

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-6433

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 21, 2009
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
ADAM GAGNIER,)	THE WESTERN DISTRICT OF
)	TENNESSEE
Defendant-Appellant.)	

ORDER

Before: MCKEAGUE and GRIFFIN, Circuit Judges; WEBER, District Judge.*

Adam Gagnier, a federal prisoner proceeding through counsel, appeals the sentence imposed by the district court following his conviction for violating the civil rights of another individual, 18 U.S.C. § 241, and mail fraud, 18 U.S.C. § 1341. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Gagnier, a former Memphis police officer, was prosecuted by way of a bill of information, filed on December 14, 2005, on allegations that he conspired with other officers to initiate traffic stops of vehicles as a pretext to commit unlawful searches, seizures, and thefts of large sums of cash and other property from individuals that were stopped. Gagnier was also alleged to have devised a scheme to defraud his insurance company by accessing blank police offense reports to create fictitious reports of burglaries of his residence. He entered a plea of guilty to the two charges. Following sentencing, Gagnier appealed, arguing that the district court failed to comply with Fed. R. Crim. P. 32. The government conceded the point, and we remanded for resentencing.

*The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

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At resentencing, the district court determined that Gagnier's total offense level was 20, which included a six-level enhancement, pursuant to United States Sentencing Guidelines ("USSG") § 2B1.1(b)(1)(D), for losses from the mail fraud in an amount greater than \$30,000, and a two-level enhancement, pursuant to USSG § 2B1.1(b)(12)(B), for possession of a dangerous weapon in connection with the mail fraud. Gagnier's total offense level and criminal history category resulted in an advisory guideline range of 33 to 41 months. However, the district court concluded that the advisory guideline range did not take into account all of the circumstances of the offense and determined that an offense level of 27 was appropriate, which resulted in a guideline range of 70 to 87 months. The district court imposed a 71-month term of imprisonment and a three-year term of supervised release, with Gagnier's required residence in the United States. Gagnier now appeals.

At the outset, the government asserts that Gagnier's claims regarding enhancements and the conditions of supervised release are waived for his failure to raise the issues in his initial appeal. In the interests of justice, however, we will consider the claims on their merits. *See United States v. Bailey*, 264 F. App'x 480, 482 (6th Cir.), *cert. denied*, 128 S. Ct. 2949 (2008).

In his first two arguments, Gagnier asserts that the six-level enhancement pursuant to USSG § 2B1.1(b)(1)(D), for the amount of monetary loss from his mail fraud, and the two-level enhancement, pursuant to USSG § 2B1.1(b)(12)(B), for possession of a dangerous weapon in connection with the mail fraud, were in error because the district court erroneously determined that an unrelated worker's compensation fraud was "relevant conduct" to his mail fraud scheme.

In fashioning an appropriate sentence, the district court considers the "relevant conduct" of an offender, which can include a "common scheme or plan" or the "same course of conduct." USSG § 1B1.3. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, accomplices, purpose, or similar modus operandi; offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected to each other as to warrant the conclusion that they are part of a single episode or ongoing series of offenses. USSG § 1B1.3, Application Note 9; *see also United States v. Hill*, 79 F.3d 1477,

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1481-82 (6th Cir. 1996). A district court's findings with respect to relevant conduct are only disturbed if clearly erroneous, *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996), and need only be based on the preponderance of the evidence. *United States v. Meacham*, 27 F.3d 214, 216 (6th Cir. 1994).

We conclude that the district court's determination of the relevant conduct of Gagnier's offense was supported by a preponderance of the evidence. Factors relevant to the determination of whether offenses are sufficiently connected or related to each other include the degree of similarity of the offenses, the regularity of the offenses, and the time interval between the offenses. *See* USSG § 1B1.3, Application Note 9(B). In its sentencing calculation, the district court began with Gagnier's charged conduct of mail fraud for filing false burglary claims with his insurance company. The court also considered uncharged conduct contained in Gagnier's proffer, in which he explained that he and his partner, Officer Fetter, defrauded the worker's compensation system by staging a shooting of Fetter in order for Fetter to obtain compensation for his injuries. The record indicates that the modus operandi for the fraudulent burglary reports and the fraudulent worker's compensation claim were similar in that Gagnier used his police training and access to materials to perpetrate the various frauds, whether by obtaining blank offense reports or by consulting with Fetter about ways to stage his shooting and procuring a firearm. The incidents involved a common factor – the filing of false reports of crime – with the common purpose to obtain compensation for harms allegedly suffered as the result of the staged crimes. The various frauds were also committed in relative close proximity in February 2005, May 2005, June 2005, and July 2005, and involved similar victims. Although there are dissimilarities between the incidents, as Gagnier points out, the district court's findings cannot be classified as clearly erroneous. Accordingly, because the worker's compensation scheme, which involved the use of a dangerous weapon, and resulted in loss of \$19,191.88 could be considered as "relevant conduct" to Gagnier's mail fraud, the district court did not err in applying the appropriate enhancements under USSG §§ 2B1.1(b)(1)(D) and (b)(12)(B).

In his third argument, Gagnier asserts that the district court abused its discretion by imposing a United States residency requirement as part of his term of supervised release. We review a district

court's imposition of a supervised-release condition for abuse of discretion. *United States v. Carter*, 463 F.3d 526, 528 (6th Cir. 2006).

We conclude that the district court did not abuse its discretion in imposing the residency requirement. The record evidences the district court's rationale for the imposition of the supervised release condition and the condition of supervised release is reasonably related to the goals of protection of the public and the rehabilitation of the defendant. *Id.* at 529. We have recently upheld a travel restriction in a case where a defendant violated earlier conditions of release, as Gagnier did here. *United States v. Alexander*, 509 F.3d 253, 256 (6th Cir. 2007). The record indicates that upon release pending sentencing, Gagnier was ordered not to violate the law and to advise the court and counsel in writing before any change in address or telephone number. Nevertheless, Gagnier absconded to Canada, without informing the court, and attempted to procure employment as a police officer through the use of fraudulent documents. Therefore, this claim lacks merit.

Finally, Gagnier argues that the district court unreasonably departed from the advisory guideline range. Whether considered a variance or a departure, we utilize the same standards used to judge the procedural and substantive reasonableness of a sentence. *United States v. Vowell*, 516 F.3d 503, 510 (6th Cir. 2008). This means that we "first ensure that the district court committed no significant procedural error," and next "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 128 S. Ct. 586, 597 (2007); *see also United States v. Smith*, 516 F.3d 473, 476 (6th Cir. 2008). On appeal, we may consider the extent of a deviation, but must give due deference to the district court's decision that the § 3553(a) factors, as a whole, justify the extent of the variance; the fact that we might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal. *Gall*, 128 S. Ct. at 597; *see also United States v. Grossman*, 513 F.3d 592, 595 (6th Cir. 2008).

After review, we conclude that Gagnier's sentence is both procedurally and substantively reasonable. Except for the two enhancements for relevant conduct which have been determined to have been properly imposed, Gagnier does not dispute the calculation of the applicable guideline range of 33 to 41 months and he does not dispute the district court's analysis of the 18 U.S.C. § 3553

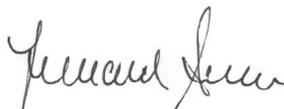
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factors. Further, the court expressed its intention to impose a sentence outside of the calculated guideline range and did so after explaining that the guidelines did not take into account all of the matters relating to the victims. Despite Gagnier's assertion that the district court "made no attempt to explain the extent of its departure" from the guidelines range, we find the district court's discussion of Gagnier's charged offenses, his applicable uncharged conduct, the impact of the conduct on the victims, Gagnier's abuse of power, and his apparent lack of remorse all led to its determination that the calculated guideline sentencing range did not adequately account for Gagnier's conduct. Moreover, it does not appear that the district court selected the sentence arbitrarily, based it on impermissible factors, failed to consider pertinent § 3553(a) factors, or gave an unreasonable amount of weight to any pertinent factor. *United States v. Tate*, 516 F.3d 459, 469 (6th Cir.), *cert. denied*, ___ S. Ct. ___, 2008 WL 2157872 (Oct. 6, 2008).

For the foregoing reasons, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Re: Case No. 07-6433 , *USA v. Adam Gagnier*
Originating Case No. : 05-20443-002

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Audrey Crockett
Case Manager
Direct Dial No. 513-564-7032
Fax No. 513-564-7094

cc: Mr. Thomas M. Gould

Enclosure

Mandate to issue