

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JAN 18 1991

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TYRONE PETER DARKS,
Defendant-Appellant.

No. 90-6168
(D.C. No. CR-89-284-T)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before LOGAN, MCWILLIAMS, and SEYMOUR, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

The single issue relevant in this criminal appeal is whether there was sufficient evidence to support the district court's addition of two points to defendant Tyrone Peter Darks' offense level under the Sentencing Guidelines for "more than minimal planning." Darks pleaded guilty to one count of mail fraud and

* 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.

two counts of opening or destroying mail not directed to him, in violation of 18 U.S.C. §§ 1341 and 1703, pursuant to a plea agreement. The court determined that Darks was in category I and had an offense level of 7, based on the amount of money involved, a finding of more than minimal planning, and Darks' acceptance of responsibility. U.S.S.G. §§ 2F1.1(b)(1)(B), 2F1.1(b)(2)(A), 3E1.1(a), and 4A1.1(c). The court sentenced him under the sentencing table to six months imprisonment. If the offense level properly calculated is only 5 and the amendments to the guidelines do not apply, as Darks argues, then five months is the maximum guidelines sentencing range and remand would be required for resentencing within that range.

Under the scheme involved in this case, Darks stole mail from postal pick-up boxes, removed checks and money orders from the stolen mail, altered the payees to read Littleton Coin Company, and under a fictitious name mailed the checks along with order forms for collectors coins to that company. Darks submitted four different orders to Littleton accompanied by a number of the altered checks.

We must review the district court's finding on the "more than minimal planning" issue, see U.S.S.G. §§ 2F1.1(b)(2)(A), 1B1.1, application note 1(f) commentary, under a clearly erroneous standard. United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990). So viewed, based upon the record before us we cannot find the determination to be clearly erroneous.

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge