UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40192
Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

MILLARD DEAN LOFTIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(5:92-CR-10)

(December 22, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Dr. Millard Dean Loftis (Loftis) challenges the upward departure and resulting sentence for his conspiracy and forgery convictions. Finding the sentence proper, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Loftis pleaded guilty to conspiracy to commit acts of mail and wire fraud and to forgery of a United States security. On the same day that Loftis was indicted for conspiracy and forgery, he was charged in a second indictment with five counts of firearm

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violations. Following a trial, Loftis was convicted of the firearm counts and was sentenced to 151 months imprisonment.

The government filed a memorandum requesting the district court to impose the sentences for the conspiracy and forgery convictions consecutively to the sentences previously imposed on the firearm convictions. The government argued that none of the evidence supporting the firearm offenses was necessary to prove the conspiracy and forgery offenses. The government also argued that the Presentence Report (PSR) prepared for the sentencing on the firearm convictions did not categorize any of the offenses alleged in the other indictment as relevant conduct. Understandably, Loftis requested concurrent sentences.

The PSR reflected that the conspiracy in which Loftis was involved resulted in defrauding a large number of medical insurance companies of payments totaling $3,111,594.35. Loftis also forged signatures on a check in the amount of $19,017.93.

At the sentencing hearing, the district court stated that it had considered U.S.S.G. §5G1.3(c), p.s., and determined that it was necessary to depart upward in sentencing Loftis so that the sentence would reflect the seriousness of the offenses. The court imposed two 60-month concurrent terms of imprisonment for the conspiracy and forgery offenses. The 60-month sentences would run consecutively to the 151-month sentence for the firearm convictions, resulting in a sentence of 211 months.

II. WHETHER THE SENTENCE IMPOSED WAS IN VIOLATION OF LAW.

Loftis argues that the district court abused its discretion in imposing consecutive sentences. Specifically, Loftis contends that the court's reasons for departing upward were inadequate.

A sentence will be upheld "unless it was imposed in violation of the law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable sentencing guideline and is unreasonable." United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 395 (1993).

Section 5G1.3(c), p.s., provides that "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense."[1] The commentary following the policy statement, §5G1.3, comment. (n.3), provides that:

> [t]o the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under §5G1.2 . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time.

[1] Section 5G1.3 applies to the imposition of a sentence imposed on a defendant who is subject to an undischarged term of imprisonment for another offense. Section 5G1.3(c), p.s., is applicable because Loftis did not commit the conspiracy and forgery offenses after he had been sentenced for the firearm offenses and because the firearm offenses were not taken into account in determining the offense level for the conspiracy and forgery offenses. See §5G1.3(a) and (b).

Pursuant to §5G1.2, the total sentence imposed for multiple counts is to be determined in accord with Part D of Chapter 3. Under §3D1.4, the combined offense level for multiple counts is determined by initially determining the offense level applicable to the offense group with the highest offense level. All counts involving substantially the same harm are grouped in a single group. See §3D1.2. The offense level for that group is then increased by the number of levels indicated for the other offense groups, having lesser offense levels, in a table in §3D1.4. United States v. El-Zoubi, 993 F.2d 442, 451 (5th Cir. 1993).

The adjusted offense level for the firearm violations was 30. The adjusted offense level for the conspiracy and forgery counts was 23. Therefore, the firearm group had the highest offense level. Because there was a seven-level difference in the offense level of the two groups, the guidelines provide for a one-level increase over the offense level for the firearm offenses. See §3D1.4(b). This formula results in a combined adjusted offense level of 31. Based on the criminal history category of III,[2] the

[2] The government asserts that the sentence for the combined offenses should be determined on the basis of a criminal history category of IV. Loftis was assigned a criminal history category of IV following his conspiracy and forgery convictions. However, Loftis had a criminal history category of III when he was sentenced for the firearm offenses. After determining the combined offense level, the amended recommendation determined the guideline range sentence based on the criminal history category of III. The district court relied on this determination at sentencing. This determination was correct. Section 5G1.3 comment. n.3 provides that the sentence is to be calculated to approximate the punishment that would have been imposed if the defendant had been sentenced for all of the offenses at the same time. If Loftis had been sentenced for the fraud offenses at the same time as the firearm offenses, his criminal history category

guideline sentencing range for the combined offenses would have been 135-168 months. The district court's sentence of 211 months exceeded the range recommended by 43 months.

In an unpublished opinion, we opined that §5G1.3(c), p.s., is "advisory" because it does not interpret a guideline and, thus, the imposition of a consecutive sentence remains within the discretion of the district court. United States v. Warren, No. 93-4227 at 2 & n.1 (5th Cir. Dec. 22, 1993) (citing United States v. Headrick, 963 F.2d 777, 782 (5th Cir. 1992)). Warren did not expressly consider a previously decided Supreme Court case regarding whether commentary in the guidelines are binding. Stinson v. United States, ___ U.S.___, 113 S.Ct. 1913 (1993).

Stinson held that commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." __ U.S. at __, 113 S.Ct. at 1915. Stinson drew an analogy between policy statements and commentary and, in dicta, stated that policy statements are binding on federal courts. Id. at 1917. In United States v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994), we determined that the Stinson rationale is inapplicable to Chapter 7 policy statements because the statements

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would have remained III because neither of the offenses would have constituted a "prior offense" within the meaning of §4A1.1. See §4A1.2, comment. (n.1).

do not interpret or explain a specific guideline.[3] Accordingly, the reasoning in Warren remains viable after Stinson.

The Eighth Circuit, however, found that §5G1.3(c) p.s. interprets a guideline, §5G1.3, and thus, unless the district court departs under guideline procedures, it must apply the policy statement §5G1.3(c). United States v. Brewer, 23 F.3d 1317, 1321-22 (8th Cir. 1994). The Sixth Circuit, citing Stinson, held that a sentencing court is bound to consider application note 3 of the commentary to §5G1.3 because it interprets this policy statement and explains how it should be applied. United States v. Coleman, 15 F.3d 610, 612 (6th Cir. 1994). However, the Sixth Circuit stated that "it will not always be necessary to follow the precise methodology called for under §5G1.3 (and §5G1.2), since there may be circumstances which will warrant the court in resorting to a simpler method of achieving a result which is the practical equivalent of the more complex computations." Id. at 613.

In any event, regardless whether the policy statement and its commentary are binding, the district court expressly considered §5G1.3 and stated that it was departing from the guideline range of 135-168 months. As set forth above, that is the range that results from the application of §5G1.3 and its commentary.

Pursuant to 18 U.S.C. § 3584, the district court retains some discretion to impose a concurrent or consecutive sentence on a defendant who is already subject to an undischarged term of

[3] In Mathena, 23 F.3d at 93, we affirmed the holding in Headrick, supra.

imprisonment. United States v. Miller, 903 F.2d 341, 346-48 (5th Cir. 1990). This discretion is limited to the court's power to depart from the guidelines. United States v. Martinez, 950 F.2d 222, 226 (5th Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 1984 (1992).

A sentencing court may depart upward from the guidelines whenever it finds that an aggravating circumstance exists that was not adequately taken into consideration by the Sentencing Commission. 18 U.S.C. § 3553(b). "A departure from the guidelines will be affirmed if the district court offers acceptable reasons for the departure and the departure is reasonable." United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (internal quotations and citations omitted). We review a district court's decision to depart for abuse of discretion.

The medical insurance fraud scheme involved numerous insurance companies located throughout the country. The district court pointed out that the scheme had a serious effect on the public's perception of the medical field and indicated the need for a means to protect the public from the fraudulent practices. Loftis' scheme contributed to the high costs of medical care which affects the public as a whole. The court properly determined that the sentence should be increased because of seriousness of the offense and its effect on the public. See United States v. Kings, 981 F.2d 790, 798 (5th Cir.), cert. denied, __ U.S. __, 113 S.Ct. 2450 (1993) (consecutive sentence was proper because the grouping rules

under §3D1.4 inadequately sanctioned the defendant for his conduct).

Because the court articulated sufficient reasons for the departure and imposed a reasonable sentence, it did not abuse its discretion in departing above the sentence recommended by §5G1.3.

III. CONCLUSION

For the foregoing reasons, the sentence imposed is **AFFIRMED**.