

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13579
Non-Argument Calendar

D.C. Docket No. 1:15-cr-20129-KMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD A. PRICE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 29, 2016)

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Richard Price appeals his total 87-month sentence of imprisonment after pleading guilty to bank fraud, in violation of 18 U.S.C. § 1344, and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). On appeal, Price argues that the district court clearly erred in applying the sophisticated-means enhancement, U.S.S.G. § 2B1.1(b)(10)(C), to the facts of this case. Price also argues—for the first time on appeal—that the sophisticated-means enhancement is vague, rendering it void as both beyond the power of the Sentencing Commission to promulgate and in violation of due process. After careful review, we affirm.

I.

The facts of this case are undisputed, but the conclusions to be drawn from them are not. According to the presentence investigation report (“PSR”), Price fraudulently opened at least five joint bank accounts at Wells Fargo Bank. He did so in order to deposit and then cash United States Treasury checks issued to other individuals for tax refunds or loans from federal employees’ retirement accounts.¹ To open the joint accounts, Price produced documentation purporting to name Price as trustee for the assets of another person he named on the joint bank account. He provided the bank with fraudulent trust agreements containing a forged signature of the other person named on the joint account, as well as falsified addresses and contact and employment information for the other person. The

¹ The PSR does not explain how Price obtained these checks—just that they were “unlawfully acquired without the intended recipient’s knowledge, authorization, or consent.”

names on the trust agreements and the joint accounts matched names on the Treasury checks Price unlawfully acquired.

Once Price successfully opened a joint account under the name of the individual on the Treasury check, Price deposited the check and then withdrew funds from the account or used a debit card tied to the account to make purchases and pay his own expenses. According to the government, the total intended loss in the case was \$1,648,597.17. The case involved twelve victims, including nine individuals whose identities were compromised, Wells Fargo Bank, the Internal Revenue Service, and the Federal Thrift Savings Plan. The offense conduct occurred between December 2014 and January 2015.

On March 5, 2015, a federal grand jury charged Price with five counts of bank fraud, in violation of 18 U.S.C. § 1344, and five counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. Price pled guilty under a written plea agreement to one count of bank fraud (Count 5) and one count of aggravated identity theft (Count 10).

The PSR assigned Price a base offense level of 7, pursuant to U.S.S.G. § 2B1.1(a)(1). It also applied a 16-level enhancement under § 2B1.1(b)(1)(I), because the loss amount of \$1,648,597.17 exceeded \$1,000,000 but was not more than \$2,500,000, and a 2-level enhancement under § 2B1.1(b)(2)(A), because the offense involved ten or more victims. Finally, the PSR assessed a 2-level

enhancement because “the offense involved sophisticated means,” pursuant to § 2B1.1(b)(10)(C), yielding a total offense level of 27. Price had three criminal history points and was assigned a criminal-history category of III. This established a guideline range of 87 to 108 months of imprisonment. These guideline calculations pertain to Count 5 only, because Count 10 required a two-year term of imprisonment imposed consecutively to any other sentence. *See* 18 U.S.C. § 1028A(a)(1), (b)(2).

Before the sentencing hearing, the parties filed memoranda addressing, among other issues, whether the sophisticated-means enhancement was applicable. After hearing argument from both parties at the sentencing hearing, the district court determined that the enhancement applied and denied Price’s objection on that ground. After ruling on the objection, the district court announced its intention to impose the same sentence regardless of whether Price successfully challenged the sophisticated-means enhancement on appeal. The parties also agreed that Price was entitled to a 3-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1.

The district court calculated Price’s total offense level to be 24 and his criminal history to be III, yielding a guideline range of 63 to 78 months of imprisonment for Count 5, to be followed by a consecutive 24 months of imprisonment for Count 10. The court sentenced Price to 63 months of

imprisonment as to Count 5 and a consecutive term of 24 months as to Count 10. Price now brings this appeal.

II.

Price first challenges the district court's application of the sophisticated-means enhancement to the facts of this case. He argues that his actions were no more than run-of-the-mill bank fraud and did not involve sufficiently complex or intricate conduct to warrant application of the enhancement.

We review for clear error a district court's finding that the defendant used sophisticated means. *United States v. Barrington*, 648 F.3d 1178, 1199 (11th Cir. 2011). Review for clear error is deferential, and we will not disturb a district court's findings unless we are left with a definite and firm conviction that a mistake was made. *United States v. Ghertler*, 605 F.3d 1256, 1267 (11th Cir. 2010).

The Guidelines provide for a two-level enhancement if the offense "involved sophisticated means." U.S.S.G. § 2B1.1(b)(10)(C). "Sophisticated means" is defined in Application Note 9 of the commentary to § 2B1.1 as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1 cmt. n.9(B). Conduct such as hiding assets or transactions "through the use of fictitious entities, corporate shells, or offshore financial accounts" ordinarily indicates sophisticated means. *Id.* But

the defendant's conduct does not need to match the examples given in Application Note 9 in order to be considered sophisticated. *United States v. Feaster*, 798 F.3d 1374, 1380-82 (11th Cir. 2015) (collecting cases). And there is no requirement that each of a defendant's individual actions be sophisticated. *Ghertler*, 605 F.3d at 1267. Rather, it is sufficient if the "totality of the scheme" was sophisticated. *Feaster*, 798 F.3d at 1380-81.

We cannot say that the district court clearly erred in finding that Price used sophisticated means to execute or conceal his bank-fraud scheme. While some individual steps in the scheme may have been unsophisticated, we are not left with a definite and firm conviction that, viewing the scheme as a whole, the district court made a mistake in applying the enhancement. The totality of the scheme involved acquiring large-value Treasury checks, creating fraudulent trust documents and supporting documentation, including false addresses and contact and employment information, forging signatures on the fraudulent documents, opening the joint account at the bank, and then withdrawing the funds from the joint account. The execution of the scheme shows a level of planning and repetition—knowing which documents and supporting information the bank would need to believe that the joint bank accounts were legitimate—that is sufficient to apply the enhancement. *See Barrington*, 648 F.3d at 1199.

While it is true that Price made little effort to conceal his identity and that the scheme was short-lived, we do not find either of these factors dispositive under the circumstances. *See Feaster*, 798 F.3d at 1381 (noting that the “the length of the scheme and the loss inflicted by it . . . *can* be acceptable factors in determining whether the totality of the scheme employed sophisticated means” (emphasis added)); *Ghertler*, 605 F.3d at 1268 (upholding application of the sophisticated-means enhancement despite the defendant’s use of “little or no effort to conceal either the fact of his fraud or his identity”). Based on the undisputed facts in the record, the district court did not clearly err in applying the sophisticated-means enhancement. *See Ghertler*, 605 F.3d at 1267.

III.

Next, Price argues that the sophisticated-means enhancement is void for vagueness on two grounds. Price first contends that the Sentencing Commission’s enabling legislation clearly prohibits it from crafting vague guidelines. Congress created the Commission to eliminate arbitrary and capricious federal sentencing practices, Price argues, and the promulgation of vague guidelines contravenes Congress’s express purpose of providing “certainty and fairness” in sentencing through the guidelines. *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f). He also asserts that “[t]here is no question” that the sophisticated-means enhancement is vague, citing

to a comment in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), that the sophisticated-means enhancement “could be described as vague,” *id.* at 1196.

Second, Price contends that vague guidelines violate due process, and he argues that this Court’s decision in *Matchett*, which held that advisory guidelines cannot be unconstitutionally vague, *id.*, was wrongly decided and is not controlling in this case because it did not discuss the potential for arbitrary enforcement.

Price concedes that we review these sentencing challenges raised for the first time on appeal for plain error only. *See, e.g., United States v. Richardson*, 166 F.3d 1360, 1361 (11th Cir. 1999). “To find plain error, there must be: (1) error, (2) that is plain, and (3) that has affected the defendant’s substantial rights.” *United States v. Hesser*, 800 F.3d 1310, 1324 (11th Cir. 2015) (quoting other sources). If those three conditions are met, we may exercise our discretion to correct the error, “but only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted). Unless the explicit language of a statute or rule specifically resolves an issue, plain error cannot exist without precedent from the Supreme Court or this Court directly resolving the issue. *Id.* at 1325. An error affects substantial rights “if there is a reasonable probability of a different result absent the error.” *Id.*

Here, Price cannot show that any error was “plain.” As for Price’s first argument, the broad language in the Sentencing Commission’s enabling

legislation—directing the Commission to promote certainty and fairness in sentencing when crafting guidelines—does not specifically resolve the issue, and Price has not cited any authority, binding or persuasive, holding that the promulgation of guidelines that “could be described as vague” is beyond the power given to the Commission by Congress. *See Hesser*, 800 F.3d at 1324-25. With regard to his second challenge, *Matchett* forecloses the argument that the guidelines can be unconstitutionally vague. We are bound by that holding under the prior-precedent rule. *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). Even aside from *Matchett*, though, neither this Court nor the Supreme Court has held either that guidelines in general can be unconstitutionally vague or that the sophisticated-means enhancement in particular is unconstitutionally vague. *See Hesser*, 800 F.3d at 1325.

Price also cannot show that any error in applying a vague guideline affected his substantial rights. The district court explicitly stated that it would have imposed the same sentence even in the absence of the sophisticated-means enhancement. Therefore, there is no “reasonable probability of a different result absent the error.” *Id.* For these reasons, Price’s vagueness challenges to the sophisticated-means enhancement fail on plain-error review.

IV.

In sum, we uphold the district court's application of the sophisticated-means enhancement in determining Price's guideline level. Consequently, we affirm his sentence.

AFFIRMED.