

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 14, 2022
Decided March 10, 2023

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 21-3085

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID GODWIN,
Defendant-Appellant.

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division.

No. 1:14-CR-00326(1)

Edmond E. Chang,
Judge.

ORDER

David Godwin used his internet-services company to defraud other businesses. He pleaded guilty to wire fraud, 18 U.S.C. § 1343, and was sentenced to 156 months in prison. At his sentencing hearing, Godwin testified that he did not remember instructing a co-conspirator to impersonate an employee of another company for the purpose of concealing the fraud. The district court found that Godwin had lied and increased his offense level under the Sentencing Guidelines for obstruction of justice.

Godwin challenges that enhancement on appeal, arguing that his statement was immaterial to the factual issue being determined at the time. But because his false statement was material to the sentence, we affirm.

Background

When he was the Chief Executive Officer of ContinuityX Solutions, Inc., Godwin orchestrated a fraudulent scheme that caused significant losses to AT&T, Vion Operations, and Forest Capital. In 2010, ContinuityX began to refer potential customers to AT&T in exchange for commissions. At the time of the referrals, ContinuityX knew that the customers would not use AT&T's business-internet services. To maximize the commissions, Godwin and a codefendant, Anthony Roth, falsified the potential customers' financial records to ensure that AT&T would accept these referrals and pay higher commissions. Then, under a factoring agreement, Godwin assigned the right to collect AT&T's commissions to Forest Capital and Vion in exchange for their agreement to pay ContinuityX a percentage of those commissions in advance.

Problems began in 2012. AT&T discovered issues with some of the referred customers, requested that ContinuityX return the corresponding commission payments, and stopped paying new commissions. Forest Capital (which had been collecting the commission payments from AT&T) then raised concerns with Godwin about the delayed commissions. In response, Godwin instructed another codefendant, John Coletti, to impersonate an employee of AT&T and assure Forest Capital that the commissions were forthcoming.

AT&T, Forest Capital, and Vion continued raising concerns, and Godwin continued lying to keep the ruse alive. He falsely told Forest Capital and Vion that Hutchison, a telecommunications company in China, owed ContinuityX \$8 million and assigned the two companies the right to receive payment of \$6 million of that debt. Godwin sent emails fraudulently posing as an employee of Hutchison to convince Forest Capital and Vion to accept the deal. Godwin also instructed Coletti to impersonate the same Hutchison employee in a phone call with Forest Capital and Vion employees.

Forest Capital and Vion discovered Godwin's fraudulent scheme in 2013. Overall, the scheme caused AT&T, Forest Capital, and Vion over \$9.3 million in losses.

Godwin pleaded guilty to one count of wire fraud, *see* 18 U.S.C. § 1343, and in his plea declaration, he admitted to creating and sending one of the fraudulent emails

purporting to be from the Hutchison employee. In the Presentence Investigation Report (PSR), the probation officer calculated Godwin's total offense level under the Sentencing Guidelines as follows: the base offense level was 7, plus an increase of 18 levels for the amount of actual loss; 2 levels because Godwin used sophisticated means; 4 levels because he was an officer of a publicly traded company; and 4 levels because of his role as an organizer of the criminal activity. The probation officer did not recommend a downward adjustment for acceptance of responsibility, for reasons including a lack of remorse and failure to provide complete financial information. This resulted in a total offense level of 35, which, when combined with Godwin's criminal history category of I, resulted in a recommended guidelines range of 168 to 210 months' imprisonment.

Godwin objected to the PSR and argued that he should receive the reduction for accepting responsibility because he pleaded guilty and did not object to the facts in the PSR (which included, among other facts, the loss figure for AT&T). The government agreed.

But Godwin later reversed course and wanted to challenge the amount of AT&T's loss that was set forth in the PSR. His counsel believed there was no non-frivolous basis to do so and requested to withdraw. The district court warned Godwin that, because this would be the second court-appointed attorney to withdraw based on his behavior, Godwin would not be appointed another attorney and would have to represent himself at sentencing. Godwin agreed and proceeded to sentencing *pro se*.

The district court began the sentencing hearing with an evidentiary hearing to resolve the newly contested issue of AT&T's loss amount. Godwin and his codefendant Anthony Roth testified, while the government rested on the record evidence that AT&T had paid roughly \$3.3 million to ContinuityX in commissions for referring customers whose financial statements ContinuityX had falsely inflated. The court ultimately accepted that figure.

Godwin's statements on the witness stand disputed facts beyond AT&T's loss. Specifically, under cross-examination, Godwin claimed not to remember asking Coletti to pose as Patrick Ross, an employee of AT&T, on a phone call to convince Forest Capital that AT&T would pay the commissions. In relevant part, Godwin testified:

Q. How about Patrick [Ross]? Do you have any recollection of asking John Coletti to pose as Patrick Ross, an AT&T employee?

A. No. John was speaking to the amount of monies owed because John's company was one of the customers we were owed commission for, but I don't remember him asking to pose as Patrick Ross.

Q. That was not a question. Did you ask John Coletti to pose as Patrick Ross, an AT&T employee, on calls with John Fox, yes or no, at any time?

A. No.

Q. You did not do that?

A. I don't remember asking him to do that.

...

Q. Just a few more questions, Mr. Godwin. It's your testimony that you did not ask Mr. Coletti to pose as Patrick Ross on calls with John Fox; is that correct?

A. Mr. Dollear, I really don't remember asking him to do that.

...

Q. So is it your testimony today that [this email] was not you asking John—related to John Coletti posing as Patrick Ross on calls with Forest Capital?

A. I—I don't believe I was asking him to do that, Mr. Dollear.

Based on this testimony, the government asked the court to apply the enhancement for obstruction of justice under U.S.S.G. § 3C1.1 because Godwin had perjured himself. The court gave Godwin a chance to respond, and Godwin stated, "I do not remember asking John to do that specifically, your Honor. I mean, there would be no reason to ask John to pose as Patrick Ross from AT&T."

After considering this testimony and the record, the district court found that Godwin had intentionally lied:

Unfortunately, Mr. Godwin, I do not believe you. This is too important an episode in this, the alleged fraud scheme for you to not remember that you asked John Coletti to pose as an entirely different person, that is, Mr. Ross, in this phone call with John Fox. I don't think it takes documents to remind

you or emails and the texts, all of which are laid out in the government version, that you clearly did ask him to pose as Mr. Ross.

You provided the information that he was to regurgitate to Mr. Fox, and then there was the text exchange afterwards in which Mr. Coletti and you discussed his performance. And I don't believe that you did not remember that. I believe you do remember that and that you just lied about it. So the two levels for obstruction on that basis does apply.

The court also rejected a reduction for acceptance of responsibility because of Godwin's statements on the witness stand and his frivolous objection to the AT&T loss amount. Therefore, the court determined that Godwin's total offense level was 37, resulting in a guidelines range of 210 months to the statutory maximum of 240 months. 18 U.S.C. § 1343.

After considering the guidelines range and the other 18 U.S.C. § 3553(a) factors, the court sentenced Godwin to a below-guidelines term of 156 months. The court stated to Godwin, "It would have been a radically different sentence had you just asked for mercy and mitigation without frivolously contesting the loss amount and lying here in court."

Analysis

Godwin argues only one issue on appeal: that the obstruction-of-justice enhancement cannot apply because his statements about whether he had instructed Coletti to pose as the AT&T employee were not material to the loss amount, which he maintains was the sole issue in contention. To properly apply an obstruction of justice enhancement based on perjury, a district court must find that the defendant willfully gave false testimony that was material to an issue being determined. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. Price*, 28 F.4th 739, 756 (7th Cir. 2022). A statement is material when, "if believed, [it] would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1 n.6; *United States v. Girardi*, 62 F.3d 943, 947 (7th Cir. 1995).

Although the parties agree on the standard, they disagree on what issue was "under determination" and, therefore, whether Godwin's statements were material. Godwin argues that, because his statements were made during the evidentiary hearing as to AT&T's loss amount, that loss amount was the sole issue "under determination." And because Coletti's impersonation of the AT&T employee was not relevant to that

amount, Godwin posits, his statements were immaterial. The government, on the other hand, contends that the issue under determination was the appropriate sentence for Godwin, and that Godwin's role in the fraudulent scheme was, therefore, a material issue.

Our case law favors the government's broader interpretation of "the issue under determination" for purposes of § 3C1.1. False testimony is material if it can affect the defendant's sentence, regardless of the purpose of the proceedings in which the testimony occurred. *United States v. Grigsby*, 692 F.3d 778, 786 (7th Cir. 2012); *United States v. Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998) (a defendant obstructs justice "when he makes it more difficult for the court to give him the sentence that is his just desert"). It does not matter that Godwin made the false statements about his instructions to Coletti during a hearing about the loss amount, because his testimony, if believed, had "a natural tendency to influence the court's sentencing decision." *Grigsby*, 692 F.3d at 785; *see also United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) ("[A]ll that is required for a lie to be material is that it could, to some reasonable probability, affect the outcome of the process (here, the sentence).").

For his part, Godwin argues that, even if believed, his statements had no realistic possibility of lowering his sentence because he already admitted in his plea declaration to sending the false email and had made other admissions supporting the loss amount. But these admissions do not negate Godwin's lie about his participation in other parts of the fraud scheme. Under the Guidelines, a sentence is based on "relevant conduct," which includes Godwin's instructions to Coletti to conceal the fraud, in addition to the conduct that formed the basis of the conviction. U.S.S.G. § 1B1.3; *id.* § 3C1.1(2)(A) (enhancement applies to false statements relating to "the defendant's offense of conviction and *any relevant conduct*") (emphasis added). Further, a false statement "need not actually have any influence or effect" to be material. *United States v. Chychula*, 757 F.3d 615, 621 (7th Cir. 2014); *accord Grigsby*, 692 F.3d at 785–86.

Godwin's argument also is inconsistent with how sentencing proceedings work. He insists that the amount of loss was the only open issue during the sentencing hearing, but that is not correct. As the Supreme Court has emphasized, properly calculating the guidelines range is just the first step in sentencing and must be followed by individualized consideration of the factors under 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 49–50 (2007). At the time of Godwin's testimony, the court had not yet considered the factors, and Godwin's lie could have affected (and, indeed, did affect) how the court weighed them. Further, Godwin's willingness to perjure himself is part of his "history and characteristics," § 3553(a)(1), and his lie related directly to the

“nature and circumstances of the offense,” *id.* Godwin’s focus on the loss amount overlooks the broader purpose of the sentencing hearing and the court’s need to evaluate the § 3553(a) factors in reaching a sentence.

Finally, Godwin argues that the court did not make a particularized finding that the false statements were material. Although separate findings on each element of perjury are preferred, “they are not always strictly necessary.” *Price*, 28 F.4th at 756. District courts are simply required to “create[] a record that allow[s] this court to determine that [they] specifically found the defendant lied about a material issue.” *United States v. Johnson*, 612 F.3d 889, 894 (7th Cir. 2010). The court did so here. *See Price*, 28 F.4th at 756; *Grigsby*, 692 F.3d at 786. Indeed, the court expressly connected Godwin’s lies to the chosen sentence by remarking: “It would have been a radically different sentence had you just asked for mercy and mitigation without frivolously contesting the loss amount and lying here in court.”

AFFIRMED