IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-10986
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES OLUMIDE ADEOYE,

Defendant-Appellant.

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Appeal from the United States District Court for the Northern District of Texas
(3:94 CR 209 X)

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July 10, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

Defendant-appellant James Olumide Adeoye (Adeoye), convicted on his plea of guilty of use of a social security account number assigned to another person contrary to 42 U.S.C. § 408(a)(8) and of mail fraud contrary to 18 U.S.C. § 1341, appeals his sentence to 24 months' imprisonment, 3 years' supervised release, a $4,000 fine,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

$162,045.56 in restitution, and a $100 special assessment. For the reasons assigned, we vacate the sentence and remand for resentencing.

Adeoye devised a scheme in which he diverted mail from the intended recipients to private mailboxes rented under aliases. After obtaining the diverted mail, Adeoye applied for credit cards under the names of the individuals whose mail he had misappropriated.

The probation officer preparing the presentence report (PSR) recommended, *inter alia*, increasing Adeoye's base offense level by eight levels because the intended loss under the scheme was more than $200,000, *see* U.S.S.G. § 2F1.1(b)(1)(I), and by two levels because he was an organizer, leader, manager, or supervisor of the criminal activity. The district court overruled the objections.

Adeoye argues that the district court's finding under section 3B1.1(c) that he was an organizer, leader, manager, or supervisor of the scheme is clearly erroneous. The district court's determination under section 3B1.1(c) is a factual finding reviewed for clear error. *United States v. Ronning*, 47 F.3d 710, 711 (5th Cir. 1995). Under this section, a defendant's base offense level is increased by two levels if the defendant is an "organizer, leader, manager, or supervisor in any criminal activity other than that described in (a) or (b)." Section 3B1.1(c). To qualify for the adjustment, the defendant must have been the organizer, leader, manager, or supervisor of one or more participants. *Id.* at comment. (n.2).

If the defendant objects to an enhancement recommended in the

PSR, the government has the burden to establish the factual predicate justifying the enhancement by a preponderance of the evidence. *United States v. Elwood*, 999 F.2d 814, 817 (5th Cir. 1993). Although the PSR generally bears sufficient indicia of reliability to be considered evidence by the district court, "[b]ald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR." *Id.* at 817-18.

The PSR stated, without factual elaboration, that "[t]he investigation further revealed that Adeoye's spouse and Adeoye's former employee, Nelson Omolewa, completed fraudulent credit card applications at the direction of the defendant." The second addendum to the PSR reflected the quoted statement in the original PSR was based on "information [which] was provided by the case agent who will be available to testify at sentencing if needed." At the sentencing hearing, the case agent testified only that "[t]here are indications that the defendant's wife is involved and a subsequent co-worker of the defendant was probably involved in it. Other than that, the defendant is the sole person." We hold that though this may come close to doing so, it ultimately does not suffice to constitute an adequate basis on which to rest an enhancement under section 3B1.1(c). The second addendum makes clear that the PSR may not rise above the agent's testimony. The agent does not say that he, or anyone else, concluded that the wife (or a co-worker) *was in fact* involved. The agent says only that there are "indications"; he does not say what they are or describe them or even say that they are persuasive or reliable, much less provide any information so indicating. Such a brief, tentative,

and conclusory assertion is not capable of evaluation as to reliability. We hold it insufficient for this purpose. *See Elwood*, 999 F.2d at 817; *United States v. Patterson*, 962 F.2d 409, 414-15 (5th Cir. 1992). Therefore, on the record before this Court the district court's finding that Adeoye is a leader, organizer, manager, or supervisor may not stand.

Adeoye next argues that there is insufficient evidence to support the finding that the intended loss under the scheme was more than $200,000. He contends that the government failed to connect him to five of the private mailboxes allegedly involved in the scheme. This Court reviews the district court's finding regarding the amount of loss under section 2F1.1 for clear error. *United States v. Chappell*, 6 F.3d 1095, 1101 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1232, 1235 (1994).

The government contended that Adeoye diverted forty-seven credit cards to eight different mail drops. Adeoye admitted his involvement with the two mail drops at 1301 West Highway 407 in Lewisville, Texas, and one at 13237 Montfort Drive in Dallas, Texas, but denied any connection with the remaining five mail drops.

The evidence established that Adeoye opened two bank accounts in Arkansas under the names John B. Obah and Andrew Kuye Blackburn. Credit card applications and convenience checks associated with the mail drop at 1702 South Highway in Lewisville were typed on Adeoye's typewriter, and the fraudulent checks were subsequently deposited in the fraudulent bank accounts in Arkansas. Fraudulent checks with return addresses to the mail drops at 1316 North Dallas

Avenue in Lancaster and 35268 Highway 66 in Rowlett, and checks associated with the mail drop at 6331 Marquita Avenue in Dallas were also deposited in the Arkansas accounts. Finally, video surveillance connected Adeoye with the mail drop at 6780 Abrams Road in Dallas. This evidence is sufficient to establish Adeoye's association with all eight mail drops. The district court's finding regarding the amount of intended loss is not clearly erroneous.

For the first time on appeal, Adeoye challenges the restitution order. He contends that the order of restitution is improper because the district court did not consider his financial ability to pay restitution, the amount of restitution ordered was not supported by the evidence, the restitution was not limited to the counts of convictions, and the order delegates the authority to determine the manner of payment to the probation officer.

We hold that Adeoye has forfeited all his complaints as to the restitution order by failing to challenge it below and that, except as to his final ground of challenge, he is not entitled to relief on appeal under Fed. R. Crim. P. 52(b). *See United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994).

Relying on *Hughey v. United States*, 495 U.S. 411 (1990), Adeoye argues that the restitution order is illegal because restitution was not limited to the counts of conviction. This Court, however, has interpreted *Hughey* to permit restitution to include all losses associated with a "scheme to defraud." *United States v. Stouffer*, 986 F.2d 916, 928-29 (5th Cir.), *cert. denied*, 114 S.Ct. 115, 314 (1993); *see also* 18 U.S.C. § 3663(a)(2). The

information alleged a scheme to defraud beginning on December 28, 1992, and continuing until May 12, 1994, and described the method used to perpetuate the scheme. These details are sufficient to satisfy *Hughey*'s requirement that the sentencing court consider only the specific conduct underlying the offense of conviction. *Stouffer*, 986 F.2d at 929. Similarly, to the extent that Adeoye argues that the evidence does not support the amount of restitution, as discussed above, there was sufficient evidence to support the district court's findings regarding the actual losses caused by the scheme.

Adeoye also argues that the restitution order is improper because the district court failed to consider his financial ability to pay before imposing restitution. The district court must consider a defendant's ability to pay before ordering restitution, 18 U.S.C. § 3664(a), but the defendant has the burden of demonstrating the lack of financial resources to comply with a restitution order. *Id.* at § 3664(d); *United States v. Reese*, 998 F.2d 1275, 1281 (5th Cir. 1993). Adeoye never raised the issue of inability to pay or requested that the district court make a specific finding regarding his ability to pay and, therefore, he has failed to carry his burden of demonstrating inability to pay restitution. *Reese*, 998 F.2d at 1281.

Except for his final challenge to the restitution order, noted below, we grant relief on none of Adeoye's complaints concerning the restitution order.

Finally, Adeoye argues that the restitution order is improper because the district court failed to specify the manner in which

the restitution should be paid and delegated the authority to the probation officer. The order says that the restitution is to be paid "in installments," but expressly leaves to the probation officer the amount and timing of the installments. The district court must designate the timing and amount of payments, *see* section 5E1.1, comment. (backg'd); *United States v. Albro*, 32 F.3d 173, 174 (5th Cir. 1994), and it is plain error to delegate this authority to the probation officer. *Albro*, 32 F.3d at 174 n.1. Therefore, the order of restitution must be vacated.

We hold that the present record does not support the enhancement under section 3B1.1(c) and that the restitution order's leaving to the probation officer the amount and timing of the installments is plain error; we deny relief on all of Adeoye's other complaints. Accordingly, the sentence is VACATED and the cause is REMANDED for RESENTENCING.