezzlement involving a single false book entry would not involve more than minimal planning, but one that entailed several false entries, or the creation of false purchase orders and invoices, would involve more than minimal planning. Id.

The district court stated that it was "obvious . . . that all of this required more than minimal planning." This finding is a question of fact reviewed under the clearly erroneous standard. United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990). Affirmance is required if the district court's account of the evidence is plausible in light of the entire record, notwithstanding that the court of appeals might have weighed the evidence differently or reached a different conclusion had it been sitting as the trier of fact. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

Godfrey applied for the fraudulent loan well in advance and he executed numerous documents in connection with the loan. See Barndt, 913 F.2d at 204 (finding of more than minimal planning was not clearly erroneous where defendant formed an intent to commit crime in advance and took several discrete steps before he actually committed the crime). The district court's finding that Godfrey's offense involved more than minimal planning is not clearly erroneous. Id.

Denial of Downward Departure

Godfrey suggests that the district court should have departed downward because the total loss figure overstated the seriousness of his conduct. He argues that his actions were not the proximate cause of SNB's eventual losses.

When a defendant is sentenced within the guideline range, appellate review is limited to whether the sentence was imposed in violation of law or was imposed as a result of an incorrect application of the guidelines. 18 U.S.C. §§ 3742(d), (e); United States v. Buenrostro, 868 F.2d 135, 136 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). This Court will not disturb the district court's exercise of discretion not to depart downward from the guidelines unless the district court mistakenly believed it was not permitted to depart. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). The Court should not disturb the district court's determination in this case. Godfrey was sentenced within the guidelines. The record does not indicate, and Godfrey has not alleged, that the district court mistakenly believed that it could not depart downward.

Withdrawal of Guilty Plea

Godfrey's final argument is that the district court abused its discretion when it refused to allow him to withdraw his guilty plea. In support of Godfrey's motion to withdraw his plea, he denied that any of his actions had been motivated by criminal intent. He alleged that his guilty plea had been motivated primarily by concern for his mother, but that he believed that she

was now in a better position to withstand the rigors of a federal criminal trial. He also alleged that he had been led to believe that he would be eligible for probation and that he was not aware of the extent of the losses for which he would be held responsible. The motion to withdraw was not filed until almost three months after Godfrey pleaded guilty. The district court denied the motion because, before filing the motion to withdraw the plea, Godfrey's new attorney had reviewed the Government's trial folder, which included the prosecutor's opening statement and her trial notes on cross-examination.

A district court may permit a defendant to withdraw his guilty plea before sentencing for any fair and just reason. Fed. R. Crim. P. 32(d). This Court reviews the denial of a motion to withdraw for an abuse of discretion. United States v. Bounds, 943 F.2d 541, 543 (5th Cir. 1991).

It is the defendant's responsibility to establish that withdrawal of the guilty plea is justified. United States v. Daniel, 866 F.2d 749, 752 (5th Cir. 1989). When determining whether to permit a defendant to withdraw his guilty plea the court considers: (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion, and if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial

resources. United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

Especially in light of the relatively weak explanation that Godfrey gives for his decision to move to withdraw his plea, the denial of Godfrey's motion to withdraw his guilty plea was within the discretion of the district court. Additionally, the record shows that the Government would have been prejudiced if the court had granted the motion. See Bounds, 943 F.2d at 543; Carr, 740 F.2d at 343-44.

We AFFIRM.