

Case No. 07-30916

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORE L. MORRIS, also known as Pretty Boy,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC Docket Nos. 5:07-CR-50003-1, 5:06-CR-50090-1

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America, plaintiff-appellee.
2. AUSA Josette Louise Cassiere, appellate attorney for plaintiff-appellee.
3. AUSA C. Mignonne Griffing, trial attorney for plaintiff-appellee.
4. Core L. Morris, defendant-appellant.
5. Douglas Lee Harville, appellate attorney for defendant-appellant.
6. J. Ransdell Keene, trial attorney for defendant-appellant.

7. The Honorable Donald E. Walter.

8. The Honorable Mark L. Hornsby.

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REQUEST FOR ORAL ARGUMENT

The defendant-appellant, CORE L. MORRIS, respectfully requests oral argument. The resolution of the issues herein will be based on this Court's determination of whether the District Court committed (1) clear error when it adopted the presentence investigation report's two-level sentencing enhancement pursuant to U.S.S.G. § 2B1.1(b)(10)(B)(i), (ii) and based Morris' offense level and sentence on this enhancement; and (2) plain error when it, in its written judgment, sentenced Morris to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. Oral discussion of the facts related to these issues and the interplay between the facts and the applicable precedent would benefit the Court by significantly aiding the decisional process.

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Western District of Louisiana, and under 18 U.S.C. § 3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE 1: Whether the District Court committed clear error when it adopted the presentence investigation report's two-level sentencing enhancement pursuant to U.S.S.G. § 2B1.1(b)(10)(B)(i), (ii) and based Morris' offense level and sentence on this enhancement.

ISSUE 2: Whether the District Court committed plain error when it, in its written judgment, sentenced Morris to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently.

STATEMENT OF THE CASE

A. Proceedings Below

On April 26, 2006, Core L. Morris was indicted in a six-count indictment. R. 2, 9-12. Count Five charged that on or about September 24, 2005, Morris knowingly made, uttered, and possessed or caused to be made, uttered, and possessed, a counterfeit and forged check allegedly drawn on Barksdale Federal Credit Union with the intent to deceive by causing said check to be cashed. R. 2, 10-11. Count Six charged that on or about February 20, 2002, Morris, for the purpose of obtaining a driver's license, willfully, knowingly, and with the intent to deceive, falsely represented that Social Security Account Number (SSAN) ***-**-5939 had been assigned to him by the Commissioner of Social Security, when, in fact, Morris knew that the SSAN had not been assigned to him. R. 2, 11.¹ On September 22, 2006, Morris pled guilty to Counts Five and Six. R. 2, 72; Supp. R. 2 (06-cr-50090), 32, 40-43.

On January 23, 2007, the United States filed a bill of information, charging that between June 10, 2000, and June 12, 2006, Morris and others known and unknown knowingly and intentionally conspired to commit offenses against the

¹ The remaining counts are not addressed as they are not relevant to Morris' conviction or sentence.

United States by using, or causing to be used, the United States mails for the delivery of mail for the purpose of executing a scheme or artifice to defraud various insurance companies and to obtain money from the insurance companies by false pretenses, representations, and promises. R. 1, 7-9.

On February 6, 2007, Morris pled guilty to Count One of the Bill of Information. R. 1, 48; Supp. R. 1, (07-cr-50003), 26, 34. The District Court, then, consolidated docket numbers 06-50090 and 07-50003, for sentencing on motion of the Government. Supp. R. 1, 35.

The presentence investigation report (PSI) determined that Morris' offense level was 27 and that his criminal history category was V. PSI (which is in the yellow envelope), ¶¶ 26-30, 32-33, 35, 38-40, 42, 64. In determining Morris' offense level, the PSI enhanced Morris' offense level by, inter alia, (1) 12 points under U.S.S.G. § 2B1.1(b)(1)(G), based on the amount of the loss; (2) 2 points under U.S.S.G. § 2B1.1(b)(9)(C), because the offense involved sophisticated means; (3) 2 points under U.S.S.G. § 2B1.1(b)(10)(B)(i), (ii), because the offense involved the production or trafficking of unauthorized access devices or counterfeited access devices or authentication features; and (4) 4 points under U.S.S.G. § 3B1.1(a), because Morris organized or lead a criminal activity that involved five or more participants. PSI, ¶¶ 27, 29-30, 32.

Morris' guideline sentencing range was 120 to 150 months of imprisonment. PSI, ¶ 86. However, as to Count One of the information and Count Six of the indictment, Morris' maximum term of imprisonment was five years, and, as to Count Five of the indictment, his maximum term of imprisonment was ten years of imprisonment. PSI, ¶¶ 83-85.

Morris filed 23 objections to the PSI. R. 3, 2-5; addendum to PSI (which is attached to the PSI); Morris' objections to the PSI (which are attached to the PSI). In part, Morris objected to (1) the 12-point enhancement under § 2B1.1(b)(1)(G); (2) the 2-point enhancement under § 2B1.1(b)(9)(C); (3) the 2-point enhancement under § 2B1.1(b)(10)(B)(i), (ii); and (4) the 4-point enhancement under § 3B1.1(a). See addendum to PSI; Morris' objections to the PSI.

A stipulation between the Government and Morris, which is not in the record, resolved a number of Morris objections, see R. 3, 2-5. On July 18, 2007, the District Court either noted or overruled the remaining objections. See id. The District Court, then, sentenced Morris to 96 months of imprisonment as to Count Five of the indictment, and 60 months of imprisonment as to Count Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. R. 3, 6. (Although it is not addressed by the Court or in the record, the stipulation that the total relevant loss was \$82,511.48 resulted in a

four-point offense level reduction and a reduction in Morris' guideline sentencing range to 84 to 105 months of imprisonment. See R. 3, 2-3, 6.)

However, the written judgment indicates that the District Court sentenced Morris' to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. See R. 1, 28, 49; R. 2, 44, 65.

On July 27, 2007, Morris filed a notice of appeal. R. 1, 43-45; R. 2, 59-61.

B. Statement of the Facts

In this matter, the PSI found that Morris “was responsible for supplying counterfeit checks to at least twenty-five other individuals involved in this case; which included fraudulent bank account numbers printed on these counterfeit checks.” PSI, ¶ 30. Accordingly, the PSI enhanced Morris’ offense level by two points, pursuant to § 2B1.1(b)(10)(B)(i), (ii), based on a finding that the offenses underlying Counts Five and Six “involved the production or trafficking of any (1) unauthorized access device or counterfeit access device or (ii) [sic] authentication feature.” PSI, ¶ 30.

As noted above, Morris objected to the § 2B1.1(b)(10)(B)(i), (ii), because Michael Williams designed and created the counterfeit checks with a simple computer program and printer and because Williams provided the “access device.” See addendum to PSI; Morris’ objections 10-11 (objecting to PSI, ¶¶ 29-30). The District Court overruled these objections “for reasons stated . . . in the probation office report.” R. 3, 3-4.

As the PSI noted, the offenses underlying Counts Five and Six “involved [Morris] . . . supplying counterfeit checks to at least twenty-five other individuals involved in this case for the purposes of these checks being cashed” and that the checks “had been produced reportedly by” Morris as paychecks.” PSI, ¶ 29.

Further, the PSI, although conceding that “no device making equipment was discovered by agents during the course of the investigation of this offense,” “determined that [Morris] . . . was responsible for supplying counterfeit checks . . . which included fraudulent bank account numbers printed on these counterfeit checks,” which merited the two-point, § 2B1.1(b)(10)(B)(i), (ii) enhancement.

SUMMARY OF THE ARGUMENT

For the reasons set forth herein, the District Court committed clear error when it adopted the presentence investigation report's two-level sentencing enhancement pursuant to § 2B1.1(b)(10)(B)(i), (ii) and based Morris' offense level and sentence on this enhancement. Specifically, under relevant case law, the cashing of counterfeit checks was not sufficient to justify the two-level sentencing enhancement pursuant to § 2B1.1(b)(10)(B)(i), (ii).

Further, for the reasons set forth herein, the District Court committed clear error when it, in its written judgment, sentenced Morris to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. Specifically, by sentencing Morris to 96 months of imprisonment as to Count Six of the indictment and as to Count One of the information, the District Court sentenced Morris in excess of the statutory maximum for the statutes underlying said counts.

Accordingly, Morris respectfully submits (1) that this Court should vacate his sentence; and (2) that this Court should remand this matter for the further proceedings consistent with this Court's opinion.

ARGUMENT

ISSUE 1: The District Court committed clear error when it enhanced Morris' sentence, pursuant to § 2B1.1(b)(10)(B)(i), (ii), based on a finding that the offenses underlying Counts Five and Six involved the production or trafficking of unauthorized access devices or counterfeit access devices or authentication features.

A. Standard of Review

In United States v. Williams, 520 F.3d 414, 422 (5th Cir. 2008), petition for cert. filed, (May 27, 2008) (No. 07-11169), this Court noted that it:

reviews the district court's findings of fact at sentencing for clear error, and its application of the sentencing guidelines de novo. A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole. The district court may consider any relevant evidence, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(internal quotation marks and citations omitted).

B. Legal Analysis

In United States v. Hughey, 147 F.3d 423, 435-36 (5th Cir.) (footnotes omitted), cert. denied, 525 U.S. 1030 (1998), this Court stated that

Hughey used the account numbers to originate a transfer solely by paper instrument. Hughey did not use the subject account numbers independently to gain account access. Indeed, Hughey merely presented bad checks with those numbers to unsuspecting third parties in order to defraud those organizations into giving him money back in exchange for the instruments. We are not

persuaded that Hughey’s mere possession of the numbers, at least without additional evidence demonstrating the possibility of an additional use, is sufficient to overcome the express statutory provision excluding his conduct from the ambit of [18 U.S.C.] § 1029.

Accord United States v. Childs, 2006 WL 1307923, at *1, 173 F. App’x 360 (5th Cir. May 10, 2006) (noting that the Government conceded “that the district court erred in imposing a two-level sentencing enhancement pursuant to U.S.S.G. § 2B1.1(b)(10)(B)(i), based on the use of fictitious account numbers on checks created by Childs”) (citing Hughey, 147 F.3d at 433-36).

In this matter, the PSI found that Morris “was responsible for supplying counterfeit checks to at least twenty-five other individuals involved in this case; which included fraudulent bank account numbers printed on these counterfeit checks.” PSI, ¶ 30 (emphasis added). Accordingly, the PSI enhanced Morris’ offense level by two points, pursuant to § 2B1.1(b)(10)(B)(i), (ii), based on a finding that the offenses underlying Counts Five and Six “involved the production or trafficking of any (1) unauthorized access device or counterfeit access device or (ii) [sic] authentication feature.” PSI, ¶ 30.

For the reasons set forth in Hughey, 147 F.3d at 433-36, as applied in Childs, 2006 WL 1307923, at *1 (noting that the Government conceded “that the

district court erred in imposing a two-level sentencing enhancement pursuant to U.S.S.G. § 2B1.1(b)(10)(B)(i), based on the use of fictitious account numbers on checks created by Childs”), the mere fact that counterfeit checks supplied by Morris contained fraudulent account numbers was insufficient to support the two-level, § 2B1.1(b)(10)(B)(i), (ii) sentencing enhancement. Accordingly, Morris respectfully submits that the District Court committed clear error when it adopted the PSI’s two-level, § 2B1.1(b)(10)(B)(i), (ii) enhancement.

ISSUE 2: The District Court committed plain error when it sentenced Morris to 96 months of imprisonment as to Count One of the information and as to Count Six the indictment.

A. Standard of Review

In United States v. Sias, 227 F.3d 244, 246 (5th Cir. 2000), this Court found that, “because a sentence which exceeds the statutory maximum is an illegal sentence and therefore constitutes plain error, our review of the issue presented in this appeal will be de novo.”

B. Legal Analysis

As noted above, the District Court, at the sentencing hearing, sentenced Morris to 96 months of imprisonment as to Count Five of the indictment, and 60 months of imprisonment as to Count Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. See R. 3, 6. However, the written judgment indicates that the District Court sentenced Morris to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently. See R. 1, 28, 48; R. 2, 44, 65.

As noted above, as to Count One of the information and Count Six of the indictment, Morris’ maximum term of imprisonment was five years, and his

maximum term of imprisonment as to Count Six of the indictment was ten years. PSI, ¶¶ 83-85; see 18 U.S.C. § 371, 18 U.S.C. § 513, 42 U.S.C. § 408(a)(7)(B).

Accordingly, the District Court erred to the extent that it intentionally sentenced Morris above the maximum term of imprisonment for Count Six of the indictment and for Count One of the information. Alternatively, the District Court made an clerical error when completing the written judgment in this matter, which error could be remedied on remand.

Therefore, Morris respectfully submits that the District Court committed clear error in its written judgment when it sentenced Morris' to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently.

CONCLUSION

For the above reasons, the defendant-appellant, CORE L. MORRIS, respectfully requests that this Court (1) find that the District Court committed clear error when it adopted the PSI's two-level sentencing enhancement pursuant to § 2B1.1(b)(10)(B)(i), (ii) and when it based Morris' offense level and sentence on this enhancement; (2) find that the District Court committed plain error in its written judgment when it sentenced Morris to 96 months of imprisonment as to Counts Five and Six of the indictment and as to Count One of the information, which sentences were to be served concurrently; (3) vacate Morris' sentence based on these errors; and (4) remand this matter to the District Court for further proceedings in light of this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DOUGLAS LEE HARVILLE, certify that today, August 26, 2008, two copies of the brief for appellant, an electronic copy of the brief, a copy of the record excerpts, and the official record in this case, consisting of TWO volumes of the pleadings, ONE volume of transcripts, TWO volumes of supplemental record, ZERO exhibit folders, and ZERO sealed envelopes of exhibits, was served upon AUSA Josette Louise Cassiere, opposing counsel, by hand-delivery to her office at United States Courthouse, 300 Fannin Street, Suite 3201, Shreveport, Louisiana 71101-3068.

As per this Court's May 21, 2008, correspondence to the undersigned counsel, the copy of the PSI released to the undersigned counsel was returned to the Court and was not forwarded to opposing counsel.

Douglas Lee Harville #27235