UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5008

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES PHILLIP ONNEBANE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
89 60063 01

July 15, 1993

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

PER CURIAM:[*]

Appellant James Onnebane was sentenced to thirty-six months imprisonment and other punishment after he pleaded guilty to one count of mail fraud and one count of conspiracy to perpetrate mail fraud. This was his second guilty plea in the case, for this court had earlier reversed and remanded his first guilty plea.

Following remand, a superseding indictment was issued, which alleged Onnebane's fraudulent coupon-cashing scheme in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

greater detail. At the sentencing hearing, the government proved a loss of more than $40,000, whereas at the earlier hearing the loss had been established at approximately $32,000. The PSI alleged that an upward departure might be warranted because Onnebane's criminal history category did not adequately assess his previous involvement in crime.

At the sentencing hearing, the district court indicated his intent to depart from the suggested guideline of 24-30 months because of Onnebane's criminal history and his recent arrest in Jefferson Parish for an ostensibly similar crime of passing bad checks. The court then sentenced him to 36 months.

On appeal, Onnebane has raised a number of issues pertaining to the second guilty plea proceeding and sentencing. We find no merit in his factual complaints concerning the amount of loss and the district court's conclusion that he was an organizer, leader, manager or supervisor in the conspiracy. These findings are shielded by the clearly erroneous rule in sentencing. United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir.), cert. denied, 492 U.S. 924 (1989). Likewise, we reject Onnebane's assertions that prosecutorial or judicial vindictiveness toward his success on the first appeal motivated harsher treatment in this second prosecution.

We are, however, compelled to reverse because of the district court's failure to comply with the procedure required by Burns v. United States, ___ U.S. ___, 111 S. Ct. 2182 (1991), in announcing a departure. Burns specifies that a defendant must be

given advance notice of the possibility of and basis for an upward departure from the sentencing guidelines range for his offense. Burns held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." 11 S. Ct. at 2187; see also, United States v. Razo-Leora, 961 F.2d 1140, 1145 (5th Cir. 1992).

Neither the court, the PSI nor the government notified Onnebane that the court would consider his bad check arrest as a ground for upward departure. It is also probable that the arrest alone would not have furnished a proper basis for departure. See U.S.S.G. § 4(a)1.3 (Policy statement).

Because the case must be vacated and remanded for resentencing, we also point out that, as the parties both agree, the proper sentencing guideline for determining the amount of loss should have been the one in effect during the course of Onnebane's illegal conduct. The PSR erroneously employed U.S.S.G. § 2F1.1(b)(1)(E), in its version following November 1989 amendments that were unfavorable to Onnebane. This error can be corrected on remand.

For the foregoing reasons, the sentence imposed by the district court is VACATED and the case REMANDED for resentencing.