

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11018

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BOBBY R. COX,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR 162-G)

(February 22, 1995)

Before SMITH and BARKSDALE, Circuit Judges, and BUCHMEYER,*
District Judge.

JERRY E. SMITH, Circuit Judge:**

I.

Bobby Cox and his co-defendant, Charles James, pleaded guilty
to filing false tax claims and conspiracy to file false tax claims.

* Chief District Judge of the Northern District of Texas, sitting by
designation.

** 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that this opinion should not be published.

The district court adopted the presentence investigation report's (PSR's) finding that the full \$125,365 loss caused by the scheme was attributable to Cox. The government concedes that Cox validly objected to the PSR as to the foreseeability issue. Cox, however, did not request an evidentiary hearing on the amount of loss caused by the scheme.¹

James also objected to his PSR's finding of the loss attributable to him. In a sentencing proceeding separate from the one on appeal before this court, the district court agreed with James that the loss attributable to him was in the \$5,000 to \$10,000 range. Part of the reason for the reduction in the loss foreseeable to James was that some of the falsified tax returns the government presented as evidence were filed while James was in prison. Cox now appeals his sentence, arguing that only \$40,000 of the loss was duly attributable to him and that the enhancement applied under U.S.S.G. § 2B1.1(b)(1)(J) was therefore inappropriate.

II.

It is well settled that under the Sentencing Guidelines, a member of a conspiracy is not liable for the entire loss occasioned by the enterprise unless that loss is reasonably foreseeable to him. United States v. Foy, 28 F.3d 464, 476-77 (5th Cir.), cert. denied, 115 S. Ct. 610 (1994). In Foy, the PSR did not make a

¹ Cox, in his brief, relies upon his objection to the PSR and does not allege that he requested an evidentiary hearing on the foreseeability issue. The government asserts that Cox requested an evidentiary hearing as to the "organizer or leader" enhancement only, and Cox does not challenge this claim in his reply brief.

foreseeability determination as to the defendant, and he was held liable for the entire amount of cocaine trafficked by the conspiracy. This court reversed, holding that the defendant could be liable only for the amount reasonably foreseeable to him. "Reasonable foreseeability does not follow automatically from proof that the defendant was a member of a conspiracy." Id. at 476 (citation omitted).

Cox concedes that his PSR did make a foreseeability determination, albeit a conclusionary one, and that Foy therefore is different from the case at bar.² Cox cites no authority for his claim that a conclusionary foreseeability determination is inadequate, other than FED. R. CRIM. P. 32(c)(3)(D)'s general requirement that the district court specifically resolve disputed issues of fact if it uses those facts as bases for its sentence. See also United States v. Hurtado, 846 F.2d 995, 998 (5th Cir.),

² The addendum to Cox's PSR specifies, in relevant part, that:

The amount of loss in this case was in excess of \$120,000 as was reported by the case agent. Further verification by the government indicates that the Internal Revenue Service (IRS) actually paid out \$125,365 as determined by the IRS Service Center, Austin, Texas. The scheme was jointly undertaken and reasonably foreseeable by both Bobby Cox and Codefendant Charles James.

In addition, paragraph 10 of the PSR discusses Cox's role in the conspiracy and lends further weight to the conclusion that over \$120,000 of loss was foreseeable to him:

IRS Investigation revealed that approximately 100 false tax returns claiming refunds in excess of \$120,000 were filed by Cox, James, and other co-conspirators. Roberson was aware that Cox and James were preparing these returns and recruiting others by providing false identifications and other information. Linley was involved in at least 10 of these false refunds. Cox and James both had experience in preparing tax refund forms and recruited others in the scheme. Cox was the leader of the illegal scheme, while James was a close ally and participant with Cox. Cox and James both recruited individuals into the conspiracy. Roberson is viewed as less culpable than his codefendants. It is noted that the case agent indicated that Cox was involved in organizing and leading more than five participants in the overall conspiracy.

cert. denied, 488 U.S. 863 (1988).

Information relied upon in sentencing must have some "minimal indicium of reliability" and bear some rational relationship to the sentence imposed. United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986). District courts have wide discretion in determining what information to consider in sentencing. United States v. Garcia, 693 F.2d 412, 416 (5th Cir. 1982). Likewise, they are entitled to accord the required "minimal indicium of reliability" to the information contained in PSR's. United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.), cert. denied, 115 S. Ct. 634 (1994). On appeal, the defendant bears the burden of demonstrating that information the court relied upon in sentencing is materially untrue. United States v. Flores, 875 F.2d 1110, 1113 (5th Cir. 1989); United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990).

No case cited by Cox prevents the district court from adopting the PSR's determinations, even where those determinations are conclusory in form and where defendant has objected to the specific finding at issue, so long as defendant has not introduced or unsuccessfully offered to introduce relevant rebuttal evidence. As Cox did not request the opportunity to introduce any evidence concerning the foreseeability issue, he did not carry his burden under Flores.

AFFIRMED.