

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

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 11-326
RANDY HUCKS	:	
a/k/a "Abubakr Muhammed"	:	
"Randy Randolph Hucks"	:	
"Abu Bakr"	:	

February 20, 2013

Anita B. Brody, J.

MEMORANDUM

In November 2010, Randy Hucks devised a scheme to order counterfeit Cialis and Viagra from China through several U.S. post office boxes with false business names, and resell them in the United States at a rate below market value. Investigators seized 10,188 counterfeit Viagra tablets and 3,040 counterfeit Cialis pills. Hucks was charged with two counts of mail fraud under 18 U.S.C. § 1341, two counts of smuggling goods into the United States under 18 U.S.C. § 545, and two counts of trafficking in counterfeit goods under 18 U.S.C. § 2320. Following his trial on June 21, 2012, the jury found Hucks guilty of the two counts of mail fraud, and two counts for smuggling goods into the United States. The jury found him not guilty of trafficking in counterfeit goods.

A. Standard

When crafting a sentence, courts have broad discretion in the information they can consider:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C.A. § 3661. This includes facts introduced at trial relating to other charges, even those for which the defendant has been acquitted. *U.S. v. Watts*, 519 U.S. 148, 152 (1997). Such information may be considered so long as that conduct has been proved by a preponderance of the evidence.¹ *Id.* at 157.

B. Determining the Guidelines Range

The four counts here are grouped together pursuant to U.S.S.G. § 3D1.2(d). When the counts involve offenses of the same general type, the offense guideline that produces the highest level offense applies. U.S.S.G. § 3D1.3(b). Here, that guideline is § 2B1.1, for mail fraud. The special offense characteristics for this guideline are based upon the amount of loss. However, both parties agree that there was no loss here, because there is no evidence that Hucks' prospective customers would have otherwise purchased Viagra or Cialis with a prescription in the legitimate market.² This is correct. Under Application Note 3 relating to the amount of loss under (b)(1), no one suffered pecuniary harm. The pharmaceutical companies did not lose out on sales they would otherwise have made because there was no evidence that Hucks' prospective buyers would have purchased the drugs legitimately. According to § 2B1.1(c)(3), under certain circumstances cross-referencing to a different guideline is proper. If:

- (A) Neither subdivision (1) [a firearm, destructive device, explosive material, or controlled substance was taken, received or transported] nor (2) [the offense involved arson or property damage by use of explosives] of this subsection

¹ The Guidelines operate as sentencing factors rather than as elements of a crime. *U.S. v. Grier*, 475 F.3d 556, 566 (3d Cir. 2007). Elements of a crime must be proved beyond a reasonable doubt as determined by a jury, whereas sentencing enhancements do not. *Id.* (discussing *Jones v. United States*, 526 U.S. 227 (1999)).

² This consideration also factors into Hucks' sentencing concerning a downward departure, *infra* Section C, and restitution, *infra* Section D (analyzing *United States v. Milstein*, 481 F.3d 132 (2nd Cir. 2007)).

applies;

- (B) The defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and
- (C) The conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

U.S.S.G. § 2B1.1(c)(3). The first requirement is met because the offense did not involve firearms, destructive devices, controlled substances, or arson or property damage of any kind. The second requirement is met because Hucks was convicted under 18 U.S.C. § 1341 (mail fraud), one of the enumerated offenses.

The third requirement is met because the conduct set forth in Hucks' counts of conviction establishes an offense specifically covered by guideline § 2B5.3, for "Criminal Infringement of Copyright or Trademark." Guideline § 2B5.3 references a variety of statutes, including 18 U.S.C. § 2320, Trafficking in Counterfeit Goods or Services.³ Despite the fact that Hucks was acquitted of trafficking, he was charged with devising a scheme to defraud and obtain money and property through fraudulent means by smuggling counterfeit Viagra and Cialis through the U.S. Postal System to sell it. As Application Note 15 explains, "Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute." U.S.S.G. § 2B1.1 App. Note 15. Hucks was convicted of mail fraud under 18 U.S.C. § 1341, which

³ The specific statutory provisions are: Copyright Infringement and Remedies – Criminal Offenses (17 U.S.C. § 506(a)), Circumvention of Copyright Protection Systems (17 U.S.C. § 1201), Copyright Protection and Management Systems – Criminal Offenses and Penalties (17 U.S.C. § 1204), Trafficking, including Trafficking in Counterfeit Labels, Criminal Infringement of a Copyright, Trafficking in Counterfeit Goods or Services (18 U.S.C. §§ 2318-2320), Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited (18 U.S.C. § 2511), Unauthorized Reception of Cable Service (47 U.S.C. § 553(b)(2)), and Wire or Radio Communication: Unauthorized Publication or Use of Communications (47 U.S.C. § 605).

provides a maximum punishment of 20 years of imprisonment for “devis[ing] or intending to devise any scheme . . . to defraud” “or to sell . . . distribute, supply . . . for unlawful use any counterfeit or spurious coin, obligation, security, or other article . . .” through use of the U.S. Postal Service. 18 U.S.C. § 1341. Similarly, the statute for trafficking, 18 U.S.C. § 2320, defines trafficking to be “to transport . . . to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer or otherwise dispose of.” 18 U.S.C § 2320(f)(5). Just as trafficking applies to § 2B5.3, so too does Hucks’ crime. His scheme is commensurate with criminally infringing a trademark or copyright.

Although Hucks did not succeed in carrying out his scheme to sell the counterfeit pharmaceuticals, I find by a preponderance of the evidence that he intended to do so had he not been arrested. Special Agent Thomas Acerno of Homeland Security Investigations testified today and at trial that after Hucks waived his Miranda rights, Hucks stated that he started selling counterfeit Viagra and Cialis in September of 2010 in blister packs for \$5 per pack. Acerno Tr. 22, lines 19-25. Hucks said that he sells tablets of Viagra and Cialis at flea markets and bars and on the streets. *Id.* In addition, Hucks ordered over 13,000 counterfeit pills—an amount consistent with a scheme to sell the pills, rather than for personal consumption. Therefore, it is evident that Hucks purchased the counterfeit pills in order to sell them and sentencing guideline § 2B5.3, for criminal infringement of copyright and trademark, is appropriate.

The base level offense for Sentencing Guideline § 2B5.3 is 8. Under § 2B5.3(b)(1), if the infringement amount exceeds \$5,000, the guidelines refer back to the table in § 2B1.1.⁴ Note 2 describes two methods for determining the infringement amount:

- (A) Use of Retail Value of Infringed Item.--The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following: (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item . . .
- (B) Use of Retail Value of Infringing Item.--The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. 2319A.

U.S.S.G. § 2B5.3 App. Note 2. In other words, there are two ways to calculate the infringement amount: under Note 2(A), based on the retail value of the *infringed* (i.e. authentic) item multiplied by the number of infringing items, or under Note 2(B), based on the retail value of the *infringing* (i.e. counterfeit) item multiplied by the number of infringing items. The Note 2(A) calculation applies in certain enumerated situations, including when “[t]he infringing item [] is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item.” U.S.S.G. § 2B5.3, App. Note 2(A)(i). The Note 2(B) calculation only applies in cases not covered by Note 2(A). U.S.S.G. § 2B5.3, App. Note 2(B).

Although Hucks urges me to apply the Note 2(B) calculation,⁵ evidence presented at trial established that the pharmaceuticals were high quality counterfeits that a reasonably informed

⁴ The background comment for § 2B5.3 states that “the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.” U.S.S.G. § 2B5.3 Background

purchaser could mistake as authentic. Representatives from Pfizer and Eli Lilly testified at trial that the color, size and shape of the tablets and their packaging were substantially equivalent to genuine trademarked Cialis and Viagra. Gov't Response to Def's. Sentencing Memo at 5. Therefore, the Note 2(A) calculation is appropriate. Based on the testified retail value for Viagra (\$22 per pill) and Cialis (\$29 per pill), the retail price would have been \$312,296. Gov't Sentencing Memo at 4-5. For that amount, Table § 2B1.1(b)(1)(G) dictates adding 12 to the base level offense, for a total of 20.

In addition, under § 2B5.3(b)(3), the offense “involved the manufacture, importation or uploading of infringing items,” requiring an increase of the offense level by 2, for a total of 22. Hucks' Criminal History Category is II. Huck's Guideline Sentence is therefore 46-57 months imprisonment.

C. Downward Departure

Hucks argues that he should be given a downward departure if the Note 2(A) calculation is used. Guideline § 2B5.3 contains considerations for departures, including allowing a departure when “[t]he method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.” U.S.S.G. § 2B5.3, App. Note 4(C). Hucks argues that the infringement amount substantially exceeds the actual pecuniary harm to the trademark owners because in all likelihood there would have not been any pecuniary harm to Eli Lilly and Pfizer. There is no evidence that Hucks' prospective customers would have purchased legitimate Viagra or Cialis from a pharmacy at their actual retail prices. In fact, there

⁵ According to Agent Acerno, Hucks intended to sell the pills for \$5 per blister pack. He had 13,228 pills. Using the Note 2(B) calculation, the Defense calculates the infringement amount to be \$16, 535. This would give him an enhancement of 4 levels pursuant to §§ 2B1.1(b)(1)(B) and 2B1.1(b)(1)(C) increasing his offense level to 12.

is evidence that his customers purchased pills at flea markets for only \$5 per blister pack. Such customers would most likely be aware that the pills were not genuine, and would not have the means to otherwise buy pills that were genuine. Therefore there was negligible pecuniary harm to Pfizer and Eli Lilly, if any. Because the infringement amount substantially exceeds the pecuniary harm, I find that a downward departure is warranted.

D. Restitution

Lastly, the government requests that Hucks pay restitution to Eli Lilly and Pfizer. Restitution is not owed because neither pharmaceutical company suffered any monetary losses as a result of the criminal conduct.

The government carries the burden of proving the “amount of loss sustained by a victim as a result of the offense,” by a preponderance of the evidence standard. 18 U.S.C. § 3664(e). The purpose of restitution is to ensure that victims are made whole for their losses. *United States v. Hudson*, 483 F.3d 707, 710 (10th Cir. 2007). Here the government’s argument for restitution is based on the theory that the companies lost sales, as articulated in *United States v. Milstein*. 481 F.3d 132 (2nd Cir. 2007). In *Milstein*, the defendant was ordered to pay \$3.5 million in restitution based on the concept that the victims’ lost sales equaled the value to the victim of an infringed trademark. *Id.* at 137. In fact, *Milstein* stands for the opposite position. The material fact in *Milstein* was that the defendant sold counterfeit drugs to doctors and pharmacists who would otherwise have bought legitimate versions of the drug to then sell to consumers. In contrast, Hucks was accused of selling counterfeit drugs directly to consumers on the street, transactions that he could not legally have accomplished without licenses and prescriptions. Hucks was not licensed to purchase the drugs and therefore could not have made a legitimate

purchase from Eli Lilly or Pfizer. Likewise, his customers could not have made legitimate purchases from him without prescriptions. The counterfeit market was entirely separate from Eli Lilly and Pfizer's legitimate market. Therefore the drug companies did not suffer actual pecuniary harm. Because restitution is intended to make victims whole and not to provide a windfall, it is not warranted in this situation.

/s/ Anita B. Brody
ANITA B. BRODY, J.

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