

LEXSEE 268 F.3D 533

United States of America, Plaintiff-Appellee, v. Scott M. Peterson, Defendant-Appellant.

No. 01-1597

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

268 F.3d 533; 2001 U.S. App. LEXIS 21579

**September 19, 2001, Argued
October 9, 2001, Decided**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Wisconsin. No. 00-CR-74-C. Barbara B. Crabb, Chief Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Peggy A. Lautenschlager, Daniel J. Graber, OFFICE OF THE UNITED STATES ATTORNEY, Madison, WI USA.

For SCOTT M. PETERSON, Defendant - Appellant: Robert K. O'Reilly, Milwaukee, WI.

JUDGES: Before Easterbrook, Diane P. Wood, and Williams, Circuit Judges.

OPINIONBY: Easterbrook

OPINION: [*533]

Easterbrook, *Circuit Judge*. As part of his plea agreement in this bank-fraud prosecution, Scott Peterson promised to pay restitution for "all losses relating to the offense of conviction *and all*

[*534] losses covered by the same course of conduct or common scheme or plan as the offense of conviction." (Emphasis added.) Normally restitution is limited to loss caused by the offense of conviction. See *18 U.S.C. § 3663A(a)*; *Hughey v. United States*, 495 U.S. 411, 109 L. Ed. 2d 408, 110 S. Ct. 1979 (1990); *United States v. Behrman*, 235 F.3d 1049 (7th Cir. 2000); *United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999). But "the court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense." *18 U.S.C. § 3663A(a)(3)*. This clause in Peterson's plea agreement is designed to exercise the option under subsection [**2] (a)(3). In exchange for promising extra restitution, Peterson received concessions. The prosecutor dismissed four of the six counts in the indictment, and the district judge imposed a sentence of only 14 months' imprisonment, together with an order requiring Peterson to pay \$53,491.87 to four lenders. Peterson did not object.

In this court he sings a different tune, contending that the district judge lacked authority to order restitution other than with respect to the two counts of conviction. Peterson insists that the plea agreement is not a valid implementation of § 3663A(a)(3). It is not clear that he understands the principal implication of this position: that his plea must be set aside, the four dismissed counts reinstated, and the prosecution resumed in the district court. He appears to believe that he can have the benefits of the plea agreement (four counts dismissed, reduced time in prison) without the detriments. That's not an option. The whole plea agreement stands, or the whole thing falls. See *United States v. Wenger*, 58 F.3d 280 (7th Cir. 1995). Peterson may find four more convictions and extra time in prison a steep price to pay—especially since reinstating [**3] the extra four counts could support the full award of restitution without regard to any agreement under § 3663A(a)(3), and then Peterson would not achieve even

his immediate aim of reducing the financial component of this judgment. It is unnecessary to pursue this, however, because there is no problem with the restitution order. Resolving the appeal in this fashion also makes it unnecessary to decide whether the failure to object in the district court should be viewed as a waiver or only as a forfeiture. Compare *United States v. Harris*, 230 F.3d 1054 (7th Cir. 2000), and *United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001), with *United States v. Williams*, 258 F.3d 669 (7th Cir. 2001).

The full text of the plea agreement's provision for restitution reads:

The defendant agrees to pay restitution for all losses relating to the offense of conviction and all losses covered by the same course of conduct or common scheme or plan as the offense of conviction. The exact restitution figure will be agreed upon by the parties prior to sentencing or, if the parties are unable to agree upon a specific figure, restitution will be determined [**4] by the Court at sentencing.

Negotiations between the plea and the sentencing did not yield agreement on a specific figure. The district judge therefore computed an amount, as the agreement provided. Peterson does not contend that the judge's calculation was mistaken; he argues only that the district judge lacked authority to specify *any* amount. He asks us to read § 3663A(a)(3) as applicable only when the defendant himself specifies both the additional victims and the precise amount of restitution to be paid. It is not possible to delegate power to the court, Peterson insists.

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Nothing in § 3663A(a)(3) prescribes *how* a defendant may exercise the option to make restitution to persons other than the victims of the crimes of conviction. Peterson believes that this open-endedness, combined with the Rule of Lenity, equals a requirement that the victims and amounts be written into the plea agreement. This seems backward. Why would the *lack* of detail in the statute lead to the conclusion that only one means of giving assent is lawful? It makes more sense to infer from the lack of detail in the statute that any means *acceptable to the defendant* is proper. It is the defendant's [**5] choice, after all. A defendant may volunteer details, or agree with the prosecutor on a formula, or delegate the power to the judge.

Defendants cannot be helped by rules cutting off options they find useful (including an option that this defendant *did* find useful). If the final amount of restitution must be specified in the plea agreement, then it may prove impossible for the parties to reach agreement (or for the defendant to obtain concessions in exchange for his promise). Plea agreements are negotiated well in advance of the presentence report, and prosecutors understandably would be reluctant to sign off on a deal whose final dollar

amounts were set before the probation office collected details that usually are helpful in understanding the full scope of the defendant's wrongful conduct. Put to a choice between final details in the plea agreement, and no deal, the result often would be no deal—to the detriment of defendants and prosecutors alike.

Defendants are free to waive both statutory and constitutional rights in the course of criminal prosecutions. See, e.g., *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998); *United States v. Mezzanatto*, 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995); [**6] *United States v. Broce*, 488 U.S. 563, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989); *Mabry v. Johnson*, 467 U.S. 504, 508, 81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984). Even if § 3663A(a)(3) favored full details in the plea agreement (which it does not), a defendant could waive that entitlement and choose a different method. Peterson did just this: he agreed to make restitution to all victims of his entire course of conduct, and agreed further that the district judge could make decisions that proved necessary to implement this choice. The district court did no more than Peterson had agreed it could. He has no basis for complaint.

Affirmed