

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) NO. S1-4:03CR00707 ERW
)
 ROBERT C. SCHULTE,)
)
 Defendant.)

**DEFENDANT’S OBJECTIONS AND MEMORANDUM
REGARDING PROPOSED RESTITUTION ORDER**

By leave of Court, Defendant Robert C. Schulte submits the following Objections and Memorandum of Law prior to the Court’s entry of a final Order of Restitution.

BACKGROUND

Pursuant to a plea agreement, Defendant entered a plea of guilty to an Information charging one count of wire fraud in connection with mortgage transactions involving a single property located at 2644 Tennessee Avenue. Defendant’s criminal conduct in connection with that charge involved his signing false names to purported leases on other property owned by the borrower to support the borrower’s loan application on the Tennessee property. At the sentencing hearing the Government asserted that the “actual loss” to the lending institution on this transaction was \$25,000, but also asserted that Defendant’s relevant conduct for sentencing purposes should be closer to \$1.5 million.

After a lengthy sentencing hearing, the Government asserted that Defendant’s “relevant conduct” should be based on losses for forty-five separate transactions totaling \$1,412,907.78 (Gmt. Ex. 791). The Court at sentencing apparently agreed with the Government and indicated that it found that the losses total for relevant conduct purposes under the now “advisory”

Sentencing Guidelines was “between \$800,000 and \$1.5 million.” However, the Court did not specify exactly what total loss it had found, nor did it specify how it had computed whatever total loss it had found.

Most importantly, for purposes of these objections, the Court indicated that it was inclined to order restitution to eighteen entities in various amounts totaling \$1,176,098.00 but again did not specify how losses attributed to certain victims were determined. It appears that the Court simply adopted the conclusions contained in the March 10, 2005 version of Presentence Investigation Report (¶. 29, 80), without requiring the Government to produce any evidence to support these conclusions particularly with regard to losses of specific alleged victims for restitution purposes.

The Presentence Investigation Report lists twenty separate entities and amounts of losses for eighteen of those entities and states without any further elaboration: “a list of victims and addresses is being maintained by the U.S. Attorney’s Offices. **According to the Government,** the loss amounts which have been determined thus far total \$1,176,098.80.” (¶80, Emphasis Supplied) The Court has indicated that it intends to enter a restitution order in that amount requiring payment to the eighteen entities designated. Defendant, as he did in his original objections to the PSR, disputes both the proposed amounts and the procedure employed to determine these amounts.

The only testimony or other evidence from representatives of lending institutions was the testimony of Mr. Jim Pechinery of Provident Bank and Mr. Patrick Bova of Mortgage USA, Inc. pertaining to loans made on properties located at 2930 McNair, 3219 Pennsylvania, 3317 Magnolia, 3717 Ohio, 4548 Virginia, 416 Wilmington, 2254 South Jefferson, 2404 Russell and 3147 Cherokee, a total two entities and nine properties.

No other witnesses were produced from any of the other lending institutions set out in the Presentence Investigation Report, and there was no competent evidence as to how much these other institutions lost as a result of the transactions asserted by the Government. In fact, several of the entities noted were not even the entities which made the loans. They may have subsequently purchased the loans (probably at a discount), but there was absolutely no competent evidence of this. Yet the Court indicated its apparent intent to simply adopt its loss findings on “relevant conduct” and apply the unproven conclusions of Government Counsel as set out in the PSR in formulating its Restitution Order.

EFFECT OF BOOKER ON SENTENCING & RESTITUTION

In view of the “remedial” opinion of Justice Breyer in United States v. Booker, 453 U.S. ____ (2005), which grants the Courts considerably more discretion at sentencing, Defendant does not take further issue with the Court’s determination as to the relevant conduct range.

However, Defendant does contest the application of a “relevant conduct” determination to an order of restitution under the MVRA. He asserts that this procedure is not consistent with the requirements of the Restitution Statute and the opinions interpreting it. Additionally, he asserts that, since the MVRA is still a mandatory directive, the Procedural and Constitutional rights recognized in Blakely v. Washington, 452 U.S. ____, 124 S.Ct.2531 (2004), as well as Justice Steven’s opinion in Booker, must be recognized and applied to restitution determinations even if these rights need not be strictly applied to determinations under the now “advisory” Sentencing Guidelines.

Defendant asserts that the recent Supreme Court opinions in Apprendi, Blakely and Booker are applicable to procedures under the Mandatory Victims Restitution Act simply because the Act is mandatory and not advisory. Unfortunately, this is an issue which, to

counsel's knowledge, has not yet been addressed by any Court in light of the decisions and opinions in Blakely and Booker. However, in United States v. Syme, 276 F3d 131 (3d Cir.2001) the Third Circuit rejected an Apprendi argument against an earlier restitution statute (the VWPA, 18 USC §3663), which was not mandatory. The Court found that restitution was a criminal sentence, but that Apprendi did not apply because that opinion dealt only with factors increasing the statutory maximum sentence. Since the Syme opinion, however, both Blakely and Booker have expanded Apprendi's reach to all sentencing factors which are to be applied mandatorily, not just those increasing the statutory maximum. Consequently, Blakely and Booker effectively change the rules for restitution procedures and require proof by competent evidence of the amount each alleged victim lost as a "direct and proximate result" of a defendant's "offense conduct." Such evidence was simply not presented in this case, and with respect to 36 of the 45 properties involved there was no testimony whatsoever from the entities alleged to be victims.

Arguably, Blakely and Booker may also require a jury trial in order to apply the MVRA. However, Defendant herein had signed a Blakely waiver consenting to trial by the Court, but reserving all other rights under Blakely including the right of confrontation. This right was not afforded to him since the Court relied on the PSR summary and did not require testimony from the alleged victims as to the amounts of their losses, the methods by which those losses were determined or the causes of those losses (with the exception of the testimony of Pechiney and Bova.) Consequently there was no evidence as to what losses were "directly and proximately caused" by defendant's offense conduct as is required for a Restitution order.

EFFECT OF PLEA AGREEMENT

Finally, it should be noted that Defendant's Plea Agreement does not alter this situation. Although acknowledging that Restitution could be based on conduct other than the specific count to which Defendant pled guilty, the plea agreement, states as follows:

The Defendant agrees to provide full restitution to the victim of all charges in the information and all relevant conduct loss as determined by the Court at sentencing, without regard to the count to which the Defendant has agreed to plead guilty **to the extent that such restitution is required by Section 3663A and this agreement shall not be interpreted to either expand or contract Defendant's liability under said section.** (Plea Agreement p. 17, Emphasis Supplied)

Consequently, Defendant has not agreed to pay restitution beyond that required by Section 3663A, and the limitations of that Section must be applied.

GENERAL OVERVIEW OF RESTITUTION LAW IN THIS CASE

Defendant asserts that the procedure used and Restitution Order contemplated by the Court would be erroneous and not consistent with the provisions of either the Mandatory Victims Restitution Act (MVRA), 18 USC §§3663A and 3664 or the Fifth, Sixth and Seventh Amendments of the United States Constitution and the case law construing those provisions in the context of federal sentencing.

Defendant again invites the Court's attention to the analysis of the restitution statutes by the Seventh Circuit in United States v. Randle, 324 F3d 550, 556 (7th Cir. 2003):

In United States v. Braslawsky, this Court applied the rule of Hughey and reversed a restitution order under the VWPS that included an amount of loss not directly attributable to the conduct for which the defendant was convicted. 951 F.2d 149, 152 (7th Cir. 1991). Under this interpretation, charged but unconvicted conduct cannot form the basis for an award of restitution. In fact, the United

States v. Menza, we noted that, under the VWPA, “Congress intended restitution to be precisely tied to the loss caused by the offense of conviction. Examination of the conduct constituting the commission of a crime only involves consideration of the conduct to which the Defendant plead guilty and nothing else.” 137 F.3d 533, 537 (7th Cir. 1998) (citations omitted); see also United States v. Scott, 250 F.3d 550, 553 (7th Cir. 2001) (noting that “relevant conduct” may not be the basis of a restitution award under the MVRA unless it is also “charged [convicted] conduct” or covered in a plea agreement).

See also the very recent opinion in United States v. Murry, No. 03-2413 (7th Cir.2005)(restitution may not be ordered for relevant conduct).

That restitution under the MVRA is limited to losses resulting from conduct of the Defendant which is charged in the indictment (or information) was also recognized by the Eighth Circuit in United States v. Ramirez, 196 F3d 895 (8th Cir. 1999). In that case the Court of Appeals reversed a Restitution Order based on fraudulent investment projects which were similar to those charged in the indictment but were, in fact, not charged. The same situation exists in this case.

First, the specific offense to which Defendant Schulte pled guilty was the substantive offense of wire fraud involving the false leases. He did not plead guilty to a conspiracy, and the Information does not charge him specifically with participating in any of the other fraudulent conduct alleged to have been done by Buyers Rep Realty or Green Valley Mortgage. The Information does not specifically assert Schulte’s illegal involvement in any illegal conduct other than his signing of false leases relating to the loan on the Tennessee Avenue property. Moreover, the “scheme conspiracy or pattern” set out in the Information was not an “element” of the offense to which Defendant Schulte pled guilty, which under Randle, supra, is necessary before restitution can be broadened to include losses resulting from such a scheme.

Secondly, the procedure followed in this case, in which the Court essentially accepted the representations and conclusions of Government Attorneys as to particular alleged losses of

particular alleged victims, is not consistent with either the specific language of the MVRA or the most recent pronouncements of the Supreme Court as to how sentencing factors must be pled and proven if those sentencing factors are to be mandatorily applied, as they are under the MVRA. As noted previously the Booker requirements must be applied to restitution orders because the mandatory nature of the MVRA is still in effect after the Booker “remedial” decision and additionally the MVRA itself (18 USC 3663) requires that disputes regarding the proper amount or type of restitution “Shall be resolved by the court by a preponderance of the evidence.”

Thirdly, Eighth Circuit opinions even prior the Apprendi, Blakely, Booker trilogy required that there be a far greater indicia of reliability of sentencing information then was present with regard to the restitution issues in this case. For example, Defendant again respectfully invites the Court’s attention to the very extensive discussion of due process requirements at sentencing hearings in the Court’s En Banc opinion in United States v. Wise, 976 F2d 393 (8th Cir. 1991) as well as the very thoughtful dissenting opinions in that case.

Writing for the majority, Judge Wollman stated: (at p. 404)

A “presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact.” Streeter, 907 F.2d at 791-92. The district court erred, then, in announcing that it would assume that the factual statements in Sexson’s presentence report were true and that it was defense counsel’s burden to prove that they were not, for “[o]nce a defendant objects to a factual allegation in the presentence report, the court must make ‘(i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.’” Grandados, 962 F.2d at 771 (citing Fed.R.Crim.P. 32(c)(D)). The district court’s announced course of action was in accordance with that which Judge Becker and Professor Orenstein have charged is a departure from the usual manner in which proposed hearsay evidence is treated: “Thus, in assessing admissibility of evidence in sentencing hearings, courts have turned the general approach to hearsay on its head. The hearsay is presumed reliable—the defendant has the burden of demonstrating others” 60 Geo.Wah.L.Rev. at 889. (Emphasis Supplied)

The dissenting and concurring opinions of Judges Arnold, Lay, McMillian and Beam are even more emphatic on the application of the right of confrontation in sentencing hearings. Although Wise did not involve restitution the pronouncements therein are, nevertheless, applicable to restitution determinations and seem to foreshadow Justice Steven's opinion in Booker. The bottom line is that restitution cannot be based on either a finding of relevant conduct or on conclusions set out in the PSR, as being the Government's contentions. There must be competent evidence presented and in this case there was no such evidence.

SPECIFIC OBJECTIONS TO PROPOSED RESTITUTION ORDER

Accordingly, Defendant asserts the following objections and arguments regarding the Restitution Order proposed by the Court.

1. Restitution Orders may not encompass losses beyond the "offense of conviction" which, in this case is the one loan transaction involved in the single count to which Defendant pled guilty and any conduct actually committed by Defendant which is part of the same transaction or scheme. Hughey v. United States, 495 U.S. 411 (1990); United States v. Randle, 324 F3d 550 (7th Cir. 2003).

2. Restitution cannot be based on findings relating to relevant conduct, or uncharged conduct absent a plea agreement to the contrary. United States v. Scott, 250 F3d 550 (7th Cir. 2001); United States v. Menza, 137 F3d 533 (7th Cir. 1998); United States v. Baker, 25 F3d 1452 (9th Cir. 1994). Defendant's plea agreement, although somewhat confusing, clearly limits his agreement to pay restitution "to the extent such restitution is required by Section 3663A" and is "not intended to either expand or contract Defendant's liability under said section." (Plea Agreement p. 17)

3. Title 18 USC §3664(e) provides that:

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.

However, in this case the Court did not impose upon the Government, and the Government did not sustain, its burden of proof as to the amount of loss suffered by each of the alleged victims or whether that loss was directly and proximately caused by the conduct of Defendant Schulte.

4. Under the Due Process Clause a Restitution Order, where there are contested issues, cannot be based on hearsay statements contained in the Presentence Investigation Report as to the identity of alleged victims and the extent of Defendant's liability. United States v. Wise, *supra*.

5. Restitution is limited to damages directly and proximately caused by the charged conduct and there was no evidence presented that all of the losses included in the restitution calculations contained in the PSR were caused by Defendant's conduct, either charged or uncharged. United States v. Murry, No. 03-2413 (7th Cir. January 3, 2005); United States v. Diamond, 969 F2d 961 (10th Cir. 1992). For example, the Government contends that Defendant Schulte is responsible for the entire loan balance of \$93,469.73 on property located at 3317 Magnolia, a property that was destroyed by arson in which Schulte was in no way involved. Surely this does not meet the "direct and proximate cause" criteria of the MVRA, yet the total loan, without reduction for property value, was apparently included in the restitution figure.

6. An order of restitution, unlike the "advisory" Sentencing Guidelines, is mandatory under the MVRA, which was not addressed in the "remedial" opinion in United States v. Booker, 453 U.S. _____ (2005). Therefore, the restrictions and requirements of Apprendi v. New Jersey,

530 U.S. 466 (2002) and Blakely v. Washington, 452 U.S. _____, 124 S. Ct. 2531 (2004) as well as Justice Stevens opinion in Booker, supra, must be applied to procedures involving restitution, except when waived. The only Blakely waiver submitted by Defendant was one permitting the Court, as opposed to a jury, to make sentencing determinations. Defendant did not waive, but, in fact, asserted his rights recognized in Blakely to have sentencing factors charged in the indictment or information and proven by competent evidence beyond a reasonable doubt, neither of which was done in this case with regard to restitution issues not addressed at the sentencing hearing. In fact, there was no evidence at all from lending institutions other than Provident Bank and Mortgage U.S.A. Inc.

7. To base a restitution order on conclusions submitted by the U.S. Attorney as to what victims lost and how much they lost as a direct and proximate result of Defendant offense of conviction is directly contrary to the basic holding in Booker as stated in the opinion of the Court written by Justice Stevens:

Accordingly we reaffirm our holding in Apprendi: any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by defendant or proved to a jury beyond a reasonable doubt. Slip. Opinion p. 20)

8. In view of the mandatory nature of restitution under the MVRA, the U.S. Supreme Court's recent opinion in Shepard v. United States, No. 03-9168 (March 71, 2005), further restricts the method of proving factors giving rise to a restitution order, such that mere summaries or opinions by the probation office or the U.S. Attorney cannot be the basis of restitution orders which, in effect, increase a Defendant's sentence, by requiring payments to individual entities. This is particularly true where there has been no competent evidence that

those entities suffered specific losses and that these losses were directly and proximately caused by Defendant's conduct as charged.

9. To the extent that Restitution is considered punishment and part of a criminal sentence the full panoply of rights recognized in Blakely v. Washington, supra, and Justice Steven's opinion in United States v. Booker, supra, must be applied and those rights were not applied in this case in that: (a) there was no allegation in the charging information concerning restitution sought or the amounts or alleged victims for which it would be sought, (b) there was no competent evidence presented at the sentencing hearing with regard to actual losses and or the identities of the alleged victims on any properties other than those addressed by Mr. Perchiney and Mr. Bova, (c) the Court's findings and sentence of restitution was based primarily, if not exclusively, on the conclusions in the Presentence Investigation Report as to what the Government's assertions were, and not on evidence presented, (e) the Court did not make specific findings as to how it computed the specific losses of each victim or how it computed the total order of restitution which it proposed. As applied in this case, therefore, the MVRA is unconstitutional for the reasons set out in Apprendi, Blakely and Booker, Supra.

10. To the extent that restitution is a civil remedy, awarding damages to particular victims, the MVRA, it is unconstitutional on its face and as applied to this Defendant in that it deprives him of procedural rights guaranteed by the Fifth and Seventh Amendments and the Federal Rules of Civil Procedure, including, but not limited to, the right to a jury trial in civil cases, the right to pretrial discovery, depositions interrogatories and requests for production of documents, and, most importantly, the right to confront and cross-examine the claimants. The Court's application of the MVRA in the context of this case renders the statute unconstitutional

because it deprives Defendant of basic procedural rights prior to being subjected to a deprivation of property and monetary liability.

CONCLUSION

For each of the foregoing reasons the Court should not enter the Restitution Order which it proposed at sentencing and should order a separate hearing or refer this matter to a magistrate judge or special master consistent with the provisions of 18 USC §3664(d)(6) for such additional determinations as may be required with such procedural safeguards as are necessary to comply with the Supreme Court opinions cited above. Thereafter the Court should make specific factual findings regarding this restitution issues, including what acts of Defendant Schulte directly and proximately caused the losses found to have been sustained by each of the alleged victims.

Respectfully submitted,

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