

FILED
United States Court of Appeals
Tenth circuit

NOV 14 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOE L. BLANTON,
Defendant-Appellant.

No. 89-5170
(D.C. Nos. 87-CR-118-02
&
88-CR-061-04)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and 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. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendant appeals from an order of the district court denying his motion filed pursuant to Fed. R. Crim. P. 35 to correct the sentences imposed in both of his criminal cases.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

In 1987, defendant was indicted in the Northern District of Oklahoma on seven counts of conspiracy to defraud the United States, failing to file currency transaction reports (CTRs), and making false statements in CTRs in violation of 18 U.S.C. §§ 371, 1001, 1002 and 31 U.S.C. §§ 5313, 5322. D.C. No. 87-CR-118-02. (Tulsa case.) In 1988, defendant was indicted in Texas on charges of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and making false statements in violation of 18 U.S.C. §§ 3, 1001, 1002 and 31 U.S.C. §§ 5313, 5322. That case was transferred to Oklahoma pursuant to Fed. R. Crim. P. 20. D.C. No. 88-CR-061-04. (Dallas case.)

In the Tulsa case, defendant pled guilty to one count of conspiracy and one count of making a false statement in a CTR. He was sentenced to five years' imprisonment on count one and three years on count two to be served consecutively. He was also ordered to make restitution to the Internal Revenue Service in the amount of \$7,280.00, to pay one half the cost of prosecution in the amount of \$3,264.66, and to pay a special assessment of \$50.00 on each count.

In the Dallas case, defendant pled guilty to one count of conspiracy to defraud the United States and was sentenced under the Sentencing Reform Act of 1984, 28 U.S.C. § 994(a) (Sentencing Guidelines), to sixty months' imprisonment and three years' supervised release to be served concurrently with count two in the Tulsa case. He was also ordered to pay a fine of \$12,500.00 and a special assessment of \$50.00. Defendant took no appeal from either conviction.

Defendant did file a motion to correct sentence pursuant to Fed. R. Crim. P. 35 in which he alleged that the special assessment imposed in both convictions, see 18 U.S.C. § 3013, violated the origination clause of the Constitution. Defendant also alleged that the restitution order should be set aside because it was not imposed in accordance with the requirements of the "Victim and Witness Protection Act" and that the district court failed to make specific factual findings regarding his ability to pay.

The district court held that although the Ninth Circuit in United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988) had held the special assessment illegal, "[t]here is no indication that the Tenth Circuit Court of Appeals would follow the holding of the Ninth Circuit, . . . therefore this Court declines to do so." District Court Order of September 19, 1989, p. 1.¹

On appeal, which defendant denominates as being taken from the denial of a motion filed pursuant to 28 U.S.C. § 2255, defendant argues he was denied due process at sentencing because the court based its judgment on inaccurate information contained in his presentence investigation report. He also argues that the probation office selected the wrong guideline and base offense level and, therefore, he was sentenced illegally. The district court noted that defendant at sentencing had contested neither the

¹ The Supreme Court has since reversed the Ninth Circuit. See United States v. Munoz-Flores, 110 S. Ct. 1964 (1990); see also United States v. King, 891 F.2d 780 (10th Cir. 1989).

amount of restitution nor the court's determination that he was able to pay the fine imposed and, therefore, no error had occurred.

We will not consider the issues defendant raises on appeal because he did not raise them first to the district court. See Baker v. Penn Mut. Life Ins. Co., 788 F.2d 650, 663 (10th Cir. 1986). Further, issues raised in the district court but not briefed on appeal are considered waived. United States v. Jenkins, 904 F.2d 549, 554 n.3 (10th Cir. 1990)(citing United Transp. Union v. Dole, 797 F.2d 823, 827 (10th Cir. 1986)); Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990).

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM