UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4427

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD S. HUFFHINES,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4-92-CR-51)

(July 14, 1994)

Before WISDOM and JONES, Circuit Judges, and COBB,[*] District Judge.

COBB, District Judge:[**]

Richard S. Huffhines, proceeding pro se, pleaded guilty to four counts arising out of his involvement in a stolen car enterprise. He asserts various procedural and sentencing errors. We find none and **AFFIRM**.

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[*] District Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. Background

Richard S. Huffhines (Huffhines) was recently re-acquainted with our court system when officers from the Beverly Hills Police Department, responding to a domestic dispute, arrested him in California. A subsequent search revealed a key to a room at the Foghorn Motel, located at the Marina Del Rey. The officers went to the Foghorn, where they learned that Huffhines' room had been repossessed because the rent had not been paid. After the desk clerk consented to a search of the room, police discovered a firearm hidden under the mattress and a briefcase belonging to Huffhines. After obtaining a warrant, police searched the case and discovered evidence implicating Huffhines in a stolen car enterprise.

For his role in possessing the gun, a grand jury for the Central District of California returned an indictment charging Huffhines with one count of 18 U.S.C. § 922(g)(1) (possession of a firearm by a felon). The California grand jury did not charge Huffhines with any counts arising out of the stolen car scheme. Prior to trial, Huffhines filed a motion to suppress certain evidence seized from the hotel room. After hearing Huffhines' motion, the California district court concluded that the motel room search was lawful because an innkeeper has the right to consent to a search of a room which has been re-possessed due to unpaid rents. However, that court indicated that the search of Huffhines' briefcase was unlawful. The government advised that court that the evidence obtained from the briefcase was irrelevant to the charged

offense of felon in possession of a firearm.

Thereafter, the case proceeded to trial, and on March 1, 1991, a jury convicted Huffhines on the firearm count. The California court imposed a 120-month sentence. However, the Ninth Circuit vacated that sentence and remanded the case because it concluded that the district court erroneously determined that the firearm conviction constituted a "crime of violence." See United States v. Huffhines, 967 F.2d 314, 321-22 (9th Cir. 1992). On remand, the district court re-sentenced Huffhines to thirty-three (33) months.[1] He was released on October 23, 1992.

Meanwhile, in Texas, authorities began an investigation into a stolen car scheme forming the basis of this appeal. A complaint and warrant were issued on October 22, 1992. As soon as Huffhines was released from custody for the California conviction, he was arrested and taken to Sherman, Texas. On November 12, 1992, a grand jury for the Eastern District of Texas returned an indictment charging Huffhines with six offenses arising out of an ongoing scheme to steal, re-title, and re-sell automobiles.[2]

Huffhines filed multiple pre-trial motions, two of which are relevant: He first urged dismissal of the indictment for

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[1] We note that the Ninth Circuit, by an unpublished opinion, recently vacated the thirty-three month sentence as well. United States v. Huffhines, 1 F.3d 1247 (9th Cir. 1993) (table).

[2] Count one of the indictment charged Huffhines with one count of interstate transportation of stolen property, 18 U.S.C. § 2314; Counts two, five, and six charged him with falsification of motor vehicle identification numbers, 18 U.S.C. § 511; and Counts three and four charged him with trafficking in motor vehicles or their components with falsified, altered or removed identification numbers, 18 U.S.C. § 2321. Three vehicles formed the basis for the indictment, a 1989 Chevrolet Blazer, a 1989 Chevrolet Truck, and a 1989 Cadillac.

prejudicial delay. Then he sought to collaterally estop the government from re-litigating the lawfulness of the briefcase search. The district court denied both. On January 11, 1993, Huffhines conditionally entered pleas of guilty to counts 1, 2, 3, and 6 of the indictment.[3] These guilty pleas were accepted without prejudice to Huffhines' right to appeal the interlocutory rulings.

On April 9, 1993, the district court held a sentencing hearing spanning three hours. At the conclusion of the hearing, the court adopted the revised findings of the Probation Department, which included a two point increase for Huffhines' role as an organizer and a two point increase for obstruction of justice. The court also imposed a $10,000 fine and upwardly departed. The total sentence imposed was 96 months on counts one and three and 60 months on counts two and six. All sentences were to run concurrently. Huffhines timely appealed, and we will first consider the district court's procedural rulings, followed by Huffhines' asserted sentencing errors.

II. Discussion

A.

Huffhines first argues that the district court should have precluded the government from re-litigating the issue whether the contents of his briefcase were admissible. In criminal as well as civil cases, when a party has had a full and fair opportunity to

[3] Counts one, two, and three dealt with the 1989 Blazer. Count six charged Huffhines with removing, tampering, and/or altering the Vehicle Identification Number on the Cadillac.

litigate an issue essential to a prior proceeding, the doctrine of collateral estoppel generally will bar him from re-litigating the same issue in a subsequent proceeding. Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Lee, 622 F.2d 787, 789 (5th Cir. 1980). Since the lawfulness of a search or seizure involves a mixed question of fact and law, collateral estoppel may be properly invoked to bar a subsequent attempt to litigate factual issues decided adversely to the government. See Ferenc v. Dugger, 867 F.2d 1301, 1303 (11th Cir.), cert. denied, 493 U.S. 828 (1989). However, in order to successfully bar an attempt to re-litigate, the defendant must have prevailed on a factual issue related to the search which resulted in the inadmissibility of evidence forming part of the charges or factual allegations levelled against him in the first proceeding. Ferenc, 867 F.2d at 1304.

In Ferenc, for example, the court concluded that the state was not collaterally estopped from re-litigating the lawfulness of a search of the defendant's van. Id. at 1305. The first proceeding involved a prosecution by the state of Florida for possession of burglar's tools, attempted burglary, and possession of a firearm. Id. at 1302. Although losing on the issue whether a search of his person was reasonable, the defendant successfully challenged the search of his van, resulting in exclusion of certain evidence. He was ultimately convicted of the charged offenses. In the second proceeding, the state of Florida charged the defendant with first-degree grand theft and sought introduction of the evidence (stolen property) seized from the vehicle. The defendant

sought to collaterally estop the state from re-litigating that issue.[4] Ferenc reasoned that the stolen property found in the van had not formed part of the factual allegations of the first trial. Id. at 1304. Therefore, the factual issues leading to the earlier suppression of that evidence had not been necessarily determined adversely to the state., id., and the court held that the issue of the lawfulness of the automobile search was open to re-litigation.

Ferenc is persuasive. What is critical to this case is that the evidence seized from the briefcase was in no way necessary to resolve the issue whether Huffhines was guilty of the firearm charge in the California proceeding.[5] In that case, the government agreed not to introduce the contents of the briefcase as part of the government's case in chief. Any evidence implicating Huffhines in the auto theft scheme which police discovered pursuant to the search of the briefcase was irrelevant to the felon in possession charge. Since the briefcase evidence was unnecessary to the

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[4] The defendant in Ferenc was convicted in the second proceeding. He sought direct review, but the conviction was affirmed by the Florida Court of Appeal. The defendant sought habeas corpus relief from the Middle District of Florida.

[5] The present case is distinguishable from our decision in United States v. McKim, 509 F.2d 769 (5th Cir. 1975). McKim involoved prosecutions for first, possession of marijuana and second, escape from federal custody pursuant to a lawful arrest. In the first prosecution, the defendant had successfully argued that border patrol agents lacked reasonable suspicion or probable cause to stop and search his automobile. For this reason, we vacated his conviction for possession of marijuana. McKim, 509 F.2d at 771-72.

Then the government prosecuted McKim for escaping from custody pursuant to a lawful arrest. We collaterally estopped the government from litigating whether the arrest was lawful. Id. at 776. We reasoned that the lawfulness of the arrest was essentially the same question as whether the stop and search were valid. Id. Therefore, the defendant in McKim had succeeded on an issue in the first proceeding essential to its judgment. Moreover, the issue on which he prevailed was the same issue which the government sought to relitigate. For the reasons set forth above, we find the present case more analogous to Ferenc than McKim.

California trial, Huffhines has not necessarily overcome any factual issues concerning whether the search of his briefcase was lawful. Therefore, the district court correctly held that the government was not precluded from raising the point anew in the present case. Huffhines' first point of error is rejected.[6]

B.

Huffhines also asserts that the government's pre-indictment delay denied him due process. He argues that had the government indicted him at the same time for his role in the car scheme as well as for possessing the firearm, application of the Sentencing Guidelines would have yielded a lesser sentence. The government contends that it did not intentionally delay when bringing the auto theft charges, but rather the time lapse resulted from a docket backlog and the need to investigate. The government further argues that any perceived legal prejudice is merely speculative and, therefore, is insufficient to make out a due process violation. There is no dispute that the stolen vehicle counts were charged within the applicable statutes of limitations.

Pre-indictment delay only violates due process when it is undertaken intentionally to obtain a tactical advantage, and the attendant delay prejudices the defendant. United States v. Marion, 404 U.S. 307 (1971); United States v. Varca, 896 F.2d 900, 904 (5th Cir.), cert. denied, 498 U.S. 878 (1990). The district court specifically found no indication that the government intentionally

[6] We take additional comfort in knowing that the district court offered Huffhines an additional opportunity to challenge the validity of the search of his briefcase.

delayed the indictment in an effort to gain a tactical advantage. We agree that there has been no such showing. Although Huffhines argues that the government's proffered reason for the delay establishes a negligent and unjustifiable delay, we cannot extrapolate negligence into intent.[7] Due process was not offended just because Huffhines was more diligent in committing crimes than the government was in solving them. We therefore hold that the district court properly denied Huffhines' motion to dismiss the charges for pre-indictment delay.

C.

Turning now to the asserted sentencing errors, Huffhines argues that the district court erroneously enhanced the offense level when it found Huffhines was an organizer or leader in the stolen car scheme. Based on its finding, the court increased Huffhines' offense level two points. We review this determination for clear error, United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992), and, since the district court did not err, we affirm the district court's two level increase.

Under the Guidelines, "if the defendant was an organizer, leader, manager, or supervisor in any criminal activity," the

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[7] We concomitantly doubt that the explanation even amounts to "negligence" or lack of "justifiable necessity." Moreover, we recently emphasized the threshold need to show actual rather than perceived prejudice in order to successfully prove a due process violation. United States v. Beszborn, 21 F.3d 62, 66 (5th Cir. 1994). Nothing indicates that Huffhines suffered any prejudice in fact as a result of the government's delay. He has made no showing that witnesses and proof have become unavailable. As to legal prejudice, Huffhines' sentencing abacus is as complex as it is moot. We decline to speculate whether he would have received a lesser sentence had he been indicted on, convicted of, and sentenced for his many criminal offenses at the same time. In view of our decision that his proof falls short of establishing an intentional delay to gain a tactical advantage, decision on this issue becomes unnecessary.

defendant's offense level is increased by two levels. U.S.S.G. § 3B1.1(c). We have limited the sentencing court's focus to criminal activity "anchored to the transaction leading to the conviction." Whitlow, 979 F.2d at 1011. However, in determining what criminal activity is transactionally anchored to the conviction, the court may properly consider the defendant's involvement in the overall criminal scheme rather than simply focusing on the specific offenses charged in the indictment. United States v. Villarreal, 920 F.2d 1218, 1223 (5th Cir. 1991).

Huffhines argues that the district court erred by looking to his escapades with Dale Russell which were unrelated to the two stolen vehicles forming the basis of his convictions. Huffhines argues that he could not have supervised Russell because Russell had no knowledge that the Blazer or the Cadillac were stolen. The district court smartly rejected this narrow focus. The evidence amply supports that court's conclusion that the two stolen vehicles for which Huffhines was indicted were a larger part of an ongoing scheme to sell stolen property. As to Dale Russell's involvement, the proof established that Huffhines had recruited his long-time colleague to help with the plan. Huffhines tutored Russell on the "ins and outs" of title washing in New Mexico. Huffhines even took his apprentice to New Mexico to get a bird's eye view of the process involved in obtaining clean titles via falsified vehicle identification numbers.[8] We therefore hold that the district court

[8] Additional evidence in the record indicates that Huffhines went as far as developing a handy vocational seminar teaching the trade of re-titling vehicles using falsified and altered vehicle identification numbers.

did not clearly err when it concluded that Huffhines was a "leader, manager or organizer" for purposes of increasing his offense level.

D.

Huffhines also argues that the district court erroneously increased the offense level for obstruction of justice. An offense level increase of two points is proper upon a finding that the defendant obstructed justice. U.S.S.G. § 3C1.1. The district court found that Huffhines intended to obstruct justice when he directed Russell not to speak with the FBI. Again we review the finding for clear error. United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989). The standard is simply whether sufficient record evidence existed to support the district court's conclusion. Id.

Huffhines does not dispute that he told Russell not to talk with the FBI. And we will not fault the district court for accepting this statement at face value. Although Huffhines argues that he was simply advising Russell of his fifth amendment right against self-incrimination, the district court reasonably rejected this explanation. A rational interpretation of this communication, made in the context in which it was made (after Huffhines had learned the FBI was investigating both men) supports the finding that Huffhines was intending to silence Russell. We therefore hold that the court did not clearly err when found that Huffhines intended to silence Russell. Consequently, the we affirm the two

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Benevolently, he marketed this package to automotive dealers so they could protect themselves from similar frauds. Huffhines thus conveniently created both the supply and the demand for such a product.

point increase for obstruction of justice.

E.

Next, Huffhines challenges the district court's upward departure from the Sentencing Guidelines. The district court decided that Huffhines' criminal history category did not accurately reflect--either quantitatively or qualitatively--Huffhines' criminal history. Since Huffhines' whopping 27 criminal history points placed him twice over into Category VI, the district court upwardly departed by increasing the total offense level by three points, from 18 to 21. Huffhines argues that the district court relied on inappropriate reasons for the departure and should have better explained why a lesser departure would have been inadequate.

A judge may upwardly depart from the Guidelines for proper reasons, provided the departure is reasonable. United States v. Fields, 923 F.2d 358, 361 (5th Cir.), cert. denied, 111 S.Ct. 2066 (1991). We will reverse the decision to grant an upward departure only for an abuse of discretion. United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993). A finding that a defendant's criminal history category does not validly reflect his prior conduct is reviewed for clear error. Laury, 985 F.2d at 1310.

The district court granted an upward departure based on its finding that the criminal history category (VI) did not truly estimate Huffhines' criminal legacy. Plainly, this is a proper

reason to upwardly depart. U.S.S.G. § 4A1.3.[9] Huffhines' criminal record reads like a felony encyclopedia. The district court noted that the defendant had more than twice the criminal history points than the minimum necessary for category VI. Category VI is the maximum criminal history category contemplated by the Guidelines. We find no clear error in the court's finding on this matter. We likewise hold that the district court did not abuse its discretion when it decided to grant the upward departure.

With respect to Huffhines' argument that the district court erred when it did not explain why a lesser departure was adequate, we have explained that the district court's reasons for upwardly departing may explain why it chose not to impose a lesser sentence. United States v. Lambert, 984 F.2d 658, 664 (5th Cir. 1993) (en banc). Although Lambert suggests that a sentencing judge may make an express recital of the reasons why a lesser departure was not proper, the reasons for upwardly departing will usually indicate, expressly or implicitly, why a lesser departure was unwarranted. Lambert, 984 F.2d at 663.

When we review this record as a whole, we conclude the judge's reasons for upwardly departing also explain why he believed a lesser departure would have been unsatisfactory. The defendant's total offense level was calculated at 18. His criminal history category was VI, placing him in a range of 57-71 months.

[9] We have described this reason supporting an upward departure as "unimpeachable." See United States v. Lambert, 984 F.2d, 658, 664 (5th Cir. 1993) (en banc).

Consistent with Lambert,[10] instead of blindly imposing a longer sentence, the court mechanically increased the offense level from 18 to 21, making the applicable Guideline range 77-96 months.[11] A 96-month sentence was then imposed. Significantly, the government had pressed for a sentence of 120 months, the statutory maximum. The court rejected that proposal. This record reflects a careful consideration of why a lesser sentence (as well as a greater sentence) would not have been appropriate.[12] The safeguards of United States v. Lambert have been satisfied.

F.

Huffhines challenges the district court's imposition of a $10,000 fine, arguing that the court should have conducted a hearing to determine his ability to pay. We do not require a district court to specify why it chooses to assess a fine, so long as the record reflects that the court considered the defendant's financial means. United States v. Matovsky, 935 F.2d 719, 721-22 (5th Cir. 1991). The present record so reflects. The fine actually imposed was near the low end of the $6,000 to $60,000 Guidelines range. Moreover, the Pre-Sentence Investigation Report

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[10] Lambert suggests that when a defendant such as Huffhines has topped the criminal history scale, a sentencing judge should consider increasing the total offense level to promote uniformity in sentencing. Lambert, 984 F.2d at 663.

[11] The court noted that a three-level increase to the total offense level was necessary to compensate for the under-represented criminal history. Implicit in this statement is that the deficient criminal history rating would not have been offset by a lesser increase in the total offense level.

[12] We find further support for our holding that the record adequately reflects correct application of Lambert--Specific reference to Lambert was made by the government both in writing in its "memorandum in aid of sentencing" and orally at the sentencing hearing.

indicated that although Huffhines might not be able to pay an immediate fine, he could afford to pay installments. The evidence also indicates Huffhines had received (and was continuing to receive) money from other sources. Finally, the district court waived interest and restitution. In sum, the fine actually imposed, in light of the evidence before the court at the sentencing hearing, reflects a studied consideration of the defendant's financial means. We therefore hold that the district court did not err when it refused to conduct an additional proceeding to determine Huffhines ability to pay the assessment.

G.

Finally, Huffhines asserts that the Sentencing Reform Act does not enable the Sentencing Commission to promulgate a guideline considering a defendant's past relevant conduct. Huffhines thus attacks U.S.S.G. § 1B1.3 as being outside the scope of the enabling legislation. Further, he argues that this circuit, when addressing relevant conduct, treats property crimes differently than other, more serious offenses.

We joined three other circuits when we rejected the first argument in United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993). Huffhines' requested distinction between property crimes and other offenses is borne out neither by the Guidelines nor by Gracia.[13] We therefore draw none. For the above reasons,

[13] In Gracia, we relied on the Eighth Circuit's en banc decision in United States v. Galloway, 976 F.2d 414 (8th Cir. 1992). Galloway treated uncharged property crimes as conduct relevant to a sentence imposed on a conviction for theft of an interstate shipment.

Huffhines' sentence is

AFFIRMED.