UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 99-11364

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL MICHAEL LECZINSKY,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 6:94-CR-055-C

May 31, 2000

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:[*]

Daniel Michael Leczinsky appeals the district court's revocation of his supervised release and the twenty-four-month sentence imposed following revocation. For the reasons set forth below, we

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

affirm the judgment of the district court.

Leczinsky pleaded guilty to an indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He was sentenced to thirty-three months imprisonment and three years of supervised release. At sentencing, the district court imposed the standard conditions and terms of supervised release, several special conditions, and the following mandatory condition:[1]

> While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

Leczinsky served his prison sentence and was released pursuant to these terms of supervision.

In September 1997, a Petition for Offender Under Supervision was filed and a warrant for Leczinsky's arrest was issued. In November 1999, the government moved to revoke Leczinsky's supervised release, asserting that he had violated the conditions of his release by (1) committing the state felony of theft of over $1,500 on September 6, 1997,[2] (2) failing to notify his probation officer that he had changed both his residence and place of employment, and (3) failing to submit a urine specimen in September 1997.

The district court conducted a hearing on the government's motion to revoke. At the hearing,

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[1] Under Standard Condition No. 6, Leczinsky was required to notify his probation officer within seventy-two hours of any change in residence or employment. Under Special Condition No. 1, Leczinsky was required to participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency which included testing for the detection of substance use or abuse.

[2] The government contended that Leczinsky stole over $1,500 from the safe at the convenience store where he worked. More specifically, it argued that Leczinsky had logged in over $1,500 in cash to be "dropped" into the stores inner safe. When the assistant manager checked the safe, all of Leczinsky's deposits were missing.

Leczinsky admitted to the second and third violations but argued that he had not committed theft. After receiving testimony, the district court determined that the government had proved the theft by a preponderance of the evidence and sentenced Leczinsky to twenty-four-months' imprisonment. Leczinsky filed this timely notice of appeal.

A district court may revoke a defendant's supervised release if it finds by a preponderance of the evidence that the defendant violated a condition of his release. *See United States v. Teran*, 98 F.3d 831 (5th Cir. 1996). This court reviews a district court's decision to revoke supervised release for abuse of discretion. *See United States v. Grandlund*, 71 F.3d 507, 509 (5th Cir. 1995).

On appeal, Leczinsky asserts various reasons why the government failed to show, by a preponderance of the evidence, that he committed theft under the Texas theft statute.[3] None of his arguments is persuasive. First, he argues that the government failed to show that Shawn Wilson, the manager of the convenience store, was the "special owner" of the funds that were taken such that it could show a violation of Texas Penal Code § 31.03.[4] We agree with the government that, as between Leczinsky and Wilson, Wilson was the "owner" of the $1,500 stolen from the store. *See* Tex. Pen. Code § 1.07(a)(35) ("'Owner' means a person who . . . has title to the property, possession

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[3] Leczinsky admitted that he violated two conditions of his release by (1) failing to report his change of address and employment and (2) failing to submit a urine specimen for drug analysis on one occasion. Both of these violations are classified as Grade C violations under U.S.S.G. § 7B1.1(a)(3). U.S.S.G. § 7B1.3(a)(2) provides that a court may revoke supervised release upon a finding of a Grade C violation. Accordingly, the district court did not abuse its discretion by revoking Leczinsky's supervised release solely based upon his admitted infractions. We focus our opinion on the district court's determination that Leczinsky committed theft because that finding supports the court's imposition of a 24-month prison sentence.

[4] Texas Penal Code § 31.03 provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the *owner* of property." Tex. Pen. Code § 31.03(a) (emphasis added).

of the property, whether lawful or not, *or a greater right to possession of the property than the actor*.") (emphasis added).

Second, Leczinsky contends that the government presented insufficient evidence that Leczinsky—as opposed to someone else with access to the funds—took the money from the store.[5] At the revocation hearing, Sherry Leschuk, a supervisor at the convenience store, testified that the day before the money was stolen from the locked portion of the safe, she confronted Leczinsky about the fact that he had violated company policy by cashing personal checks at the store. Leschuk told Leczinsky that he had until the following Monday to take care of approximately $1,100 worth of personal checks that had not cleared or he would be fired. Leczinsky worked on Saturday, and after his shift, the store assistant manager discovered that all of the money dropped into the safe by Leczinsky was missing. Leczinsky did not show up to work again. Viewing this evidence and all reasonable inferences that may be drawn from in a light most favorable to the government, *see United States v. Prieto-Tejas*, 779 F.2d 1098, 1101 (5th Cir. 1986), the district court was justified in concluding that the government proved, by a preponderance of the evidence, that Leczinsky took the missing funds. *See United States v. Alaniz-Alaniz*, 38 F.3d 788, 792 (5th Cir. 1994) (finding that at revocation proceeding, government bears burden of proving alleged violation by a preponderance of the evidence).[6]

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[5] At both the revocation hearing and on appeal, the defendant suggested that Robert Smith, the employee who worked the shift after Leczinsky, had the opportunity to take the money from the safe and blame the theft on Leczinsky.

[6] Leczinsky argues that, under the rule set out in *Home Indem. Co. v. Gonzalez*, 383 S.W.2d 857, 859-60 (Tex. Civ. App. 1964, writ ref'd n.r.e.), "mere access/opportunity to take money is not sufficient to support a finding, even by a preponderance of the evidence, that any particular one of the persons with such access or opportunity actually took the money." *Home Indemnity* held that evidence of an employee's careless record keeping, coupled with his shared access to company funds,

Third, Leczinsky argues that the government failed to prove that the amount stolen from the safe was over $1,500.[7] At the hearing, Leschuk testified that "about $1,600" was missing from the safe after Leczinsky's shift. Leczinsky presented no evidence to contradict this testimony, nor did he give the district court any reason to doubt the veracity of Leschuk's testimony. Accordingly, it was reasonable for the district court to find that over $1,500 was taken from the safe.

Finally, Leczinsky argues that the district court erred in allowing Leschuk's hearsay testimony into evidence at the revocation hearing.[8] Specifically, he contends that (1) Leschuk's testimony was unreliable, and (2) the admission of her testimony denied Leczinsky his due process right of confrontation. Because Leczinsky raises these arguments for the first time on appeal, we review the district court's decision for plain error. *See United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *United States v. McGill*, 74 F.3d 64, 68 (5th Cir. 1996). "Plain error" is a "clear or obvious error that affected substantial rights or seriously affected the fairness or integrity of the judicial proceeding." *McGill*, 74 F.3d at 68. The district court's decision to allow Leschuk's testimony did not rise to level of plain error and, accordingly, we decline to review Leczinsky's

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was inadequate to prove that company losses were due to that employee's fraud or dishonesty. *See id*. (addressing sufficiency of evidence to prove fraud or dishonesty in civil context). To the extent that *Home Indemnity* is applicable to the instant case, it is readily distinguishable. We are presented here with more than weak evidence of shared access to missing funds. *See id.* at 860. Here, the government presented evidence of motive, opportunity, and Leczinsky's failure to return to work following the theft of funds that he logged in as deposited in the store safe.

[7] Texas Penal Code § 31.03 provides that a theft offense is a state jail felony if "the value of the property stolen is $1,500 or more but less than $20,000." Tex. Pen. Code § 31.03(e)(4)(A).

[8] At the revocation hearing, Leschuk testified that she had been told by another store employee that on the day after the money was taken, Leczinsky's girlfriend came to the store and told an employee that Leczinsky had accidentally left the "drop money" in his smock pocket and taken the smock with him home. The smock was then stolen from the his car.

admissibility challenge. Even without Leschuk's testimony regarding the "girlfriend story," the government provided sufficient evidence to support its allegation that Leczinsky committed theft.

For the reasons stated above, we find that the district court did not abuse its discretion in finding that Leczinsky committed theft. The court's imposition of a 24-month prison sentence was within the applicable range of imprisonment set out in the Sentencing Guidelines. *See* U.S.S.G. § 7B1.4(a). Accordingly, we AFFIRM the judgment of the district court.