NONPRECEDENTIAL DISPOSITION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

Submitted March 28, 2023
Decided April 4, 2023

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN *Circuit Judge*

Nos. 22-1360 & 22-1761

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LATONYA R. FOXX,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:18-CR-80 JD

Jon E. DeGuilio,
Chief Judge.

O R D E R

LaTonya Foxx pleaded guilty to one count of wire fraud under 18 U.S.C. § 1343, and her sentence included 18 months in prison, one year of supervised release, and $1.2 million in restitution. She filed a notice of appeal, but her appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). We disagree. Counsel's brief does not discuss a potential challenge to the amount of restitution that we identify as nonfrivolous. Therefore, we deny the motion.

Foxx ran a fraudulent tax-return operation. For a fee she would file tax returns on someone's behalf—without identifying herself as the preparer—and falsely claim entitlement to the American Opportunity Tax Credit, an education tax credit. From 2014 to 2016, Foxx filed over 500 returns claiming this credit on behalf of taxpayers who had paid no higher-education tuition.

Foxx occasionally received clients from Yvonna Lee. Lee sent taxpayers' personal information (name, date of birth, etc.) to Foxx, who used that information to file a tax return falsely claiming the education credit. Foxx also sent taxpayer information to Lee, which Lee used to file false returns (using different methods, such as fabricating income on a W-2 form) or passed along to Tanisha Bledsoe, who did the same.

The government indicted Foxx, Lee, and Bledsoe together for multiple counts of wire fraud, *see* 18 U.S.C. § 1343, and aggravated identity theft, *see id.* § 1028A. After multiple false starts in negotiating a plea agreement, Foxx changed lawyers and filed a plea declaration stating that she intended to plead guilty to the count of wire fraud pertaining to giving Lee a taxpayer's information.

The district judge then held a change-of-plea hearing. For the factual basis, the judge relied on the plea declaration and a colloquy with Foxx—in which she admitted that (1) she sent Lee a text message with a taxpayer's information; (2) she knew Lee or Bledsoe would use the information to file a fraudulent tax return; and (3) the goal was to get funds from the IRS to which the taxpayer was not entitled. This wire-fraud count did not charge Foxx with filing false returns or falsely claiming the education tax credit for any taxpayer. The judge found the factual basis sufficient and accepted Foxx's guilty plea. The government dropped all remaining counts.

The probation office then prepared a presentence investigation report. For the purposes of setting the offense level under the Sentencing Guidelines, the PSR calculated the actual loss amount at $1,261,903 and recommended restitution to the IRS in the same amount. Foxx lodged objections to both calculations but later withdrew her objection to the loss amount used for the Guidelines calculation. At sentencing the judge imposed a below-Guidelines sentence of 18 months in prison and deferred ruling on the final restitution obligation. *See id.* § 3664(d)(5).

The parties briefed the question of how much Foxx's fraud had cost the IRS, the victim under the Mandatory Victims Restitution Act. *See id.* § 3663A. The government argued that restitution should be equal to the actual loss used to set the offense level. Without explaining why the losses associated with the education-credit scheme could

be included in restitution, the government explained how it calculated the losses caused by that endeavor. Foxx contested the government's methodology but did not challenge the assumption that she owed restitution for losses caused by the falsely claimed education credit. The judge found Foxx's arguments "unconvincing" and entered an amended judgment ordering restitution of $1,261,903.

That brings us to this appeal. In his brief, counsel considers potential challenges to Foxx's guilty plea—after confirming that she wishes to challenge it, *see United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002)—along with her sentence, including the terms of imprisonment and supervised release and the amount of restitution. We will grant an *Anders* motion only if there is no nonfrivolous argument to make on appeal—when any argument is "so clearly blocked" by legal authority that we could reject it summarily. *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014); *United States v. Tatum*, 760 F.3d 696, 698 (7th Cir. 2014).

We agree with counsel's assessment of the issues he discusses, but in analyzing the amount of restitution, counsel does not consider under what authority the judge could include the various components of the total amount, and this issue requires further attention. When calculating the amount of restitution payable to the IRS (the fraud victim), the judge included (as the PSR and the government urged) the value of the education credits Foxx fraudulently claimed on behalf of hundreds of taxpayers. But there is a colorable argument that the judge could not include these amounts without making factual findings that this conduct was part of the same scheme that Foxx was convicted of—disseminating a taxpayer's information.

Though it often overlaps with an actual loss used for calculations under the Sentencing Guidelines, restitution is calculated differently. The education-credit losses were properly included in the actual loss amount because they were part of Foxx's relevant conduct. *United States v. Locke* (*Locke II*), 759 F.3d 760, 765 (7th Cir. 2014); *see* U.S.S.G. § 1B1.3. Restitution, however, can derive only from the specific conduct of the offense of conviction. *United States v. White*, 883 F.3d 983, 992 (7th Cir. 2018) (citing § 3663A). Relevant conduct is not part of the determination. *Id.*; *Locke II*, 759 F.3d at 765.

There is an exception: If the crime of conviction involves a criminal scheme, then restitution can encompass all financial harm caused by the scheme, even if that conduct was not part of the offense of conviction. *See* § 3663A(a)(2); *United States v. Westerfield*, 714 F.3d 480, 489 (7th Cir. 2013). But in such a case, the judge must make specific findings that the losses included in restitution derived from the same scheme for which

the defendant was convicted. *Westerfield*, 714 F.3d at 489; *United States v. Locke* (*Locke I*), 643 F.3d 235, 247 (7th Cir. 2011).

Here, Foxx did plead guilty to an offense involving a criminal scheme—one count of wire fraud—but not to a conspiracy. The count of conviction charged her with sending a taxpayer's personal identifying information to an accomplice knowing it would be used to file a fraudulent return. It did not charge her with falsely claiming the education tax credit. The counts charging her with those filings were dropped after the guilty plea. Because the education-credit conduct is outside the crime of conviction, the judge was required to make specific findings of relatedness. We see none in the record.

Moreover, it would not be frivolous to argue that Foxx's various fraudulent acts were not all part of the same scheme. Whether different criminal acts are part of the same scheme is a fact-intensive inquiry. *Compare United States v. Mitrione*, 357 F.3d 712 (7th Cir. 2004) (same scheme where defendants defrauded Medicaid and Medicare over several years using different billing tactics), *vacated on other grounds*, 543 U.S. 1097 (2005), *with United States v. Frith*, 461 F.3d 914 (7th Cir. 2006) (different schemes when convicted securities violations happened on one day and acquitted fraud happened over several years). Perhaps Foxx's education-credit fraud was part of the same scheme as her trading of taxpayers' information with her codefendants: She did occasionally use taxpayer information from Lee to falsely claim an education credit. But it appears this was less common. The record allows for the possibility that exchanging taxpayer information with the group, which mostly did not involve claiming the education credit, was a separate scheme from Foxx's cottage industry of filing fraudulent returns claiming the education credit. If these were separate "iterations" of tax fraud, *Westerfield*, 714 F.3d at 489, not a "unitary scheme," *Locke I*, 643 F.3d at 248, they could not both be included in restitution for the count of conviction.

Either way, the parties never developed the record on this point, and thus the judge never made findings. This makes it hard to say that any argument for separate schemes would be frivolous.

As our analysis above suggests, Foxx potentially forfeited this argument. She consistently challenged the amount of restitution but did not appear to contest that losses from falsely claiming the education credit could be included. But this does not make the issue frivolous. If she forfeited the argument, we could still review for plain error. *White*, 883 F.3d at 992. And we have held that in some circumstances a judge's failure to make findings that "demarcate the scheme" is plain error. *See, e.g.*, *id.*; *Locke I*,

643 F.3d at 247–48; *see also United States v. Burns*, 843 F.3d 679, 689–90 (7th Cir. 2016) (not making a proximate-cause finding in a restitution order is plain error).

We express no conclusion on the merits of this potential challenge. We decide only that raising this issue would not be frivolous and that Foxx is entitled to the benefit of briefing by counsel. *See United States v. Eskridge*, 445 F.3d 930, 931–32 (7th Cir. 2006). Counsel's motion to withdraw is DENIED, and the parties are ORDERED to brief the issue of whether the losses caused by the falsely claimed education credit were properly included in the restitution amount. Briefing will proceed as follows:

1. The appellant's brief and required short appendix are due by May 4, 2023.

2. The appellee's brief is due by June 5, 2023.

3. The appellant's reply brief, if any, is due by June 26, 2023.

Important Scheduling Notice!

Hearing notices are mailed shortly before the date of oral argument. Please note that counsel's unavailability for oral argument must be submitted by letter, filed electronically with the Clerk's Office, no later than the filing of the appellant's brief in a criminal case and the filing of an appellee's brief in a civil case. *See* Cir. R. 34(b)(3). The court's calendar is located at http://www.ca7.uscourts.gov/cal/argcalendar.pdf. Once scheduled, oral argument is rescheduled only in extraordinary circumstances. *See* Cir. R. 34(b)(4), (e).