

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40478

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN HOWARD THOMAS,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:93-CR-109-1)

(April 20, 1995)

Before DAVIS, and JONES, Circuit Judges, and COBB, District
Judge.*

PER CURIAM:¹

Appellant pled guilty to one count of conspiracy to export
stolen motor vehicles. He was sentenced to a 30-month term of
imprisonment, a \$25,000 fine, \$31,482 in restitution, and a three-
year period of supervised release. He now appeals his sentence.
We affirm.

*Hon. Howell Cobb, United States District Court for the
Eastern District of Texas, sitting by designation.

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
expenses 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should not be published.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.

Appellant John Howard Thomas was charged in a six-count indictment relating to stolen vehicles. Amongst the counts in the indictment were charges for exporting stolen motor vehicles, and conspiring to export motor vehicles. Thomas pleaded guilty to the conspiracy count in return for the dismissal of the remaining counts. The plea agreement also included a promise on the part of the U.S. Attorney to file a U.S.S.G. § 5K1.1 motion for a downward departure, conditioned on Thomas' substantial assistance in the investigation of other crimes. On appeal, Thomas raises a number of objections to the court's sentence which we discuss below.

II.

A.

Did The District Court Commit Clear Error In Its Valuation Of The Loss Attributable To Thomas?

Thomas filed forty objections to the original Presentence Report ("PSR"). In response the PSR was amended to reflect some of his concerns, including a reduction of the loss attributable to Thomas from \$114,600 to \$111,000. At sentencing, the district court largely adopted the loss valuation of the PSR, settling on a figure of \$112,000 (the thousand dollar difference having no bearing on the sentencing outcome).

On appeal, Thomas argues that the district court erred in accepting the PSR's valuation of the loss attributable to him. He points out that the revised PSR was not specific as to the value or ownership of two vehicles Thomas was credited with.

The PSR's calculations were based on the testimony of a probation officer. The probation officer's testimony was in turn based on several lengthy interviews of Calvin Finnels, a co-conspirator of Thomas'. Thomas contested the veracity of the PSR by asserting that Finnels' testimony was self-interested and therefore unreliable. Determining loss is a factual inquiry which is reviewed for clear error. **United States v. Palmer**, 31 F.3d 259, 261 (5th Cir. 1994). The district court's finding is fully supported by the PSR and is not clearly erroneous.

B.

Did The District Court Commit Clear Error In Assessing A Four-Level Increase For Thomas' Role As A Leader Or Organizer?

Following the recommendation of the PSR, the district court assessed a four-level increase for Thomas' role as a leader or organizer. Thomas argues that there was insufficient evidence to support his role as a leader or organizer.

Section 3B1.1(a) of the sentencing guidelines provides for an increase in four levels if the defendant was an organizer or leader in a criminal enterprise that involved five or more persons, or was otherwise extensive. At sentencing, the government bears the burden of proving, by a preponderance of evidence, that the defendant was a leader or organizer. **United States v. Barbontin**, 907 F.2d 1494, 1497 (5th Cir. 1990).

The PSR established that Thomas' conspiracy did involve five persons. Apart from Thomas himself, the PSR identifies Finnels, who stole equipment for Thomas and supervised its transport to

Belize; it identifies Ashton Laday, who was Thomas' supply source for stolen equipment; it establishes that Thomas used Frederick Chapman to store stolen equipment. The PSR also establishes the role of Mark Stubbs, who was hired by Chapman to grind the serial numbers off of stolen equipment.

In addition to basing Thomas' role as a leader on the number of participants, the district court could have also based the finding on the extensive nature of the criminal enterprise. The district court found that the export of a caravan of stolen vehicles into Belize requires exceptional organizational and leadership skills. Based on the facts adduced in the PSR and in the sentencing hearing, the district court's findings are supported by substantial evidence and are not clearly erroneous.

C.

Did The District Court Commit Clear Error In Its Assessment For Obstruction Of Justice?

As part of a sting operation, law enforcement authorities placed a recorder on a witness who contacted Thomas about a grand jury subpoena. After being informed of the grand jury subpoena, Thomas suggested that the bulldozer that was the subject of the subpoena should be driven in a river, and that a false bill of sale should be prepared for the bulldozer. Based on these comments, the district court assessed Thomas with a two-level increase for obstruction of justice. On appeal, Thomas argues that the finding of obstruction of justice was erroneous because his attempts to deflect detection occurred after he was already the subject of an investigation. This argument fails because an obstruction of

justice assessment can be based on a finding of attempted obstruction of justice.

D.

Did The District Court Abuse Its Discretion In Denying Thomas' Motion For Production Of Documents, And Did The Government Improperly Refuse To File A § 5K1.1 Motion?

Pursuant to Thomas' plea bargain agreement, the Substantial Assistance Committee of the United States Attorney's Office reviewed the aid Thomas provided in deciding whether to file a § 5K1.1 motion. The committee determined that Thomas did not provide substantial assistance, and recommended the motion not be filed. At sentencing, Thomas made a motion for the production of all documents used by the committee in reaching its decision. That motion was denied. Thomas now argues that the district court erred in denying his request for these documents because it prevented him from effectively rebutting any erroneous assumptions the committee might have made, and prevented the meaningful review of the good faith of the committee's decision. Thomas also contends that the government's refusal to file a § 5K1.1 motion was improper.

Both before the district court and on appeal, Thomas argued that the § 5K1.1 motion should have been filed because he actually did provide substantial assistance. In Thomas' plea bargain agreement, the government retained the discretion to file the § 5K1.1 motion. This discretionary decision is "reviewable only on the same basis as other discretionary decisions by a prosecutor: district courts may grant relief 'if they find that the refusal was based on an unconstitutional motive' such as the defendant's race

or religion." **United States v. Urbani**, 967 F.2d 106, 109 (5th Cir. 1992) (quoting **Wade v. United States**, ___U.S. ___, 112 S.Ct. 1840, 1844 (1992)). Absent such a showing, a defendant is not entitled to an evidentiary hearing or discovery. **Id.** Because Thomas has not alleged an improper constitutional motive for the government's refusal to file a § 5K1.1 motion or met the substantial threshold showing of such a motive, the district court's denial of the request for the production of documents is affirmed. Further, for the same reasons, Thomas is not entitled to relief from the government's refusal to file a § 5K1.1 motion.

The sentence of the district court's is AFFIRMED.