

J. Jim W. [unclear]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 84-0047-A
)	
GARY M. STUVER)	
)	
Defendant.)	

MEMORANDUM OPINION

This matter is before the Court on remand from the Fourth Circuit Court of Appeals for resentencing of the defendant and on the defendant's motion for a reduction in sentence pursuant to Fed. R. Crim. P. 35.

The Court originally sentenced the defendant to five years imprisonment on Counts 1 and 2 of the indictment, to run concurrently. The Court suspended imposition of sentencing under Count 3 and placed the defendant on probation for five years. As a special condition of probation, the defendant was ordered to "make restitution to Tricon Enterprises in an amount to be determined by his probation officer at the direction of his probation officer."

In ordering restitution, the Court failed to delineate its authority for imposing such a penalty and also neglected to make the requisite findings of fact as outlined in United States v. Bruchey, 810 F.2d 486 (4th Cir. 1987). The Court corrects those errors here.

The defendant is ordered to make restitution to Tricon Enterprises pursuant to the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663-3664 (codified at §§ 3579-3580 at the time of the original sentencing.) The VWPA places restrictions on the trial judge in the amount of restitution that can be ordered and the length of time over which it can be paid. In considering the amount of restitution to order, the Court must consider "the amount of the loss sustained by the victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3664.

Unless otherwise ordered, restitution under the Act shall be paid immediately. 18 U.S.C. § 3663(f)(3). Here the defendant is incarcerated and claims to have no assets. He will not be able to pay any restitution until he is released and has an opportunity to earn a living. The VWPA grants the sentencing judge the authority to order the defendant to pay restitution during the period of probation, five years from the defendant's release from prison if no probation is ordered, or five years after the date of sentencing. Stuver was originally sentenced to five years probation. Although at the evidentiary hearing in this matter, the Court suggested that the period of probation would be reduced to three years, upon further reflection the five year period is appropriate to ensure that the defendant pays meaningful restitution to Tricon Enterprises.

Stuver illegally obtained through wire and mail fraud \$700,000. Of that sum, \$284,509.04 has been recovered and Tricon anticipates recovering an additional \$152,752.34. Therefore, \$262,738.64 remains unaccounted for. Stuver apparently frittered this sum away in living expenses during the two and a half years between the commission of his crimes and his apprehension.

Tricon Enterprises, nonetheless, remains out-of-pocket \$262,738.64. No insurance policy covers the company's loss.¹ In considering Stuver's ability to repay this amount, the Court notes that Stuver has no dependents. He has been separated from his wife since late 1983, and she is self-supporting. He has no children. He also, however, has no assets which can be used to satisfy the debt owed Tricon. Stuver has represented to the Court that upon his release from prison he will be able to secure employment in Texas that will make use of his financial and foreign language skills. Based upon Stuver past employment history and assuming his criminal conviction does not have too detrimental an effect on his salary negotiations, Stuver can be expected to command a salary of \$35,000 which will increase over the term of his probation.

Since restitution under the VWPA must be completed within the duration of the defendant's probation period, Stuver must complete his payment of restitution within five years of his

¹Tricon Enterprises apparently was not insured for the losses it sustained. If in fact it was, then the restitution order will be modified. See United States v. Golomb, 811 F.2d 787 (2d Cir. 1987).

release from prison. Accounting for the loss to Tricon Enterprises and Stuver's financial needs and ability to pay, the Court orders the defendant to pay restitution to Tricon Enterprises in the amount of \$100,000 over the five years of his probation as a special condition of that probation. Although the defendant has expressed his willingness to repay the entire \$262,738.64 and the Court feels this amount is appropriate if it could be paid out over a longer period of time, to order Stuver to repay the entire amount in five years would be inconsistent with the Fourth Circuit's interpretation of the VWPA in United States v. Bruchey, 810 F.2d 486 (4th Cir. 1987).

The defendant argues that the Fourth Circuit's ruling in this matter vacated the Court's earlier sentence in its entirety. The Fourth Circuit's decision speaks, however, only to the issue of restitution. In all other respects, the Court's earlier sentence is in full force and effect. Therefore, the Court considers the defendant's motion as made pursuant to Fed. R. Crim. P. 35. To enhance Stuver's ability to to repay the amount owing Tricon and to allow him the opportunity to begin rebuilding his life, the defendant's Rule 35 motion is granted. The five year sentence imposed on Counts 1 and 2 is reduced to three years. The term of probation imposed on Count 3, however, remains five years for the reasons stated earlier.

Let the Clerk send a copy of this memorandum opinion to all
counsel of record.

7/5/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE