IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10640

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARK ERWIN KEETON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CR-0085-X)

(May 16, 1995)

Before HIGGINBOTHAM, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

Eighteen-year-old bank teller Mark Keeton decided to rob his employer. His duties at the Heritage Bank in Red Oak, Texas, included closing the bank and arming the security system in the evening, and he was intimately familiar with the placement and operation of security cameras and other safeguards. Keeton

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

organized an after-hours robbery of the bank, in which he posed as a victim. In the course of the robbery, Keeton's partner Haney held a gun to the head of Kristi Arnold, one of Keeton's fellow tellers. Keeton got between $45,000 and $50,000 of the money stolen from the bank.

II.

Keeton and Haney were charged with one count of bank robbery under 18 U.S.C. §§ 2113(a) and 2. Pursuant to an agreement in which the U.S. Attorney promised not to prosecute him for any other offenses, Keeton pled guilty and agreed that the facts were as summarized in the factual resume. They are as follows:

> At approximately 6:30 pm on January 7, 1994, Heritage Bank in Red Oak, Texas, a federally insured bank, was robbed. The robbery was planned by three individuals, the first being the defendant, Mark Erwin Keeton, a Heritage Bank employee, the second was the "gunman" Kevin Troyce Haney and the third was an individual who agreed to drive the car to and from the robbery.
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> The driver borrowed an automobile and drove the gunman Haney, armed with a pellet or BB. gun which had the appearance of a handgun, to the Heritage Bank premises. Haney accosted a female Bank employee with the weapon in the parking lot and forced her back into the Bank. With assistance from Keeton, who was appearing to be a victim, Haney obtained approximately $98,180.25 in a white cloth bag from the robbery. He was driven away from Heritage Bank by the driver.
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> Haney carted money away from the robbery in bags. Keeton took approximately $14,000.00 from his cash drawer shortly before the robbery. These funds were divided between the participants, with Keeton receiving between $45,000.00 and $50,000.00 for his role in the offense.
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> In planning the robbery, a kick by Haney to Keeton's body and the use of the BB. gun were designed to intimidate the female Heritage Bank employee and induce her cooperation.

The court sentenced Keeton to 97 months of confinement, three

years of supervised release, and restitution of $48,286.25. He claims that the court erred by increasing his offense level under U.S.S.G. § 3B1.3[1] for abuse of position of trust, under § 2B3.1(b)(4)(B) for the physical restraint of teller Kristi Arnold during the robbery, and under § 3B1.1(c) for being an organizer, leader, manager, or supervisor of the criminal activity. In addition, he argues that the order of restitution was improper because he was unable to pay, because the amount of restitution was improperly entered, and because the district court's delegation of the determination of a "rate" of repayment to the probation office was impermissible.

III.

Keeton's sentence was enhanced under a provision of the guidelines applicable where "the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Keeton argues that the plain language of the sentencing guidelines, and a number of our cases interpreting that language, prohibit the district court from applying the abuse of trust enhancement to him because of his position as a bank teller. We conclude that the enhancement was proper, as Keeton's duties included some security responsibilities not inherent in the job of teller.

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[1] As Keeton was sentenced on June 27, 1994, the November 1993 Guidelines govern his case, absent an ex post facto problem. United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S. Ct. 170 (1993).

We review the determination that the defendant abused a position of trust for clear error. United States v. Fisher, 7 F.3d 69, 70 (5th Cir. 1993). The commentary to the 1993 Sentencing Guidelines states:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult) . . . . This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described features.

U.S.S.G. § 3B1.3, application note 1 (emphasis added).

Another circuit has ignored this language and finds ordinary paying and receiving tellers to be in positions of private trust under § 3B1.3. See, e.g., United States v. Lamb, 6 F.3d 415, 420 (7th Cir. 1993). This court has not gone so far. In Fisher, we found a head teller to be in a position of private trust for purposes of the § 3B1.3 enhancement. We carefully distinguished her situation from that of an ordinary teller, however, pointing out that a head teller has substantial supervisory responsibilities and a much greater sphere of authority than does her subordinates:

> . . . Fisher's duties and responsibilities as head cashier went significantly beyond the duties of an ordinary bank teller. Her job was classified as a "position of trust;" she supervised one cashier; she had the authority to get money out of the vault, requisition money, and check money; and she was subject only to

monthly spot-checks.

Fisher, 7 F.3d at 71. In United States v. Campbell, No. 93-5270 (5th Cir. March 23, 1994) (unpublished), we made a similar distinction, taking a defendant out of § 3B1.3's teller exception and holding that "Campbell's duties and responsibilities as cashier of the Imprest Fund went significantly beyond the duties of an ordinary bank teller."

In United States v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, 502 U.S. 1008 (1991), we explained that two findings are necessary for enhancement under § 3B1.3: (1) that the defendant occupied a position of trust and (2) that he abused his position in a manner that significantly facilitated the commission or concealment of the offense. Although Brown involved heroin smuggling by a prison official, we discussed the teller exception in the context of the § 3B1.3 enhancement. The Ninth Circuit's cases, we explained, stand for the proposition that a bank teller cannot abuse a position of trust because she, in contrast to higher-ranking bank officials, does not occupy one. Brown, 941 F.2d at 1305. We acknowledged that several courts have attempted to explain the bank teller exception by suggesting that a teller's position of trust may already be included in the offense of embezzlement and therefore is inappropriate as a basis for an enhancement. Id. at 1305 n.6 (citing United States v. Drabeck, 905 F.2d 1304, 1306-07 (9th Cir. 1990)). Finally, we examined the second prong of § 3B1.3, holding that the defendant's opportunity to commit the crime or conceal it is to be measured against that of

the general public rather than against that of other persons occupying the same position. Id.

In an unrelated case coincidentally involving another Parchman prison employee named Brown, United States v. Brown, 7 F.3d 1155 (5th Cir. 1993), we again addressed the application of § 3B1.3. In distinguishing Brown's position as a prison food service manager from that of a bank teller, we wrote:

> Unlike teller embezzlement, a position of trust is not already implicit in charges of mail fraud and money order alteration against a prison worker . . . . Moreover, Brown's position is in other respects not wholly analogous to an embezzling bank teller . . . . It has been stated that the rationale underlying the 'bank teller exception' is that although the teller's position provides an opportunity to embezzle money, reasonably diligent supervisors could easily detect the wrongdoing after it has occurred . . . . Where the wrongdoing is smuggling money into a prison, however, there is no analogous supervision capable of detecting the completed crime.

Id. at 1161 (citations and footnote omitted). We noted that we had observed in some decisions a reluctance to analogize broadly from the bank teller exception and a tendency, instead, either to limit its scope or to suggest that the teller's position of trust is already implicit in the charge of embezzlement. Id. at 1161 n.4.

We find the distinction between Keeton's security responsibilities at the bank (arming the alarm, closing, etc.) and his teller responsibilities to be dispositive in this case, so we affirm the § 3B1.3 enhancement on the basis of the security responsibilities. This approach is consistent with applications of § 3B1.3 to security guards. See United States v. Parker, 903 F.2d 91, 104 (2nd Cir.), cert. denied, 498 U.S. 872 (1990).

IV.

Next, Keeton challenges the enhancement of his sentence under U.S.S.G. § 2B3.1(b)(4)(B) for the physical restraint of teller Kristi Arnold by Haney during the robbery. The factual resume signed by Keeton in connection with his guilty plea specifies that Haney accosted Arnold "with the weapon in the parking lot and forced her back into the Bank." The weapon was "a pellet or BB. gun which had the appearance of a handgun." The Sentencing Guidelines define physical restraint as "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S.S.G. § 1B1.1, application note 1(i). Courts interpreting this definition have held that the use of the modifier "such as" indicates that "being tied, bound, or locked up" is listed by way of example rather than limitation. See, e.g., United States v. Stokely, 881 F.2d 114, 116 (4th Cir. 1989). Keeton argues that the definition excludes restraint accomplished by grabbing someone and threatening him with a gun.

Several other circuits have upheld application of the physical restraint enhancement in situations like the one at bar. One circuit has upheld the application of the physical restraint enhancement where a bank robber ordered tellers into an unlocked bathroom and threatened to shoot them if they emerged, United States v. Doubet, 969 F.2d 341, 346 (7th Cir. 1992), and where the bank robber fired mace at the victims, United States v. Robinson, 20 F.3d 270, 279 (7th Cir. 1994) ("Because a person experiencing burning in her eyes and throat may have difficulty chasing after a

bank robber and will be restricted in movement for some period of time, 'physical restraint' is satisfied here since defendant created a 'chemical wall' . . . ."). Another court, in a case factually similar to the one at bar, held that "a victim who is held around the neck at knifepoint is denied freedom of movement so as to be physically restrained." United States v. Roberts, 898 F.2d 1465, 1470 (10th Cir. 1990).

Still another court went even further; in United States v. Elkins, 16 F.3d 952, 953 (8th Cir. 1994), the defendant argued that the two point enhancement for physical restraint should apply, rather than the four point enhancement for abduction, where he held a bank patron at knife point and forced him out of the bank and into the parking lot, releasing him only after he had provided the robber with the keys to his vehicle. The court held that the abduction enhancement applied (and that the physical restraint provision, as a lesser included enhancement, therefore did not).

Although the Elkins court did not apply the physical restraint enhancement, the logic of the opinion supports upholding it where, as here, there is no abduction enhancement issue. But see United States v. Johnson, 1995 WL 32001, *3 (7th Cir. 1995) ("To be eligible for the additional two-level enhancement for physical restraint the court had to find that Johnson (or his 'assistants') did something beyond pointing a gun and inflicting injury . . . . [such as] surround[ing] Cunningham in such a way as to form a human wall.") (emphasis added). We hold that the application of the physical restraint enhancement to Keeton was proper.

V.

We review a trial court's finding that defendant was "an organizer, leader, manager, or supervisor" of the criminal activity for clear error. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989). Here, the enhancement was amply supported by the evidence. Keeton referred to himself as a leader and took in half or almost half of the proceeds of the robbery (leaving the other half to be divided among the two other perpetrators). In addition, Keeton planned the robbery using his special knowledge of bank security systems and practices.

VI.

We review an order of restitution for abuse of discretion. United States v. Paden, 908 F.2d 1229, 1237 (5th Cir. 1990), cert. denied, 498 U.S. 1039 (1991). The burden of demonstrating that he lacks the resources to comply with a restitution order is on the defendant. 18 U.S.C. § 3664(d). Current indigency is not a per se bar to restitution. United States v. Matovsky, 935 F.2d 719, 723 (5th Cir. 1991).

Keeton has failed to meet his burden, making no showing that he will be unemployable after his prison term. He has no dependents, and is supported by his parents. We find no abuse of discretion.

In the alternative, Keeton argues that the restitution as computed by the district court exceeds the actual loss to the bank and therefore must be reduced by $185. This argument is meritless.

In making it, Keeton relies upon a portion of the record listing the bank losses as $98,100. Keeton pled guilty, however, to robbing the bank of approximately $98,180.25.

VII.

Finally, Keeton argues that the restitution order impermissibly delegates a judicial function to the probation office by ordering it to determine the "rate" of repayment. We agree. In United States v. Albro, 32 F.3d 173, 174 (5th Cir. 1994), we held that it was plain error for the district court to delegate the establishment of a restitution payment schedule to the federal probation office rather than itself designating the timing and amount of payments. Albro requires us to vacate that part of the district court's restitution order delegating the establishment of a rate of payment to the probation office and remand for resentencing.

For the foregoing reasons, the judgment of sentence is AFFIRMED in part and VACATED and REMANDED in part.