NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 23, 2025*
Decided April 30, 2025

Before

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 24-2559

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERIC UPCHURCH,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:23CR00069-001

William M. Conley,
Judge.

O R D E R

In 2024, a jury found Eric Upchurch guilty of 12 counts of wire fraud, using false documents, and engaging in monetary transactions with property derived from wire fraud. 18 U.S.C. §§ 1343, 1001(a)(3), 1957(a). The conviction stemmed from his attempts to obtain, and his obtaining of, loans from the COVID-19 pandemic-era Paycheck Protection Program (PPP) by submitting false information about his businesses.

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* We granted the appellant's unopposed motion to waive oral argument. Thus, the appeal is submitted on the briefs and record. *See* FED. R. APP. P. 34(f).

Upchurch now appeals his sentence. He argues that the district court erred when it calculated a higher range of imprisonment under the Sentencing Guidelines based on the intended monetary loss from his conduct, rather than the actual loss it caused. *See* U.S.S.G. § 2B1.1 cmt. n.3(A) (2023). Because—as he acknowledges—Upchurch's argument is foreclosed by circuit precedent, we affirm his sentence.

Before Upchurch was sentenced for the fraud scheme, a probation officer prepared a presentence investigation report (PSR) and calculated Upchurch's sentencing range under the 2023 Guidelines. The base offense level was increased by 12 to account for the $406,211 actual loss that Upchurch's scheme caused, based on the trial evidence. *See* U.S.S.G. § 2B1.1(b)(1)(G). The government objected, attaching screenshots of four denied PPP applications that Upchurch had submitted. The government argued that, based on this evidence, he should be held responsible for another $400,378 in attempted loss, bringing the total intended loss amount to $806,589. Upchurch disagreed, stating that the attached documents were speculative and showed only "a non-descript computer screenshot."

In the addendum to the revised PSR, the probation officer agreed with the government, explaining that Application Note 3(A) to § 2B1.1 calls for the total loss amount to reflect "the greater of the actual loss or intended loss." The officer further clarified that "the intended loss is not only the amounts of the PPP loans that the defendant successfully received but also the additional [$400,378] he attempted to receive[]" (as shown by the evidence the government submitted with its objections). Therefore, the officer concluded that $806,589 was the proper total loss calculation and revised the PSR accordingly to increase the base offense level by 14. *See* U.S.S.G. § 2B1.1(b)(1)(H).

At the sentencing hearing, the district court agreed with the government and the revised PSR. The court explained that the loss amount is the greater of the actual loss or intended loss and "the intended loss is $806,589." After accounting for Upchurch's use of sophisticated means to commit fraud, *id.* § 2B1.1(b)(10)(C), and his lack of criminal history, *id.* § 4C1.1, the court arrived at a total offense level of 21 and a criminal history category of I. This yielded a guidelines range of 37 to 46 months in prison, instead of the 30- to 37-month range that would have applied if the court had used the actual loss. The court then sentenced Upchurch to 28 months in prison—a term below the low end of either possible range—and 3 years of supervised release.

On appeal, Upchurch challenges the interpretation of "loss" to include intended loss. He argues that we mistakenly deferred to Application Note 3(A) in *United States v.*

Ponle, 110 F.4th 958, 963 (7th Cir. 2024), based on the Supreme Court's ruling that guidelines commentary is authoritative and should be deferred to unless plainly erroneous. *See Stinson v. United States*, 508 U.S. 36, 38 (1993). Upchurch insists that the Supreme Court later modified *Stinson* when it held that deference to an agency's interpretation of a regulation is discouraged unless the regulation is "genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019). And because the meaning of "loss" in § 2B1.1 is not genuinely ambiguous, Upchurch argues, deference to Application Note 3(A)'s incorrect definition was inappropriate in *Ponle* and is here, too.

Instead, he urges that we follow the Third Circuit's position. That court applied *Kisor*'s reasoning to § 2B1.1 and interpreted "loss" to mean only "actual loss," according to its unambiguous meaning, notwithstanding Application Note 3(A). *United States v. Banks*, 55 F.4th 246, 257–58 (3d Cir. 2022). Upchurch also cites decisions of the Sixth, Ninth, and Eleventh Circuits, applying *Kisor* to application notes. *See United States v. Riccardi*, 989 F.3d 476, 485–86 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648, 657–58 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc). On the other side of the split, the Fifth and Tenth Circuits have ruled in alignment with *Ponle*, concluding that *Stinson* still controls how to apply guidelines commentary. *See United States v. Vargas*, 74 F.4th 673, 680–83 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 805 (10th Cir. 2023).

As an initial matter, the parties dispute whether Upchurch waived his argument by failing to raise this specific theory when opposing the government's objection to the PSR. Upchurch argues that he generally objected to the government's proposal to use intended loss in the guidelines calculation, and therefore the argument is merely forfeited. The government responds that Upchurch waived the argument about intended loss because he did not explicitly object to the reliance on Application Note 3(A); rather, he contested only the sufficiency of the evidence showing intended loss. The government contends that this kind of selective objection is strategic and therefore not a simple failure to raise the argument, which would be a forfeiture.

Liberally construing the waiver principle in Upchurch's favor, *see United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018), we decline to deem the argument waived. A "failure to make a particular objection on a specified ground during a sentencing hearing constitutes forfeiture." *United States v. Foy*, 50 F.4th 616, 625 (7th Cir. 2022) (citation and internal quotations omitted); *see* FED. R. CRIM. P. 51(b). In contrast, when a defendant employs a strategy that leads him to relinquish certain arguments altogether, failure to raise the argument results in waiver and we cannot review it. *See Foy*, 50 F.4th at 625.

Here, without pointing to any details in the record, the government speculates that Upchurch intentionally relinquished his argument about intended loss because it is "near-frivolous" and "weak." But the circuit split on how to interpret "loss" suggests otherwise, and regardless, mere speculation as to Upchurch's litigation strategy is not enough to show waiver. *See Barnes*, 883 F.3d at 957 ("[W]e are cautious about interpreting a defendant's behavior as intentional relinquishment."). Upchurch expressly objected to the government's proposed addition of attempted loss to the actual loss amount. And Upchurch did not disclaim the position he now argues by, for example, acknowledging that Application Note 3(A) controls the loss determination or agreeing to the ultimate guidelines range. *See, e.g.*, *United States v. Seals*, 813 F.3d 1038, 1045 (7th Cir. 2016); *Foy*, 50 F.4th at 626. Therefore, Upchurch only forfeited the argument, so we may review for plain error. *See* FED. R. CRIM. P. 52(b); *Foy*, 50 F.4th at 622.

No error occurred. We will not overturn *Ponle* without a "compelling reason," *Sotelo v. United States*, 922 F.3d 848, 851–52 (7th Cir. 2019), and "the mere existence of a circuit split does not justify overturning precedent." *United States v. Lamon*, 893 F.3d 369, 371 (7th Cir. 2018). Our precedent holds that the greater of the actual or intended loss is used to calculate the offense level increase, consistent with Application Note 3(A) of § 2B1.1. *See Ponle*, 110 F.4th at 963.

Though Upchurch asserts that this conclusion ignores *Kisor*, we explained in *Ponle* that the notice-and-comment process that Application Note 3(A) underwent "distinguishes it from an executive agency's internal interpretation of its own regulations that animated the Supreme Court's [deference] concern in *Kisor*." *Id.* *See also United States v. White*, 97 F.4th 532, 539 (7th Cir. 2024) ("*Kisor* did not purport to modify *Stinson*."). Indeed, *Stinson* recognized that the Sentencing Commission, an independent body within the judicial branch, is not an executive agency and cannot be directly compared to one. *See Stinson*, 508 U.S. at 44. Therefore, *Stinson* still controls, and Application Note 3(A) "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of" § 2B1.1. *Id.* at 38; *see also Ponle*, 110 F.4th at 961–62. Upchurch does not identify any legal development that makes Application Note 3(A) a "plainly erroneous" interpretation of the Guideline. Therefore, consistent with our precedent, we conclude that the district court correctly used the greater of the actual or intended loss to calculate Upchurch's offense level.

Upchurch has, however, preserved his argument in this court for further plain-error review.

AFFIRMED