

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10137  
Summary Calendar  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECELIA JANE RUTHERFORD,  
a/k/a Cecilia Ruth,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Northern District of Texas  
(4:93-CR-99-A(2))  
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(September 8, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.\*

PER CURIAM:

Defendant-appellant Cecelia Jane Rutherford (Rutherford) was convicted, on her plea of guilty pursuant to a plea agreement, of wire fraud contrary to 18 U.S.C. § 1343, as charged in a one-count superseding information, and was sentenced to ten months' confinement, followed by three years' supervised release, and a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

fifty dollar special assessment.<sup>1</sup> She appeals, claiming as her sole asserted ground of error that the district court improperly calculated the amount of loss which should be attributed to her for purposes of calculating her sentence under the guidelines.

From November 1, 1991, until December 18, 1991, Rutherford worked as a salesman for Citybest Financial Services, Inc. (Citybest).

Citybest was a boiler room scheme devised to obtain money as an advanced fee of \$250 for arranging nonexistent loans up to \$40,000. Rutherford and other salespeople would answer phone calls from individuals making inquiries from newspaper and television advertisements. Working from and beyond a script, Rutherford and others would give their initial pitch, which included instruction to the buyer/borrower to call back after an hour. On the second call, the salesperson would tell the buyer that a lender had been found for the loan and that the loan would be forthcoming in one to two weeks from the receipt of the \$250 fee. No one received a loan.

During the period that Rutherford worked at Citybest, she was personally responsible for approximately \$16,000 of sales. Total sales from the same period were approximately \$148,250. The probation officer recommended calculating Rutherford's offense level based on the total sales figure. Rutherford objected to this recommendation, arguing that she did not jointly undertake criminal activity with the other salespeople; therefore, she should be

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<sup>1</sup> At sentencing, she was called by her married name, Cecelia Jane Rutherford-Baker.

accountable only for her sales. Rutherford did not dispute that these other sales were reasonably foreseeable to her, and she did not dispute the facts found within the PSR.

At sentencing, a codefendant from the scheme, Sandra Kennedy,<sup>2</sup> testified that, as a salesperson for Citybest, she did not share in the profits from the sales made by others. She also testified that she viewed the other salespeople as competitors and that confrontation occurred between salespeople when the one handling the first phone call did not receive the customer's second phone call, thus losing the sales commission. On cross-examination, Kennedy admitted that all the salespeople worked in the same room and that she had no knowledge of how the company divided the phone calls between the telemarketers. Rutherford's attorney informed the court that Rutherford's testimony would be the same as Kennedy's. Without objection from the government, the court deemed Kennedy's testimony to be Rutherford's.

The district court found that Rutherford and Kennedy engaged with others in a jointly undertaken criminal activity, the overall scheme set up to defraud the buyer/borrowers calling the Citybest telephone number. The court expressly found that "each of these defendants agreed to participate in that criminal activity by making telephone calls and generating income for the operation of the overall scheme, to perpetuate the existence of the overall scheme. Without the activities of these defendants and others like these defendants, the scheme simply wouldn't have worked." The

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<sup>2</sup> Kennedy also objected to the use of the total sales figure to calculate her offense level.

scope of Rutherford and Kennedy's agreements included their respective "enage[ment] in activities that would further the interests of the entire scheme . . . that they would generate income to cause the business to continue to operate."

The district court used the offense level and criminal history category found in the PSR and, after granting a downward departure, sentenced Rutherford to ten months' imprisonment.

Rutherford argues that her offense level should be figured on her \$16,000 sales for Citybest, not on the total sales generated for Citybest by all the telephone salespeople during her period of work. According to Rutherford, the scope of her jointly undertaken criminal activity was her employment contract with her employer, and the criminal activity was jointly undertaken between herself and her employer. Application of the guidelines are reviewed *de novo*, while the underlying findings of fact are reviewed for clear error. *United States v. Brown*, 7 F.3d 1155, 1159 (5th Cir. 1993). "A factual finding is not clearly erroneous as long as the finding 'is plausible in light of the record as a whole.'" *Id.* (citation omitted).

Rutherford is held accountable for relevant conduct of "all reasonably foreseeable acts . . . of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). "In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake . . . the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." U.S.S.G. § 1B1.3, comment (n.2).

The district court found that the scope of the criminal activity which Rutherford agreed to join included the perpetuation of the overall scheme and that Rutherford jointly undertook this criminal activity with her employer, Citybest, and the other telephone salespeople. The factual resume accompanying Rutherford's plea agreement referred to the actions of "Rutherford and others," without limitation to Rutherford and her employer. The PSR, adopted by the district court and containing facts which Rutherford did not dispute, described Citybest's operation, the use of telephone salespeople, and the similarity of information provided by the salespeople that investigators spoke with over the telephone. Further, Kennedy's testimony indicated that it was possible for a telephone caller to speak with more than one salesperson through the two-call transaction and that all the telephone lines ended in the same room where all the salespeople worked. Based on the record, the district court's finding as to the scope of the jointly undertaken criminal activity that Rutherford agreed to join is plausible. See *Brown*, 7 F.3d at 1159.

Rutherford "is accountable for the conduct (acts and omissions) of others that was both: (i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3, comment (n.2); see *United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir. 1993). Rutherford does not dispute that the other sales were reasonably foreseeable and that the district court so found. As explained above, the district court's findings concerning the first requirement are not clearly erroneous.

Therefore, the guidelines were properly applied in holding Rutherford accountable for the total sales of the criminal activity.

Rutherford's conviction and sentence are accordingly

AFFIRMED.