

14-2032-cr
United States v. Cote

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated Term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the
3 28th day of August, two thousand fifteen.
4

5 Present: GUIDO CALABRESI,
6 CHESTER J. STRAUB,
7 ROSEMARY S. POOLER,
8 *Circuit Judges.*
9

10 _____
11 UNITED STATES OF AMERICA,
12
13 *Appellee,*
14

15 v.

14-2032-cr

16
17 JOHN COTE,
18
19 *Defendant-Appellant.*
20 _____
21

22 Appearing for Appellant: PETER GOLDBERGER (Pamela A. Wilk, *on the brief*), Ardmore,
23 PA.
24

25 Appearing for Appellee: ALEXANDER P. ROBBINS, Attorney, Tax Division, Department
26 of Justice (Caroline D. Ciralo, Acting Assistant Attorney General;
27 Frank P. Cihlar, Chief, Criminal Appeals & Tax Enforcement
28 Policy Section; Gregory Victor Davis, Attorney, Tax Division,
29 Department of Justice; Deirdre M. Daly, United States Attorney
30 for the District of Connecticut, *on the brief*), Washington, DC.
31

1 Appeal from the United States District Court for the District of Connecticut (Bryant, *J.*).
2

3 **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**
4 **AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED**.
5

6 Defendant-Appellant John Cote appeals from the May 29, 2014 judgment of the United
7 States District Court for the District of Connecticut (Bryant, *J.*), convicting him, after jury trial,
8 of one count of conspiracy to commit tax evasion, in violation of 18 U.S.C. § 371, and four
9 counts of tax evasion, in violation of 26 U.S.C. § 7201. Cote was principally sentenced to 46
10 months' incarceration and ordered to pay \$222,690.57 in restitution. We assume the parties'
11 familiarity with the underlying facts, procedural history, and specification of issues for review.
12

13 Cote argues that the district court committed reversible error in failing to offer sua sponte
14 a limiting instruction with respect to evidence entered by the government and in its instructions
15 to the jury on the overt act requirement for the conspiracy count. Neither contention has merit.
16

17 We review a district court's failure to give an unrequested limiting instruction for plain
18 error, *United States v. Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995), and will reverse only if the
19 error "is egregious and obvious and if reversal is necessary to redress a miscarriage of justice,"
20 *United States v. Tracy*, 12 F.3d 1186, 1195 (2d Cir. 1993) (internal quotation marks omitted).
21 Here, Cote contends that the district court should have restricted the jury's consideration of a
22 February 2009 IRS booklet, "The Truth About Frivolous Tax Arguments," to the tax evasion
23 counts arising from conduct occurring after the date of the document's publication. However,
24 this exhibit was relevant to Cote's earlier acts. *See United States v. Bok*, 156 F.3d 157, 165–66
25 (2d Cir. 1998) ("The jury may consider evidence of intent to evade taxes in one year as evidence
26 of intent to evade payment in prior or subsequent years." (quoting *United States v. Ebner*, 782
27 F.2d 1120, 1126 n.7 (2d Cir. 1986))). In these circumstances, the district court did not commit
28 error, let alone plain error, in failing to offer sua sponte the limiting instruction Cote requests for
29 the first time on appeal.
30

31 As Cote acknowledges, binding Second Circuit precedent forecloses his argument that
32 the jury be instructed to find unanimously a specific overt act in order to return a conviction on
33 the Section 371 conspiracy offense. In *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011), we
34 held that "although proof of at least one overt act is necessary to prove an element of
35 [conspiracy], which overt act among multiple such acts supports proof of a conspiracy conviction
36 is a brute fact and not itself [an] element of the crime. The jury need not reach unanimous
37 agreement on which particular overt act was committed in furtherance of the conspiracy" *id.* at
38 132. We are bound by prior decisions of this Court unless overruled by an en banc panel or the
39 Supreme Court. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).
40

41 Challenging his sentence on several fronts, Cote argues that the district court: (1) erred in
42 determining the total "tax loss" amount for purposes of calculating his Guidelines sentencing
43 range; (2) miscalculated the restitution amount; and (3) violated the Sixth Amendment by relying
44 on facts not found by the jury in imposing restitution. We reject all of Cote's contentions.
45

1 A district court's sentence is reviewed for both procedural and substantive
2 reasonableness, a "standard . . . akin to review for abuse of discretion." *United States v.*
3 *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006), *abrogated on other grounds by Rita v. United States*,
4 551 U.S. 338 (2007). A procedural error occurs where a district court, inter alia, "makes a
5 mistake in its Guidelines calculation." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008).
6 We apply plain error review to sentencing challenges where the defendant fails to object to his
7 sentence on such ground before the district court. *See United States v. Thomas*, 274 F.3d 655,
8 666 (2d Cir. 2001).

9
10 Cote argues that the district court miscalculated the total "tax loss" amount by including
11 (a) tax amounts that neither the court nor the jury found had resulted from criminal conduct and
12 (b) penalties and interest. As an initial matter, it is clear that the district court made the
13 appropriate factual findings by adopting, as modified, the findings of fact in the presentence
14 report in open court. *See United States v. Molina*, 356 F.3d 269, 275 (2d Cir. 2004) ("A district
15 court satisfies its obligation to make the requisite specific factual findings when it explicitly
16 adopts the factual findings set forth in the presentence report."). Cote raises a substantial
17 question as to whether the district court erred in considering interest and penalties when
18 calculating the "tax loss" amount resulting from his conviction for tax evasion conspiracy under
19 18 U.S.C. § 371, where the relevant commentary provides that "[t]he tax loss does not include
20 interest or penalties, except in willful evasion of payment cases under 26 U.S.C. 7201 and willful
21 failure to pay cases under 26 U.S.C. 7203." U.S.S.G. § 2T1.1, Application Note 1. However,
22 because the district court unambiguously stated that it would have imposed the same sentence
23 were Cote to prevail on his interpretation of the Guidelines, any error in calculating the
24 Guidelines sentencing range was harmless. *See United States v. Feldman*, 647 F.3d 450, 459 (2d
25 Cir. 2011).

26
27 Next, we turn to the restitution order. The district court's imposition of restitution under
28 the Mandatory Victim Restitution Act ("MVRA") is also reviewed for abuse of discretion, but
29 where the defendant fails to object at the time of sentencing, we review for plain error. *See*
30 *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012).

31
32 On appeal, Cote primarily contends that the district court erred in including interest and
33 penalties in setting the restitution amount. The Internal Revenue Code "expressly defines 'tax' to
34 include penalties and interest." *Carroll v. United States*, 339 F.3d 61, 76 (2d Cir. 2003); 26
35 U.S.C. §§ 6665(a)(2), 6601(e)(1). Thus, in determining the loss caused to the government by the
36 conspiracy to avoid the payment of Cote's outstanding tax liability, the district court properly
37 considered these figures. *See* 18 U.S.C. § 3663A(b)(1)(B)(i) (defining the measure of "loss" for
38 restitution purposes as "the value of the property" taken from the victim).

39
40 Finally, Cote submits that the district court committed plain error by imposing a
41 restitution amount not determined by the jury, in violation of the Sixth Amendment. However,
42 we recently concluded in *United States v. Bengis*, 783 F.3d 407 (2d Cir. 2015), "that judicial
43 factfinding to determine the appropriate amount of restitution under a statute that does not
44 prescribe a maximum does not implicate a defendant's Sixth Amendment rights," *id.* at 413.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: August 28, 2015
Docket #: 14-2032cr
Short Title: United States of America v. Cote (John
Cote)

DC Docket #: 3:12-cr-264-1
DC Court: CT (NEW HAVEN)
DC Judge: Bryant

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature