FILED
United States Court of Appeals
Tenth Circuit

FEB 25 1988

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEONARD GERALD RHODES,

Defendant-Appellant.

No. 87-1325
(D.C. No. 86-CR-268)
(D. Colo.)

ORDER AND JUDGMENT

Before LOGAN, TACHA and BALDOCK, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(a). The cause therefore is ordered submitted without oral argument.

In September 1986, defendant-appellant Rhodes was indicted on five counts of conversion of collateral in which the Farmer's Home Administration (FmHA) had a security interest, in violation of 18 U.S.C. § 658. Each of the counts charged the conversion of numerous head of cattle in which the FmHA had a security interest. The first four counts charged transactions from November 4, 1981 to October 14, 1982. The fifth count charged the conversion of 98 head of cattle on or about February 4, 1983. Defendant entered a plea of not guilty to all counts.

In December 1986, defendant entered a plea of guilty to the fifth count of the indictment and to an information charging the conversion, by fraudulent endorsement on February 4, 1983, of the government's interest in a check drawn by a cattle auction company to the defendant and the FmHA. See 18 U.S.C. § 641. The plea agreement provided that the defendant stipulated that the loss to the government as the result of his unlawful activities was $82,299.08.[1] The government's statement concerning the factual basis for the plea established that the loss to the government from the unlawful acts in the first four counts of the indictment totaled $54,651.92. The loss to the government from the

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[1] The plea agreement provided:

Plea Agreement: Defendant agrees to plead guilty to Count V of the indictment filed against him on September 25, 1986, and to plead guilty to an information charging him with one misdemeanor count of theft of government property in violation of 18 U.S.C. § 641. Additionally, the defendant stipulates that the total loss to the government resulting from the defendant's unlawful conversion of livestock pledged to the government as collateral for loans is $82,299.08. The government agrees to move to dismiss the remaining four counts of the indictment upon the sentencing of the defendant pursuant to this agreement. Additionally, the government agrees to make no recommendation to the Court concerning the sentence to be imposed on the defendant.

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transaction in the fifth count of the indictment and in the information was $27,647.16.

In January 1987, defendant was sentenced to six months on the misdemeanor charge in the information and five years probation on the charge contained in count five of the indictment. One of the special conditions of probation was that the defendant make restitution of the $82,299.08 to the government. The trial judge did not specify whether the special condition of probation was pursuant to the Federal Probation Act, specifically 18 U.S.C. § 3651, or the Victim and Witness Protection Act (VWPA), specifically 18 U.S.C. § 3579.

Defendant then filed a motion to correct and reduce sentence in which he sought a reduced term of confinement and a reduced amount of restitution, from $82,299.08 to $27,647.16. Defendant suggested that if restitution had been ordered under 18 U.S.C. § 3651,[2] then the amount of restitution would be limited to losses attributable to counts of an indictment or information to which the defendant actually pleaded guilty. The loss attributable to count five and the information defendant pleaded guilty to is limited to $27,647.16. In the alternative, defendant argued that restitution under the VWPA (§ 3579) would be limited to offenses which occurred after January 1, 1983, because the restitution section of the Act applies with respect to offenses occurring on

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[2] 18 U.S.C. § 3651 allowed the court to require that a defendant make restitution "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." It has since been repealed. Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984) & Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985).

or after that date. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, §§ 5, 9(b)(2), 96 Stat. 1248, 1253-55, 1258; United States v. Martin, 788 F.2d 184, 188-89 (3rd Cir. 1986); United States v. Forzese, 756 F.2d 217, 222 (1st Cir. 1985). Under this alternative theory, defendant argues that the court could not order him to make restitution pursuant to the VWPA for $54,651.92 because that amount of the government's loss relates to transactions prior to January 1, 1983.

The scope of our review of the trial court's denial of a Rule 35 motion is narrow and, absent a showing of an abuse of discretion or a sentence not within legal limits, the trial court's decision concerning a sentence will be upheld on appeal. See United States v. MacClain, 501 F.2d 1006, 1013 (10th Cir. 1974). This same standard applies when the defendant challenges a district court restitution order. United States v. Richard, 738 F.2d 1120, 1121 (10th Cir. 1984)(review of restitution under VWPA).

The circuits are divided on whether a district court may impose restitution under the VWPA for offenses or losses occurring prior to the effective date of the Act, January 1, 1983. The Sixth and Eleventh Circuits hold that if the offense on which the defendant pleads guilty occurred after January 1, 1983, and is part of a continuing conspiracy or a scheme to defraud, the court may impose restitution for conduct or offenses which occured prior to the Act. United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987); *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir.

1986), cert. denied, 107 S.Ct. 1578 (1987). The Fourth and Third Circuits hold that losses occurring prior to January 1, 1983, are not subject to the Act. United States v. Oldaker, 823 F.2d 778, 781 (4th Cir. 1987); United States v. Martin, 788 F.2d at 189 (3rd Cir. 1986). The Fifth Circuit has followed the Fourth and Third Circuits in part, and has ruled that losses arising from acts occurring prior to the effective date of the Act are not subject to the Act. United States v. Corn, No. 87-2722, slip op. at ___, (5th Cir. Jan. 21, 1988). We agree with the approach taken by the Fifth Circuit in Corn for two reasons: 1) it is most consistent with the plain meaning of the effective date provision in the Act; and, 2) the Act may be viewed as increasing punishment for offenses by allowing restitution independent of a condition of probation. See S. Rep. No. 532, 97th Cong., 2d Sess. 30-33, reprinted in, 1982 U.S. Code Cong. & Admin. News 2515, 2536-39. We recognize that when the Act is used merely as means of imposing restitution as a special condition of probation, the second reason has less force because of the district court's power to impose restitution under § 3651.

The district court's oral sentence did not specify whether the court was ordering restitution pursuant to the older § 3651 or the more recent § 3579. Record vol. III at 12-14. We recently have held that it is the district judge's oral pronouncement of sentence at the sentencing hearing which controls. United States v. Villano, 816 F.2d 1448, 1451 (10th Cir. 1987)(en banc)("The sentence orally pronounced from the bench is the sentence.").

Although the broader restitution provisions of § 3579 will be applied to most offenses occurring after January 1, 1983, § 3651 had not yet been repealed and provided the statutory basis for the district court's power to impose restitution for offenses occurring during the time period in question, November 4, 1981, until February 4, 1983. It is of no moment that the sentencing judge, when asked later at the Rule 35 hearing, attributed her power to § 3579, because it is the oral sentence which controls. We are satisfied that at the time of sentencing, the district judge had the power to order restitution, as a special condition of probation, in the amount of $82,299.08, in light of the defendant's stipulation to that amount as the loss suffered by the government. Thus, we decline to address whether a defendant may stipulate to losses occurring prior to the effective date of § 3579 and have restitution ordered under § 3579. Likewise, we decline to address defendant's claim that a sentence under § 3579 for losses occurring prior to its effective would be an application of an ex post facto law.

A defendant may acknowledge the amount of loss caused by his conduct and be held to restitution for that amount, even if the amount relates in part to counts of an indictment to which the defendant did not plead guilty. United States v. Davies, 683 F.2d 1052, 1054-55 (7th Cir. 1982); see also, United States v. Franks, 723 F.2d 1482, 1487 (10th Cir. 1983)(in a tax prosecution, an amount of restitution for unpaid taxes required as a special condition of probation must be acknowledged by the defendant, or conclusively established in a criminal proceeding or finally determined in civil proceedings). "The amount of restitution or reparations ordered may be only for such amount of actual damage or loss as has been ascertained with certainty by a court or by stipulation of the parties." United States v. John Scher Presents, Inc., 746 F.2d 959, 963 (3rd Cir. 1984). In his motion to correct the sentence, defendant sought to set aside the stipulation claiming that he did not understand its implications. After taking evidence at the Rule 35 hearing, the trial judge concluded that "restitution is in an amount stipulated by the defendant and should not be corrected." Record vol. IV at 65. We have reviewed the record, including the transcripts from the various hearings, and are satisfied that the district court made the defendant aware of the potential restitution in accordance with Fed. R. Crim. P. 11(c)(1). At the change of plea hearing, the trial judge properly informed defendant that restitution was a sentencing option and the defendant indicated that he understood. Record volume II at 8-9. In finding against the defendant on this issue, the district court did not abuse its discretion. The restitution amount stands.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge