UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8218
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WALTER KELLY HABERER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-89-CR-24-1)

(January 28, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:[1]

Haberer challenges the district court's restitution order which the district court reimposed when it revoked his supervised release term. We dismiss the appeal.

I.

Count 1 of a 1989 superseding indictment charged Walter Kelly Haberer, Riley McSpadden, and Eliasar Sanchez Garza with conspiring

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to possess stolen chattels that were worth more than $100 and that were traveling in foreign commerce. Count 1 specifically alleged that Haberer and McSpadden sold two cases of stolen shoes, that all three defendants had a meeting at a lounge in San Antonio, and that Haberer and McSpadden possessed over 268 cases of stolen shoes. Count 2 charged Haberer and McSpadden with possessing two cases of stolen shoes and Garza with aiding and abetting. Count 3 charged Haberer and McSpadden with possessing 261 cases of stolen shoes.

The entire shipment of which those cases were a part was stolen. It contained 1,013 cases of shoes. All but 142 cases, or 14% of the entire shipment, were recovered. All of the shoes identified in the indictment were among those recovered.

Haberer pled guilty. As part of the recommended sentence, the presentence report proposed that Haberer be ordered to pay restitution in the amount of 14% of the total financial loss suffered by Kaepa, the manufacturer, and its insurer. The total loss, direct and incidental, was $89,707.85, 14% of which is $12,559.09.

The district court sentenced Haberer in 1990 to serve three concurrent 30-month prison terms and three years on supervised release. He was ordered to pay restitution in the proposed amount.

In 1993, on the Government's motion alleging Haberer's use of controlled substances, the district court revoked Haberer's supervised release, ordering him to serve a 12-month prison term and to pay restitution to Kaepa and its insurer in the amount of $12,359.09. The district court made the amount payable immediately

so that Haberer's earnings in prison could go toward the restitution.

Haberer made no objection to the restitution order when the district court revoked supervised release. Pursuant to Fed. R. Crim. P. 35(c), he filed a motion to correct sentence five days after the court filed the judgment ordering revocation. The district court denied the motion.

On Haberer's motion, the district court found that his failure to timely notice an appeal was due to excusable neglect, and Haberer noticed the appeal. Haberer appealed the judgment revoking supervised release and the denial of the motion to correct sentence. The Government concedes the propriety of the district court's finding of excusable neglect.

II.

The government argues persuasively that we have no jurisdiction over this appeal. The government reasons that the court's original sentence was a final, appealable judgment that included an order requiring defendant to pay restitution in the amount of $12,559.09. The only alteration the district court made in that restitution order following revocation of Haberer's supervised release was to give Haberer credit for $200 he had paid on that obligation and to make the restitution due immediately so his prison earnings could be applied to his debt. We agree with the government that the reimposition of the identical restitution order subject to credit for sums previously paid did not render it a new, appealable order.

Nix v. United States, 131 F.2d 857, **cert. denied**, 318 U.S. 771 (1943), is closely analogous. In that case the appellant was convicted in June of 1937 and sentenced to pay a fine of $10,000 and to serve ten years in prison. The execution of the imprisonment portion of the sentence was suspended and appellant was placed on probation. Approximately five years later, the court revoked the probation and the sentence of imprisonment was reduced to two years. Appellant filed a timely notice of appeal from the order revoking probation contesting the validity of his 1937 conviction. We dismissed the appeal and stated that:

> [E]very ground urged relates to the trial in 1937. The judgment of conviction occurred then and an appeal from it must, under Rule III for criminal procedure . . . be taken within five days unless a motion for new trial be made. (Omitting cases). No provision is made for delaying appeal because of the putting of the defendant on probation. Probation does not set aside the judgment of conviction but itself involves a judgment of conviction, even when the imposition of sentence is suspended, because probation can only be visited on a convict, and is itself a form of mild punishment. . . . if the probated convict is dissatisfied at his conviction, he can and must appeal at once. This appellant is far too late.

Id. at 887.

That same reasoning applies with equal force to this case. Haberer's sentence following his conviction was a final judgment. The restitution order, being a part of that final judgment, was ripe for appeal at that time. The reimposition of that restitution order following revocation of supervised release was not a new judgment. If Haberer was dissatisfied with the order of restitution, he was required to challenge it on appeal within the

time provided by F.R.A.P. 4(b). Because his challenge to that order comes far too late, his appeal is

DISMISSED.