IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

99-CR-0006-C

v.

JOHN J. NOBLE,

Defendant.

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This case is before the court on a motion by defendant John J. Noble to bar the government from calling Steven Jobe as a witness at defendant's third sentencing hearing, following the second remand of the case for resentencing. United States v. Noble, 299 F.3d 907 (7th Cir. 2002). On defendant's appeal from his amended sentence, the court of appeals found that it had been mistaken when it held on the first appeal that sufficient evidence existed to support this court's reliance on a statement by Steven Jobe to the effect that defendant had sold about one-half to one ounce of cocaine at strip clubs five nights a week for approximately one year. In examining the record more closely, the court of appeals realized that Jobe's statement had been made to a law enforcement officer and not at trial,

at sentencing or to the author of the presentence investigation report and that the officer's report had not been before the court in connection with defendant's sentencing. In the court of appeals' view, this left the court with nothing but the statement in the presentence report to the effect that Jobe "believed" defendant had sold a certain amount of drugs at strip clubs. Id. at 911. Concluding that the amount of cocaine Jobe attributed to defendant was not based on sufficiently reliable evidence, the court vacated the sentence and remanded the case for resentencing. Id.

Defendant contends that the resentencing should not include any consideration of the amount of cocaine Jobe attributed to defendant. He argues that because the government had an opportunity to call Jobe as a witness at defendant's original sentencing and failed to do so, it has forgone its right to call him now. In support of his contention, he cites United States v. Wyss, 147 F.3d 631, 633 (7th Cir. 1998); United States v. Wilson, 131 F.3d 1250, 1253-54 (7th Cir. 1997); and United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996).

I have reviewed the cases defendant cited, his brief and that of the government in opposition, re-read the court of appeals' decision on remand and listened to the oral argument on defendant's appeal. Although the question is not entirely free from doubt, I am persuaded that the court of appeals did not intend to preclude the government from calling Jobe to testify at defendant's second re-sentencing. Nothing the judges said at oral argument suggests any concern about the propriety of doing so; indeed, the judges asked

counsel for the government expressly why he did not call Jobe at his second sentencing, implying that such a procedure would have been proper. The court said nothing in its opinion that could be read as expressly or implicitly precluding the court from considering Jobe's testimony on remand. See Parker, 101 F.3d at 528 ("the scope of the remand is determined, not by formula, but by inference from the opinion as a whole").

Drawing the correct inference is not always easy. There is room for confusion between the line of cases holding that the sentencing court must examine the court of appeals' order on remand to determine what sentencing issues are to be reconsidered and the line of cases following the rule that reversal of a sentencing decision on one of a number of counts "unbundles" the sentencing package and allows the sentencing judge "to reevaluate the sentencing package in light of changed circumstances and resentence the defendant to effectuate the original sentencing intent." United States v. Shue, 825 F.2d 1111, 1114 (7th Cir. 1987). See also Noble, 299 F.3d at 910 (citing United States v. Walker, 118 F.3d 559, 561 (7th Cir. 1997) (defendant who attacks single count of conviction "faces the risk that the district court will look anew at the entire punishment and resentence on a remaining count")).

It was easy to discern to court of appeals' intention and the scope of the remand in Wyss, 147 F.3d 631, because the court of appeals said explicitly that on remand the sentencing court could not reconsider whether defendant had kept for personal use half the

amount of cocaine attributed to him. The court had vacated the defendant's original sentence after finding that it was error for the court to take the full amount into account at the first sentencing when defendant had claimed to have used half of it for personal consumption. Noting that the government had failed to adduce any evidence at the first sentencing to refute defendant's claim, the court of appeals barred it from making a second effort at the resentencing. "The government was entitled to only one opportunity to present evidence on the issue." Wyss, 147 F.3d at 633.

Wilson was less directive. The court of appeals vacated defendant's first sentence on the ground that the district court had erred in not grouping defendant's mail fraud and money laundering counts under § 3D1.2(d) and in assessing a two-level multiple count adjustment under § 3D1.4. In remanding, the court said only that the fraud and money laundering counts should have been grouped and that the two-level multiple count adjustment should not have added. United States v. Wilson, 98 F.3d 281, 284 (7th Cir. 1996). On remand, the district court grouped the counts as directed and added six levels to the base offense under the money laundering guideline (§ 2S1.1(b)(2)) to take into account all of the money taken from the mail fraud victims. In addition, it added two levels to the adjusted offense level for abuse of trust. At the original sentencing, the court had added only three levels, believing that the "value of funds" under the guideline applied only to the money actually laundered, rather than all of the fraud proceeds, and it had made the abuse

of trust adjustment only in connection with the mail fraud offense. At the original sentencing, the government had not objected to this calculation and had not argued that the acts of mail fraud should be considered relevant conduct for the laundering offense. When the defendant appealed his amended sentence, the court of appeals vacated it, holding that the district court had erred in reopening the relevant conduct question because the government had never argued it at the original sentencing, although it had an incentive to do so at that time. (Considering the mail fraud as relevant conduct for the laundering count would have increased the defendant's sentencing range beyond the 41 to 51 month range the district court applied.) Therefore, "that issue was effectively closed by the time [the defendant's appeal] reached this court, and the government cannot reopen it." Wilson, 131 F.3d at 1253.

Without this opinion, I would have thought that when the court of appeals vacates a sentence because of an error in applying the guidelines, the sentencing court has an independent obligation to redetermine the guidelines applications in their entirety so as to insure that the defendant receives a correct sentence. Wilson indicates that this is not the case. If the government fails to catch the court's and probation office's error and does not argue it at the original sentencing, the issue has been "finally determined" and cannot be reopened.

From Wyss and Wilson, I conclude that, on remand of a sentence, the district court

must determine whether the government has waived its right to challenge a particular sentencing decision. In determining whether waiver has occurred, it is necessary to consider the government's incentive to argue a particular issue. See Wilson, 131 F.3d at 1253 ("government had every incentive to make that argument"). If, for example, the probation office has made a factual determination or recommendation in the presentence report and defendant makes no objection to it, the government has no incentive to argue the point. In that instance, the courts should not consider the government's failure to address the determination as a waiver of the point.

In this case, defendant contends that because the government did not call Jobe as a witness at the original sentencing, it should be barred from doing so now. The answer to this is that the government had no incentive to call him at the first sentencing because defendant never raised any question about Jobe's having made the statement to the law enforcement agent. Presumably, during discovery, defendant had seen the agent's report in which the agent recorded Jobe's statement that defendant had told him about the number of trips he made to strip clubs, along with extensive information on other subjects provided by Jobe. (Had the government withheld such a report, defendant would have a reason to argue for vacation of his conviction and not just his sentence.) Defendant's objections to the Jobe evidence were that the statement was unreliable because it involved "nebulous eyeballing," it did not identify the time frame of the transactions (the visits to strip clubs) and it was

made by an unreliable witness (Jobe), who had testified at trial that he had advised his wife to leave town so that she would be unavailable as a witness at defendant's trial and who had admitted that his testimony was based on information he had obtained when he was intoxicated. Defendant never objected to the government's characterization of Jobe's information as a statement made to law enforcement or argued either that Jobe had never made such a statement or that it represented Jobe's mere "belief" and not information defendant had given him. From the government's argument at sentencing and defendant's counsel's written and oral statements, I understood the question to be whether the statement Jobe made to law enforcement was reliable rather than whether Jobe had actually made the statement and whether it represented information given him by defendant. Although the court of appeals has held that defendant did not waive his opportunity to object to the court's reliance on the probation office's report of "Jobe's belief," I do not read the court's opinion as indicating that the government should have realized that defendant's objections went to the reliability of the information in the presentence report and because it did not, it waived its right to call Jobe as a witness at the third sentencing.

In contrast to the Wyss and Wilson cases, the government argued vigorously at the original sentencing that defendant had admitted to Jobe that he had distributed one-half to one ounce of cocaine at strip clubs five nights a week for approximately one year. (The government did not argue the point at the second sentencing on the understanding that the

court of appeals had resolved it on appeal and it was the law of the case.) Furthermore, the government relied reasonably on the evidence in the presentence report.

I am satisfied from my review of the record and of the court of appeals' opinion on remand that the court of appeals did not intend to limit the scope of the remand in the manner defendant has suggested. I conclude that the government is not barred from calling Steve Jobe as a witness at defendant's third sentencing hearing.

ORDER

IT IS ORDERED that defendant John J. Noble's motion to bar the government from calling Steven Jobe as a witness at defendant's third sentencing is DENIED. The clerk of court is directed to schedule this matter for resentencing.

Entered this 6th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge