

FILED
United States Court of Appeals
Tenth Circuit

MAR 19 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
LOREN W. WEHRENBURG,)
)
Defendant-Appellant.)

No. 89-6161
(D.C. No. CR-88-244-P)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TACHA** and **EBEL**, Circuit Judges, and **SAFFELS**, District Judge. **

This appeal is from a sentence imposed by the district court pursuant to the Sentencing Guidelines. The district court determined that defendant played a leadership role in suborning the perjurious testimony of a witness and enhanced the defendant's offense level by two points under Guidelines § 3B1.1(c), increasing the defendant's offense level from 10 to 12. Defendant appeals on the grounds that Guidelines § 3B1.1(c)'s enhancement for leadership roles in criminal activity should not be applied under the circumstances of this case where only two persons, the

* 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.

** The Honorable Dale E. Saffels, District Judge, United States District Court for the District of Kansas, sitting by designation.

suborner and the perjurer, were involved in the offense. The defendant argues that his underlying crime, suborning perjury, is one that of necessity incorporates the defendant's leadership role in encouraging the witness to commit perjury. We agree but find that the district court's application of § 3B1.1(c) was harmless error and does not require us to remand for resentencing.

The court sentenced the defendant to a term of incarceration of 11 months. This sentence also could have been imposed without § 3B1.1(c)'s two point increase in the defendant's offense level. The offense level for suborning perjury is 10, with a sentencing range of 6-12 months. The district court specifically noted at the sentencing hearing that even if he had chosen not to apply § 3B1.1(c), he would have imposed the same 11 month sentence. We hold that the district court's error in applying Guideline § 3B1.1(c) is harmless and resentencing is not required because the district court would have imposed the same sentence under a proper application of the Guidelines. See United States v. Colon, 884 F.2d 1550, 1552 (2d Cir. 1989).

Our holding that the district court should not have applied § 3B1.1(c) renders the defendant's other arguments concerning § 3B1.1(c) moot. **AFFIRMED.**

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge