IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
DAVID E. NAPIER	:	No. 97-214

MEMORANDUM AND ORDER

J. M. KELLY, J. **JANUARY , 2001**

The Defendant, David E. Napier ("Napier"), pleaded guilty to four counts of bank fraud. Napier appealed the Court's sentence, and the United States Court of Appeals for the Third Circuit remanded his case back to this Court for action consistent with its opinion.

I. BACKGROUND

On October 27, 1997, Napier pleaded guilty to four counts of bank fraud in violation of 18 U.S.C. § 1344 (1994). The Court held a sentencing hearing for Napier on December 17, 1998, where it calculated the loss to the banks that Napier defrauded. The appropriateness of Napier's sentence depended in large part upon the measure of this loss. The Court determined that Counts III and IV resulted in negligible losses to Meridian Bank, and that Count II resulted in $13,933 of loss to Provident National Bank. Napier agrees that the Court properly calculated the loss to these parties in determining his sentence.

The loss suffered by the victim in Count I, however, is in

dispute. Count I involved submissions fraudulently made to an affiliate of Great Western Bank ("Great Western") in order to receive a $384,000 loan to purchase real property. Specifically, Napier submitted a false social security number, false salary and employer information, a false tax return, a false accountant letter, a forged letter of reference, a forged executive bonus letter, false earnings statement and a fraudulent residence.

After obtaining the fraudulently induced loan, Napier defaulted on the loan and Great Western foreclosed. As a result, the property securing the loan was scheduled for a forced sheriff's sale in 1995. Although the property had been appraised at $468,000 in 1990, the 1995 appraisal before the sheriff's sale estimated the property's value at only $414,000. Great Western obtained the property for $305,261, its lowest authorized bid and, apparently, the only bid made at the sale. More than one month after the sheriff's sale, on October 5, 1995, Great Western sold the property to EMC Mortgage Company ("EMC") for $307,500; EMC then sold the property to its current owners for $307,000 on May 2, 1997.[1]

At Napier's sentencing, the Court computed Great Western's loss by first determining the amount of the unpaid loan, $435,250. The Court arrived upon this number by combining the principal balance owed, $384,000, and the applicable costs, taxes

[1] These two figures were formerly unavailable to the Court.

and fees of $51,250.[2] Subtracting from the amount of the unpaid loan the value of the property Great Western recovered at the sheriff's sale, $305,000, the Court determined that the loss to Great Western totaled $130,250. Coupled with the $13,933 loss to Provident National Bank from Count II, the losses suffered by Napier's victims totaled $144,183.

This amount of total loss resulted in a seven point upward adjustment to Napier's base offense level of six. Pursuant to 18 U.S.C. § 3147 and U.S. Sentencing Guidelines Manual § 2J1.7, the Court also adjusted this base offense level upwards by three points because Napier committed the crimes while on release. Napier's total offense level therefore amounted to 16. Napier's Pre-Sentence Report indicated that he had six criminal history points, placing him in criminal history category III. Based on a total offense level of 16 and a criminal history category of III, the Sentencing Guidelines provided for a range of imprisonment of twenty-seven to thirty-three months. The Court sentenced Napier to thirty months imprisonment, five years supervised release, a special assessment of $200, and restitution of $16,000.

Napier appealed, contending that the Court should have used the appraised value of the property, either $468,000 or $414,000,

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[2] These amounts did not include any interest accrued on the loan, but did include: (1) foreclosure costs of $11,500 and $3,600; (2) property taxes of $22,400; (3) foreclosure fees of $3,500; and (4) legal expenses of $10,250.

instead of its purchase price at the sheriff's sale, $305,000.[3] The United States Court of Appeals for the Third Circuit remanded the case back to this Court for calculation of Great Western's loss in a manner consistent with United States v. Sharma, 190 F.3d 220, 229 (3d Cir. 1999), a case decided after Napier's sentencing.

IV. Discussion

The Federal Sentencing Guidelines assess fraud a base offense level of six, and increase the offense level in proportion to the magnitude of the loss suffered by the victims. U.S. Sentencing Guidelines Manual § 2F1.1. Courts should calculate the "actual loss" to a victim by taking "the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." U.S. Sentencing Guidelines Manual § 2F1.1, cmt. 8(b). The parties agree that the total losses on Counts II through IV amount to $13,933. There is also no dispute that the amount owed to Great Western totaled $435,250, the principal balance combined with applicable fees and taxes. The essential question before the Court is what amount Great Western recovered by virtue of the

[3] Napier also appealed the Court's denial of his Motion to Withdraw his guilty plea, which the Third Circuit affirmed.

sheriff's sale.

At that sale, Great Western paid approximately $305,000 for the property. In determining Napier's sentence originally, the Court used this figure as the amount recovered by Great Western. In an opinion authored after this Court sentenced Napier, however, the Third Circuit concluded that an appraisal value of property should be used in preference to the purchase price of that property paid by a creditor at a forced sale. United States v. Sharma, 190 F.3d 220, 229 (3d Cir. 1999). The Sharma decision does not, however, stand for the proposition that an appraisal value should always be used in preference to other, perhaps more reliable, valuations of property.

The Court is satisfied that the $307,500 paid for the property by EMC, a third party buying the property after the sheriff's sale, represents the most reliable measure of the property's value at the time of the loss suffered by Great Western. The $468,000 appraisal of the property in 1990 is too far removed to be a reliable measure of its value in 1995.[4] Unlike the amount paid by Great Western at the sheriff's sale, or the bank's appraisal preceding that forced sale, the $307,500 represents the result of an arm's length transaction between

[4] Moreover, the evidence indicates that the value of the property was in decline. Originally appraised at $468,000 in 1990, and at $414,000 by 1995, the property sold for $307,500 in 1995 and for $307,000 in 1997.

sophisticated parties. Such valuations of property, if available, should be used in preference to appraisals, which are, by definition, merely estimates of what property will cost in an arm's length transaction. That the property's current owners bought the property for almost the same amount two years later also lends credence to this position. Moreover, no other party entered a bid on the property at the sheriff's sale that exceeded Great Western's bid of $305,000, indicating that no one considered the property more valuable. The sale price of the property immediately following the sheriff's sale represents the most reliable evidence of the property's value at the time of the loss suffered by Great Western. Using that value instead of the $305,000 used by the Court originally, the loss to Great Western amounts to $127,750.

The Sharma decision also instructs, however, that certain types of interest should be included in a calculation of a bank's loss. The Court did not include such amounts in Great Western's loss originally. The United States Sentencing Guidelines Manual provides that loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred." U.S. Sentencing Guidelines Manual § 2F1.1, cmt. 8. In Sharma, however, the Third Circuit distinguished between "bargained-for" interest and "opportunity-cost" interest. Sharma, 190 F.3d at 227-28. Opportunity-cost interest, interest that a bank could

have earned had it not made the loan in question, must be excluded from the calculation of loss. Id. On the other hand, bargained-for interest, that interest for which the debtor bargains and is contractually required to pay the victim bank, should be included. Id. Although Napier contends that the Court cannot include any interest in its new calculations because the government did not object to its exclusion at the original sentencing, he fails to cite any authority supporting this position.[5] The Court also finds his position curious because Napier's counsel previously represented to the Court that such interests could not be included in Great Western's loss.[6]

Accordingly, bargained-for interest should be included in the determination of loss. Taking into account the $130,447 of bargained-for interest in this case would increase Great Western's loss to $258,197, and the loss suffered by all of

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[5] Napier also contends that there was no loss to Great Western because, under Pennsylvania law, a creditor's failure within six months to file a petition with the state court to fix the fair market value of the property gives rise to an irrebutable presumption that the creditor received payment in full. See 42 Pa. Cons. Stat. Ann. § 8103(a). Although Napier offers a creative argument, he fails to explain why this state law should control the determination of loss in a federal criminal action. Moreover, the federal guidelines require the determination of actual loss, whereas the Pennsylvania law in question sets a de jure absence of loss despite actual loss.

[6] See Tr. of Sentencing Hr'g, Dec. 17, 1998 at 27-30. It should be noted, however, that Napier has since acquired new representation.

Napier's victims to $272,130.[7] The Court therefore finds that Napier's wrongdoing caused his victims a total of $272,130 loss.

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O R D E R

AND NOW, this day of January, 2001, in consideration of the foregoing memorandum, this matter is scheduled for sentencing on Thursday, February 1, 2000, at 10:00 A.M.

BY THE COURT:

JAMES McGIRR KELLY, J.

[7] Were Sharma interpreted to require this Court to use the appraisal value of the house in preference to its sale in an arm's length transaction, however, the Court would nonetheless include the $130,447 in interest. This would result in a total loss to all victims of $166,630, which in turn would call for the same sentence as originally imposed on Napier.