UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION
KNOXVILLE

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL R. WALLI, et al., Defendants.	)	Criminal No. 12-107-ART-(1),(2),(3) **MINUTE ENTRY ORDER**

*** *** *** ***

On January 28, 2014, at 9:00 a.m., the Court held a joint sentencing hearing in this matter. *See* R. 264. Jeffrey E. Theodore represented the United States. Christopher Scott Irwin and William P. Quigley represented defendant Michael R. Walli. Francis L. Lloyd, Jr., represented defendant Megan Rice. Greg Boertje-Obed appeared *pro se*, with Bobby E. Hutson, Jr., as elbow counsel. Cynthia Smith was the court reporter, and Angela Archer was the courtroom deputy.

I. Restitution

The Court first addressed the defendants' joint objection to ¶ 109 of their Presentence Investigation Reports ("PSRs"), which pegged the amount of restitution they owed the United States at $52,953. R. 261.

As an initial matter, the Court denied the defendants' argument that all facts tending to increase the amount of restitution must be submitted to a jury and established beyond a reasonable doubt. *See* R. 289. The defendants argued that restitution orders are subject to the Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), based on the

Supreme Court's reasoning in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). *See* R. 289. *Apprendi* held that the Sixth Amendment "reserves to juries the determination of any fact . . . that increases a criminal defendant's maximum potential sentence." *Southern Union*, 132 S. Ct. at 2348. *Southern Union* applied this rule to the imposition of criminal fines, holding that a jury must find beyond a reasonable doubt all facts that determine a fine's maximum amount. *Id.* at 2349, 2351–52. Suggestive though *Southern Union*'s reasoning may be, Sixth Circuit precedent binds the Court on this matter. The Sixth Circuit has held that restitution orders, though criminal punishment, are unaffected by the Supreme Court's ruling in *Apprendi*. *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005). As other circuits have concluded, nothing in *Southern Union* directly overrules this analysis. *See United States v. Green*, 722 F.3d 1146, 1148–51 (9th Cir. 2013); *United States v. Rebollo*, 506 F. App'x 544, 545 (9th Cir. 2013); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v. Wolfe*, 701 F.3d 1206, 1215–1218 (7th Cir. 2012). Moreover, as those courts explained, ordering restitution is significantly different from imposing a fine. Restitution has no cap and is limited to the amount of loss experienced by a victim. Accordingly, the Court—rather than a jury—remains responsible for determining the restitution amount in this case by a preponderance of the evidence. *See United States v. Elson*, 577 F.3d 713, 732 (6th Cir. 2009) (affirming a district court restitution finding based on a preponderance of the evidence).

The Court turned next to the United States' factual basis for the restitution amount. In support of this calculation, the United States submitted a Cost Impact Statement, which itemized the costs of repairing damage to the Y-12 Complex. R. 285-1. The United States also presented testimony by Rodney L. Johnson, Brigadier General (Retired), whom the

Court found to be very credible. Johnson, the Senior Vice President and Deputy General Manager of Security Operations and Emergency Services at the Y-12 Complex, prepared the Cost Impact Statement. At the hearing, he testified to the basis for the sums listed on the Cost Impact Statement.

The defendants objected to the restitution amount on several counts. First, the defendants argued that the government's failure to offer witness testimony by an employee or officer of the United States irreparably damaged its claim for restitution. But the relevance of Johnson's testimony is unquestionable, since preparing the Cost Impact Statement and overseeing repairs to the Y-12 Complex is his direct responsibility. Next, the defendants complained of the discrepancy between the damages initially claimed by the United States and those asserted in the Cost Impact Statement. However, the United States originally stated a lower sum in its attempt to justify felony charges and not as a comprehensive accounting of the injury it suffered due to the defendants' actions. Accordingly, there is no basis for binding the United States to its initial, incomplete estimate.

The defendants also pointed out that the United States may have received compensation for the damage from other sources, including its contractors. By statute, the Court may not consider the fact "that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source" when determining the amount of restitution. 18 U.S.C. § 3664(f)(1)(B). Any "offsets stemming from a victim's compensation from other sources are 'to be handled separately as potential credits against the defendant's restitution obligation—not as reductions in the amount of that obligation in the first instance.'" *United States v. Elson*, 577 F.3d 713, 733 (6th Cir. 2009). The Court therefore declined to factor outside compensation into its restitution calculation.

The defendants then requested a waiver of restitution on account of their inability to pay. But restitution is mandatory in this case, in which the defendants were convicted of a property crime pursuant to 18 U.S.C. § 2155(a). *See* §§ 3663A(a)(1) ("Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense."); 3663A(c)(1)(A) (including all offenses against property under Title 18). In a restitution order, the Court must order restitution "in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." § 3664(f)(1)(A). The Court may, however, take the defendants' financial resources into account when setting a payment schedule. § 3664(f)(2). Moreover, its restitution order may direct the defendant to make nominal periodic payments if the Court finds that "economic circumstances . . . do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments." § 3664(f)(3)(B); *accord* U.S.S.G. § 5E1.1(f). The Court explained its normal practice of ordering quarterly restitution payments for incarcerated defendants who otherwise have an inability to pay and granted the defendants' oral motion to adopt that practice in this case.

Finally, the defendants contended that the Court should exclude those portions of the witness's testimony that rely on hearsay evidence. During a restitution hearing, the Court may accept hearsay evidence so long as "the accused [is] given an opportunity to refute [hearsay evidence], and the evidence . . . bear[s] some minimal indicia of reliability in respect of defendant's right to due process." *United States v. Wallace*, 451 F. App'x 523, 528 (6th Cir. 2011) (citing *United States v. Silverman*, 976 F.2d 1502, 1512 (6th Cir. 1992))

(en banc) (internal quotation marks omitted). In this case, the Court found that the hearsay evidence did bear significant indicia of reliability. The witness, based on his ample experience in charge of security and operations at the Y-12 Complex, considered the cost figures that he gathered for the Cost Impact Statement to be reasonable. The defendants offered no evidence to the contrary.

For these reasons, the Court found that a preponderance of the evidence supported the United States' account of its damages and accepted the Cost Impact Statement. The Court then ordered restitution in the amount of $52,953 and waived interest on this sum due to the defendants' limited means.

II. Other Objections

The defendants first objected to the statement in each PSR that they "maliciously defaced and injured" a building. R. 273 at 1 (Rice's individual objections, which her co-defendants orally adopted). The defendants argued that this statement could cause unfair prejudice. R. 269 at 5. The Court sustained this objection on the ground that the PSRs should not have used the complaint's language after the Court held a trial in this matter.

The defendants next objected to the PSRs' failure to grant them each a two-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. R. 273 at 1; *see also* R. 258 at 7; R. 265 at 8. The decision whether to grant this reduction is "uniquely within the province of the District Court." *United States v. Kraig*, 99 F.3d 1361, 1372 (6th Cir. 1996); *accord* U.S.S.G. § 3E1.1 cmt. n.5. Relevant considerations include whether the defendants: (1) truthfully admitted the conduct comprising the offense of conviction and any additional relevant conduct for which they are accountable; (2) voluntarily surrendered to authorities promptly after the commission of the offense; or (3) timely manifested acceptance of

responsibility. § 3E1.1 cmt. n.1. In the Sixth Circuit, "[c]onviction by trial does not automatically preclude a defendant from consideration for a reduction based on acceptance of responsibility." *Kraig*, 99 F.3d at 1371; *accord* U.S.S.G. § 3E1.1 cmt. n.2. For example, where a defendant goes to trial to assert issues that do not relate to factual guilt, he may be entitled to a reduction. § 3E1.1 cmt. n.2. Here, the defendants allege that they did not contest any conduct-related factual issues and went to trial only to raise a necessity defense and assert their view that international law compelled their conduct. R. 269 at 6–8. That is, they only denied having the requisite intent for the charged offense.

The Court overruled this objection because the defendants failed to accept responsibility in any meaningful sense. The defendants showed no contrition for their actions (and still do not) and contested the government at every stage, via pretrial motions, a trial, post-trial motions, and objections to the PSRs. As the Sixth Circuit has noted, "sincere contrition" is an element of acceptance of responsibility. *United States v. Fleener*, 900 F.2d 914, 918 (6th Cir. 1990) (internal quotation marks omitted). Absent evidence that the defendants genuinely accept their culpability, the Court cannot properly apply the acceptance of responsibility reduction.

III. Departures

The Court then turned to the departures Boertje-Obed proposed. Defendants Rice and Walli stated during the hearing that they did not wish to argue in favor of any departures, but rather would present their arguments through a potential request for a variance. The Court adopted the Third Circuit's three-step process for determining the applicability of proposed departures. *See United States v. Ali*, 508 F.3d 136, 142 (3d Cir. 2007).

The Court first considered U.S.S.G. § 5K2.11, which permits a downward departure where the defendant committed criminal acts to avoid a perceived greater harm. Section 5K2.11 also provides that "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." For example, "providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected." *Id.* According to Boertje-Obed, the defendants' "symbolic and real act of transformation was done with the hope that people's eyes would be opened to the greater harm of the tens of millions of deaths, [and] massive numbers of cancers and other illnesses which are ongoing from the building and testing of nuclear weapons." R. 265 at 9. The Court concluded that this view, while genuinely held, did not justify breaking the law, particularly where Boertje-Obed had not established that the government possessed a lesser interest in deterring the defendants' conduct. Obviously, the government has a strong interest in protecting intrusion into its national security facilities and the like. The Court therefore denied Boertje-Obed's motion for a downward departure.

The Court next considered the applicability of U.S.S.G. § 5K2.0, which permits the Court to grant a downward departure where a defendant's conduct falls outside the heartland of the offense. Boertje-Obed argued that civilian peace protesters do not fit within the heartland of 18 U.S.C. § 2155(a), the sabotage offense. R. 265 at 9. To the Court's knowledge, however, since 1986 the government has employed that statute primarily to charge peace protesters. *See United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005); *United States v. Sicken*, 223 F.3d 1169 (10th Cir. 2000); *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986). And the heartland of the offense does not include terrorism, which is governed by separate statutes and guidelines enhancements. *See* 18 U.S.C. § 2332b; U.S.S.G. § 3A1.4.

At the hearing, the Court acknowledged that the Sentencing Guidelines provide the same base offense level for all individuals convicted under this statute, *see* U.S.S.G. § 2M2.3, and that this base offense level may punish defendants like Boertje-Obed disproportionately. Still, Congress and the Sentencing Commission have declined to modify the statute or the Sentencing Guidelines for decades, even in light of cases like this. For these reasons, the Court found that—for better or for worse—this case is within the heartland of the offense of conviction. Nevertheless, the Court remains concerned with the issue of defining an offense's heartland. The Court therefore will consider this in greater detail as part of its 18 U.S.C. § 3553(a) analysis when considering the nature and circumstances of the offense.

Finally, Boertje-Obed requested a downward departure pursuant to U.S.S.G. § 5H1.11, which provides that "[c]ivic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted." Courts should rely on discouraged factors such as these only in "exceptional cases." *Koon v. United States*, 518 U.S. 81, 95 (1996) (internal quotation marks omitted); *see also United States v. Madison*, 226 F. App'x 535, 551 n.9 (6th Cir. 2007) (internal quotation marks omitted) (holding that discouraged factors "were inappropriate for consideration under the mandatory guidelines, [but] they provide a justification for a sentence decrease under the now-discretionary guidelines"). But determining what qualifies as an "exceptional case" poses certain difficulties. In *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998), a district court granted a multi-level downward departure in large part because of the defendant's prior good works. The Sixth Circuit held that this departure was unreasonably large because the defendant's "community works . . . are not unusual for a prominent businessman." *Id.* at 792. In this case, the

question now becomes whether the Court should measure Boertje-Obed's good works against the population as a whole, against the group of Catholic Workers to which he belongs, or against some other subset of American society. The Court will take up this matter again at Boertje-Obed's sentencing hearing.

CONCLUSION

After ruling on the defendants' objections and motions for a downward departure, the Court adopted the PSRs (with the modification noted above) and heard testimony from four witnesses for the defense: Kathleen Boylan, Mary Evelyn Tucker, Wilfred Anderson, and John LaForge. Due to inclement weather, the Court and parties agreed that it would be best to delay the remainder of the sentencing hearing. The Court informed the parties that it had a number of questions for the sentencing phase. Some of those questions are laid out below.

Accordingly, and for the reasons stated on the record, it is **ORDERED** that:

(1) The defendants' sentencing hearings are **CONTINUED** until **Tuesday, February 18, 2014**. Since all joint issues are now resolved, the Court will consider each defendant individually for sentencing. Walli's sentencing hearing will begin at **9:00 a.m.** Boertje-Obed's sentencing hearing will begin at **10:30 a.m.** Rice's sentencing hearing will begin at **12:30 p.m.** The Court will begin where it left off at the end of the continued hearing, with the allocution and argument. As the parties agreed at the conclusion of the hearing, neither side may call any further witnesses.

(2) Boertje-Obed's motion for leave to file a document under seal, R. 266, is **GRANTED**.

(3) Rice's motion for a downward departure or variance, R. 270, and Boertje-Obed's motion for a downward departure or variance, R. 265, are **TAKEN UNDER ADVISEMENT**.

(4) The Court has been struggling with several issues. Since some of these issues require complex analysis of the guidelines and statutes in this case, the Court hereby requests a friend-of-the-court brief from Professor Douglas A. Berman of the Ohio State University Moritz College of Law. As a friend-of-the-court submission, his brief shall remain neutral with respect to the proper sentence for each defendant but shall tackle the following issues:

(A) Courts often define the heartland of an offense by the types of crimes that are charged under a particular statutory section. Should the Court define the heartland by (1) the United States' charging decisions (that is, the type of defendant or crime the United States charges under a particular statute) or (2) the intentions of Congress and the Sentencing Commission? The Court requests that Professor Berman analyze Congress's intent in passing 18 U.S.C. § 2155(a) and the Sentencing Commission's intent in promulgating U.S.S.G. § 2M2.3, along with the uses to which the United States has put these provisions. Finally, the Court welcomes any additional thoughts on how it should define the "heartland" of this offense. This can be important both in an analysis of the guidelines and the § 3553(a) factors.

(B) U.S.S.G. § 2M2.3 provides that all defendants convicted under 18 U.S.C. § 2155(a) shall have a base offense level of 26, regardless of the

gravity of their conduct. In what way, if any, can the Court account for the fact that § 2155(a) captures a broad range of conduct, from peace protests to treasonous acts?

(C) Against which subset of the American population should the Court measure the defendants in order to determine whether their prior good works are "exceptional"? *See Koons*, 518 U.S. at 95. Additionally, to what extent should a defendant's prior good works be considered within the § 3553(a) rubric as the "history and characteristics" of the defendant, rather than as the basis for a downward departure?

(D) The Court will consider Professor Berman's submission during its § 3553(a) analysis, and the parties should come prepared to discuss this matter. Thus, the Court would appreciate if Professor Berman can make his filing no later than **February 14, 2014.**

This the 28th day of January, 2014.

Signed By:
Amul R. Thapar AT
United States District Judge