

Petitioner's Appendix A

United States of America
v.
China Hester

Decision of the United States
Court of Appeals for the Sixth Circuit
(unpublished)

Docket Number 19-3977

Issued August 19, 2020

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: August 19, 2020

Ms. Kimberly Robinson
Mr. Blake P. Somers

Re: Case No. 19-3977, *USA v. China Hester*
Originating Case No. : 2:19-cr-00086-1

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. Richard W. Nagel

Enclosure

Mandate to issue

FILED
Aug 19, 2020
DEBORAH S. HUNT, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 19-3977

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---------------------------|---|---------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | ON APPEAL FROM THE UNITED |
| v. |) | STATES DISTRICT COURT FOR |
| |) | THE SOUTHERN DISTRICT OF |
| CHINA HESTER, |) | OHIO |
| |) | |
| Defendant-Appellant. |) | |

ORDER

Before: NORRIS, GRIFFIN, and LARSEN, Circuit Judges.

China Hester challenges her sentence on the basis of ineffective assistance of counsel. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Pursuant to a written plea agreement, Hester pleaded guilty to false representation of a social security number, in violation of 42 U.S.C. § 408(a)(7)(B). The parties agreed that Hester's base offense level was 6 pursuant to USSG § 2B1.1(a)(2) and that 2 levels were added pursuant to USSG § 2B1.1(b)(1)(B). Hester agreed to pay restitution in the amounts of \$1,382 to LJ Ross, a collection account for American Electric Power, and \$2,928 to American Express. In the statement of facts attached to the plea agreement, the parties stipulated that Hester served a 50-month sentence for conspiracy to possess with intent to distribute 28 grams or more of cocaine base and began a four-year term of supervised release in February 2017. After her release, Hester falsely represented her social security number on four occasions: in addition to Hester's use of a false social security number on two rental applications, credit reports in her name but with false social

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security numbers reflected a collection account payable to LJ Ross for \$1,382 and “an American Express credit card opened in January 2019 with an all-time high balance of \$5,543 and a current balance of \$2,928.”

Consistent with the plea agreement, Hester’s presentence report set forth a base offense level of 6 and a 2-level increase for a loss more than \$6,500 but less than \$15,000. According to the presentence report, Hester obtained fraudulent credit in the total amount of \$6,925—\$1,382 from American Electric Power and \$5,543 from American Express. After a 2-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, Hester’s total offense level was 6, which, combined with her criminal history category of IV, resulted in a guidelines range of six to twelve months of imprisonment. The presentence report provided for restitution in the amounts of \$1,382 to LJ Ross and \$2,928 to American Express.

At sentencing, the district court confirmed that the parties had no objections to the presentence report. After considering the relevant sentencing factors under 18 U.S.C. § 3553(a), particularly Hester’s lengthy criminal history and the need to protect the public from further crimes by her, the district court sentenced her to time served—seven months at that point—and three years of supervised release and ordered her to pay \$4,310 in restitution. The district court imposed a consecutive eighteen-month prison term for Hester’s supervised release violation. Defense counsel did not raise any objection, but Hester herself objected to the sentence: “It’s still too many months. It should have been four to ten months. The dollar amount is still wrong. I’m still not going to get credit for the months I spent in jail according to the last case. He said consecutive.” Hester challenged the restitution amount in particular: “The American Express card that’s in the case, that was not mine. That was an authorized user card. I don’t know how that (sic) even got that I used it. I’ve never used the American Express card. The one for the electric bill is mine.” The district court reviewed the plea agreement and the presentence report and confirmed the restitution obligation of \$4,310—\$1,382 to LJ Ross and \$2,928 to American Express. Hester asserted that she wanted to appeal the restitution amount.

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This timely appeal followed. Seeking reversal of her sentence, Hester argues that she received ineffective assistance because counsel (1) failed to resolve issues about the loss amount that was attributed to her and resulted in an increased sentencing range and (2) failed to challenge the timeliness of the presentence report. Hester's eighteen-month sentence for her supervised release violation is not at issue in this appeal.

In the plea agreement, Hester waived the right to appeal her conviction and sentence. But Hester frames her appellate issues as claims of ineffective assistance of counsel, which are not barred by her appeal waiver. We “ordinarily . . . will not review a claim of ineffective assistance of counsel on direct appeal because the record is usually insufficient to permit an adequate review of such a claim.” *United States v. Gardner*, 417 F.3d 541, 545 (6th Cir. 2005). “An exception to this principle exists for cases in which the record is adequately developed to allow the court to properly assess the merits of the issue.” *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999). That exception applies to Hester's ineffective-assistance claims. To establish ineffective assistance of counsel, Hester must demonstrate (1) that counsel's performance was deficient—“that counsel's representation fell below an objective standard of reasonableness”—and (2) that counsel's deficient performance prejudiced her defense—“that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

Hester first argues that she received ineffective assistance because counsel failed to resolve issues at sentencing about the loss amount used to determine her offense level. Without American Express's loss, Hester asserts, her total loss amount would have been \$1382, her base offense level would not have been increased by two levels, and her guidelines range would have been two to eight months of imprisonment. As the government points out, Hester's admissions defeat her argument. In her plea agreement, Hester agreed to the two-level increase to her base offense level pursuant to USSG § 2B1.1(b)(1)(B), which corresponded to a loss more than \$6,500 but less than \$15,000. Hester also agreed to pay restitution in the amount of \$2,928 to American Express. In the statement of facts attached to the plea agreement, Hester stipulated that a credit report for her

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name and a false social security number “reflects an American Express credit card opened in January 2019 with an all-time high balance of \$5,543 and a current balance of \$2,928.” During the plea hearing, Hester affirmed under oath that she had read the plea agreement and the statement of facts, that she had discussed them with her attorney, and that she understood and agreed with them. In light of her admissions, Hester cannot demonstrate that counsel’s failure to pursue her belated objection to the loss amount fell below an objective standard of reasonableness. *See United States v. Laskowski*, 1 F. App’x 363, 367 (6th Cir. 2001); *United States v. Williams*, 176 F.3d 301, 312 (6th Cir. 1999).

Nor can Hester demonstrate prejudice. When Hester objected to the “dollar amount,” particularly the inclusion of the loss from the American Express credit card, the district court reviewed the plea agreement and the presentence report and confirmed the restitution obligation of \$4,310. Given that the district court considered and rejected her argument regarding the American Express credit card, Hester cannot show that there is a reasonable probability that her sentencing would have been different if counsel had pursued her challenge to the loss amount.

Hester next argues that she received ineffective assistance because counsel failed to object to the timeliness of the presentence report. Under Federal Rule of Criminal Procedure 32(e)(2), “[t]he probation officer must give the presentence report to the defendant, the defendant’s attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.” Hester asserts that the probation officer disclosed the presentence report on September 11, 2019, less than thirty-five days before her sentencing on October 9, 2019. The government contends that Hester effectively waived the thirty-five-day requirement by requesting an expedited timeline for preparing the presentence report and sentencing to obtain an earlier release from custody. Regardless, Hester cannot show prejudice. The presentence report was consistent with the plea agreement as to the guidelines calculation and the restitution amount. At sentencing, Hester affirmed that she had received a copy of the presentence report and that she had read the presentence report and discussed it with her attorney. Hester has failed to show that the shortened timeframe—twenty-eight rather than thirty-five days—affected her ability to challenge

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the presentence report or resulted in a more severe sentence. *See United States v. Marrero*, 651 F.3d 453, 473 (6th Cir. 2011).

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk

Petitioner's Appendix B

United States of America

v.

China Hester

Judgment of the United States

District Court for the Southern District

of Ohio

(unpublished)

Docket Number 2:19-cr-086-1

Filed October 9, 2019

UNITED STATES DISTRICT COURT

Southern District of Ohio

UNITED STATES OF AMERICA

v.

China Hester

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:19-cr-086-1

USM Number: 72038-061

W. Joseph Edwards, Esq.

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|--|----------------------|--------------|
| 42 U.S.C. §408(a)(7) | False Representation of a Social Security Number | 11/27/2017 | 1 |
| (B) | | | |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/9/2019

Date of Imposition of Judgment

s/James L. Graham

Signature of Judge

James L. Graham, Senior United States District Judge

Name and Title of Judge

10/9/2019

Date

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Time served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three (3) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall participate in a program of mental health treatment, including medication management, as directed by the U.S. Probation Office, until such time as the defendant is released from the program by the probation office. The co-payment is waived for these services.
- 2) The defendant shall pay \$4,310 in restitution at a rate to be determined by the Court.
- 3) The defendant shall provide the probation officer with access to any requested financial information and authorize the release of any financial information to the probation officer. The probation officer may share financial information with the U.S. Attorney's Office.
- 4) The defendant shall not incur new credit charges or open lines of credit without approval of the probation officer.

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | | | | |
|---------------|-------------------|-------------------------|-------------|--------------------|
| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
| TOTALS | \$ 100.00 | \$ 0.00 | \$ 0.00 | \$ 4,310.00 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss**</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|---------------------|----------------------------|-------------------------------|
| LJ Ross | \$1,382.00 | \$1,382.00 | |
| P.O. Box 1838 | | | |
| Ann Arbor MI 48103 | | | |
| American Express | \$2,928.00 | \$2,928.00 | |
| P.O. Box 981537 | | | |
| El Paso, TX 79998 | | | |
| | | | |
| | | | |

| | | |
|---------------|--------------------|--------------------|
| TOTALS | \$ <u>4,310.00</u> | \$ <u>4,310.00</u> |
|---------------|--------------------|--------------------|

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: China Hester
CASE NUMBER: 2:19-cr-086-1**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 4,410.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☒ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☒ Payment during the term of supervised release will commence within 30 (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Petitioner's Appendix C

Text of

42 U.S.C. §408(a)(7)(B)

Text of 42 U.S.C. § 408(a)(7)(B)

“Whoever -- . . .

(7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose-- . . .

(B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person;...

shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both, except that in the case of a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this subchapter (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination, such person shall be guilty of a felony and upon conviction thereof shall be fined under Title 18, or imprisoned for not more than ten years, or both.