UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10781
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD E. ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(2:94-CR-20-1)

(February 16, 1995)
Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

Richard E. Allen appeals the sentence he received following his plea of guilty to odometer tampering in violation of 15 U.S.C. § 1984 and 18 U.S.C. § 2. Finding no error, we affirm.

I.

Richard E. Allen worked in the used-car business, purchasing used cars and selling them to used-car dealers. According to the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

factual resume, in 1990 Allen obtained three purchase money loans amounting to $13,779.59 from Amarillo National Bank of Amarillo, Texas (the "Bank"). Under the terms of the loan, Allen was to use the loan proceeds to purchase three vehicles to which the Bank would hold title as collateral for the loans. He then was to use the proceeds from the sale of the cars to pay off the loans.

Allen subsequently defaulted on the loans, and the Bank obtained a default judgment against him in the amount of $12,609.05. At that time, Allen maintained that he had sold the cars underlying the loans without the Bank's knowledge and had spent the proceeds. However, the Bank later learned that F.B.I. investigators had found one of the cars with altered tags in Allen's yard. The Bank repossessed that vehicle and sold it for $3500.

The Government alleged that the loans were part of a fraudulent scheme in which Allen would purchase high mileage vehicles, change the odometers to indicate lower mileage, and apply for and obtain replacement titles. Using this false information, Allen obtained bank loans in excess of the value of the cars. The Government charged Allen in a six-count indictment, including four counts of odometer tampering and two counts of fraudulent loan and credit transactions. Allen pleaded guilty to Count Five, an odometer alteration charge, and the Government dismissed the other charges.

The Presentence Report ("PSR") assigned a base offense level of six pursuant to the fraud guidelines, U.S.S.G. § 2F1.1. It recommended a three-point increase for a loss of more than $10,000.

See id. § 2F1.1(b)(1)(D). Over Allen's objections to the amount of loss calculation, the district court adopted the PSR's recommendations and sentenced Allen to ten months imprisonment with a one-year term of supervised release. The court also ordered Allen to pay restitution in the amount of $7,109.05, as stipulated by the parties.[2]

II.

On appeal, Allen argues that the district court erred by increasing his offense level three points for an amount of loss exceeding $10,000. He contends that the district court incorrectly determined the actual loss by failing to offset the value of the car repossessed by the Bank. Allen argues in the alternative that if the court based the increase on the intended, rather than the actual, loss, it failed to make the required findings as to an intent not to repay the Bank and the amount of the intended loss. **See United States v. Henderson**, 19 F.3d 917, 928 (5th Cir.), **cert. denied**, 115 S. Ct. 207 (1994).

We review a district court's application of the Sentencing Guidelines **de novo** and its findings of fact for clear error. **United States v. Wimbish**, 980 F.2d 312, 313 (5th Cir. 1992), **cert. denied**, 113 S. Ct. 2365, **abrogated in part on other grounds sub nom. United States v. Stinson**, 113 S. Ct. 1913 (1993). The calculation of the amount of loss is a factual finding. **Id.** A factual finding is not clearly erroneous as long as it "is plausible in light of the record as a whole." **Id.** The district

[2] This amount reflects the $12,609.05 default judgment minus $3500 for the repossessed vehicle minus $2000 in payments made by Allen since the judgment.

court need not determine the loss precisely, but need only make a reasonable estimate based on the information available. U.S.S.G. § 2F1.1, comment. (n.7); **see United States v. Chappell**, 6 F.3d 1095, 1101 (5th Cir. 1993), **cert. denied**, 114 S. Ct. 1232, 1235 (1994).

The Sentencing Guidelines mandate a three-point increase if the amount of loss resulting from a fraud or deceit offense exceeds $10,000. U.S.S.G. § 2F1.1(b)(1)(D). Comment 7 provides guidance on how to determine loss: "As in theft cases, loss is the value of money, property, or services unlawfully taken. . . . [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." **Id.** § 2F1.1, comment. (n.7) For fraudulent loan applications:

> [T]he loss is the actual loss to the victim . . . . For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) for any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

Id.

The PSR did not specify the amount of loss to the Bank, simply indicating that it was above $10,000. It did indicate, however, that, besides the loss to the Bank, there was also an uncalculated loss to victims who had purchased cars with altered odometers and titles from Allen. In response to Allen's objections to the recommended 3-level increase, the addendum to the PSR noted that $12,609.05 was the amount of loss to the Bank.

At sentencing, Allen reiterated his objection to the increase,

arguing that the amount of loss was $7109.05. Allen contended that the court should offset both the $3500 recovery and the $2000 paid to the Bank since the default judgment.[3] Allen further argued that there was no evidence that Allen intended to defraud the Bank of the full amount, thus suggesting that the intended loss was zero. The Government contended that the increase should be based on intended loss. It argued that the intended loss was the full amount, pointing to evidence that Allen had sold one of the cars underlying the loan by fraudulently obtaining a certified copy of the title from the State, had failed to give the Bank title to the second car in violation of the agreement, had kept and spent the proceeds from sales of two of the cars, and had concealed the third car.

After listening to the arguments, the court merely stated: "I will find that the Guidelines--that the loss exceeded $10,000, and I will not change the presentence report in that matter." In referring to the car repossessed by the Bank, the court indicated that it based the amount of loss on intended loss:

> It may be some evidence of the intention of the defendant. I think it is clear that the defendant attempted to conceal the vehicle. According to the facts set forth in the presentence report . . . . he fully expected to defraud the bank in that amount.

Although the district court's reasons could be clearer, we are satisfied that the judge found that Allen intended to defraud the Bank of $12,609.05. The record fully supports this conclusion. Allen used deceitful tactics to sell two of the cars underlying the

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[3] On appeal, Allen abandons the argument that the court should have offset the $2000 and argues only that the court should have offset the $3500 recovery.

loans without the Bank's knowledge, thereby depriving the Bank of the titles and its security interest. Although his scheme ended before he could do the same with the third car, his efforts to conceal it reflect an intent to deprive the bank of any security interest in that car as well and to avoid payment of the balance on the loan. Given this information, it was plausible for the district court to determine that the intended loss was over $10,000. **See United States v. Johnson**, 16 F.3d 166, 173 (7th Cir. 1994) ("Given that Johnson's [lack of] control over the collateral and his pattern of deceptive conduct so diminished the bank's chance of ever recovering had the fraud reached fruition, we cannot say that the district court's decision to hold Johnson accountable for the total amount of the loans was clearly erroneous.").

Even if the court based the increase on actual loss, a finding that the actual loss exceeded $10,000 is also plausible from the record. An offset of the $3500 recovery for the repossessed vehicle would reduce the $12,609.05 amount to $9109.05. Considering the loss to the other victims listed in the PSR--the buyers of the vehicles with the altered odometers and titles--the loss caused by the offense most likely exceeded $10,000. Indeed, the court explained that he sentenced Allen at "the top of the guidelines" because of Allen's "involve[ment] in a number of schemes over a period of time that required systematic dishonesty."

AFFIRMED.