

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10677

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY WAYNE ELROD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(3:93-CR-377-G)

December 18, 1995

Before REAVLEY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Anthony Wayne Elrod appeals, *inter alia*, the imposition of restitution and the delegation of responsibility to the probation officer for determining the rate of restitution installment payments. We **AFFIRM** the imposition of restitution, but **REMAND** for the district court to determine the amount of installment payments.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Elrod was convicted following a guilty plea to arson, aiding and abetting, and use of a fire to commit a felony. The charges arose out of a scheme to defraud insurance companies by hiding or destroying property which Elrod owned or controlled and filing false claims, which resulted in a loss of \$4,302,899.54. Elrod, at 26 years of age, was sentenced, *inter alia*, to a 240-month term of imprisonment and a three-year period of supervised release. The district court declined to impose a fine, noting that Elrod lacked the resources to pay a fine and was not likely to have them in the future. On the other hand, Elrod was ordered to pay \$4,302,899.54 in restitution (the amount of loss) jointly and severally with his co-defendants.¹

II.

Elrod did not object to the restitution provisions in issue. Accordingly, he claims that the district court committed plain error in ordering approximately \$4.3 million in restitution and in delegating to the probation officer the responsibility for determining the amount of restitution installment payments.²

¹ The district judge based the institution of approximately \$4.3 million in restitution on the possibility of a windfall, such as an inheritance or book or movie deal.

² Elrod concedes that his remaining issue, a double jeopardy claim, must be decided against him, pursuant to ***United States v. Nguyen***, 28 F.3d 477 (5th Cir. 1994).

A.

The threshold issue is whether, as urged by the Government, Elrod, at the sentencing hearing, waived any objection to restitution. As discussed in *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770, 1777 (1993) (citations omitted), "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the `intentional relinquishment or abandonment of a known right.'" Although forfeiture does not extinguish an "error" under FED. R. CRIM. P. 52(b) (court may notice plain errors), waiver does. See *Olano*, 113 S. Ct. at 1777.

When the district judge stated at the sentencing hearing that he would have to decide whether to impose restitution, Elrod's counsel responded:

Your Honor, with reference to restitution, with reference to the twenty-year sentence and eighty percent of that being sixteen years, I would think absent a finding that there are assets, which I do not believe there are, we *have no objection to an order of restitution*. It seems it would encumber the files of the court to have one. *We would certainly agree to one*, and Mr. Elrod wants to make amends to people the best he can, but it seems like he'll be incapacitated for a while.

(Emphasis added.) In light of counsel's statements that "we have no objection to an order of restitution", "we would certainly agree to one", and "Mr. Elrod wants to make amends to people the best he can", Elrod waived any objection to restitution. Restated, as evidenced by these statements, he intentionally relinquished the known right to object to restitution. See *Olano*, 113 S. Ct. at

1777. And, consistent with Elrod's previous waiver of any objection to restitution, he did not object when the district judge later set the amount of restitution. In light of the waiver, Elrod's challenge to that amount is meritless.

B.

Elrod was ordered to pay "equal monthly installments at a rate to be determined by the probation office...." The Government concedes plain error, because, as held in *United States v. Albro*, 32 F.3d 173, 174 (5th Cir. 1994), "the district court must designate the timing and amount of payments" of restitution. While the district court "is free to receive and consider recommendations from the probation officer in this regard", the payment schedule must be decided by the district judge, not the probation officer. *Id.* at 174.³ Without deciding whether such error is always reversible under our plain error standard, we agree that this case must be remanded for the district court to establish the restitution payment schedule.

III.

For the foregoing reasons, restitution in the amount of \$4,302,899.54 is **AFFIRMED**, but this case is **REMANDED** for the district court to determine the rate of restitution to be paid by Elrod.

AFFIRMED AND REMANDED

³ Our court held in *Albro*, 32 F.3d at 174 n.1, that "at least under the circumstances presented" there, this constituted plain error.