IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9055

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS J. PHARRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-0532-H-01)

(July 25, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

After Dennis Pharris entered a guilty plea to one count of wire fraud in violation of 18 U.S.C. § 1343 as part of a plea agreement, the district court sentenced him to forty-six months imprisonment, assessed a $25,000 fine, and ordered him to pay

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

$1,058,863 in restitution. Pharris appeals his sentence. Finding no error, we affirm.

I.

A grand jury returned a seven-count superseding indictment against Pharris on January 13, 1993, charging him with mail fraud and wire fraud. The indictment alleged that Pharris used Nationwide Income Management, Inc. ("Nationwide"), a company he controlled, to solicit money from investors for the alleged purpose of acquiring Bulk Sales Loan Packages from the Federal Deposit Insurance Corporation. The indictment charged that Pharris then diverted money provided by these investors to Nationwide or for his own use and benefit.

Pursuant to a written plea agreement, Pharris agreed to plead guilty to one count of wire fraud. Pharris further agreed to "pay restitution relating to his relevant conduct, including restitution relating to Benchmark Bank and Texas American Bank--McKinney, in the amount ordered by the Court."

The district court accepted Pharris' plea and ordered a presentence report (PSR). The PSR recommended denying Pharris any reduction for acceptance of responsibility because Pharris "admitted that four or five days after his plea of guilty in this case he wrote two insufficient funds checks [for a total amount of $62,000] to a travel agent in Wichita Falls." The PSR concluded that, pursuant to U.S.S.G. § 3E1.1, comment. (n.1(a)), Pharris was not entitled to the reduction. The PSR also found

that Pharris' scheme and relevant conduct over a two and one-half year period resulted in a total loss of $1,126,612.60. The PSR identified ten victims who had been defrauded of a combined sum of more than $1,000,000 during the course of the scheme and recommended restitution to each victim.

Pharris objected to, among other things, the PSR's recommendations to deny an acceptance of responsibility reduction and for restitution in the amount of more than $1,000,000. After overruling both of these objections, the district court sentenced Pharris to forty-six months in prison, assessed Pharris a fine of $25,000, and ordered him to pay $1,058,863 in restitution. Pharris filed a timely notice of appeal.

II.

Pharris first argues that the district court erred by denying him a reduction for acceptance of responsibility based on unrelated criminal conduct. He points out that the applicable version of U.S.S.G. § 3E1.1(a) provides in part that a reduction is proper "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a) (Nov. 1, 1992). The prior version of section 3E1.1(a) required a defendant to accept responsibility for "his criminal conduct" to earn the reduction. U.S.S.G. App. C. amendment 459. Pharris contends that this amendment evinces the Sentencing Commission's intent to limit acceptance of responsibility to the offense of conviction only, not criminal conduct in general.

This argument is foreclosed by this court's recent decision in United States v. Portwood, No. 93-1505 at 3-4 (5th Cir. May 6, 1994) (unpublished). In Portwood, the court rejected this precise argument and stated that "[t]he defendant's failure to withdraw voluntarily from criminal conduct remains an appropriate consideration under the amended guideline's application notes." Id. at 3 (citing U.S.S.G. § 3E1.1, comment. (n.1(b))).[1] The court in Portwood held that "any continued criminal conduct is a sufficient basis for denying a reduction for acceptance of responsibility." Id. at 4. The court declined to follow United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993), which limited the comment's reach to criminal conduct related to the charged offense only. Portwood, at 4.

The defendant bears the burden of demonstrating to the sentencing court that he is entitled to a downward adjustment for acceptance of responsibility, and we review the sentencing court's determination on acceptance of responsibility with even more deference than under the pure clearly erroneous standard. United States v. Watson, 988 F.2d 544, 551 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994). The district court's finding that Pharris does not deserve a reduction for acceptance of responsibility is not clearly erroneous.

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[1] The Seventh and Eleventh Circuits have reached the same conclusion. See United States v. McDonald, 22 F.3d 139 (7th Cir. 1994); United States v. Pace, 17 F.3d 341, 343-44 (11th Cir. 1994).

III.

Pharris argues that the district court erred by ordering him to pay restitution for the total loss caused by his scheme, instead of only the loss caused by the one count in the indictment to which he pleaded guilty. He bases his argument on Hughey v. United States, 495 U.S. 411 (1990), in which the Supreme Court held that restitution can be ordered only for the loss caused by the specific conduct that underlies the offense of conviction. Id. at 414.

The law has changed since Hughey, however. The Crime Control Act of 1990 authorizes a sentencing judge to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3); see United States v. Arnold, 947 F.2d 1236, 1237-38 (5th Cir. 1991). The plea agreement in the present case provides: "The defendant agrees to pay restitution relating to his relevant conduct, including restitution relating to Benchmark Bank and Texas American Bank--McKinney, in the amount ordered by the Court."

The district court rejected Pharris' argument that the plea agreement limited his obligation to pay restitution only for the conduct related to the count to which he pleaded guilty. The court found the plea agreement "fairly forthright" on this point and held Pharris responsible for restitution to all the victims of his scheme.

The government contends that Pharris' interpretation of the agreement is implausible for several reasons. First, the

government notes that the two banks to which Pharris agreed to make restitution were not named in the count to which he pleaded guilty. In fact, the two banks were not named at all in the indictment. Second, the government notes that the plea agreement uses the term "relevant conduct" and binds Pharris to pay restitution "in the amount ordered by the Court." The government argues that this demonstrates an intent not to limit the amount of restitution to the conduct described in that one count. Moreover, "relevant conduct" is a term of art under the Guidelines and includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Third, the government observes that Pharris did not object to the PSR's calculation of the amount of the loss caused by his overall scheme to set his base offense level under U.S.S.G. § 2F1.1.

A plea agreement is interpreted by using an objective standard to determine what the two parties reasonably understood the terms to be at the time they entered into the agreement. See United States v. Chagra, 957 F.2d 192, 194 (5th Cir. 1992). The language of the agreement in this case supports the government's position. The language demonstrates that Pharris agreed to pay restitution for his relevant conduct in an amount to be determined by the court, not simply for his conduct related to the count of the indictment to which he pleaded guilty. Thus, the district court did not err by enforcing the terms of the agreement in accordance with its plain language and ordering

Pharris to pay restitution to all the victims of his fraudulent scheme.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.