UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7574
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHIWETA BIOSAH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C-93-63 (01))

(March 16, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Chiweta Biosah appeals from his conviction and sentence for, among other things, bank fraud and conspiracy to commit same. We **AFFIRM**.

I.

Between August 1992 and February 1993, Biosah recruited individuals to use stolen credit cards and false identification, all provided by Biosah, to obtain cash withdrawals on the credit cards. Biosah was charged and convicted of three counts of bank

---

[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

fraud, two counts of trafficking and using unauthorized access devices, one count of conspiracy to commit bank fraud and trafficking and using unauthorized access devices, and one count of possession of more than five false identification documents.[2] Over Biosah's objection, the district court increased Biosah's base offense by eight levels pursuant to U.S.S.G. § 2F1.1(b)(1)(I), finding the total loss attributable to Biosah was $200,000.01. Biosah was sentenced, *inter alia*, to 41 months imprisonment.

II.

A.

Biosah contends that his conviction for bank fraud *and* conspiracy to commit bank fraud, as well as his conviction for bank fraud *and* trafficking and using unauthorized access devices, violates double jeopardy. As Biosah concedes, because he failed to raise this issue in district court, our review is for plain error only. Fed. R. Crim. P. 52(b); ***United States v. Calverley***, 37 F.3d 160, 162-64 (5th Cir. 1994). We find none.

1.

Generally, a conviction for both an offense and a conspiracy to commit that offense does not violate double jeopardy. ***United States v. Brown***, 29 F.3d 953, 957 (5th Cir.), *cert. denied*, 115 S. Ct. 587 (1994). Such is the case here. Conspiracy to commit bank fraud requires proof of an agreement to commit the crime, but does not require proof that bank fraud was actually committed.

---

[2] The district court granted Biosah's motion for acquittal on a single count of possession of stolen mail.

Conversely, bank fraud does not require proof of an agreement, but, of course, does require proof of the elements of bank fraud. Thus, under ***Blockburger v. United States***, 284 U.S. 299 (1932), there is no double jeopardy because each conviction requires proof of an element that the other does not. Biosah's argument to the contrary appears to be that the government must necessarily allege a conspiracy in this case in order to demonstrate the "scheme" element of bank fraud. His argument is unavailing. *See* ***United States v. Payan***, 992 F.2d 1387, 1390 (5th Cir. 1993)(rejecting similar argument; requiring that it be "*impossible under any circumstances* to commit the substantive offense without cooperative action". (emphasis in original)).[3]

2.

We are likewise unpersuaded by Biosah's double jeopardy claim with respect to his conviction for both bank fraud and trafficking and use of unauthorized access devices. Biosah contends that because the same conduct was used to convict him of both crimes, the two counts alleged the same offense. Under ***Blockburger***, however, such a circumstance is permissible as long as proof of the elements of one crime do not *always* constitute proof of the elements of the other crime. ***United States v. Singleton***, 16 F.3d

---

[3] Biosah also asks us to apply ***Grady v. Corbin***, 495 U.S. 508 (1990), *overruled*, ***United States v. Dixon***, 113 S. Ct. 2849 (1993), because ***Grady*** was the law at the time he committed the offense. Absent a showing of manifest injustice, courts apply the law as it exists at the time of decision. ***FDIC v. Faulkner***, 991 F.2d 262, 265-66 (5th Cir. 1993). In any case, ***Grady*** is inapplicable to single prosecution cases such as Biosah's. ***Payan***, 992 F.2d at 1392 n.33.

1419, 1422 (5th Cir. 1994). Because bank fraud and trafficking unauthorized access devices each require an element the other does not,[4] there is no double jeopardy violation.

B.

Biosah challenges the eight-level increase to his base offense, based upon the court's finding the amount of loss attributable to Biosah was more than $200,000. U.S.S.G. § 2F1.1.[5] We review for clear error. ***United States v. Robichaux***, 995 F.2d 565, 571 (5th Cir.), *cert. denied*, 114 S. Ct. 322 (1993).

The amount of loss calculation need not be precise. The district court must only make a reasonable estimate in light of the available information. U.S.S.G. § 2F1.1, comment 8; ***Robichaux***, 995 F.2d at 571. Here, the record reveals that in a four month period, between November 1992 and February 1993, Biosah obtained at least $100,000 from the scheme.[6] Furthermore, there was evidence that

---

[4] Bank fraud requires proof of intent to defraud a federally insured bank. Trafficking unauthorized access devices requires no such proof. 18 U.S.C. §§ 1029(a)(2), 1344.

[5] Biosah also challenges the constitutionality of the relevant conduct provisions in the Sentencing Guidelines, U.S.S.G. §§ 1B1.3(a) and 3D.2(d). Once again, as he concedes, Biosah failed to raise this issue before the district court, and our review is limited to plain error. Regardless, Biosah's claim, based on the nondelegation doctrine, fails. The Supreme Court found that the statutory delegation of power to the Sentencing Commission is constitutional. ***Mistretta v. United States***, 488 U.S. 361, 374, 412 (1989). This court has held that statutory authority exists for the enactment of the relevant conduct guidelines. ***United States v. Thomas***, 932 F.2d 1085, 1089 (5th Cir.), *cert. denied*, 502 U.S. 895 (1991).

[6] Penny Jean Walters testimony revealed she obtained at least $61,000. Kimberly Devine testified to attempting two transactions of $2,500 to $3,500 each in at least two cities and "maybe three more"--she could not remember the exact number. Tammy Annette

Biosah had engaged in similar schemes for three years. From this evidence, the district court could reasonably estimate that the total loss from Biosah's schemes over the three year period exceeded $200,000. There is no clear error.

III.

For the forgoing reasons, Biosah's conviction and sentence are **AFFIRMED**.

Nixon testimony revealed she obtained at least $24,000. This evidence establishes a *conservative* total of $100,000 over only a four month period.