UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5223
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTHA E. MINNIEWEATHER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CR-30003-01)

(July 28, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Appellant Martha Minnieweather, an attorney, was convicted after a jury trial on seven counts of bankruptcy fraud and mail fraud. She was sentenced to 48 months imprisonment, followed by a three year term of supervised release, and was ordered to pay restitution of $67,579.89. Proceeding pro se on appeal, she has raised twenty-one issues challenging her conviction

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and sentence. Most of these issues are frivolous, and we deal with them as such. The others we reject.

I. TRIAL ISSUES

Minnieweather first contends that the evidence was insufficient to sustain her convictions on four counts of mail fraud.[1] Each of the victims of fraud was a client of Minnieweather. The evidence showed that Minnieweather settled Bobbie Hunter's tort claim without informing her and pocketed the proceeds. Likewise, Minnieweather settled Lacy Alexander's lawsuit for $7,500, although Alexander had rejected that offer. The client, who was not told of the settlement, never received even this money. Lisa Twymon-Jones retained Minnieweather to handle her husband's succession after he was killed in a car accident. Minnieweather received his last paycheck from International Paper Company and money from the sale of stocks and bonds, but she never turned those over to the widow. Finally, Minnieweather accepted a $24,000 money order on behalf of parishioners of the Saline Baptist Church; the money was entrusted to her during a struggle among members of the church and was for the purpose of paying its expenses as the fight dragged on. When the church members wanted their money back, Minnieweather mailed a "lulling letter", but she never returned the money. The U.S. Mail was used in all these incidents.

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[1] She does not challenge the bank fraud convictions in her main brief. Insofar as those counts were challenged for the first time in her reply brief, this court will not consider them. United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

To prove mail fraud, the government was required to show a scheme to defraud and a mailing for the purpose of executing the scheme. 18 U.S.C. § 1341. Proof of intent to defraud may be circumstantial, and use of the mail is satisfied if it followed in the ordinary course of business or as part of the scheme or plan. United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1981); United States v. Paul, 853 F.2d 308, 312-13 (5th Cir. 1988), cert. denied, 488 U.S. 1012 (1989). The foregoing thumbnail sketch shows that the government introduced sufficient evidence to convict on each count of mail fraud.

Minnieweather's defenses seem to be that she never misled her clients, she made no affirmative misrepresentations, she had powers of attorney that authorized her to do what she did, and all clients fully understood the nature of her legal representation. Later, she breathtakingly asserts that all of these clients lied on the stand. Obviously, the jury did not accept her disclaimers.

The trial court rejected her proffered instruction on the nature of a power of attorney. Minnieweather asserts this was error. She did not, however, furnish even a partially complete instruction that would have informed the jury of the significance of a power of attorney in this case. The trial court did not err in refusing the instruction.

Minnieweather's complaint that she was denied her sixth amendment right to counsel before and during trial is ill-founded. After the court denied the attorney's motion to withdraw, he continued to act as her counsel. If he was ineffective, as

Minnieweather alleges, that issue must be developed on habeas review and not on direct appeal, in which the record is inadequate to evaluate it.

The other objections Minnieweather raises to the conduct of trial are, as seen here, frivolous:

1. Because Minnieweather did not object to the instruction, there is no "plain" error in the trial court's instruction that she was an "officer of the court" in regard to bankruptcy cases.

2. Under Fed. R. Evid. 608(b), Minnieweather did not have the right to call a witness to impeach a government witness, Alice Whitfield Williams, by evidence of specific conduct.

3. Allegations that the judge should have recused are patently inadequate.

4. Minnieweather makes no effort factually to sustain her claims that the government knowingly used perjured testimony from her clients who took the stand.

5. The government's use of rebuttal testimony concerning office copier forgery was both invited by defense counsel and within the realm of the court's discretion to admit or exclude. There is no reversible error.

6. The alleged prejudicial comments of the trial court concerning the trustworthiness of an expert witness opinion and of the prosecutor that the counts "really boiled down to a theft and an abuse of trust . . ." must be judged by the plain error standard

because they were not objected to at trial. There is no error, much less plain error in these particular remarks.

II. SENTENCING ISSUES

Minnieweather disputes the calculations of loss rendered in the PSR for several reasons, none of which has merit. She asserts that properly understood, the evidence at trial showed that none of her clients suffered any losses from her representation. She offers no record citations to support this claim. She contends that the government was obliged to prove the commission of crimes charged in a pending state indictment before they could be used in the PSR. This is contrary to a recent decision of this court. United States v. Rosogie, ___ F.3d ___ (5th Cir. May 16, 1994, No. 93-1495). She takes issue with two particular calculations of loss. Even if there is error in the double-counting of the fraudulent concealment of $11,000 belonging to June Broadnax, it is harmless, because the total loss calculation still would exceed $200,000. Minnieweather's assertion of double-counting as to the $10,000 fraud perpetrated on Bobbie Hunter is simply wrong. See PSR ¶¶ 5-14.

In making sentencing determinations, the district court properly considers any relevant information that has sufficient indicia of reliability to support its probable accuracy. U.S.S.G. § 6A1.3(a). Because the PSR is reliable, it may be considered as evidence by the trial court. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). Objections in the form of unsworn assertions, like those made by Minnieweather here, do not bear

sufficient indicia of reliability to be considered id. If no relevant affidavits or other evidence are submitted to rebut the information contained in the PSR, the court may adopt its findings without further inquiry or explanation. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). The court's application of U.S.S.G. § 2F1.1 was not clearly erroneous, given that the PSR supplied sufficient evidence to support the district court's finding that the total loss to Minnieweather's victims exceeded $200,000.

Contrary to Minnieweather's assertions, the trial court did not clearly err in finding (a) that she was not entitled to a two-point adjustment for acceptance of responsibility, (b) that her scheme involved "more than minimal planning," (c) that some of her victims were vulnerable, and (d) that she deserved the increase for obstruction of justice. Each of these findings properly caused increases in her base offense level.

Minnieweather finally objects to the order of restitution and the court's order that she not be allowed to practice law during the three-year term of her supervised release following incarceration. Neither of these contentions has any merit. The court was not required to assign complete reasons to its assessment of a restitution obligation, so long as the record contains sufficient data to permit appellate review. United States v. Ryan, 874 F.2d 1052 (5th Cir. 1989). The PSR here adequately evaluated Minnieweather's financial condition, her future ability to work, and her likely ability to repay her victims. Further, Minnieweather does not take issue with the amount of restitution

ordered. Minnieweather's brief does not even cite the Sentencing Commission's Guidelines that permit conditions of supervised release that are reasonably related to (1) the nature and circumstances of the offense, (2) the need for deterrence of further criminal conduct, and (3) the need to protect the public. U.S.S.G. § 5D1.3. Further, the Guidelines authorize appropriate occupational restrictions as a condition of probation or supervised release. § 5B1.4(b)(22). It is self-evident that having been convicted of defrauding her clients, a restriction on Minnieweather's future practice of law was authorized.

For the foregoing reasons, the conviction and sentence imposed in the trial court are AFFIRMED.