

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Tom Ineze Emasealu

No. 17-20387 (5th Cir. Oct. 11, 2019) (per curiam) (unpublished) · No. No. 17-20387 · Decided October 11, 2019

SUMMARY

The United States Court of Appeals for the Fifth Circuit reviewed restitution orders imposed under the Mandatory Victim Restitution Act in Tom Ineze Emasealu's criminal case. The court reduced restitution owed to Amy and Joe Mikesell by \$84.75 for credit-monitoring costs incurred before the fraudulent schemes and affirmed the judgment as modified.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Per curiam; Jolly; Jones; Southwick
JURISDICTION	Federal
DECIDED	October 11, 2019
DOCKET	No. 17-20387
DISPOSITION	affirmed
PROCEDURAL POSTURE	Emasealu appealed restitution orders entered in the final judgment following his guilty-plea convictions for conspiracy to commit access-device fraud, access-device offenses, aggravated identity theft, and wire fraud.
STANDARD OF REVIEW	The court pretermitted deciding the standard of review for the temporal-scope challenge. A legal restitution order is ordinarily reviewed for abuse of discretion as to the propriety of a particular restitution amount, but an issue not preserved in the district court is reviewed for plain error.
PRECEDENTIAL VALUE	nonprecedential unpublished opinion
PARTIES	Tom Ineze Emasealu v. United States of America

TOPICS

[restitution criminal](#)[sentencing](#)[standard of review](#)[criminal procedure](#)[appellate procedure](#)

PRACTICE AREAS

criminal law

sentencing and restitution

appellate procedure

QUESTIONS PRESENTED

1. Whether restitution for the Mikesells' credit-monitoring costs incurred after the temporal scope of the crimes of conviction was illegal.
2. Whether restitution for credit-monitoring costs incurred before Emasealu committed the fraudulent schemes was erroneous and should be reduced.
3. Whether the restitution amounts were improper because they were not supported by separate documentation when the district court relied on the presentence report and sworn victim statements.

HOLDINGS

1. When a fraudulent scheme is an element of the conviction, restitution may include compensable losses caused by conduct outside the temporal scope of the particular acts of conviction. The restitution order for the Mikesells' post-offense credit-monitoring costs was therefore not shown to be illegal.
2. Restitution for the Mikesells' \$84.75 in credit-monitoring costs incurred before Emasealu committed his fraudulent schemes was erroneous and not harmless; the judgment had to be modified to reduce the restitution award by that amount.
3. The challenged restitution amounts were not improper merely because they lacked separate supporting documentation where the district court relied on a presentence report containing sworn victim statements and the defendant offered no evidence rebutting the report.

KEY QUOTATIONS

“Only when a fraudulent scheme is not an element of the conviction is the court prohibited from awarding restitution for compensable “losses caused by conduct that falls outside the temporal scope of the acts of conviction.”” (2)

“Ordinarily, “a PSR bears sufficient indicia of reliability to permit the sentencing court to rely on it at sentencing. The defendant bears the burden of demonstrating that the PSR is inaccurate; in the absence of rebuttal evidence, the sentencing court may properly rely on the PSR and adopt it.”” (3)

FACTUAL BACKGROUND

Emasealu pleaded guilty to multiple offenses involving fraudulent access devices, aggravated identity theft, and wire fraud. The district court relied on the presentence report and addenda, including sworn victim statements, in ordering restitution to Amy and Joe Mikesell, including credit-monitoring costs. The restitution award included \$84.75 for credit monitoring incurred before Emasealu committed the fraudulent schemes, while other challenged amounts were supported by the PSR materials.

PROCEDURAL HISTORY

The United States District Court for the Southern District of Texas entered a final judgment imposing restitution under the Mandatory Victim Restitution Act. Emasealu challenged restitution awarded to Amy and Joe Mikesell for credit-monitoring costs incurred outside the temporal scope of the offenses and challenged other restitution amounts as unsupported by documentation. The Fifth Circuit rejected the challenges in part, reduced the Mikesells' award by \$84.75 for pre-offense credit monitoring, and affirmed the judgment as modified.

DISPOSITION

affirmed

CASES CITED

- United States v. Rodriguez, 523 F.3d 519, 525 (5th Cir. 2008)
- United States v. Mathew, 916 F.3d 510, 516 (5th Cir. 2010)
- United States v. Teuschler, 689 F.3d 397, 400 (5th Cir. 2012)
- United States v. Westbrook, 858 F.3d 317, 327 (5th Cir. 2017)
- United States v. Ollison, 555 F.3d 152, 164 (5th Cir. 2009)
- United States v. Ayala, 47 F.3d 688, 690 (5th Cir. 1995)

OPINION

PER CURIAM.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals

Fifth Circuit

No. 17-20387

FILED

October 11, 2019

Summary Calendar

Lyle W. Cayce

Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOM INEZE EMASEALU,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CR-268-1

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM: *

Tom Ineze Emasealu appeals certain restitution orders imposed under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, in the final judgment entered on his guilty plea convictions for conspiring to commit access device fraud, 18 U.S.C. §§ 371, 1029(a)(2), (b)(2); possessing 15 or more unauthorized access devices, 18 U.S.C. § 1029(a)(3); using and trafficking in unauthorized access devices (11 counts), § 1029(a)(2); committing aggravated

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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identity theft (7 counts), 18 U.S.C. § 1028A; and committing wire fraud, 18 U.S.C. § 1343. We modify the judgment and affirm it as modified. Premitting determination of the standard of review applicable to it, we reject Emasealu's claim that an order of restitution to Amy and Joe Mikesell for credit monitoring costs incurred after the temporal scope of the crimes of conviction is illegal. See *United States v. Rodriguez*, 523 F.3d 519, 525 (5th Cir. 2008). Only when a fraudulent scheme is not an element of the conviction is the court prohibited from awarding restitution for compensable "losses caused by conduct that falls outside the temporal scope of the acts of conviction." *United States v. Mathew*, 916 F.3d 510, 516 (5th Cir. 2010) (internal quotation marks and citation omitted). Thus, Emasealu fails to show any error at all in connection with this claim. See *United States v. Teuschler*, 689 F.3d 397, 400 (5th Cir. 2012). But we agree with the parties that an order of restitution to the Mikesells in the amount of \$84.75 for credit monitoring before Emasealu committed his fraudulent schemes was erroneous and not harmless. See *United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017). Additionally, we reject Emasealu's claim that the judgment improperly includes certain restitution amounts because they were not supported by documentation. Emasealu failed to demonstrate that any part of his sentence was illegal. If a restitution order is legal, the propriety of a particular

restitution amount is ordinarily reviewed for abuse of discretion. *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009). But Emasealu's failure to raise a no-documentation objection to the restitution amounts in the district court relegates this claim to plain error review. See *id.* Emasealu cannot meet that standard because he fails to show any error at all. See *Teuschler*, 689 F.3d at 400.

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The district court relied on and adopted the presentence report (PSR) and its addenda; those documents included the sworn victim statements underlying the restitution awarded. Ordinarily, "a PSR bears sufficient indicia of reliability to permit the sentencing court to rely on it at sentencing. The defendant bears the burden of demonstrating that the PSR is inaccurate; in the absence of rebuttal evidence, the sentencing court may properly rely on the PSR and adopt it." *United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995) (internal quotation marks and citation omitted); see *Ollison*, 555 F.3d at 164. Emasealu offered no evidence to rebut the PSR's recommendation of these claims; consequently, his contentions about a lack of documentation are unavailing. See *Teuschler*, 689 F.3d at 400; *Ollison*, 555 F.3d at 164. We modify the judgment to reduce the restitution ordered to be paid to the Mikesells by \$84.75. See 28 U.S.C. § 2106.

AFFIRMED AS MODIFIED.

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