IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-8334
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK IVEY,

Defendant-Appellant.

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Appeal from the United States District Court for the
Western District of Texas
(P-90-CR-46)

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(August 3, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Jack Ivey (Ivey) appeals the district court's denial of his motion to reconsider a motion for reduction or elimination of the fine assessed pursuant to his conviction for transportation and conspiracy to transport bobcat hides in violation of 18 U.S.C. §§ 371 and 545. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On September 20, 1990, a jury found Ivey guilty of one count of conspiracy to import and transport bobcat hides in violation of 18 U.S.C. §§ 371 and 545 (Count One), and of two counts of transportation of bobcat hides in violation of 18 U.S.C. § 545 (Counts Five and Seven). The United States District Court for the Western District of Texas sentenced Ivey for Counts One and Seven under the Sentencing Guidelines (the Guidelines), since the conduct for which he was convicted took place at least in part after the date on which the Guidelines became effectiveSQNovember 1, 1987.[1] Because the conduct underlying Ivey's conviction on Count Five occurred before the effective date of the Guidelines, the court sentenced him under 18 U.S.C. § 545 without applying the Guidelines.[2] Ivey was sentenced to twenty months for Counts One and Seven and five years for Count Five. The confinement terms on all counts were concurrent. In addition, the district court sentenced Ivey to 3 years of supervised release and fined him $5,000 for all 3 offenses.[3] The court ordered that Ivey pay his

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[1] The district court adopted the findings and guideline application of the presentence report (PSR). The PSR established Ivey's total offense level at 20, with a criminal history category of I, resulting in an imprisonment range of from 33 to 41 months and a fine range of from $7,500 to $75,000.

[2] Section 545 provides, *inter alia*, that, upon conviction, a defendant "Shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 545.

[3] The judgment states: "The defendant shall pay a fine of $5,000.00 The fine is designated for use by the United States Fish and Wildlife Service Law Enforcement reward account. This amount is the total of the fines imposed on individual counts, as follows: S1, S5, S7."

fine in installments according to a schedule to be designated by the United States Probation Officer. Ivey appealed his conviction to this Court, but did not challenge his sentence or fine. We affirmed the conviction. *See United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 64 (1992).

On January 12, 1993, Ivey filed in the district court a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. In his motion, Ivey requested reduction of his sentence for Count Five and reduction or elimination of the $5,000 fine. On January 21, 1993, the court granted a sentence reduction on Count FiveSQmaking Ivey immediately available for paroleSQbut denied the portion of the motion requesting modification of his fine.[4]

On March 11, 1993, Ivey filed a motion to reconsider the court's denial of the motion to modify the fine. On April 1, 1993, the district court denied Ivey's motion to reconsider.[5] In its order, the court noted that it had "departed below the guideline fine range of $7,500 in imposing the $5,000 fine." The court also observed that "the pre-sentence investigation in this case revealed [Ivey] was capable of paying the fine imposed if allowed to do so through installments." Finally, the court "encouraged [Ivey] to make a good faith effort to" pay the fine. On April 27, 1993, Ivey timely filed a notice of appeal to this Court and now appeals the

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[4] The order made the sentence subject to 18 U.S.C. § 4205(b)(2). This order was not entered on the docket until June 2, 1993.

[5] Like the January 21, 1993, order denying Ivey's motion for reduction, the April 1, 1993, order denying Ivey's motion to reconsider was not entered on the docket until June 2, 1993.

district court's denial of his motion to reconsider.

Discussion

On appeal, Ivey contends that the trial court erred in not reducing his fine. Apparently, Ivey's argument is that the court abused its discretion by failing to take into account his financial situation when considering his motion to modify the fine. He maintains that because such a fine would present a significant financial burden on him, the court should have eliminated the entire fine. As putative authority for this argument, Ivey cites, without explanation, 18 U.S.C. §§ 3573 and 3593. Whatever Ivey's reason for citing these statutes, however, neither provides any support for his contentions.

Although under section 3573 a fine may be modified, any such modification may take place *only* upon petition of the government.[6] 18 U.S.C. § 3593, on the other hand, was intended to allow a person subject to a fine to petition the court for modificationsQbut section 3593 *never became effective*. It was enacted on October 12, 1984, and was to become effective November 1, 1986; instead, it was

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[6] Section 3573 provides in relevant part:

> "Upon petition of the Government showing that reasonable efforts to collect a fine or assessment are not likely to be effective, the court may, in the interest of justicesQ
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> (1) remit all or part of the unpaid portion of the fine or special assessment, including interest and penalties;
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> (2) defer payment of the fine or special assessment to a date certain or pursuant to an installment schedule; or
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> (3) extend a date certain or an installment schedule previously ordered." 18 U.S.C. § 3573.

repealed only two weeks after it was enacted. *See* Pub.L. 98-596, § 12(a)(1), 98 Stat. 3139 (1984).

Even though Ivey cannot base his appeal on the authority he cites, he may have another option. Ivey brought his original motion for reduction of sentence under Federal Rule of Criminal Procedure 35. Under Rule 35, Ivey was not able to challenge his sentence or fine on Counts One and Seven (the Guidelines counts) because the version of the Rule applicable to conduct occurring after November 1, 1987, permits a trial court to reduce a sentence *only upon motion of the Government*. FED.R.CRIM.P. 35(b). But, because the version of the Rule applicable to conduct occurring before the effective date of the Guidelines permitted both the Government and a person who has been sentenced to make a motion for a reduction of a sentence or fine, Ivey was able to challenge his sentence and fine for Count Five (the pre-Guidelines count). Indeed, in response to Ivey's Rule 35 motion, the district court modified his sentence for Count Five so that it in substance mirrored the sentences imposed for Counts One and Seven. Hence, we will assume for the sake of argument that Ivey is now appealing the district court's denial of his motion to reduce the fine assessed pursuant to Count Five.

We will reverse a district court's decision to deny a motion to reduce a sentence under Rule 35 only for illegality or gross abuse of discretion. *United States v. Sinclair*, 1 F.3d 329 (5th Cir. 1993). A fine is a punitive sanction, and "it is not an abuse of discretion to impose a fine that 'is likely to constitute a significant financial burden.'" *United States v. Matovsky*, 935

F.2d 719, 722 (5th Cir. 1991) (quoting *United States v. Doyan*, 909 F.2d 412, 414-15 (10th Cir. 1990)). Although 18 U.S.C. § 3572 states that the ability to pay shall be considered when a court imposes a fine, a district court's finding on a defendant's ability to pay a fine is a factual one, subject to appellate review under the clearly erroneous standard. *See, e.g., United States v. Thomas*, 13 F.3d 151, 152 (5th Cir. 1994) (citing *United States v. Favorito*, 5 F.3d 1338 (9th Cir. 1993)). A district court does not have to express reasons for imposing a fine as long as it is shown that the judge considered the defendant's ability to pay. *Matovsky*, 935 F.2d at 722. In this regard, it is enough that a district court explicitly adopts the factual findings of a PSR which concludes that a defendant is capable of paying a fine. *Id*.

In the instant case, it is obvious that the court considered Ivey's financial condition since it adopted the factual findings of the PSR which explicitly concluded, "after viewing [Ivey's] financial information, . . . that [Ivey] is capable of paying a fine if allowed to do so through a series of installments." The court then set the fine well below the statutory maximum under 18 U.S.C. § 545 (which permits a court to impose a fine of up to $10,000 per violation) and below the Guidelines fine range (the low end of which is $7,500). And, consistent with the PSR's recommendation, the district court ordered that the fine be paid in installments. Taking all of this into account, it is clear that the district court considered Ivey's financial situation when it initially assessed the fine and again when it ruled on Ivey's motion for reduction of the fine. Hence, the district court's

denial of Ivey's motion to reconsider was neither illegal nor a gross abuse of discretion.

Moreover, as far as this Court is aware, the probation officer has not yet attempted to collect the fine and no installment schedule has been established. In denying the motion to reconsider, the district court assumed that the probation officer would not begin collection of the fine until after Ivey was released from prison and the probation officer evaluated Ivey's financial condition. Thus, although Ivey may be "'currently without substantial assets or gainful employment and therefore unable to pay the full fines immediately,'" we cannot say that he will not be able to "'obtain employment and pay the fines over time.'" *Matovsky*, 935 F.2d at 723 (quoting *United States v. Mastropierro*, 931 F.2d 905, 906 (D.C.Cir. 1991)).

In any event, we construe Ivey's sentence to impose but a single fine, that single fine being in the amount of $5,000, but being applicable to each count of conviction, so that, for example, a single $1,000 payment would reduce the balance to $4,000 on each countsQin other words, a sort of concurrent fine. Even if the district court had modified the Count Five sentence so as to impose no fine on that count, that would not affect the fine on Counts One and Seven, which the court has no power to modify in these circumstances and which would remain as $5,000.

Conclusion

For the reasons stated above, Ivey's arguments are rejected and the district court's denial of his motion to reconsider the motion for reduction or elimination of his fine is hereby

AFFIRMED.