

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 03-CR-23

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SCOTT LEE KIMBALL,

Defendant.

REPORTER'S TRANSCRIPT
(Sentencing Hearing: Order)

Proceedings before the HONORABLE MARCIA S. KRIEGER,
Judge, United States District Court for the District of
Colorado, commencing at 11:53 a.m., on the 1st day of December,
2003, in Courtroom 12, United States Courthouse, Denver,
Colorado.

APPEARANCES

JOSEPH URBANIAK, Assistant U.S. Attorney, 1225 17th
Street, Suite 700, Denver, Colorado, 80202, appearing for the
plaintiff.

KENNETH EICHNER, Attorney at Law, 1776 Lincoln Street,
Suite 1010, Denver, Colorado, 80203, appearing for the
defendant.

Proceeding Recorded by Mechanical Stenography, Transcription
Produced via Computer by Paul Zuckerman, 1929 Stout Street,
P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

1 (The following proceedings were had and entered of record
2 after the Court heard the arguments of counsel and statement of
3 defendant:)

4 THE COURT: Thank you.

5 The Court will announce the sentence it intends to
6 impose at this time; but, Counsel, you will have a final chance
7 to make any legal objections that you care to before I actually
8 impose the sentence.

9 We begin with the presentence report; and as I have
10 previously noted in the record, no finding is necessary as to
11 dispute between the Government or the defense with regard to
12 that report except as to the applicability of the enhancement
13 provided by Section 2B1.1(b) (8) pertaining to an upward
14 adjustment. And the Court has previously received an offer of
15 proof with regard to that by both the defense and the
16 prosecution and concluded based upon application of the
17 definition of "sophisticated means" that the upward enhancement
18 is not applicable in these circumstances.

19 With regard to all other aspects of the presentence
20 report, it does not appear that any further findings are
21 required; and the Court adopts the report with its various
22 addenda as the Court's findings.

23 Based on that report and the representations made
24 today, the Court finds that the Sentencing Commission guideline
25 applicable to the counts in the information to which the

1 defendant has pled guilty is Section 2B1.1; and pursuant to
2 Section 3D1.2(d), Counts 1 and 2 are placed in a one-count
3 group.

4 The guideline for violation of 18 U.S.C. Section
5 513(a) is Section 2B1.1 with a base offense level of 6.
6 Because the amount involved in the fraudulent checks was more
7 than \$5,000 but less than \$10,000, Section 2B1.1(b)(1)(B)
8 provides for a two-level increase.

9 In this case, the loss was \$8,287.95; and the parties
10 agree that that sum is currently being held by the Cordova
11 Police Department in Cordova, Alaska.

12 There are no victim, role, or obstruction adjustments;
13 and the Court has declined to make an upward adjustment in
14 accordance with Section 2B1.1(b)(1)(B). Therefore, the
15 adjusted offense level is 8. Actually, the declination that I
16 made was not 2B1.1(b)(1)(B) but 2B1.1(b)(8).

17 The defendant has accepted responsibility for his
18 conduct; and therefore, pursuant to section 3E1.1(a), the
19 offense level is reduced by two levels. This results in a
20 total offense level of 6.

21 The defendant's criminal history category is IV; and
22 in accordance with the guidelines, this results in an
23 imprisonment range of 6 to 12 months, a fine range of 500 to
24 \$5,000 and a supervised release range of two to three years for
25 each of Counts 1 and 2.

1 The Government has filed a motion for downward
2 departure in accordance with section 5K1.1 and points to at
3 least three instances in which the defendant has provided
4 substantial assistance in the investigation or prosecution of
5 another person who has committed an offense. These include
6 information with regard to charges brought against individuals
7 in Alaska and also here in Colorado.

8 The Court is troubled with regard to this motion that
9 the defendant seeks a downward departure based upon his acts in
10 revealing information about other people but his blatant
11 unwillingness to reveal information about his own financial
12 affairs in preparation of the presentence report. And the
13 Court is further troubled that his current financial
14 circumstances about which he will not disclose information
15 pertain to the fact that he has received substantial funds from
16 the FBI in assisting the Government with regard to all of these
17 actions.

18 This behavior smacks of an attitude of "I will do what
19 benefits me but I have no obligation to be forthcoming in
20 information that the Court requires in order to impose my
21 sentence." In other words, "I'm happy to turn other people in,
22 but I don't want to be held fully accountable for my own
23 behavior."

24 There is no exception that I am aware of under section
25 5K1.1 for refusing a downward departure where there has been

1 substantial assistance, even under these circumstances. And
2 therefore, the Court grants the motion for a downward departure
3 as requested by the Government because an appropriate showing
4 has been made.

5 That will reduce the period of incarceration from a
6 range of 6 to 12 months to 3 months, which means that the
7 defendant will serve no time because his presentence
8 incarceration or detention in Alaska exceeds the three-month
9 period.

10 But in light of the fact that Mr. Kimball is
11 disinclined to reveal the information that is required for
12 adequate evaluation of the appropriate sentence and in light of
13 the fact that Mr. Kimball has funds in the sum of \$20,000 that
14 are being held by third parties and in light of the fact that
15 he has received \$20,000 from the FBI for assistance in his
16 living expenses over the past months, the Court will impose the
17 maximum fine to be paid immediately upon release of the funds
18 by the third party.

19 The Court intends to impose an incarceration period
20 consistent with granting the Government's motion of six months;
21 to impose a fine in the amount of \$5,000, to be paid
22 immediately upon the release of the \$20,000 from the party
23 holding the \$20,000; to impose a restitution obligation to be
24 paid from said funds in the amount of \$8,287.94, to be paid
25 directly to Wells Fargo, and to further impose a supervised

1 release period of three years subject to the standard
2 conditions imposed by the Court with a special condition that
3 the defendant continue in his current course of mental health
4 treatment until released by the treating physician.

5 The Court will authorize the probation officer to
6 release psychological reports and the presentence report to the
7 treating professional, but the probation officer shall have no
8 role in determining the length, scope, or duration of the
9 treatment.

10 The Court also declines to waive interest on the fine
11 and is required to impose a mandatory assessment of \$100. I
12 believe it's on each count.

13 *THE PROBATION OFFICER:* Yes. That's correct, your
14 Honor.

15 *THE COURT:* So a total sum of \$200 to be paid
16 immediately.

17 In evaluating what sentence is appropriate under these
18 circumstances, the Court has taken into account the seriousness
19 of the offense and attempted to tailor a sentence that promotes
20 respect for law, not only the law that the defendant wants to
21 comply with but all the laws; a sentence that provides just
22 punishment, affords adequate deterrence to criminal conduct,
23 protects the public from further crimes of the defendant, and
24 provides the defendant with needed medical -- here
25 psychological -- treatment in the most effective manner.

1 Is there any further argument that counsel desire to
2 make?

3 MR. URBANIAK: No, your Honor.

4 MR. EICHNER: Court's indulgence.

5 (Discussion off the record between Mr. Eichner and
6 defendant.)

7 MR. EICHNER: No other objections, your Honor. The
8 only thing my client mentions is he wants to comply with
9 everything as fast as possible. And would the order to the
10 court -- or excuse me -- the order to go out that we would give
11 to the police in Alaska be an order to release all the funds to
12 the Clerk of the Court so they can immediately pay these
13 things? We just want to make sure the order is correct to take
14 care of your wishes as soon as possible.

15 THE COURT: No. It would not be an order directing
16 payment to the clerk of this court. It will be an order
17 directing payment directly to Wells Fargo.

18 MR. EICHNER: And for him to pay that \$5,000 fine
19 would -- can you also put in the order to release the remaining
20 funds to Mr. Kimball to pay the fine you just ordered?

21 THE COURT: We will -- I will direct in the judgment
22 that the remaining funds are to be released -- and we can do
23 this one of two ways. I can have the funds, the \$5,000 fine
24 paid directly to the designated recipient of the fine amount
25 from those funds, or they can be released to Mr. Kimball and he

1 can turn over the \$5,000.

2 Mr. Urbaniak, what's your position?

3 MR. URBANIAK: Probably the first option, your Honor,
4 to save Mr. Kimball some trouble and possible mischief.

5 THE COURT: Mr. Eichner?

6 MR. EICHNER: We would ask for the second; that all
7 remaining funds be turned over to Mr. Kimball. He's not going
8 to get any mischief. There is a microscope over his behavior.
9 He wouldn't do anything like that. But it would be easier to
10 get the remaining funds to him so he can pay the \$5,000 and any
11 other fines and costs.

12 THE COURT: And is the Cordova Police Department in
13 possession of the remaining funds?

14 MR. EICHNER: They are indeed.

15 THE COURT: And the total of it is \$20,000?

16 MR. EICHNER: 19,700 is the more accurate amount, I
17 believe.

18 MR. URBANIAK: I didn't mean to imply that he was
19 going to do anything wrong with the money. It's just something
20 could come up, like "all of a sudden my transportation broke
21 down," or "my wife needed an operation," or just something like
22 that, which could prevent it going --

23 MR. EICHNER: He'll pay that money within 24 hours
24 that he receives it.

25 THE COURT: All right. Then when I enter the

1 judgment, what I will do is direct that the Cordova Police
2 Department release the \$8,287.94 directly to Wells Fargo, the
3 remainder to be released and paid to Mr. Kimball. And I will
4 direct that the police department within 48 hours of the
5 release of funds confirm that with the probation department and
6 within 48 hours of the release -- now, we better make it 48
7 hours after receipt of that payment, Mr. Kimball will pay the
8 fine --

9 MR. EICHNER: Yes, your Honor.

10 THE COURT: -- failing which that will be a breach of
11 a condition of supervised release which will require you to
12 come back before me to determine whether I send you to jail.

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Any further argument?

15 MR. URBANIAK: No, your Honor.

16 MR. EICHNER: Nothing on behalf of the defense. Thank
17 you, your Honor.

18 THE COURT: Then pursuant to the factual findings that
19 the Court has previously made and in accordance with the
20 Sentencing Reform Act of 1984, it is the judgment of the Court
21 the defendant, Scott Lee Kimball, is hereby committed to the
22 custody of the Bureau of Prisons for a term of three months on
23 each count, to be served concurrently. The Court notes that he
24 has previously been detained in presentence confinement 412
25 days. The Court notes that although credit for time served is

1 determined by the Bureau of Prisons, it appears that the time
2 served exceeds by some substantial degree the term of
3 imprisonment imposed by this sentence.

4 The defendant shall be placed on supervised release
5 for a term of three years on each of Counts 1 and 2, the terms
6 to run concurrently.

7 While on supervised release, he shall not commit
8 another federal, state, or local crime; shall not illegally
9 possess any controlled substances; shall not possess a firearm
10 or destructive device, and shall comply with the standard
11 conditions adopted by this court.

12 It shall be a condition of supervised release that he
13 pay the fine according to the terms I shall specify and that
14 restitution be paid in accordance with the terms I shall
15 specify.

16 He shall refrain from the unlawful use of a controlled
17 substance and submit to one drug test within 15 days of
18 beginning on supervised release and at least two periodic tests
19 thereafter, and he shall continue in his current course of
20 mental health treatment until he is released by the treating
21 professional.

22 The Court authorizes the probation officer to release
23 psychological reports and/or the presentence report to the
24 treating professional for continuity of treatment.

25 It is the judgment of the Court that the Cordova

1 Police Department in Cordova, Alaska, who presently hold a sum
2 of approximately \$19,700, shall within 10 days of the date of
3 the judgment pay to Wells Fargo Bank of Alaska, Cordova Store,
4 Post Office Box 1250, Cordova, Alaska, 99574, the sum of
5 \$8,287.94 and that at such time the Cordova Police Department
6 shall release the remaining balance of the sum currently held
7 in their possession to the defendant, Scott Lee Kimball, and
8 immediately notify, certainly no later than 48 hours after the
9 release, that said sums have been disbursed in accordance with
10 this judgment by contacting the probation officer supervising
11 Mr. Kimball.

12 We will assume that 10 days is sufficient time from
13 the disbursement by the Cordova Police Department to
14 Mr. Kimball for him to deposit and pay his fine of \$5,000, and
15 that way we don't have to worry about when he precisely
16 receives the money. So it shall be the order of this court
17 that the Court imposes a fine on Count 1 and Count 2 treated as
18 a single count -- a fine of \$5,000, which is the maximum fine
19 that can be imposed here, and that this will be paid to -- is
20 it the Clerk of the Court?

21 *THE PROBATION OFFICER:* Yes, your Honor.

22 *THE COURT:* -- Clerk of this Court no later than 10
23 days after disbursement of funds by the Cordova Police
24 Department.

25 The fine shall bear interest, and it shall be a

1 condition of supervised release that the fine be paid in
2 accordance with this judgment.

3 In addition, the Court imposes the mandatory
4 assessment of \$100 per count, which is due immediately.

5 Have I missed anything?

6 MR. URBANIAK: Not that I can think of, your Honor.

7 Thank you.

8 THE COURT: Mr. Eichner?

9 MR. EICHNER: No.

10 THE COURT: Mr. Merlo?

11 THE PROBATION OFFICER: I believe that's fine, your
12 Honor. Thank you.

13 THE COURT: All right. We crafted this as we went
14 along; so if there is an error, I trust that Counsel and
15 probation Department will file an appropriate motion to amend
16 the judgment, if I've overlooked something.

17 Mr. Kimball, you are advised of your right to appeal
18 this sentence. If you desire to appeal, a notice of appeal
19 will be filed with the Clerk of the Court within ten days after
20 the entry of judgment, or the right to appeal will be lost. If
21 you are unable to afford an attorney for an appeal, I will
22 appoint one to represent you. If you so request, the Clerk of
23 the Court will immediately prepare and file a notice of appeal
24 on your behalf.

25 Is there any further business to bring before the

1 Court?

2 MR. URBANIAK: No, your Honor. Thank you.

3 MR. EICHNER: Nothing on behalf of the defense.

4 THE COURT: All right. Then consistent with the
5 manner in which we opened this proceeding, I'll direct
6 Mr. Zuckerman to prepare a transcript of the Court's findings
7 and judgment which ordinarily would be attached to the judgment
8 that will be entered and to provide Mr. Eichner with a copy of
9 those findings and conclusions so that he can determine whether
10 he wishes to file a motion to seal any part of the judgment.
11 That motion will be due to be filed with this court within 24
12 hours after Mr. Zuckerman's transmission of the transcript to
13 you, Mr. Eichner.

14 MR. EICHNER: I understand. We'll comply. Thank you.
15 And I'll give Mr. Zuckerman my card to make sure he has my
16 address.

17 THE COURT: All right. Then that concludes this
18 matter and we will stand in recess.

19 (Recess at 12:17 p.m.)

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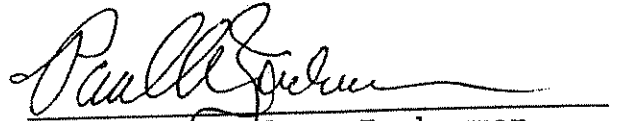
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REPORTER'S CERTIFICATE

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 2d day of December, 2003.


Paul A. Zuckerman