IP 99-0109-CR 1 B/F US v. Schaefer
Judge Sarah Evans Barker Signed on 11/25/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
SCHAEFER, RONALD T,	)	CAUSE NO. IP99-0109-CR-01-B/F
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	IP 99-109-CR-01-B/F
RONALD T. SCHAEFER, Defendant.	)	

ORDER

The Seventh Circuit has remanded this case to us for resentencing, directing that we undertake additional fact-finding relating to the relevant conduct in making the U.S.S.G. § 2F1.1(b)(1) loss calculation. U.S. v. Schaefer, 291 F.3d 932, 938 (7th Cir. 2002). Judge Dillin had presided over the trial and had imposed the original sentence, but thereafter relinquished his docket. Thus when the case was remanded, it was reassigned to this judge, who required additional time to review the record and get up to pace on the relevant evidence and legal issues. Having now reviewed the trial transcript and the transcript of the initial sentencing hearing, having considered the parties' voluminous briefs and submissions as well as their arguments in response to the Seventh Circuit's order of remand, and having the benefit of the oral argument which was conducted on September 27, 2002, the Court now enters its findings and conclusions relating to the loss amounts and relevant conduct. These rulings will be incorporated in the reimposition of sentence at a soon-to-be-scheduled sentencing hearing:

1. The Indictment charged Defendant with fourteen counts of mail fraud (Counts 1 through 8) and wire fraud (Counts 9 through 14). The jury convicted him on five counts, one of which (Count 2) was later vacated. (See ¶ 5 below.) The remaining counts of conviction (Counts 1, 5, 12 and 13), obviously were proven beyond a reasonable doubt. The total loss amount resulting from the counts of conviction was $1,875. The parties apparently do not dispute this calculation of loss.

2. We hold, based on our review of the evidence, that each of the counts of conviction (Counts 1, 5, 12 and 13) occurred as part of the Defendant's overall mail and wire fraud scheme as alleged in the Indictment.

3. In terms of determining Defendant's relevant conduct, we must first identify what other conduct, if any, on the part of the Defendant was of a criminal nature, beyond the counts of conviction, and whether the additional conduct occurred within the scope of Defendant's scheme to defraud. Schaefer, 291 F.3d at 938-41; see also U.S.S.G. § 1B1.3(a)(1)-(2). We conclude, again based on our review of the trial testimony and the Declarations of Special Agent Brouwer and James E. Lentz, proffered by the Government as part of its sentencing memorandum, that the whole of Defendant's art selling business activities during the years 1994 through 1999 comprised a fraudulent scheme perpetrated by him against numerous customers/purchasers, virtually all of whom became victims through Defendant's acts of mail and wire fraud.

This conclusion is buttressed by evidence evincing a well-established, on-going, consistent pattern of misrepresentations and deceits told or written to customers that permeated and influenced virtually every transaction he conducted. Defendant lied to purchasers concerning his sources of supply for the artwork he offered for sale and his allegedly innocent motives for selling the artwork; he both

exaggerated the nature of and concocted fictional histories for the individual pieces of artwork to enhance their value; and he routinely inflated their intrinsic economic and artistic value and their resale potential. Defendant conducted numerous such fraudulent transactions, passing off a high volume of inventory in this deceitful and fraudulent way over several years. The Defendant's intentions were further demonstrated by his dogged refusal to yield to the requests and warnings from legitimate producers (e.g., Warner Brothers) when they admonished him to stop trading in fraudulent art objects and by his intentional flaunting of court-imposed restrictions mandating that he refrain from further engaging in such transactions. The record leaves us entirely convinced that Defendant's intentions and methods in dealing in animation art were all of one fraudulent piece, advanced as a part of an over-arching, all-inclusive scheme that affected every transaction he conducted.

In reaching this conclusion, we also adopt the corroborative factual details set out in the Offense Conduct portion of the Presentence Investigation Report as well as the Brouwer and Lentz Declarations regarding the nature and values of the fraudulently sold artwork.

4. As stated above, all of the Defendant's art-related business activity was criminal conduct, resulting in monetary losses to the victims of his crimes. This activity thus includes both the acquitted conduct and the uncharged conduct. Because Defendant's acquitted conduct and uncharged conduct constituted criminal acts, those acts are properly included in and treated as "relevant conduct" under the Sentencing Guidelines, in that they were part of the same course of fraudulent conduct or common scheme or plan for which Defendant was convicted in Counts 1, 5, 12 and 13. U.S.S.G. § 1B1.3(a)(2). The total harm caused by Defendant flowed from all of Defendant's business activities –

the acts for which he was convicted, those on which he was acquitted, and those on which he was not charged.

5. The conviction on Count 2 requires separate comment. The jury reached a verdict of guilty beyond a reasonable doubt on that charge, but the verdict was later vacated by the Court, not because of a failure of proof, but because of a post-trial-discovered Brady violation. Therefore, the monetary loss to the victim associated with this count, in the amount of $2700 (that being the purchase price paid by Dr. Tyson for the "Lady" cel), should be included in assessing the total losses caused by Defendant's criminal conduct; the fact that it is acquitted conduct rather than convicted conduct is immaterial to our loss analysis, given our holding that all of the Defendant's conduct qualifies for designation as relevant conduct. That said, we need to clarify that our treatment of this $2700 amount is not to add it as a separate amount to the total from the counts of conviction in reaching a total loss amount, but to incorporate it as a part of the losses attributed to Tyson, Gluck and Nelson transactions. (See ¶ 7 below.) In other words, we have avoided any error in counting it twice.

6. Concerning the acquitted conduct (Counts 3, 4, 6, 7, 8, 9, 10, 11 and 14), we note that all of these counts relate to Defendant's fraudulent sales of the same three items of artwork involved in the counts of conviction. Having reviewed the trial record, we conclude that as to each count, the evidence established by a preponderance the criminal nature of these acts by the Defendant. Each occurred as part of the same course of conduct and common scheme or plan to defraud.

These fraudulent sales transactions are properly included as relevant conduct because, as we have noted, like the sales by the Defendant for which he was convicted, they involved the same three types of art work (the Lady cel, the Mickey Drawing Walt piece, and the Lion King brochure), the

fraudulent sales in the acquitted counts were perpetrated using the same pattern of ruses and misrepresentations, and the transactions all happened within the same general time period as did the fraudulent sales of which Defendant was convicted. See U.S. v. Cedano-Rojas, 999 F.2d 1175, 1180 (7th Cir. 1993) citing U.S.S.G. § 1B1.3(a)(2) comment 9(B)) (guiding courts to look to the similarity, regularity, and temporal proximity of the uncharged [or acquitted] acts to the offense of conviction); U.S. v. Allender, 62 F.3d 909, 916 (7th Cir. 1995) (including as relevant conduct acquitted and uncharged conduct that took place during the same time period as the conduct charged in the indictment and also involved a similar modus operandi). The Defendant utilized the mails and the wires to perpetrate all of his frauds, in the acquitted as well as convicted counts. He took out newspaper ads inviting potential customers, many from out of state, to phone him; he used the mails to correspond and communicate with them; and he pedaled his counterfeit goods to them. See U.S. v. Sykes, 7 F.3d 1331, 1336 (7th Cir. 1993) citing U.S. v. White, 888 F.2d 490, 500 (7th Cir. 1989) (directing district courts to identify distinctive similarities between the offense of conviction and conduct sought to be included as relevant conduct). The victims in each of these counts testified to their recollections of Defendant's fraudulent statements and the Government's expert witness, Mr. Lentz, testified convincingly as to the diminished values of the art objects each purchased compared to what they paid Defendant for them. Even where the record disclosed no written corroboration of what a particular witness recalled, their testimony regarding Defendant's fraudulent oral statements was convincing. We credit the testimony of the victims over the statements of the Defendant whom we determine, consistent with Judge Dillin's conclusion, was singularly incredible in both his purported explanations and denials. See U.S. v. Bequette, No. 00 CR 30178, slip. op. at 4 (7th Cir. Oct. 29, 2002) ("Regardless of the

type of evidence considered by a judge, our concern is first and foremost that the findings are based on reliable evidence").

The essential legal elements for the mail fraud charges as explicated in Trial Instruction No. 16 and the essential legal elements for the wire fraud charges as explicated in Trial Instruction No. 17 were satisfied by a preponderance of the evidence adduced at trial with regard to the acquitted counts.[1] There were no failures of proof as to any of these counts.

7. Regarding uncharged conduct, we again rely on the evidence proffered in the Brouwer and Lentz Declarations detailing the losses experienced by Tyson, Gluck and Nelson as representative victims of Defendant's fraudulent sales of artwork. These three victims had purchased a variety of artwork sold to them by Defendant in addition to the three kinds of artwork at issue in the counts of the Indictment. We are convinced by a preponderance of the evidence that Defendant's uncharged conduct with respect to these particular transactions was criminal, in that the Defendant utilized the same methods and means to perpetrate his fraudulent course of conduct as he did in the counts of

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[1] Those elements are: the defendant knowingly devised a scheme to defraud or to obtain money or property by means of false pretenses, representations or promises, as described in Counts 1 through 8 of the indictment; that the defendant did so knowingly and with the intent to defraud; that for the purpose of carrying out the scheme or attempting to do so, [mail fraud] the defendant used and caused the use of the United States mails or private or commercial interstate carriers in the manner charged in the particular count; or [wire fraud] the defendant caused interstate wire communications to take place in the manner charged in the particular count.

The PSR, which we adopt and was also adopted by Judge Dillin, states that "[t]he only distinguishing feature between the mail fraud counts of conviction and the counts on which Schaefer was acquitted are that the testimony supporting the mail fraud counts of conviction were corroborated by documentary evidence that further established that defendant misrepresented artwork to consumers implicated by those counts." PSR ¶ 24

conviction. The sales to Tyson, Gluck and Nelson were similar to the other sales by Defendant in terms of subject matter, content and timing, and were thus part of the common scheme to defraud. See Sykes, 7 F.3d at 1336; Allender, 62 F.3d at 916.

8. In determining the total amount of loss for relevant conduct purposes under § 2F1.1 of the Sentencing Guidelines, we shall include the losses from the counts of conviction and the acquitted counts as well as a portion of the uncharged conduct. More specifically, we adopt the computational approach summarized by the Government in its September 5, 2002 Summary Charts on Loss. It assigns $40,614 as the amount of total loss attributable to the three pieces of artwork involved in the Indictment (the Mickey Drawing Walt piece, the Lady cel, and the Lion King brochure). To that figure, we shall add $45,749, the amount of loss attributable to the sales of animation art to Tyson, Gluck and Nelson, which were recorded and valued in the Brouwer and Lentz Declarations, respectively. Making the appropriate adjustments to avoid double-counting, the total loss for the fraudulent sales of these items is $81,801. (See Gov't Aug. 1, 2002 Sentencing Mem. p. 29, n. 7, which explains as follows: "If one adds the loss suffered by Messrs. Tyson, Gluck, and Nelson to the loss suffered as a result of the defendant's sales of the Lady cel, Mickey Drawing Walt and the Lion King brochure, the result is $81,801 in loss. (This figure counts only once the Lady cels, the Mickey Drawing Walts and the Lion King brochures purchased by Tyson, Gluck and Nelson).")

We utilize this $81,801 figure as the relevant conduct amount because it is the calculation that the Court can most straightforwardly and accurately perform and document from the evidence and about which we have the most confidence in terms of a sum certain. We decline the invitation by the Government to draw broad inferences and to make additional financial extrapolations (i.e., the 55%

multiplier) since such analyses necessarily involve speculation, which undermines our ability to reach reliable conclusions as to loss by a preponderance of the evidence.

9. That said, however, it is absolutely clear that the $81,801 amount understates the actual losses caused by Defendant's extensive pattern of criminal conduct. Our inability to extract from the evidence specific additional amounts of loss does not prevent us from acknowledging that the actual losses perpetrated by the Defendant on his customers for other art work were substantial, whatever the exact amount.

For example, the evidence establishes (again, by a preponderance) that the Defendant's yearly income for the years 1994-1999 from the sale of animation products was a total of $420,000, a figure derived from Defendant's sworn statement of income, which he said averaged $7000 per month. (Gov't Aug. 1, 2002 Sentencing Mem. p. 18-19 referencing the "Schaefer Aff. ¶¶ 1-2.") Having previously determined that Defendant's pattern of fraud was all-encompassing and pervasive, it is reasonable to conclude, and therefore we do conclude, that some major portion, perhaps all, of his earnings were criminally-derived proceeds.

Further, the evidence establishes (again, by a preponderance) that the inventory of art seized from the Defendant at the time of his arrest had an estimated value of $500,000. From this, we impute an intended loss to the Defendant; he was positioned to do considerably more harm than he did, having been prevented from doing so only by virtue of his arrest and the seizure of the fraudulent, counterfeit art work.

Finally, because the artwork did not yield for the purchasers the appreciated values that Defendant's representations and assurances had promised them as part of the inducement to buy, these

unrealized amounts should be construed as additional losses.

10. As we have noted, the losses outlined in Paragraph 9 cannot be determined with specificity. Nonetheless, they were clearly the result of Defendant's criminal conduct, and they were real. As such, they fall outside the "heartland" of conduct embodied by U.S.S.G. § 2F1.(b)(1) and provide, pursuant to U.S.S.G. § 5K2.0, a basis for the imposition of an upward departure from the applicable Sentencing Guideline ranges tied to the $81,801 loss amount. See U.S. v. Jones, 278 F.3d 711, 716 (2002); U.S.S.G. § 5K2.0 Grounds for Departure (Policy Statement) ("Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'")

An upward departure is both permissible and appropriate because the evidence so persuasively establishes that the full extent of monetary loss caused by the Defendant was present to a degree substantially in excess of that which can be calculated and demonstrated with the particularity required under the loss tables in U.S.S.G. § 2F1.1(b)(1). U.S. v. King, 150 F.3d 644, 650 (7th Cir.1998) citing Koon v. U.S., 518 U.S. 81, 94-96 (1996) ("A case may be unusual ... because a considered factor [loss, in this case] is present in an exceptional way.") In adjusting the defendant's base offense level, we may take into account "all harm" caused by the defendant. See U.S.S.G. § 1B1.3(a)(3); U.S. v. Kahn, 175 F.3d 518, 522 (1999).

11. Accordingly, at the time of sentencing, the Court will adopt the Presentence Investigation Report computations in part, and overrule them in part, and make the following rulings and adjustments:

the Base Offense Level will remain at level 6 (¶ 52); the Specific Offense Characteristics level will be 6 (¶ 53) (pursuant to § 2F1.1(b)(2)), because the total loss to victims was more than $70,000 and less than $120,000, to wit, $81,801; the remaining three upward adjustments of 2 levels each (¶¶ 54, 55, and 58) will also be applied; for a Total Offense Level of 18.

To that level, the Court will apply a 3-level upward departure based on the fact that the identifiable losses grossly and substantially understate the actual monetary losses resulting from Defendant's criminal behavior, imposing a one level increase for each of the following circumstances, respectively: (1) the overall earnings from sales of artwork over a five year period in the amount of $420,000, virtually all of which was fraudulently generated; (2) the extent of Defendant's intended loss as reflected in the seizure of $500,000 in inventory at the time of the Defendant's arrest; and (3) the loss to purchasers from the unrealized appreciation in value of the artwork bought from the Defendant based on false inducements.

With those calculations and departures, the Total Offense Level will be 21, which in light of the Defendant's Criminal History Category of I, directs the following Guideline Ranges: for incarceration, 37-46 months; for the fine, $7,500 to $75,000; and for supervised release, 2 to 3 years. The Defendant is not eligible for probation. The Special Assessment amount is $400. The previously entered restitution amounts and recipients, as detailed in Judge Dillin's Order of February 14, 2001, which we adopt, will be reimposed. The ranges are those set forth in the 1997 Guidelines Manual.

A sentencing hearing will be set at the earliest convenient time to allow the parties an opportunity to address these findings and conclusions, preparatory to a final resolution of the issues relating to loss computations. No other sentencing issues will be addressed at the hearing, given the

limited nature of the Seventh Circuit's remand order.

It is so ORDERED this _____ day of December 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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