IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	
v.	*	**Crim. No. DKC-02-0556**
BEVERLY KING, et al.	*	

* * * * *** * * * *

SENTENCING MEMORANDUM

Defendant herein, Beverly King, by and through her attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby provides the following Memorandum to aid this Court in Ms. King's sentencing:

I. INTRODUCTION

Beverly King and her husband, David King, are awaiting sentencing upon their guilty pleas to Counts Two and Three of the Indictment herein, in which they are charged with making false statements and declarations in connection with bankruptcy proceedings, in violation of 18 U.S.C. §152(3).

At present, there are three sentencing issues in dispute: (1) the amount of "loss" attributable to Mr. and Mrs. King under U.S.S.G. § 2F1.1; (2) whether Mr. and Mrs. King's offense levels should be reduced by three, instead of two levels, for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(b)(2)[1]; and (3) whether a criminal history Category III overrepresents the actual seriousness of Mrs. King's prior criminal record or the likelihood she will commit new offenses, and therefore, whether a downward departure to a Category II is appropriate under U.S.S.G. § 4A1.3. ¶ 5.

Each of these issues is separately discussed below.

II. ARGUMENT

---

[1] Assuming the Kings' offense level, after any increase for "loss" under § 2F1.1, is 16 or greater. *See* § 3E1.1(b).

A. <u>Loss Amount</u>.

Both the government and the probation office have adopted a "loss" figure of $161,225.45. This figure was arrived at by a Staff Attorney in the Bankruptcy Trustees Office by adding up the unsecured debts, as well as the undersecured portions of any secured debts, listed in the bankruptcy petitions filed by Mr. and Mrs. King. This methodology in arriving at a loss figure, however, is legally incorrect.

The reason is that a loss calculation under U.S.S.G. § 2F1.1 can only includes those losses *caused* by the defendant's fraudulent conduct at issue. *See United States v. Eidson*, 108 F.3d 1336, 1346-47 (11th Cir. 1997) ("there must be some factual basis for the conclusion that these losses were the result of fraud"), *cert denied*, 522 U.S. 899 (1997); *United States v. Daddona*, 34 F.3d 163, 170 (3rd Cir. 1994) (where a loss determination was set aside due to a lack of evidence that the "loss was due to the fraud of the [defendants]"); *also see United States v. Saacks*, 131 F.3d 540, 542-43 (5th Cir. 1997) (where, in a bankruptcy fraud case, the Court held that § 2F1.1 is concerned with "the amount of loss caused by the fraud.").

Therefore, a proper loss calculation under § 2F1.1 does not include monies owed creditors because a defendant-debtor was merely unable to pay back a loan or debt.

The fact is that Mrs. King's offense conduct - making misrepresentations on her bankruptcy petitions - did not cause the losses to the various creditors listed on those petitions. Instead, the creditors' losses occurred *before* the petitions were filed by virtue of Mr. and Mrs. King having defaulted on their debts and not having sufficient assets to cover them.

The fact that Mrs. King might have *subsequently* made misrepresentations on bankruptcy petitions concerning her true name and social security number, and whether she had filed bankruptcy petitions in the previous seven years, did not cause the losses to creditors in those cases where the debts were ordered discharged. Nor could these misrepresentations be expected to cause losses to creditors where the petitions were dismissed.

The logic in this assertion is apparent when considering the more egregious situation where

bankruptcy fraud is committed by a defendant who conceals assets and/or lies about the value of assets in order to avoid those assets being used to satisfy his or her debts. In such a case, if the value of the assets exceeds the debts, then the proper amount of loss is the amount of the debts listed in the petition. *See e.g., Saacks*, 131 F.3d at 541-42 (debts of $74,520.11, and concealed assets of $118,000, plus $75,000 recently received from the sale of a business).

On the other hand, where the amount of the debts listed in the petition is greater than the value of assets held by the defendant-debtor, the appropriate amount of loss for purposes of § 2F1.1 is the amount of the assets (equaling what the creditors could have collected). This is reflected in the ruling in *United States v. Wheeldon*, 313 F.3d 1070 (8th Cir. 2002), where the Eighth Circuit reversed the District Court's finding that the intended loss equaled the $139,528.71 listed in the defendant-debtor's bankruptcy petition and where the value of the concealed assets and income (according to the defendant-debtor) was $64,600.70. *Id.* at 1072.

In making its ruling, the *Wheeldon* Court observed:

> It belies reality to argue that Mr. Wheeldon, or a debtor similarly situated, intended to defraud his creditors of everything he owed them solely because he failed to disclose all of his (rather modest) assets. Suppose Mr. Wheeldon owed creditors a million dollars. He filed a petition in bankruptcy seeking a discharge, which would of course have covered the entire million. He represented that he had nothing. In fact, he did have a few hundred dollars worth of assets, which he concealed from the court. We cannot agree that the debtor's intention, in these circumstances, was to inflict a loss of a million dollars.

Id. at 1073.

Although the Fourth Circuit Court of Appeals has not had to decide a case with the precise issue as presented in *Wheeldon* or the instant case, its decisions are consistent with the approach of the Court in *Wheeldon*. In particular, in *United States v. Walker*, 29 F.3d 908 (4th Cir. 1994), the Court upheld a District Court's loss finding in excess of $200,000. Despite the fact that the claims of Walker's creditors totaled over $3 million, the Court of Appeals upheld the District Court's decision that the loss under § 2F1.1 was over $200,000 based on the defendant-debtor's admission he undervalued his assets by more than this amount.

In light of the foregoing, adding up Mr. and Mrs. King's unsecured debts and the

undersecured portions of their secured debts is not the proper methodology in arriving at a loss figure under § 2F1.1. Instead, only those losses which *resulted* from Mrs. King's offense behavior in this case can be counted. Absent such a showing, there should be no increase for loss under § 2F1.1.[2]

B. <u>Third Level for Acceptance of Responsibility</u>.

With regard to the appropriate reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(b)(2) provides:

> . . . if the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level sixteen or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by . . . timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by one additional level.

Courts have held that the reduction of one extra point under § 3E1.1(b) may not be denied once the requirements of the section have been met. *See United States v. Tello*, 9 F.3d 1119, 1124-28 (5th Cir. 1993); *United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir. 1997) (district court does not have discretion to award only two-point reduction once defendant has met requirements of § 3E1.1(a) or (b)); *United States v. Corrigan*, 128 F.3d 330, 337 (6th Cir. 1997) (the language of subsection (b) is absolute on its face and does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied).

The timeliness of a defendant's acceptance of responsibility is context specific. U.S.S.G. § 3E1.1, *comment.* (n. 6). The primary considerations, as suggested by the guideline, are whether the

---

[2] Even assuming some debts can be counted in calculating loss under § 2F1.1 (which is disputed), the loss figure cannot include debts which the Kings hoped or intended to pay back. This includes debts listed in their Chapter 13 filings, which did not seek a discharge of debts but a manageable payment plan (case #'s 90-40405, 93-10932, and 99-21932) and debts listed in petitions which were voluntarily dismissed by the Kings (case #'s 93-10932 and #93-14801). Excluded too from any loss figure should be debts which the Kings agreed to pay back outside of any discharge order, were disputed by the Kings as being owed, are reflected in more than one petition (so as to avoid double-counting), and amount to non-dischargeable debts.

government has been able to avoid needless trial preparation and the court has been able to allocate its resources efficiently. Other factors are the length of time that has passed before a defendant's notification of his intent to plea, the reasons for any delay requests, whether any pretrial motions were frivolous or filed for the purposes of delay, and whether the government had actually begun preparing for trial. *United States v. Kimple*, 27 F.3d 1409, 1413 (9th Cir. 1994).

Moreover, the third point for acceptance of responsibility cannot be denied merely because a defendant exercises a constitutional right. *Kimple*, 27 F.3d at 1413. Although "the government and the district court may expend time and resources in preparing and considering pretrial motions, these concerns must be balanced against the prevailing constitutional concerns." *Id.*

In the instant case, Mrs. King's motion hearing was held on March 20, 2003. Although some plea negotiations had taken place before then, after the motions hearing, the negotiations intensified, resulting in a signed a plea agreement on March 25, 2003, and a guilty plea on March 28, 2003. Trial had been scheduled for April 8, 2003.

Although the government may have begun some trial preparation by the time of the plea agreement, they certainly were able to avoid other, needless preparation. The Court too was able to avoid needless expenditure of time and ultimately was able to allocate its resources more efficiently as a result of Mrs. King's guilty plea.

For these reasons, Mrs. King is entitled to a reduction of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

C. <u>Overrepresentation of Criminal History Score</u>.

In the presentence report prepared herein, the Probation Office has scored four (4) criminal history points, placing Mrs. King in a criminal history category III. This is based on one (1) point each for two misdemeanor convictions in 1989, some 14 years ago, and two (2) points for Mrs. King being on probation from these convictions in 1990, at the time of relevant conduct considered under the Sentencing Guidelines.

A downward departure for overrepresentation of criminal history score is appropriate since

Mrs. King's criminal record, due to the age and nature of her prior crimes, is not "typical" of category III defendants. *See* U.S.S.G. § 4A1.3, ¶ 5, and the seriousness of her criminal history "most closely resembles that of most defendants" who fall within Criminal History Category II. *Id.*

In addition, the age and nature of Ms. King's prior crimes make it relatively unlikely that she will engage in future criminal conduct, *see* U.S.S.G. § 4A1.3, ¶ 5, and thus, a downward departure is also appropriate for this reason.

Respectfully submitted
JAMES WYDA
Federal Public Defender
for the District of Maryland

_____

MICHAEL T. CITARAMANIS (#03674)
Assistant Federal Public Defender
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Office: (301) 344-0600
Fax: (301) 344-0019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2003, a copy of the foregoing Sentencing Memorandum was delivered via courthouse mail to Daphene R. McFerren, Assistant United States Attorney, 6500 Cherrywood Lane, Room 400, Greenbelt, Maryland 20770, and United States Probation Officer Melissa A.C. Reynolds, 9200 Edmonston Road, Suite 200, Greenbelt, Maryland 20770; and first-class mail to Frederick J. Sullivan, Esq., McCarthy & Sullivan, 12427 Sadler Lane, Bowie, Maryland 20715.

_____
MICHAEL T. CITARAMANIS
Assistant Federal Public Defender