

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7133
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDWARD P. CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C92-00118-SS-01)

(May 5, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Edward Cantu appeals the district court's denial of his motion to reconsider a restitution order of \$8.14 million to the Department of Defense ("DOD"). Finding that the district court erred in calculating the amount of restitution, we reverse.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Cantu pleaded guilty of conspiracy to defraud the United States, presenting false claims, wire fraud, money laundering, and three counts of making false statements in an application for a line of credit. The district court sentenced Cantu to separate terms of imprisonment of forty-eight and twenty-four months, to be served concurrently, followed by a term of supervised release. The district court also ordered cantu to pay a \$5,000 fine, restitution of approximately \$3.5 million to the Corpus Christi National Bank, and restitution of approximately \$8.14 million to the DOD.

The presentence investigation report ("PSR") indicated that the DOD lost about \$8.25 million from Cantu's scheme to submit false claims. Cantu objected to the \$8.25 million figure, contending that it was inflated. The district court held a hearing to review Cantu's objection; the parties could not agree, however, on the amount of loss. The court continued the hearing to allow the parties to resolve the dispute.

When the hearing reconvened, the government informed the district court that the parties had not reached an agreement as to the amount of the loss. The government attempted to prove the amount of loss through Joe Satagaj, an attorney for the DOD, who testified that the loss suffered by the DOD was \$12,160,050. Cantu's attorney argued that the amount of loss in the PSR was incorrect because Cantu was paid no more than eighty percent on the false invoices.

The government moved for a continuance when asked whether the government had an accounting of the losses. The district court denied the continuance and determined a "presumptive" amount of loss. The court took 80% of the total of the false invoices submitted as alleged in the indictment (\$10.18 million),¹ for a total of \$8,144,000. The court determined that the government had met its burden of proof as to this amount and allowed Cantu to rebut.

Cantu presented testimony from three witnesses: a CPA specializing in government contract costing, an attorney specializing in government contract law, and an attorney involved in bankruptcy proceedings associated with the case. The government presented the testimony of Satagaj in rebuttal. Without explaining further, the district court ordered that Cantu pay \$8,144,000 in restitution to the DOD.

Cantu filed a motion for new trial, arguing that the district court's restitution order was improper because the government could not prove the amount of its losses. The district court denied the motion, and Cantu appealed. This court construed Cantu's motion for a new trial as a motion for reconsideration and remanded for a determination of whether excusable neglect entitled Cantu to an extension of time to appeal. The district court entered an order finding excusable neglect and finding that Cantu should have the benefit of appeal.

¹ A portion of each claim submitted by Cantu was not false. The indictment alleged only the specific amount of false invoices included in each claim, not the total amount of the claim.

II.

Cantu argues that the district court erred by ordering that he pay \$8.14 million in restitution to the DOD because the court did not assign specific reasons for ordering the payment and because the record does not contain sufficient data to support the order. The legality of a restitution order is reviewed de novo and, if the sentence is legal, the award is reviewed for abuse of discretion. United States v. Reese, 998 F.2d 1275, 1280 (5th Cir. 1993) (citation omitted).

The burden of proof for establishing restitution is upon the government by a preponderance of the evidence. Id. at 1282. The government may meet this burden by providing affidavits and letters of injured parties, hearsay evidence that bears minimal indicia of reliability as long as the defendant is given an opportunity to refute that evidence, or by relying upon a properly supported PSR determination. Id. Moreover, the district court is not required to assign specific reasons for the restitution order unless the record contains insufficient data for appellate review. United States v. Patterson, 837 F.2d 182, 183-84 (5th Cir. 1988).

Cantu argues that the district court's method of computing the loss relieved the government of its burden of proof and improperly shifted the burden to him to rebut the court's presumption of the amount of loss. Since the district court did not assign reasons for the restitution order, we must look to the record to determine whether the order was proper. The record reveals that the district court multiplied the amount of total false claims alleged in the

indictment (and to which Cantu pled guilty) by eighty percent, the portion of the contracts for which Cantu could receive progress payments. Cantu argues that the amount of the false claims is not equal to the amount of loss by the government. For example, the value of recovered inventory, not accurately accounted for in the indictment, would offset government losses. Cf. Hughey v. United States, 495 U.S. 411, 418 (1990) (stating that statute authorizing restitution was designed to limit the scope of restitution from maximum losses charged).

It is apparent that the government could not provide an accurate accounting of the actual losses. The hearing held on this matter revealed several different figures for the amount of government losses. Ultimately, the district court rejected both sides' evidence and relied upon the figure in the indictment, discounted by the percentage the defendant actually received in progress payments, as the measure of restitution. This method of calculation presumes that the amount of false claims equals the value of losses and ignores the fact that it is the government's burden to prove these losses. Accordingly, the order of restitution is REVERSED, and this case is REMANDED for further consideration of the amount of restitution owed.