U.S. 2nd Circuit Court of Appeals

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UNITED STATES OF AMERICA,

Appellee,

v.

ABRAHAM McLEOD,

Defendant-Appellant.

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This criminal appeal merits a brief opinion primarily to make clear the proper method for imposing sentences on multiple counts where the total punishment sought to be imposed by the sentencing judge exceeds the statutory maximum sentence on any one count. Abraham McLeod appeals from the December 3, 1999, judgment of the District Court for the Southern District of New York (Colleen McMahon, District Judge) sentencing him to consecutive sentences totaling 121 months after he pled guilty to five counts of income tax violations. On appeal, McLeod contends: (1) that the District Court failed to apply the standard of proof beyond a reasonable doubt in determining his relevant conduct, which enhanced his adjusted offense level, (2) that the court improperly calculated his adjusted offense level by denying him a three-level reduction for acceptance of responsibility and adding a two-level increase for obstruction of justice, and (3) that the court unlawfully ordered his sentences to run consecutively. We reject all of these contentions, but conclude that the sentencing judge's method of achieving consecutiveness was partially incorrect, even though the total punishment imposed was correctly determined. We therefore affirm the total 121-month sentence, but modify the sentences on the five counts to conform to the requirements of the Sentencing Guidelines, and affirm the judgment as modified.

Facts

McLeod operated McLeod's Tax Service, a tax-return preparation firm that offered its customers assistance in filing fraudulent income tax returns. McLeod and employees acting at his direction completed customers' tax returns that listed, among other things, non-existent or falsely inflated child care credits and charitable and other deductions. McLeod also falsified answers on clients' audit questionnaires and provided audited clients with fraudulent documents to substantiate their returns. The Internal Revenue Service calculated that the tax loss caused by McLeod's various schemes was $7,578,925. This sum comprised $340,867, determined by IRS fraud agents to be the tax loss for a group of 46 returns, and $7,238,058, determined by an IRS civil audit to be the tax loss for 2,866 other returns.

Pursuant to a plea agreement, McLeod pled guilty to a five-count information. Count One charged assisting in the preparation of the 46 fraudulent tax returns, in violation of 26 U.S.C. § 7206(2), and each of Counts Two through Five charged obstructing the administration of the tax laws with respect to one false tax return, in violation of 26 U.S.C. § 7212(a).

The Government sent McLeod a so-called Pimentel letter, see United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991), explaining its belief that the base offense level should be 22, see U.S.S.G. §§ 2T1.4(a)(1), 2T4.1 (tax loss between five and ten million dollars), plus two levels for being in the business of preparing tax returns, see id. § 2T1.4(b)(1)(B), and an additional four levels for his organizer role, see id. § 3B1.1(a), minus three levels for acceptance of responsibility, see id. § 3E1.1(a), for an adjusted offense level of 25. The letter cautioned that the Government would oppose a reduction for acceptance of responsibility "[s]hould the defendant falsely deny or frivolously contest relevant conduct for which he is accountable under U.S.S.G. § 1B1.3."

At the plea allocution, McLeod acknowledged that he had helped his employees prepare tax returns containing fraudulent deductions and that he had signed off on forms that his employees prepared, knowing them to contain false information. He "took responsibility for everything" that was on the fraudulent tax forms. He also conceded that he concocted receipts for his customers and assisted them in filing false questionnaires in response to audits. Judge McMahon accepted McLeod's guilty plea, but only after cautioning him that "[t]here will be the possibility of a consecutive sentence here" and ensuring that he understood what that meant.

At the sentencing hearing, however, McLeod challenged the inclusion of the tax loss resulting from the civil audit and disclaimed responsibility for the false returns covered by the audit. He testified that the willingness of his employees to claim false deductions could have only resulted from a misunderstanding. The Government rebutted McLeod's claim with the testimony of an IRS agent who testified that the employees told him that McLeod taught them how to prepare returns: to assign the client a refund that is approximately half of their tax due, to give clients charitable deductions equal to approximately ten percent of their income, and to use names of child care providers from a list McLeod supplied, names unknown to the taxpayers.

Judge McMahon found that McLeod's testimony at the sentencing hearing was false, denied him a reduction for acceptance of responsibility, and added two levels for obstruction of justice. She also included the $7.2 million tax loss discovered by the civil audit as relevant conduct. This gave McLeod an adjusted offense level of 30,[1] which in Criminal History Category III yielded a sentencing range of 121-151 months. The Court then sentenced McLeod to 121 months, the bottom of that range.

About a week later, the Court endeavored to correct the sentence to remedy the initial failure to apportion the 121 months of imprisonment among the five counts of conviction, each of which carries a three-year statutory maximum. The court apportioned the 121-month sentence as follows: 36 months on Count One, 22 months on Count Two, and 21 months on Counts Three through Five, with all sentences to run consecutively.

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