

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50222  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENT B. BALES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(EP-90-CR-345B(2))

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(December 19, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:\*

**Facts and Prior Proceedings**

Kent Bales pleaded guilty to intentionally aiding and abetting the making of false entries in the reports and statements of the Western Bank of Texas in violation of 18 U.S.C. §§ 2 and 1005.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Bales aided Barbara Chaney, President of the Western Bank, in making the false entries in connection with a sham loan. The district court sentenced Bales to three years of imprisonment, and ordered him to pay restitution in the amount of \$575,000, jointly and severally, with his co-defendants. Bales appealed, and this Court affirmed.

Bales then filed a motion for reduction or modification of his sentence pursuant to former Fed. R. Crim. P. 35.<sup>1</sup> Bales' central argument was that his sentence should be reduced because co-defendant Chaney, who was far more culpable than he, had her sentence reduced from five years to 11 months pursuant to a Rule 35 motion. The district court denied the motion.

Bales filed a pro se motion for reconsideration of the court's denial of his Rule 35 motion. Bales argued that his sentence should be reduced because: (1) the financial statement relied on by the district court at sentencing was inaccurate and led the court to order restitution which he could not pay; (2) his sentence was disparate from co-defendant Chaney's; and (3) he has serious

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<sup>1</sup> Former Rule 35 was applicable to offenses committed prior to November 1, 1987. Bales was convicted for offenses that occurred in 1984. Former Rule 35 provided that:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after . . . receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.

medical problems.<sup>2</sup> The district court denied Bales' motion for reconsideration, and he timely appeals to this Court for relief.

### **Discussion**

"Motions under Rule 60(b) are directed to the sound discretion of the district court, and its denial of relief upon such motion will be set aside on appeal only for abuse of that discretion." **Carimi v. Royal Caribbean Cruise Line, Inc.**, 959 F.2d 1344, 1345 (5th Cir. 1992) (quoting **Seven Elves, Inc. v. Eskenazi**, 635 F.2d 396, 402 (5th Cir. 1981)). Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted--denial must have been so unwarranted as to constitute an abuse of discretion." **Seven Elves**, 635 F.2d at 402 (emphasis in original). A district court's ruling with regard to a motion for reduction of sentence under Rule 35 will be reversed only for illegality or a gross abuse of discretion. **United States v. Tooker**, 747 F.2d 975, 978 (5th Cir. 1984), **cert. denied**, 471 U.S. 1021 (1985).

#### **A. Restitution**

Bales argues that the district court erred by using an inaccurate and unreliable financial statement at sentencing. Bales was sentenced under pre-guidelines law, and accordingly, the sentencing judge possessed wide discretion in both the kind and source of information he could consider in determining punishment.

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<sup>2</sup>Bales also argued that the PSR inaccurately reported the relationship between himself and his co-defendants, but he abandoned this argument on appeal. See **Hobbs v. Blackburn**, 752 F.2d 1079, 1083 (5th Cir.), **cert. denied**, 474 U.S. 838 (1985).

**See United States v. Ochoa**, 659 F.2d 547, 549 (5th Cir. 1981), **cert. denied**, 455 U.S. 959 (1982). Even if Bales had a negative worth at the time of sentencing, the court could have nevertheless ordered full restitution based on Bales' future ability to earn. **See United States v. O'Banion**, 943 F.2d 1422, 1432, n.11 (5th Cir. 1991). Indeed, we note that the district court believed Bales possessed sufficient business competence to earn a living in the future:

Obviously, Mr. Bales, you have a great deal of ability. You can go into bankruptcy, you know, and four years later you're worth a half a million bucks. That shows to me that you're either working or you know what you're doing when it comes to money.<sup>3</sup>

Accordingly, we find no merit in Bales' contentions.

#### **B. Medical Condition**

Next, Bales argues that his deteriorating medical condition warrants a reduction of his sentence. Specifically, Bales contends that he has severe osteoarthritis of both shoulders, lumbar spondylosis, and a hernia, but that the Bureau of Prisons refuses to treat him. A district court does not necessarily abuse its discretion if it denies a Rule 35 motion based on a defendant's

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<sup>3</sup> Bales argues that this statement evidences that the district court believed that his net worth was half a million dollars at the time of sentencing. Bales contends that his assets did not total half a million dollars at the time of sentencing, therefore the district court must have based the restitution order on inaccurate information. The argument has no merit because the PSR, referenced by the district court at sentencing, reported that Bales had a deficient net worth of \$52,307. The district court's reference to half a million dollars does not indicate that it considered Bales' net worth to be half a million dollars at the time he ordered restitution.

health problems. **See United States v. Nerren**, 613 F.2d 572, 573 (5th Cir. 1980). Although serious, Bales' medical conditions are not critical, and Bales acknowledges that he is currently seeking treatment through the administrative remedy process of the Bureau of Prisons. The district court did not abuse its discretion in denying Bales' motion to reconsider based on his medical condition.

### **C. Disparate Sentences**

Bales contends that his sentence should be reduced because, although Chaney was more culpable than he, she received a reduction in sentence from five years to 11 months. The mere disparity of sentences does not, alone, constitute an abuse of discretion in denying a Rule 35 motion. **United States v. Castillo-Roman**, 774 F.2d 1280, 1283 (5th Cir. 1985). A defendant cannot rely upon his co-defendant's sentence as a yard-stick for his own sentence. **Id.** at 1284. When a sentence is imposed within statutory limits and nothing in the record indicates that the defendant's sentence was based on inaccurate information, a district court does not abuse its discretion in denying a Rule 35 motion based on a disparate-sentencing argument. **Id.** We see nothing in the record that shows that Bales' sentence was founded upon an inaccurate or tainted record. Still further, the statutory maximum for Bales' offense was five years, and Bales received only a three-year sentence. Thus, the district court did not abuse its discretion in denying Bales' Rule 35 motion on that ground. **See id.** at 1283-84.

#### **D. Prosecutorial Vindictiveness**

Bales argues that the prosecutor became personally and emotionally involved in the Rule 35 proceedings and treated him severely because Bales and his wife had written letters to public officials regarding Bales' conviction. He argues that the prosecutor's actions, which lean toward vindictiveness, caused the district court to hastily rule on his motion for reconsideration, denying the motion on the same day it was received.

The prosecutor's response to Bales' Rule 35 motion contains no expression of personal opinion, **see United States v. Cantu**, 876 F.2d 1134, 1138 (5th Cir. 1989), nor is this a situation in which there exists a substantial and realistic likelihood "that the prosecution would act to punish Bales for the exercise of a substantive legal right by increasing the measure of jeopardy against him. **See United States v. Ward**, 757 F.2d 616, 620 (5th Cir. 1985). Thus, Bales' claim of prosecutorial vindictiveness must fail. Moreover, regarding Bales' claim that the district court acted hastily in ruling on his motion, a district court may summarily deny a Rule 35 motion if the facts alleged fail to show illegality or gross abuse of discretion. **Tooker**, 747 F.2d at 978 n.4. We find no such illegality or gross abuse of discretion by the district court.

#### **Conclusion**

Based on the foregoing, we affirm the actions of the district court.

AFFIRMED.