

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

United States v. Gallant

306 F.3d 1181 (1st Cir. 2002) · No. 01-2679 · Decided October 15, 2002

SUMMARY

The First Circuit held that the defendant did not forfeit his objection to the denial of an additional one-level reduction for acceptance of responsibility under the Sentencing Guidelines. Because the district court granted a two-level reduction and the defendant satisfied the criteria for the additional level, the court remanded for resentencing. The court also affirmed an order requiring the defendant to transfer or sell assets as necessary to satisfy restitution, holding that the order effectuated restitution rather than imposing criminal forfeiture.

CASE DETAILS

COURT	United States Court of Appeals for the First Circuit
WRITING FOR THE COURT	Lynch, Circuit Judge; Boudin, Chief Judge; Torruella, Circuit Judge
JURISDICTION	Federal
DECIDED	October 15, 2002
DOCKET	01-2679
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Gallant pleaded guilty to two counts of mail fraud, one count of fraudulent receipt of Social Security benefits, and one count of tax evasion. He appealed his sentence, challenging the denial of an additional one-level reduction for acceptance of responsibility and a supervised-release condition requiring the transfer or sale of assets to fund restitution.
STANDARD OF REVIEW	A preserved sentencing issue is reviewed under the applicable ordinary appellate standard; forfeited objections are reviewed for plain error. The court held that Gallant did not forfeit his objection. The restitution-related special condition was reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published First Circuit opinion; precedential.
PARTIES	Norman J. Gallant v. United States of America

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QUESTIONS PRESENTED

1. Whether Gallant forfeited his objection to the denial of the additional one-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) by failing to object after the district court announced its sentence.
2. Whether the district court lacked discretion to deny the additional one-level reduction after finding Gallant entitled to the two-level reduction under U.S.S.G. § 3E1.1(a) and finding that he satisfied the relevant condition of § 3E1.1(b)(2).
3. Whether a supervised-release condition requiring Gallant to transfer or sell assets necessary to make restitution was an improper criminal forfeiture rather than a permissible means of effectuating restitution.

HOLDINGS

1. Gallant did not forfeit his objection to the denial of the additional acceptance-of-responsibility level because he consistently asserted entitlement to a three-level reduction, neither party anticipated the two-level-but-not-three-level outcome, the government's position did not put him on notice of that possibility, and the sentencing judge did not invite further objections.
2. A district court lacks discretion to deny the additional one-level reduction when the defendant qualifies for the two-level reduction under U.S.S.G. § 3E1.1(a), has an offense level of at least 16 before the reduction, and satisfies a condition specified in § 3E1.1(b), including timely notification of an intent to plead guilty under § 3E1.1(b)(2).
3. An order requiring a defendant to transfer or sell assets necessary to make restitution is not a criminal forfeiture when it effectuates a lawful restitution obligation; it is a permissible condition of supervised release within the district court's discretion.

KEY QUOTATIONS

“A district court lacks discretion to deny the additional one-level reduction if the defendant is found to have accepted responsibility under U.S.S.G. § 3E1.1(a) and has complied with the conditions specified in U.S.S.G. § 3E1.1(b)(2).” (1181)

“On balance, given the facts here, we think it simply would be unfair and unwise as a matter of policy to hold that Gallant forfeited the argument.” (1187)

“This is not a case of asset forfeiture at all and the order was well within the district court's discretion over conditions of supervised release.” (1188)

FACTUAL BACKGROUND

Gallant fraudulently obtained approximately \$300,000 from the federal government through fraudulent HUD rental subsidies, Medicaid funds, Social Security disability benefits, and tax evasion. He pleaded guilty and agreed that the total loss was between \$200,000 and \$350,000. The district court granted a two-level acceptance-of-responsibility reduction but denied a third level based on concerns about Gallant's willingness to liquidate assets and make restitution, while also ordering restitution and requiring the sale or transfer of assets to satisfy it.

PROCEDURAL HISTORY

Gallant waived indictment and was charged by information. The district court granted a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), denied the additional one-level reduction under § 3E1.1(b), imposed a 24-month sentence, and ordered restitution and the sale or transfer of assets as a special condition of supervised release. The First Circuit held that Gallant had not forfeited his challenge to the acceptance-of-responsibility ruling, remanded for resentencing, and affirmed the restitution-related order.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for resentencing consistent with the opinion. The district court may determine where within the applicable guidelines sentencing range the defendant should be resentenced. The restitution order is affirmed on the merits.

CASES CITED

- United States v. Marroquin, 136 F.3d 220, 223 (1st Cir. 1998)
- Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 944 (1st Cir. 1995)
- Cyr v. B. Offen & Co., 501 F.2d 1145, 1155 (1st Cir. 1974)
- Palmer v. Hoffman, 318 U.S. 109, 119 (1943)
- Golden v. United States, 318 F.2d 357, 360 (1st Cir. 1963)
- United States v. Meserve, 271 F.3d 314, 323 (1st Cir. 2001)
- United States v. Keppler, 2 F.3d 21, 22-23 (2d Cir. 1993)
- United States v. Lilly, 13 F.3d 15, 17-18 (1st Cir. 1994)
- United States v. Ticchiarelli, 171 F.3d 24, 29-30 (1st Cir. 1999)
- United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001)
- United States v. Phaneuf, 91 F.3d 255, 262-63 (1st Cir. 1996)
- United States v. Hines, 196 F.3d 270, 273 (1st Cir. 1999)
- United States v. Olano, 507 U.S. 725, 732 (1993)
- Johnson v. United States, 520 U.S. 461, 467 (1997)
- United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir. 2000)
- United States v. Torres-Otero, 232 F.3d 24, 32-33 (1st Cir. 2000)

- Burns v. United States, 501 U.S. 129, 136 (1991)
- United States v. Walker, 234 F.3d 780, 786 (1st Cir. 2000)
- United States v. Canada, 960 F.2d 263, 266-67 & n.4 (1st Cir. 1992)
- United States v. Sharpton, 252 F.3d 536, 543 & n.8 (1st Cir. 2001)
- United States v. Brown, 235 F.3d 2, 4-5 (1st Cir. 2000)

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