IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9111
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID DANIEL MYERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-142-G)

(July 18, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant David Daniel Myers appeals purported sentencing errors committed by the district court following his conviction on a plea of guilty to transmitting threatening

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

interstate wire communications in violation of 18 U.S.C. § 875(c). Specifically, Myers challenges the sentencing court's six-level increase in his base offense level for conduct evidencing an intent to carry out his threats, and in prohibiting, as a condition of his supervised release, any communication with his children. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Myers married Lina Lee in 1984, and the couple had two children. They divorced in 1991, after which numerous conflicts over the custody of the children ensued.

On December 24, 1992, Myers, who was in Texas, called Lee's stepmother in Maryland. He told the stepmother that she had better talk to him if she did not want to see Lee dead. Myers further stated that "I will shoot Lina in the head."

Myers pleaded guilty to one count of transmitting threatening interstate wire communications in violation of 18 U.S.C. § 875(c).

The presentence report (PSR) recounted Myers' harassment of Lee and her family from 1991 until 1993. The PSR contained the recommendation that Myers' base offense level of 12 be increased six levels pursuant to U.S.S.G. § 2A6.1(b)(1), as Myers had engaged in conduct evidencing an intent to carry out his December 24, 1992, threat. Myers objected, arguing that "he never engaged in any conduct evidencing his intention to kill Ms. Lee."[1] In response to

[1] Myers also filed a motion for a downward departure, arguing that Lee had provoked Myers' conduct by harassing him. In its objection to the motion for the downward departure, the government

Myers' objection, the PSR noted that "this case involves a four year period of continued harassment and threats made by the defendant against his ex-wife." The PSR further noted that the defendant's harassing conduct had resulted in two prior criminal convictions and ten pending criminal cases, and that Lee had twice moved to different states in efforts to hide from Myers.

At the sentencing hearing, the district court noted Myers' objections to the six-level increase and concluded that "I do think based upon what is stated in the report that there is a long history here of which this crime charged is but a single episode and that there certainly was some conduct here evidencing an intent to carry out the threat made." The district court then overruled Myers' objection and sentenced him to 30 months of imprisonment and three years of supervised release, one condition of which was that Myers refrain from all contact and communication with Lee and with their children. Myers was granted leave to file an out-of-time appeal.

II

ANALYSIS

A. Conduct Evidencing Intent to Carry Out Threat

Myers contends that the district court erred by increasing his base offense level by six pursuant to § 2A6.1(b)(1). He argues that (1) the district court failed to articulate any specific behavior occurring after the December 24th incident that would

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introduced numerous exhibits evidencing Myers' harassment of Lee.

indicate his intent to carry out the threat, and (2) conduct predating the threat cannot serve to establish intent to carry out the threat.

Neither counsel in briefs nor our own research reveals any cases indicating that we have addressed the application of § 2A6.1(b)(1). That section provides simply that "[i]f the offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels." § 2A6.1(b)(1).

The district court's determination that Myers' conduct evidenced an intent to carry out his threat is a factual finding that we review for clear error. See United States v. Alfaro, 919 F.2d 962, 964 (5th Cir. 1990) (district court's finding that four others were involved in the offense conduct reviewed for clear error); United States v. Hines, ___ F.3d ___ (9th Cir. Jun. 20, 1994), 1994 WL 267952 at *3. The issue whether Myers' conduct that predated the threat may serve as the basis for imposing the six-level increase involves application of the Sentencing Guidelines, an issue that we always review de novo. See United States v. Madison, 990 F.2d 178, 182 (5th Cir.), cert. dismissed, 114 S.Ct. 339 (1993); Hines, 1994 WL 267952 at *3.

In the district court, though, Myers' objection to the six-level increase was based on the contention that he did not engage "in any conduct" evidencing an intent to kill Lee; he never argued specifically that his conduct predating the threat could not form the basis for the increase. As Myers' challenge to the increase based on the timing of the conduct was arguably not raised

adequately in the district court, we could choose to review the district court's ruling for plain error only. See United States v. Condren, 18 F.3d 1190, 1192 n.5 (5th Cir. 1994); but see United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991) (closer scrutiny may be appropriate when the failure to preserve error is mitigated by an objection on related grounds). Even when we assume arguendo that Myers adequately raised the objection in the district court, and thus consider Myers' argument de novo, we conclude that it is without merit.

In urging that conduct which predates the threat cannot be the basis for an increase under § 2A1.6(b)(1), Myers relies on the Second Circuit's decision in United States v. Hornick, 942 F.2d 105, 108 (2nd Cir. 1991), cert. denied, 112 S.Ct. 942 (1992), which held that "[a] person cannot take action that will constitute proof of his intent to carry out a threat until after the threat has been made[;]" therefore, "conduct needed to show an intent to carry out a threat must occur either contemporaneously with or after the threat." But other circuits have rejected Hornick's approach, reasoning that the "critical issue should not be the timing of the conduct, but whether the conduct shows the defendant's intent and likelihood to carry out the threats." Hines, 1994 WL 267952, at *3; see also United States v. Gary, 18 F.3d 1123, 1127-28 (4th Cir.), petition for cert. filed (U.S. May 31, 1994) (No. 93-9400). Still, we need not resolve the timing issue here to decide the instant appeal, and therefore refrain from doing so in obiter dicta. For here the record before the district court evidenced

occurrence of the requisite conduct by Myers both before and after the predicate threat of December 24th.

Aside from conveying an abundance of sadistic and threatening phone messages to Lee and to her family, friends, and associates,[2] Lee reported that Myers attempted to break into her apartments located in Texas and Maryland. Prior to December 24, 1992, Myers was arrested for slashing six tires on two different vehicles owned by Lee's sister, and for forcibly entering Lee's apartment and striking a person there. In addition, less than two months after the December 24th threat, Myers obtained a .38 caliber revolver. As the district court was not clearly erroneous in determining that Myers exhibited conduct evidencing an intent to carry out his threats both before and after he made the December 24th threat, the district court did not commit reversible error in applying § 2A1.6(b)(1) to increase his base level by six.

Myers also argues that oral treats made after the December 24th threat cannot be considered conduct evidencing an intent to carry out that predicate threat. The government "agrees with Myers that mere repetition of threats is not alone enough to indicate an intent to carry out a threat[.]"

Again, it is unclear whether Myers' objection to the PSR that "he never engaged in any conduct evidencing his intention to kill Ms. Lee" sufficiently preserved the error for appeal on the basis

[2] Myers argues that oral threats which he made after the December 24th threat cannot be considered conduct evidencing an intent to carry out the December 24th threat. As discussed above, however, Myers' conduct consisted of more than mere oral threats.

that Myers now asserts. See Condren, 18 F.3d at 1192 n.5; Lopez, 923 F.2d at 50. As discussed above, however, Myers' conduct consisted of more than mere oral threats, so that there was no error, plain or otherwise, in the district court's application of § 2A1.6(b)(1).

B. Supervised Release

Myers also insists that the district court erred by including as a condition of supervised release that he have no communication with his children. He acknowledges that he failed to object to this condition at the time of sentencing so that the imposition of the condition is reviewed for plain error. Under such standard of review, we may correct forfeited errors only when the appellant shows the existence of three factors: (1) an error (2) that is clear or obvious (3) affecting the appellant's substantial rights. United States v. Rodriguez, 15 F.3d 408, 415-16 (5th Cir. 1994) (citing United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)). The decision to correct the forfeited error is within our sound discretion, which we do not exercise unless the error seriously affects fairness, integrity or the public reputation of judicial proceedings. Olano, 113 S.Ct. at 1779.

"Section 5D1.3 of the Guidelines gives a sentencing court broad discretion to impose conditions on supervised release if they are reasonably related to (1) the nature and circumstances of the offense; (2) the need for adequate deterrence of further criminal conduct, and (3) the need to protect the public." United States v.

Mills, 959 F.2d 516, 519 (5th Cir. 1992); 18 U.S.C. § 3583(d). The condition may not, however, involve a "greater deprivation of liberty than is reasonably necessary for" the goals of sentencing. § 3583(d)(2).

Myers argues that the condition imposed by the district court was not a recommended condition listed in § 5B1.4 of the Guidelines. He insists that, as the condition was purely discretionary, it must be reasonably related to the goals of sentencing and involve only such deprivation of liberty as is reasonably necessary. He further insists that, as his children have never been the object of his harassment, the condition that he have no contact with them during his term of supervised release is not reasonably related to the goals of sentencing.

In his interview with the Federal Bureau of Investigation (FBI), Myers stated "that everything involved in this case is in reference to him wanting to see his children." The evidence before the district court revealed that much of Myers' harassment of Lee was based on the couple's prolonged battle for custody of the children. The attorney who represented Lee during the couple's divorce told the FBI that Myers' harassment of Lee accelerated just prior to a child custody hearing. Myers left a message threatening to kill Lee despite his awareness that his children were listening. The record also reveals that the children told a child protective services worker that they feared that Myers would take them away. The district court's goal in imposing the condition was to protect the safety of Lee and the children. Thus, the condition had a

reasonable relationship to the goals of sentencing and did not amount to a clear or obvious error affecting Myers' substantial rights. See Rodriguez, 15 F.3d at 415-16.

AFFIRMED.