U.S. v. Neal

United States Court of Appeals, Fifth Circuit Sep 24, 2008

294 F. App'x 96 (5th Cir. 2008)

No. 07-11047.

97 September 24, 2008. *97

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Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:06-CR

Before KING, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:[fn*] [fn*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Robert David Neal appeals his 327-month sentence for wire fraud, alleging (1) that his offense was '
98 U.S.S.G. § 2X1.1, and (2) that the sentence is unreasonable under *98 18 U.S.C. § 3553(a). For the r affirm the district court's sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

Neal concocted a scam through which he intended to collect millions in worker's compensation insur employers, and then bilk the workers when it came time to pay claims. To pull this off, Neal claimed from an established company with adequate funding and reinsurance. He created shell companies to fictitious individuals who supposedly ran such companies, and through these companies, underbid le created forms for the "policies" he issued and collected premiums. Neal hired a third-party administr claims, but provided it with token funding. Neal also had in place an exit strategy: in the event of a c intended to take the money he had collected as premiums and flee the country.

Following indictment, Neal sent numerous letters from prison in which he attempted to coerce testim
concerning the scope of the deal with ECI and Doctors Community. Neal wrote to Lawrence Hoover
incorporate his bogus companies, stating that if they were able to "lift [the ECI deal] off of us, the do
have on us is minimal." According to the testimony of FBI Special Agent Jody Windle, Neal also thr
Assistant U.S. Attorney prosecuting the case, attempted to recruit people to continue the scheme afte
99 planned to engage in insurance fraud after serving his sentence. His letters detailed plans to *99 have
altered, so that he could flee the country and commit frauds with impunity from an offshore location

Neal pleaded guilty — without a plea agreement — to Counts 1 through 6 on April 27, 2007, three d
begin.

The presentence investigation report (PSR) attributed to Neal an actual and intended loss of $11,205
$401,170.51 which Neal had received at the time the FBI interceded, and added to that amount the p
would have been paid by the PEOs over the course of their one-year policies. The PSR also attribute
Neal arising from the insurance policies with ECI on behalf of Doctors Community.

At sentencing, Neal objected to the loss calculation. After hearing the testimony of Cory and various
scope of the fraud and the probable loss had the fraud continued unimpeded, the district court overru
court adopted the PSR and stated:

> I am persuaded . . . on the basis of testimony presented today as well as the sentencing exhibits th
> should be used and that the amounts of intended loss used by the probation officer in calculating
> [PSR] are an accurate calculation of the intended loss with the information that is currently avail

The PSR yielded an offense level of 37 and a criminal history category of III, for a Guideline range o
contended that a sentence in this range would be unreasonable in light of the factors of 18 U.S.C. § 3
noted that it had considered each of the § 3553(a) factors and sentenced Neal to the statutory maxim
count. The court ordered that the counts were to run consecutively, so as to produce an aggregate ser

II. STANDARD OF REVIEW

Sentencing issues raised for the first time on appeal are reviewed for plain error. *United States v. Pel*
(5th Cir. 2007). At sentencing, a defendant need not cite specific Guideline provisions, so long as a g
sentencing court of the defendant's disagreement with a particular application. *See United States v. C*
Cir. 2000). Nevertheless, this circuit adheres to the requirement that defendants must object to error,
informed decision-making and giv[e] the district court an opportunity to correct errors before they ar
Peltier, 505 F.3d at 392. In *Ocana*, the defendant filed an objection to the use of unadjudicated "relev
an upward adjustment in her offense level. 204 F.3d at 589. The court held that the defendant's objec
sentencing court of her disagreement with an upward adjustment under § IB 1.3 of the Guidelines, n
provide a citation to that provision. *Id.*

Neal argues that the district court should have applied a three-level downward adjustment to his offe
was a "partially completed offense." *See* U.S.S.G. § 2X1.1.[1] However, Neal did not make this argum

(quotation and internal punctuation omitted). *Brown* concerned constitutional errors and therefore its scrutiny are of diminished salience in the sentencing context. Second, the basic principle of *Brown* is objection may preserve error despite being phrased in general or non-technical terms, so long as the reason-ably apparent. As discussed above, Neal's objections to loss calculation simply did not alert t arguments under § 2X1.1.

Neal also cites *United States v. Saro*, in which a circuit court noted that the interests of finality and ju when a defendant seeks re-sentencing, as opposed to a new trial. 24 F.3d 283, 287-88 (D.C. Cir. 199 district court had misapplied the Guidelines, and the appellate court considered only how to apply th As will become apparent, the district court in this case did not misapply the Guidelines — there was *Saro* is not on point.

In sum, Neal did not adequately present his § 2X1.1 objection to the sentencing court. Our review is standard, the court "may correct the sentencing determination only if (1) there is error (and in light o sentence equates to a finding of error); (2) it is plain; and (3) it affects substantial rights." *Peltier*, 50 this showing, this court may correct the error, but should not exercise its discretion to do so unless th

importantly, Mr. Neal could have changed his mind and elected not to continue with the fraudulent a responds that because Neal pleaded guilty to the completed offense of wire fraud, the adjustment und inapplicable, despite the fact that Neal never received funds under the deal with ECI and Doctors Co government contends that, under the plain language of § 2X1.1, this particular fraud was too far alon completed."

Wire fraud is complete when a defendant makes a communication to advance what he knows to be a U.S.C. § 1343; *see United States v. Nguyen*, 504 F.3d 561, 568 (5th Cir. 2007), *cert. denied*, ___ U.S L.Ed.2d 135 (2008); *United States v. Lemons*, 941 F.2d 309, 317-18 (5th Cir. 1991); *United States v.* (9th Cir. 2008). Because the *actus reus* is the communication, whether the defendant actually obtains sought is immaterial to his criminal liability. *See United States v. Wharton*, 320 F.3d 526, 538 (5th C at 580. For sentencing purposes, the offense level for wire fraud is to be determined in accordance w Guidelines. When a defendant is prosecuted before realizing the fruits of his frauds, courts must grap calculation. *See* § 2B1.1, app. n. 3(A) (stating that "loss is the greater of actual loss or intended loss" note 17 directs the sentencing court to apply § 2X1.1 in the case of a "partially completed offense (e. completed theft or fraud that is part of a larger, attempted theft or fraud)." § 2B1.1, app. n. 17. This r conviction is for the substantive offense, the inchoate offense . . . or both." *Id.*

The basic rule of § 2X1.1 is that inchoate offenses (conspiracies, attempts, and solicitations) receive as the substantive offense, "plus any adjustments from such guideline for any intended offense condu
102 with reasonable certainty." § 2X1.1(a). To illustrate when a defendant is convicted of an attempt, the offense level by three points, "unless the defendant completed all the acts the defendant believed nec completion of the substantive offense or the circumstances demonstrate that the defendant was about for apprehension or interruption by some similar event beyond the defendant's control." § 2X1.1(b)(2X1.1 contemplates situations in which a substantive fraud offense is complete, but is a part of a "lar fraud." In such a case, loss is calculated under § 2B1.1, with a three-level downward adjustment und if the defendant has been convicted of the inchoate offense for theft or fraud (and not the substantive adjustment under § 2X1.1 is inappropriate if the defendant was close to completing the substantive c Commentary to § 2X1.1 confirms the inference that this adjustment is to be used sparingly:

> Similar rules apply to conspiracies and solicitations. *See U.S.S.G.* § 2X1.1(b)(2)-(3).
>
> In most prosecutions for conspiracies or attempts, the substantive offense was substantially comp or prevented on the verge of completion by the intercession of law enforcement authorities or the reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before th conspirator has completed the acts necessary for the substantive offense. Under such circumstanc levels is provided under § 2X1.1(b)(1) or (2).

The Fifth Circuit has never addressed the application of § 2X1.1 to a wire fraud conviction. The Circ provision in the context of bank fraud, which, like wire fraud, does not require that a defendant actua money or property. *See* 18 U.S.C. § 1344; *United States v. Oaten*, 122 F.3d 222 (5th Cir. 1997); *Unit*

We now turn to Neal's argument that his 327-month sentence is unreasonable under 18 U.S.C. § 355 Court's decisions in *Rita v. United States*, ___ U.S. ___, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), an U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), this court applies a two-step procedure when revie substantive reasonableness. *United States v. Rodriguez-Rodriguez*, 530 F.3d 381, 384-85 (5th Cir. 20 determines whether the sentencing court has committed a significant procedural error, such as misca Guideline range, treating the Guidelines as mandatory, or failing to consider the factors of 18 U.S.C. individualized assessment of the proper sentence. *See Gall*, 128 S.Ct. at 597. If the first step reveals within the Guideline range, the court then applies a presumption of reasonableness and reviews the s abuse-of-discretion standard. *See Rodriguez-Rodriguez*, 530 F.3d at 384-S5, 389; *see also Gall*, 128 the appellate court might reasonably have concluded that a different sentence was appropriate is insu the district court.").

For a within-Guidelines sentence, the court may "infer that the judge has considered all the factors fo the guidelines." *United States v. Mares*, 402 F.3d 511, 519-20 (5th Cir. 2005). A presumption of reas only be overcome if the sentence "falls so far afoul" of the following standards as to demonstrate tha its broad discretion: the sentence "(1) does not account for a factor that should have received signific significant weight to an irrelevant factor; or (3) represents a clear error of judgment in balancing the *States v. Nikonova*, 480 F.3d 371, 376 (5th Cir.) (quoting *Smith*, 440 F.3d at 708), *cert. denied*, ___ U L.Ed.2d 112 (2007).

First, Neal contends that the sentence grossly overstates the seriousness of the offense. He argues tha for over $11,000,000 in actual and intended loss is wholly disproportionate with the true loss he caus $151,392.91. He emphasizes that $8,000,000 of the loss attributed to him arises from the deal with E and is a "speculative amount." Neal notes that without the $8,000,000 added to the loss calculation, h have been 210-262 months. Neal argues that because this one figure vastly increased his Guideline r sentence, the maximum under the Guidelines, is unreasonable. Neal provides no authority to show h be proper under § 2B1.1 of the Guidelines but yield an unreasonable result in light of the seriousness to increase the offense level in light of Neal's audacious scheme, which had the potential to leave tho compensation insurance. The sentencing court's consideration of these matters is amply reflected in t hearing; therefore, the court's decision to sentence Neal to the high end of the Guideline range was d

Second, Neal contends that the sentence is greater than necessary to incapacitate him, to deter future
104 abuse of *104 others), or to promote respect for the law. He notes that he will be well over eighty bef sentence. He contends that the length of his sentence disregards any chance or hope of rehabilitation became involved in criminal enterprises after the age of fifty, when his marriage dissolved and he be While the government agrees that recidivism might generally decline with age, it posits that Neal is activities have all come after age fifty, he demonstrated no intent to give up unlawful activity after in devised future frauds to carry out after he served his sentence.

Advanced age does not preclude a long sentence. *See* U.S.S.G. § 5H1.1 ("Age (including youth) is n determining whether a departure is warranted. Age may be a reason to depart downward in a case in