APPENDIX

674 Fed.Appx. 712
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Artak OVSEPIAN, Defendant-Appellant.

No. 15-50338
|
Argued and Submitted December 6, 2016 Pasadena, California
|
Filed January 9, 2017

Synopsis
Background: Defendant was convicted in the United States District Court for the Central District of California, S. James Otero, J., on charges relating to health care fraud scheme, and he appealed.

Holdings: The Court of Appeals held that:

[1] district court did not engage in impermissible double counting when it applied two-level enhancement for number of victims;

[2] defendant's conviction for conspiracy to commit health care fraud could serve as predicate offense for crime of aggravated identity theft; and

[3] district court made sufficient factual findings when it declined to apply sentencing adjustment for acceptance of responsibility.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (3)

[1] **Sentencing and Punishment**
Base offense level

Number-of-victims sentencing enhancement served purpose distinct from punishing identity theft, and thus district court did not engage in impermissible double counting when it applied two-level enhancement for number of victims in sentencing defendant for aggravated identify theft. 18 U.S.C.A. § 1028A; U.S.S.G. § 2B1.6.

Cases that cite this headnote

[2] **False Pretenses**
Relation to other offenses

Defendant's conviction for conspiracy to commit health care fraud could serve as predicate offense for crime of aggravated identity theft, even though statute of conviction did not include health care fraud as enumerated predicate felony, where statute provided that conviction could be predicated on felony violation of "any provision contained in chapter 63 (relating to mail, bank, and wire fraud)," and health care fraud statute was included in that chapter. 18 U.S.C.A. § 1028A(c)(5).

Cases that cite this headnote

[3] **Sentencing and Punishment**
Use and effect of report

Sentencing and Punishment
Sufficiency

District court made sufficient factual findings when it declined to apply sentencing adjustment for acceptance of responsibility, where there was no factual dispute with presentence investigation report (PSR) requiring explicit resolution by district court.

Cases that cite this headnote

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding, D.C. No. 2:11-cr-01075-SJO-6

Attorneys and Law Firms

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Benjamin Lee Coleman, Coleman & Balogh LLP, San Diego, CA, for Defendant-Appellant

Before: D.W. NELSON and OWENS, ***713** Circuit Judges, and KORMAN, [*] District Judge.

MEMORANDUM [**]

Artak Ovsepian ("**Ovsepian**") appeals his sentence and restitution order following his conviction on charges relating to a health care fraud scheme. We affirm in part and reverse in part, vacate the sentence, and remand for resentencing. The restitution order is affirmed.

I. Aggravated Identity Theft and Double Counting

Ovsepian argues that his consecutive sentence for aggravated identity theft under 18 U.S.C. § 1028A bars two enhancements as impermissible double counting because they are based on the unlawful use of a means of identification. *See* U.S.S.G. § 2B1.6 cmt. n.2.

[1] First, we find that the district court did not engage in impermissible double counting in applying a two-level enhancement for number of victims under U.S.S.G. § 2B1.1(b)(2). The number-of-victims enhancement serves a purpose distinct from punishing identity theft: punishing offenders based on the number of victims. *See United States v. Holt*, 510 F.3d 1007, 1011–12 (9th Cir. 2007); *see also United States v. Smith*, 751 F.3d 107, 121 (3d Cir. 2014) ("Quite plainly, the victim enhancement under § 2B1.1(b)(2) is not an enhancement based on the use of a 'means of identification'; it is an enhancement based on the number of victims.").

Second, the record does not show, however, why the district court applied a sentence enhancement for unlawful use or possession of an authentication feature under U.S.S.G. § 2B1.1(b)(11)(A)(ii). We therefore vacate the sentence and remand for resentencing so the district court can explain why it applied this enhancement and address whether such application constituted impermissible double counting.

[2] There is one issue that does not relate to double counting that we address here. Pursuant to § 1028A(c)(5), aggravated identity theft may be predicated on a felony violation of "any provision contained in chapter 63 (relating to mail, bank, and wire fraud)." Ovsepian argues that this parenthetical has the effect of limiting predicate felonies under Chapter 63 to mail, bank, and wire fraud, and excludes other fraud offenses prescribed in that chapter, including conspiracy to commit health care fraud—the offense on which he was convicted. We have held, however, that Congress did not intend such parentheticals "be accorded a limiting effect rather than a descriptive one." *United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011). Instead, the parenthetical "merely provides a short-hand description of what several of the cited sections primarily cover." *Id.* at 1011 (citation omitted); *see also United States v. Abdur–Rahman*, 708 F.3d 98, 101–02 (2d Cir. 2013).

II. Sophisticated Means Enhancement

The district court did not err in applying the sophisticated means enhancement. We reject at the threshold the argument that the Sentencing Guidelines provision for a sophisticated means enhancement is unconstitutionally vague. Outside the First Amendment context, the void-for-vagueness doctrine requires a finding of vagueness as applied to the facts of the instant ***714** case. *Cavitt v. Cullen*, 728 F.3d 1000, 1005 (9th Cir. 2013). The facts of the conspiracy in this case showed that it was sophisticated, as it included use of fake and real doctors, covert transportation, and other means of operation.

We reject Ovsepian's argument that this enhancement was subsequently amended in a way that would have made it inapplicable because the amendment Ovsepian relies on is substantive rather than clarifying, and substantive amendments do not apply retroactively unless they are "specifically referenced in U.S.S.G.§ 1B1.10." *United States v. Diaz–Cardenas*, 351 F.3d 404, 409 (9th Cir. 2003). Nevertheless, as the United States Attorney concedes, the district court would have the discretion on remand to consider the amended enhancement in fashioning an appropriate sentence. *See* *United States v. Taylor*, 648 F.3d 417, 425 n.3 (6th Cir. 2011) (collecting cases).

III. Acceptance of Responsibility Adjustment

[3] We reject Ovsepian's argument that the district court did not make sufficient factual findings when it declined to apply an adjustment for acceptance of responsibility. There was no factual dispute with the presentence investigation report ("PSR") requiring an explicit resolution by the district court. *Cf.* *United States v. Carter*, 219 F.3d 863, 866–68 (9th Cir. 2000) (error where district court did not resolve objections to facts in the PSR necessary to find that defendant was a manager or supervisor, as required for enhancement). Moreover, our review of the record persuades us that the district court did not erroneously decline to apply the adjustment for acceptance of responsibility.

IV. *Apprendi* Claim

The district court did not err under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in ordering restitution without a jury calculation. We previously held in *United States v. Green* that *Apprendi* does not affect restitution. 722 F.3d 1146, 1149–1151 (9th Cir. 2013). Recent Supreme Court authority does not, as Ovsepian argues, undercut the rationales in *Green*.

First, *Paroline v. United States*, ––– U.S. ––––, 134 S.Ct. 1710, 1726, 188 L.Ed.2d 714 (2014), does not hold that restitution is solely punitive and so does not undermine *Green*'s rationale that the nature of restitution may sometimes be punitive, or remedial, or both. *Green*, 722 F.3d at 1150; *see also* *United States v. Alvarez*, 835 F.3d 1180, 1185 (9th Cir. 2016). Second, *Green* relied on the fact that restitution does not implicate a statutory maximum. *Id.* Thus, while restitution arguably serves to aggravate a criminal sentence, *see* *Alleyne v. United States*, ––– U.S. ––––, 133 S.Ct. 2151, 2162–63, 186 L.Ed.2d 314 (2013), it does not implicate a statutory minimum like in *Alleyne*. On the whole, there is not enough support to conclude that intervening authority has sufficiently undercut *Green*'s rationales to be "clearly irreconcilable" for this panel to overrule circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *United States v. Eyraud*, 809 F.3d 462, 471 (9th Cir. 2015) ("[*Green*] forecloses counsel's ... invocation of [*Paroline*].... We held in *Green* that [*Apprendi*] does not apply to restitution orders, and *Paroline* does not invalidate that holding.").

V. Conclusion

We affirm the district court on all issues except for whether its application of a sentence enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii) constituted impermissible double counting. On this issue, we ***715** vacate and remand. The restitution order is affirmed.

AFFIRMED in part, **REVERSED** in part, **VACATED**, and **REMANDED**.

All Citations

674 Fed.Appx. 712

Footnotes

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36–3.

695 Fed.Appx. 304 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Kenneth Wayne JOHNSON, M.D., Defendant-Appellant.

No. 16-50028
|
Submitted August 10, 2017 [*] Pasadena, California
|
Filed August 15, 2017

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding, D.C. No. 2:11-cr-01075-SJO-3

Attorneys and Law Firms

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***305** Devin Burstein, Attorney, Devin Burstein, Esq., San Diego, CA, for Defendant-Appellant

Before: CALLAHAN and OWENS, Circuit Judges, and GILLIAM, [**] District Judge.

MEMORANDUM [***]

Kenneth Wayne Johnson, M.D., appeals from his jury conviction and 108-month sentence for his participation in a multi-million dollar health care fraud scheme. As the parties are familiar with the facts, we do not recount them here. We affirm in part, vacate in part, and remand for resentencing. [1]

The district court was "well within its discretion" in "deferring consideration of [Johnson's] ineffective assistance claim to collateral review, when a complete record would be available." *United States v. Steele*, 733 F.3d 894, 895, 899 (9th Cir. 2013).

Viewing the evidence in the light most favorable to the prosecution, the jury reasonably could have found that the Medicare and Medi-Cal cards qualified as "identification documents" under 18 U.S.C. § 1028. *See* 18 U.S.C. § 1028(d)(3) (defining "identification document"); *see also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Moreover, Johnson's conviction also rested on possession of driver's licenses, which qualify as "identification documents." 18 U.S.C. § 1028(d)(3).

Regarding sentencing, the district court did not plainly err in applying a sophisticated means enhancement under U.S.S.G. § 2B.1(b)(10)(C). Further, as Johnson concedes in his reply brief, the district court also did not plainly err in applying a number of victims enhancement under U.S.S.G. § 2B.1(b)(2)(A).

However, as with Johnson's co-defendant, "the record does not show ... why the district court applied a sentence enhancement for unlawful use or possession of an authentication feature under U.S.S.G. § 2B1.1(b)(11)(A)(ii)." *United States v. Ovsepian*, 674 Fed.Appx. 712, 713 (9th Cir. Jan. 9, 2017). "We therefore vacate the sentence and remand for resentencing so the district court can explain why it applied this enhancement and address whether such application constituted impermissible double counting." *Id.*

AFFIRMED in part, VACATED in part, and REMANDED.

All Citations

695 Fed.Appx. 304 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Haywood S. Gilliam, Jr., United States District Judge for the Northern District of California, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 We grant both Johnson's Unopposed Motion for Judicial Notice of Related Court Records (Dkt. No. 35) and the Government's Unopposed Request for Judicial Notice (Dkt. No. 43).

739 Fed.Appx. 448 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Artak OVSEPIAN, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Kenneth Wayne Johnson, Defendant-Appellant.

No. 17-50231, No. 18-50026
|
Argued and Submitted August 10, 2018 Pasadena, California
|
Filed October 5, 2018

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding, D.C. No. 2:11-CR-1075-SJO-6, D.C. No. 2:11-CR-1075-SJO-3

Before: CALLAHAN and NGUYEN, Circuit Judges, and EZRA, [*] District Judge.

MEMORANDUM [**]

In these consolidated appeals, Appellants **Artak Ovsepian** ("**Ovsepian**") and Kenneth Johnson ("Johnson") raise two principal arguments: first, Ovsepian and Johnson argue that their consecutive sentences for aggravated identity theft under 18 U.S.C. § 1028A bar an enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii) as impermissible double-counting because the sentences are based on the unlawful use of a means of identification, *see* U.S.S.G. § 2B1.6 cmt. n.2; and second, Ovsepian contends that his 15-year sentence is substantively and procedurally unreasonable under 18 U.S.C. § 3553(a) because it created an unwarranted sentence disparity with Johnson. Johnson does not challenge the reasonableness of his sentence.

I. Enhancement Under U.S.S.G. § 2B1.1(b)(11)(A)(ii). We review the district court's interpretation of the Guidelines de novo, the district court's factual findings for clear error, and the district court's application of the Sentencing Guidelines to the facts of the case for abuse of discretion. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017).

Despite Appellants' argument to the contrary, under the facts in this case, Application Note 2 to section 2B1.6 did not bar the two-level authentication-feature enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii). Accordingly, the district court did not err in applying the two-level enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii).

II. Reasonableness of Sentence. In his last issue on appeal, Ovsepian argues that the district court procedurally erred because it did not state with sufficient specificity ***449** its reason for imposing a significantly disparate sentence from that of his co-defendant Johnson. Ovsepian also contends that his sentence is substantively unreasonable because of the significant disparity between his and Johnson's sentences.

Because Ovsepian failed to raise his procedural argument before the district court, we review the procedural reasonableness of his sentence for plain error. *United States v. Rangel*, 697 F.3d 795, 800–01 (9th Cir. 2012) ("Where a procedural sentencing error is raised for the first time on appeal, it is reviewed for plain error."). We review the substantive reasonableness of Ovsepian's sentence for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

Here, the record contains ample reasons for the disparity in sentences. The district court explained that it imposed a harsher sentence on Ovsepian because he and Johnson had engaged in different criminal conduct, all of which had occurred under Ovsepian's direction and leadership. As a result of his leadership role, Ovsepian received an enhancement, whereas Johnson received no such enhancement. Moreover, the district court explained that, unlike Johnson, Ovsepian acted as one of the managers of the scheme and participated in numerous aspects of the conspiracy. The district court also cited the fact that Ovsepian received a greater monetary benefit from the scheme.

The record reflects that the district court considered and rejected Ovsepian's arguments regarding the sentencing disparity and gave thoughtful attention to the criteria set forth in § 3553(a), including the need to avoid unwarranted sentencing disparities, before imposing the sentence. *See* 18 U.S.C. § 3553(a)(6). After completing this review, the district court imposed a sentence that was below the Guidelines range. Based on the record, we conclude that there was no procedural error and that the sentence is substantively reasonable.

For the reasons stated, we **AFFIRM**: (1) the district court's decision to impose a two-level enhancement under U.S.S.G. § 2B1.1(b)(11)(A)(ii); and (2) Appellant Ovsepian's sentence.

AFFIRMED.

All Citations

739 Fed.Appx. 448 (Mem)

Footnotes

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.