CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 1:

The defendant fraudulently obtained credit cards. The defendant used five of the cards, charging $1,000 on each card. The court determined the §2B1.1 loss amount as $7,500, based on $5,000 for the five cards used, and another $2,500 based on the $500 per card rule at §2B1.1. Assuming none of the stores where the cards were used were reimbursed at the time of sentencing, what is the amount of restitution?

Answer:

$5,000. While the amount of loss for purposes of §2B1.1 can include intended loss, restitution can only include actual loss suffered by the victims. Here, because only five of the cards were used, the restitution amount could not include the $500 special rule for the five unused cards. *See U.S. v. Lundstrom*, 880 F.3d 423 (8th Cir. 2018) and *U.S. v. Bussell*, 414 F.3d 1048 (11th Cir. 2010).

Scenario 2:

The defendant was convicted of health care fraud (18 U.S.C. § 1347). Medicare paid the defendant $150,000 based on bills submitted by the defendant. At sentencing, the government asks for $150,000 in restitution. The defendant argues that $50,000 of the amount paid by Medicare was for bills that involved legitimate services he provided to patients, but the defendant had submitted no evidence showing the work was legitimate. The court orders $150,000 in restitution, concluding that the defendant has the burden to prove that $50,000 was for legitimate work and the defendant did not offer any evidence.

Will the court's restitution order likely be affirmed on appeal?

Answer:

Yes. To reduce a restitution obligation, the defendant bears the burden of showing that she completed legitimate work and that Medicare would have paid for those services. Here, as the defendant did not offer any evidence that she provided legitimate work to the patients, she will not receive any reduction from the $150,000 restitution order. *See U.S. v. Ricard*, 922 F.3d 639 (5th Cir. 2019), *U.S. v. Smathers*, 879 F.3d 453 (2d Cir. 2018) and *U.S. v. Foster*, 878 F.3d 1297 (11th Cir. 2018).

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 3:

The defendant was convicted of using a company he controlled to defraud a lender of tens of millions of dollars. After the fraudulent scheme came to light and the company went bankrupt, the lender conducted a private investigation of defendant's fraud and participated as a party in the company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, the lender spent nearly $5 million in legal, accounting, and consulting fees related to the fraud. After the defendant pleaded guilty to federal wire fraud charges, the court ordered him to pay restitution to the lender for those fees because under the Mandatory Victim Restitution Act (MVRA), the defendant must "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

Was the court's order correct?

Answer:

No. The Supreme Court held that this MVRA provision regarding reimbursement is limited to government investigations and criminal proceedings and does not include expenses related to private investigations and civil or bankruptcy proceedings. *See Lagos v. U.S.*, 138 S. Ct. 1684 (2018).

Scenario 4:

The defendant is charged with federal carjacking. He pistol-whipped a woman as she was entering her car and then stole the car. The woman was taken to the hospital with a concussion and a broken nose and jaw. The government introduced into evidence medical bills showing her medical expenses were $25,000. The defendant pled guilty to felon in possession under 18 U.S.C. § 922 and the court ordered $25,000 in restitution to the victim of the carjacking.

Is this restitution order correct?

Answer:

No. Restitution is determined based on the offense of conviction and there is no identifiable victim of felon in possession offense. If the plea agreement specified that the defendant would pay restitution to the victim, then the court could order restitution to the victim. *See U.S. v. West*, 646 F.3d 745 (10th Cir. 2011).

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 5:

The defendant is convicted of tax evasion under 26 U.S.C. § 7201. Can the court order restitution as a criminal monetary payment?

Answer:

No. The court can order restitution in tax cases under 26 U.S.C. § 7201, but it must be as a condition of supervised release, not as a criminal monetary payment. *See U.S. v. Rankin*, 929 F.3d 399 (6th Cir. 2019), *U.S. v. Jansen*, 884 F.3d 649 (7th Cir. 2018), and *U.S. v. Westbrooks*, 858 F.3d 317 (5th Cir. 2017). Thus, the defendant cannot be ordered to pay restitution while in prison. The court should examine the defendant's ability to pay restitution in determining whether to order restitution immediately or in setting up a payment schedule.

Scenario 6:

The defendant is convicted of kidnapping and assault. The court orders $50,000 in restitution under 18 U.S.C. § 3663. The defendant challenges the order because he is indigent and believes restitution should waived.

Can the court waive the amount of restitution based on the defendant's inability to pay restitution?

Answer:

No. Section 3664(f)(1)(A) mandates that the court impose restitution for the "full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *See U.S. v. Brazier*, 933 F.3d 796 (7th Cir. August 12, 2019).

Scenario 7:

The defendant was convicted of Failing to Register as a Sex Offender, under 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2012 Louisiana conviction for sexual assault. He received a two year sentence for having sexual relations with his 15-year old neighbor. The defendant has no other prior sex offense convictions.

At sentencing, the probation officer is recommending lifetime supervised release and the following supervised release condition:

"Defendant is prohibited from viewing adult pornography."

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Is this an appropriate supervised release condition in this case?

Answer:

Probably not. This condition would be considered a special condition of supervised release and it must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care). Here, the defendant's prior sexual conviction for assaulting his 15-year old neighbor does not seem to involve anything related to watching adult pornography. Imposing a condition banning adult pornography on this record does not appear to be related to the purposes listed in § 3553(a). *See U.S. v. Eaglin*, 913 F.3d 88 (2d Cir. 2019).

Scenario 8:

The defendant was convicted of Felon in Possession of a Firearm (18 U.S.C. § 922(g)). The defendant has a history of mental illness and the court imposed the following condition of supervised release:

"Supervised release condition requiring defendant to notify third parties if the probation officer determines the defendant poses a risk to them."

Assuming the defendant is a risk to others, is this a reasonable condition?

Answer:

Probably not. Because this condition allows a probation officer to restrict a defendant's significant liberty interest, it is an improper delegation of authority. Courts distinguish between permissible delegations that merely task the probation officer with performing ministerial or support services related to the punishment imposed and impermissible delegations that allow the officer to decide the nature or extent of the defendant's punishment. *See U.S. v. Cabral*, 926 F.3d 687 (10th Cir. 2019), *U.S. v. Boles*, 914 F.3d 95 (2d Cir. 2019), and *U.S. v. Franklin*, 838 F.3d 564 (5th Cir. 2016).

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 9:

The defendant is convicted of drug trafficking. The defendant admits to the probation officer during an interview that he is addicted to heroin and oxycodone. The probation officer recommends mental health treatment as a condition of supervised release based on this information.

Is this a proper condition of supervised release?

Answer:

Probably not. A defendant's drug addiction does not mean that the defendant has a mental health problem requiring treatment. The court could impose drug treatment as a supervised release condition on these facts, but not mental health treatment without more evidence of mental illness. *See U.S. v. Bree*, 927 F.3d 856 (5th Cir. 2019).

Scenario 10

The defendant was convicted of possession of child pornography. The court included a supervised release condition ordering the defendant to undergo polygraph testing, but she did not mention this condition at sentencing.

Is this a proper supervised release condition?

While polygraph testing has been authorized in child pornography cases, because it is a special condition of supervised release, it must be announced at sentencing and not just included in a written judgement. *See U.S. v. Washington*, 904 F.3d 204 (2d Cir. 2018) and *U.S. v. James*, 792 F.3d 962 (8th Cir. 2015).