

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9103
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA DAY,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:93-CR-93-K(4)
- - - - -
(July 21, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Linda Day argues, without pertinent citation, that the district court improperly calculated her offense level by finding that she knew or should have known that a firearm would be used to rob Commerica Bank, a financial institution, and that in excess of \$10,000 was stolen. "This [C]ourt will uphold the district court's sentence so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Alfaro, 919 F.2d 962, 964

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(5th Cir. 1990) (internal quotation and citation omitted). The sentencing court's interpretations of the guidelines are conclusions of law subject to de novo review. United States v. Madison, 990 F.2d 178, 182 (5th Cir.), cert. dismissed, 114 S.Ct. 339 (1993).

To calculate the offense level for misprision of a felony, the base offense level is "9 levels lower than the offense level for the underlying offense." § 2X4.1. "`Underlying offense' means the offense as to which the defendant is convicted of committing the misprision." Id. comment. (n.1). The sentencing court is directed to "[a]pply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant." Id. "In the case of . . . misprision, . . . the conduct for which the defendant 'would be otherwise accountable' includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant." § 1B1.3 comment. (n.10).

When it made its factual findings at the sentencing hearing, the district court had before it the Presentence Report and the testimony of FBI Special Agent Deborah Eckhart. Although Day objected to the district court's findings respecting the foreseeability of the applicable special offense characteristics, she did not offer affidavits or other sworn testimony to rebut the evidence contained in the Presentence Report and Agent Eckhart's testimony. This Court is reluctant to consider unsworn assertions as evidence in its review of the sentencing court's

findings because they "do not bear sufficient indicia of reliability to support their probable accuracy, and, therefore, should not generally be considered by the trial court in making its factual findings." Alfaro, 919 F.2d at 966 (internal punctuation and citation omitted).

Day contends that she was unaware that her co-defendants were planning to rob a financial institution, that they used a shotgun during the bank robbery, and that they stole more than \$10,000, and that the district court erred by attributing that knowledge to her because she should not have reasonably known it. The Presentence Report indicates, however, that the plans for the robbery were discussed in Day's apartment in her presence at least twice, and that Day knew that co-defendant Chambers had been recently convicted of bank robbery. In addition, at the sentencing hearing, Agent Eckhart testified that on the day she was arrested, Day told Agent Eckhart that her co-defendants met at her apartment a couple of times to discuss a bank robbery, that Day cased the bank for three weeks prior to the robbery, and that Day admitted knowledge of detailed information respecting the mechanics of the robbery. Even if Day's unsworn assertions are accepted as evidence, at best the evidence creates a credibility question for the district court. The district court's decision to accept the facts as presented by the Presentence Report and Agent Eckhart is plausible in light of the record as a whole and, accordingly, does not constitute clear error.

Day also contends that the district court erred by failing to make sufficiently specific findings regarding whether Day should have reasonably foreseen the use of a gun during the bank robbery. Although Day failed to raise this argument at the sentencing hearing, because she presents a legal issue, it is subject to this Court's review for plain error. United States v. Cockerham, 919 F.2d 286, 288 (5th Cir. 1990). "Plain error" is error which, "when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings" and constitute a miscarriage of justice. United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991); see United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

Although Fed. R. Crim. P. 32 requires sentencing courts to make findings regarding any controverted facts in the Presentence Report or state that those facts will not be taken into account in sentencing, "Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference." United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). When a sentencing court expressly adopts the facts set forth in the Presentence Report, there is an implicit determination by the court that the probation department's version of the facts should be credited. Id. If a defendant objects to the Presentence Report but does not present rebuttal evidence to refute the facts, the district court may adopt the

facts in the Presentence Report without further inquiry. Id. at 1099-1100. The district court adopted the Presentence Report's implicit finding that Day knew or reasonably should have known that a firearm could have been used in the commission of the offense and made the specific determination that "if she knew about the robbery, she could certainly foresee a gun would be used," over Day's unsubstantiated objections; the district court did not plainly err because no further findings were required.

AFFIRMED.