

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10397  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY DANE ELSEY, a/k/a  
Dane L. Elsey,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Northern District of Texas  
(6:93-CR-025-C)

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( March 20, 1995 )

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

POLITZ, Chief Judge:\*

Larry Dane Elsey appeals his conviction and sentence for wire fraud. We affirm the conviction but vacate the sentence and remand for resentencing.

Background

Two Louisiana businessmen, Hugh Brashier and Pat Edgar,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

contacted Elsey in his capacity as a broker of oil field pipe. They wished to purchase a supply of pipe which was located in Odessa, Texas. The three men traveled to Odessa to examine the pipe. Satisfied that the pipe met their specifications, on August 22, 1990 Brashier and Edgar wired Elsey the sum of \$24,968.02, the amount agreed to for the purchase and delivery of the pipe. The pipe was not delivered, the monies were not returned, and in due course Elsey was indicted for wire fraud under 18 U.S.C. § 1343. The jury returned a guilty verdict and Elsey was sentenced to 18 months imprisonment, three years supervised release, and the statutory assessment. He timely appealed both his conviction and sentence.

#### Analysis

Elsey first challenges the sufficiency of the evidence, claiming that the government failed to prove either that he engaged in a scheme to defraud or that he possessed the requisite intent to defraud.

In determining evidentiary sufficiency, we examine the evidence in the light most favorable to the verdict.<sup>1</sup> Viewed thusly, if the evidence would allow a rational juror to find all of the elements of the crime proven beyond a reasonable doubt, the conviction is to be affirmed.<sup>2</sup>

To establish wire fraud the government must prove the

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<sup>1</sup>**Jackson v. Virginia**, 443 U.S. 307 (1979); **United States v. Roberson**, 6 F.3d 1088 (5th Cir. 1993), cert. denied, \_\_\_\_\_ U.S., \_\_\_\_\_, 114 S.Ct. 1322 (1994).

<sup>2</sup>**Id.**

existence of a scheme to defraud, via use of interstate wire communications, and that the defendant possessed the intent to commit fraud.<sup>3</sup> This intent may be "demonstrated by direct or circumstantial evidence that allows an inference of unlawful intent, and not every hypothesis of innocence need be excluded."<sup>4</sup>

Brashier testified that Elsey agreed to deliver the pipe upon receipt of the wired funds. The funds were transferred on August 22, 1990; the pipe was not delivered. Elsey claimed that he could not ship the pipe until August 24 because he hit a deer with his vehicle. On August 27, Elsey informed Brashier that the pipe would be delivered on the 28th. No delivery was made.

Upon contacting the vendor of the pipe, Brashier discovered that Elsey had not even attempted a purchase. Brashier consulted his attorney, who telephoned Elsey. Brashier's attorney testified that Elsey claimed to be having problems obtaining the pipe from the vendor and that he agreed to return the money and dissolve the sale. Brashier immediately obtained the pipe directly from the vendor with no difficulty. Despite Elsey's repeated assurances, the money was never returned. Bank records reflect that Elsey used the money wired to his account to defray personal expenses.

Viewing this evidence in the light most favorable to the verdict we must conclude that the jury could have found the existence of both a scheme and the requisite intent to defraud. Elsey's suggestions to the contrary are not persuasive.

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<sup>3</sup>**United States v. Aggarwal**, 17 F.3d 737 (5th Cir. 1994).

<sup>4</sup> **Id.** at 740.

Eley contends that during his sentencing the district court erroneously assessed two additional criminal history points for his commission of the instant offense while under another criminal sentence. The calculation of a defendant's criminal history category is a finding of fact reviewable for clear error.<sup>5</sup>

The district court found that Eley had been convicted on July 7, 1992 of felony misapplication of fiduciary property, that the charged wire fraud offense continued until return of the indictment on October 19, 1993, and, accordingly, that the instant offense occurred while Eley was under deferred adjudication for the state felony charge. Eley contends, and the government candidly concedes, that although Eley may have delayed repayment as part of a continuing scheme, the wire fraud offense terminated upon the transfer of the funds as "[i]t is not the scheme to defraud but the use of the . . . wires that constitutes . . . wire fraud."<sup>6</sup> Thus, as the offense of conviction terminated in 1990, it was not committed while Eley was "under any criminal justice sentence."<sup>7</sup> The district court's finding to the contrary and its assessment of the two additional points was clearly erroneous.

Under the district court's calculation, Eley had a criminal history score of three, placing him in criminal history category II, which, when combined with his offense level score of 12,

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<sup>5</sup>**United States v. Martinez-Moncivais**, 14 F.3d 1030 (5th Cir.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S.Ct. 72 (1994).

<sup>6</sup>**United States v. St. Gelais**, 952 F.2d 90, 97 (5th Cir.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 113 S.Ct. 439 (1992).

<sup>7</sup>U.S.S.G. § 4A1.1(d).

resulted in a guideline range of 12 to 18 months of imprisonment. The proper calculation reduces Elsey's criminal history score by two points, placing him in category I, with a sentencing range of 10 to 16 months of imprisonment.<sup>8</sup> The 18-month sentence imposed must therefore be vacated.

The conviction is AFFIRMED, the sentence is VACATED, and the matter is REMANDED for resentencing.

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<sup>8</sup>U.S.S.G. Ch.5 Pt.A (Sentencing Table).