

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1946

UNITED STATES OF AMERICA
Plaintiff-Appellee,

-vs-

ROBERT GENSCHOW, Sr.,
Defendant-Appellant

Appeal From The United States District Court
For The Western District of Michigan
Southern Division

**REPLY BRIEF FOR DEFENDANT-APPELLANT
ROBERT GENSCHOW, SR.,**

RAY KENT
Federal Public Defender

PAUL L. NELSON
Assistant Federal Public Defender

JASNA TOSIC
Research & Writing Specialist
Office of the Federal Public Defender
50 Louis, N.W., Suite 500
Grand Rapids, Michigan 49503
(616) 742-7420

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. Acceptance of Responsibility.....	1
A. Standard of review.	1
B. The fact that Mr. Genschow went to trial to assert a good faith defense does not preclude the acceptance of responsibility reduction because Mr. Genschow admitted his conduct and only went to trial to contest the legal element of the intent. Additionally, the district court did improperly rely on the offense conduct to deny Mr. Genschow acceptance of responsibility reduction.	1
II. Restitution.....	8
A. Standard of review.	8
B. Two-part test for determination of the amount of loss announced in <i>United States v. Warshawsky</i> is still the controlling law in this Circuit.	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE.	11
APPELLANT’S DESIGNATION OF RECORD FROM DISTRICT COURT... .	12

TABLE OF AUTHORITIES

Cases

<i>United States v. Anaya-Zamora</i> , 113 F. App'x 775 (9th Cir. 2004).	3
<i>United States v. Barris</i> , 46 F.3d 33 (8th Cir. 1995).	3
<i>United States v. Beasley</i> , 346 F.3d 930 (9th Cir. 2003)	3
<i>United States v. Fleener</i> , 900 F.2d 914 (6th Cir. 1990).	3
<i>United States v. Gauvin</i> , 173 F.3d 798 (10th Cir. 1999).	3-5
<i>United States v. Hakley</i> , 101 F. App'x 122 (6th Cir. 2004).	1
<i>United States v. Reed</i> , 173 F. App'x 184 (3d Cir. 2006)	3
<i>United States v. Sosebee</i> , 419 F.3d 451 (6th Cir. 2005)	8, 9
<i>United States v. Triana</i> , 468 F.3d 308 (6th Cir. 2006).	8
<i>United States v. Warshawsky</i> , 20 F.3d 204 (6th Cir. 1994).	8, 9
<i>United States v. Williams</i> , 940 F.2d 176 (6th Cir. 1991).	4

Sentencing Guidelines

U.S.S.G. § 3E1.1.	2, 4
---------------------------	------

ARGUMENT

Mr. Genschow relies on his initial brief in regard to the issue one, the district court's denial of the Motion to Dismiss the Indictment. In regard to the issue two and three, while for the most part Mr. Genschow relies on the arguments made in his initial brief, there are certain arguments raised by the government to which he wishes to respond.

I. Acceptance of Responsibility

A. Standard of review

The government states in its brief that the standard of review for denial of acceptance of responsibility is clear error. (Appellee's brief, at 39). While this standard of review is generally used for review of acceptance of responsibility orders, whether the district court relied on improper consideration is a legal question, and it is reviewed *de novo*. *United States v. Hakley*, 101 F. App'x 122, 126 (6th Cir. 2004)(unpublished).

B. The fact that Mr. Genschow went to trial to assert a good faith defense does not preclude the acceptance of responsibility reduction because Mr. Genschow admitted his conduct and only went to trial to contest the legal element of the intent. Additionally, the district court did improperly rely on the offense conduct to deny Mr. Genschow acceptance of responsibility reduction.

The government argues that the district court's denial of two-level reduction

in Mr. Genschow's offense level for acceptance of responsibility under U.S.S.G. § 3E1.1 was proper because (1) Mr. Genschow went to trial and asserted a good faith defense, and (2) the district court did not improperly rely on the offense conduct as a basis for denial. Both of these positions are wrong.

Even though Mr. Genschow went to trial, he is still eligible for the acceptance of responsibility reduction because a defendant who proceeds to trial is not automatically precluded from receiving the reduction. While the guidelines state that a defendant who "puts the government to its burden of proof at trial, is convicted and only then admits guilt and expresses remorse" ordinarily should not get the acceptance of responsibility reduction in his offense level, the guideline also allows the reduction in a rare cases "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt." U.S.S.G. § 3E1.1, cmt. n. 2. *Id.* This case is one of contemplated rare case because Mr. Genschow admitted all of his conduct, and only went to trial to contest the legal element of the intent. The Sixth Circuit, as well as other circuits, have held that in some cases even though a defendant raised a defense relating to intent, he still may qualify for the acceptance of responsibility reduction.

This Circuit has held that a defendant who goes to trial to raise an entrapment defense is not precluded from receiving the reduction for acceptance of responsibility.

United States v. Fleener, 900 F.2d 914, 918 (6th Cir. 1990). Similarly, the Eighth Circuit held that raising an insanity defense at trial is not an automatic bar to reduction for acceptance of responsibility. *United States v. Barris*, 46 F.3d 33, 35 (8th Cir. 1995). Neither is the assertion of the justification offense at trial an automatic bar to acceptance of responsibility reduction. *United States v. Anaya-Zamora*, 113 F. App'x 775, 777 (9th Cir. 2004)(citing *United States v. Beasley*, 346 F.3d 930, 934 (9th Cir. 2003) (reversing the district court's denial of acceptance of responsibility reduction on the ground that the defendant asserted justification defense at trial); *but see United States v. Reed*, 173 F. App'x 184, 190 (3d Cir. 2006) (holding that a defendant who asserted justification defense to charge of being a felon in possession of a firearm was not entitled to reduction in his offense level for acceptance of responsibility). The Tenth Circuit upheld the district court's reduction for the acceptance of the responsibility where defendant argued at trial that he did not have an intent to commit a crime. *United States v. Gauvin*, 173 F.3d 798, 806 (10th Cir. 1999). These defenses, entrapment, insanity, and justification, are defenses related to intent, yet the courts do not necessarily deny an acceptance of responsibility reduction where defendant raises those defenses at trial.

In support of his argument that a defendant who contests the element of intent at trial is not eligible for the acceptance of responsibility reduction, the government

cites in its brief *United States v. Williams*, 940 F.2d 176, 181 (6th Cir. 1991). (Appellee's Brief, at 40). This case, however, is inapposite here.

In *Williams*, the defendant denied altogether that she was involved in a criminal drug activity and maintained throughout the trial and sentencing that she was an innocent bystander, unaware of any illegal activity. *Williams*, 940 F.2d at 179, 182.

In addition to that, the defendant received an obstruction of justice enhancement, which in most cases precludes an acceptance of responsibility reduction under the application note 4 to § 3E1.1. *Id.* at 183. The Sixth Circuit found that, because the defendant denied her criminal *conduct* and because she obstructed the justice, the defendant did not accept the responsibility for her action. *Id.* at 182-83.

In contrast to the defendant in *Williams*, Mr. Genschow admitted his conduct even before the trial. He also testified at trial, and as the government acknowledged in its closing argument, other than the intent, admitted all of the elements of the charged offense. (R. 72, Trial Transcript, at 158). He went to trial solely to assert that, based on his belief of the status of the Ontonagon Band and ownership of the Ontonagon Reservation, he lacked the specific intent element contained in the count two of the indictment.

This case is comparable to *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999) where the defendant, who admitted his conduct but proceeded to trial to contest

the element of the intent to commit the crime, received the acceptance of responsibility reduction. The defendant in *Gauvin* was charged with assault with a dangerous weapon and assault on a federal officer. 173 F.3d at 801. The defendant accelerated his truck when a police officer signaled him to stop, and while being pursued by the police, and edged into opposing traffic forcing two incoming cars to swerve into the breakdown lane to avoid the defendant's truck. *Id.* Additionally, the defendant was swerving his truck into another lane to prevent police car to pass him, which resulted in his truck and the police car colliding and the two vehicles flipping onto a ditch. *Id.* The defendant admitted his conduct but proceeded to trial to argue that while drunk and scared, he did not intend to cause injury to others.

The district court found that Mr. Gauvin was entitled to pursue theory that he did all of these things but that he did not intend to hurt the officers, and therefore he was entitled to acceptance of responsibility reduction. 173 F.3d at 806. The Tenth Circuit affirmed. *Id.* at 806. The Tenth Circuit stated that the defendant admitted all of his conduct, but “simply disputed whether his acknowledged state of mind met the legal criteria of intent to harm or cause apprehension.” *Id.* This defense “essentially [challenges] the applicability of the statute to his conduct,” and “does not as matter of law preclude application of the guideline.” *Id.*

Similarly, Mr Genschow “admitted to all of the conduct with which he was

charged,” and he “simply disputed whether his acknowledged factual state of mind met the legal criteria of intent.” The district court, in its order denying the government’s motion to prevent Mr. Genschow from raising a good faith defense at trial, stated that Mr. Genschow has a constitutional right to present his defense. (R. 65, Opinion, at 2-3). He should not be penalized for exercising his constitutional right. And since he did not deny any of his conduct and only raised a legal argument of intent at trial, this is one of the rare cases contemplated by the guidelines.

Moreover, the district court did not deny Mr. Genschow reduction because he went to trial and asserted good faith defense. This issue has been briefed by both parties and argued at the sentencing proceedings. (See R. 73, Defendant Sentencing Memorandum, at 4-6; R. 74, Government’s Sentencing Memorandum, at 2-6; R. 83, Sentencing Transcript, at 3-6). At the close of the government’s argument at sentencing, the district court stated that it was not persuaded that the case relied on by the government is controlling here. (R. 83, Sentencing Transcript, at 6). The district court then proceeded to consider whether Mr. Genschow demonstrated acceptance of responsibility. *Id.* at 6-9. In doing so, as argued in Mr. Genschow’s initial brief, the district court improperly relied on the offense conduct, and the government’s argument to the contrary is incorrect.

As was argued in Mr. Genschow’s initial brief, the district court discussed at

length the offense conduct and relied on that conduct to deny the reduction. The government itself acknowledges that “the court clearly contemplated events leading up to offense.” (Appellee’s Brief, at 43). And while the district court sitting at the bench trial did not believe that Mr. Genschow lacked a requisite intent, as the jury in *Gauvin* did not believe that the defendant did not have an intent to injure officers, such a finding does not preclude application of the acceptance of responsibility reduction.

In conclusion, Mr. Genschow should be awarded the acceptance of responsibility reduction. Mr. Genschow never denied his conduct, and at all times he readily admitted all of his actions and testified at trial about his actions. He only contested the legal element of the intent. This Court as well as other circuits allow for acceptance of responsibility where defendant raises at trial defense related to intent. And as far as Mr. Genshow’s beliefs regarding the ownership of the Ontonagon Reservation, the district court commented that Mr. Genshow’s asserted belief is a “heartfelt belief” that neither the court nor anyone else is asking him to abandon. (R. 83, Sentencing Transcript, at 8). More importantly, as the district court stated at the sentencing, Mr. Genschow showed a “recognition of his erroneous action” and showed “great regret for the consequences of what he did.” (R. 83, Sentencing Transcript, at 8). Had the district court not improperly relied on the

offense conduct, these factual findings mandate a finding that Mr. Genschow accepted a responsibility for his conduct and should get reduction in his offense level.

II. Restitution

A. Standard of review

This Court reviews the district court calculation of the amount of loss for purpose of determining base offense level under the guidelines for clear error, and the restitution order for abuse of discretion. *United States v. Sosebee*, 419 F.3d 451, 455-56 (6th Cir. 2005) *cert denied*, 546 U.S. 1082 (2005). When, as here, the challenge is to the methodology used by the district court to calculate loss, the review is *de novo*. *United States v. Triana*, 468 F.3d 308, 321 (6th Cir. 2006).

B. Two-part test for determination of the amount of loss announced in *United States v. Warshawsky* is still the controlling law in this Circuit.

As stated in Mr. Genschow's initial brief, in *United States v. Warshawsky*, 20 F.3d 204, 212-14 (6th Cir. 1994), this Court set out two-part test used for determination of the amount of loss in a case such as this. This Court stated in *Warshawsky* that the primary method the district court should use in determining the amount of loss is the fair market value of the property. *Id.* Only when the market value is not readily-ascertainable or inadequately measures the harm or gain, the court may use other method. *Id.*

The government, however, argues that this Court's holding in *Warshawsky* is not controlling law in this Circuit because the guideline note cited in *Warshawsky* has since been amended in 2001. (Appellee's Brief, at 48-49). However, despite the amendment, this Court continues to use the test announced in *Warshawsky*. In 2005, after the guideline amendment, this Court reiterated the continued validity of the holding in *Warshawsky*. *United States v. Sosebee*, 419 F.3d 451, 456 (6th Cir. 2005) (citing *Warshawsky*, 20 F.3d at 212-14) ("We established in *Warshawsky* that the market value rule should be bypassed only if the market value is not readily-ascertainable or inadequately measures the harm or gain.").

It should be noted that the amount of loss the district court arrived at also impacted Mr. Genschow's offense level, which was increased by six levels, from level six to level twelve because the loss was calculated to be over \$30,000.00 but less than \$ 70,000.00. (See Appellant's Brief, at 14; PSR at 7, ¶ 31; R. 83, Sentencing Transcript at 42). If this Court reverses the amount of loss for the purpose of the restitution, Mr. Genschow's offense level should be recalculated.

CONCLUSION

For the reasons stated in Mr. Genschow's initial brief, Mr. Genschow respectfully requests that this Court vacate the district court's decision to deny the Motion to Dismiss the Indictment, dismiss the Indictment for the lack of jurisdiction, and vacate Mr. Genschow's conviction. In the alternative, for the reasons stated in the initial brief and in this reply brief, Mr. Genschow respectfully requests this Court to (1) reverse the district court's denial of the acceptance of responsibility reduction, or to vacate and remand for the further proceeding with instructions regarding the proper time frame and (2) to vacate the restitution award ordered by the district court and instead adopt the market value calculation offered by the defense expert.

Respectfully Submitted,

RAY KENT
Federal Public Defender

PAUL L. NELSON
Assistant Federal Public Defender

Dated: February 22, 2010

JASNA TOSIC
Research & Writing Specialist

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on February 22, 2010, and that a copy was made upon opposing counsel through the Court's CM – ECF system.

/s/ Paul L. Nelson
PAUL L. NELSON
Assistant Federal Public Defender

**APPELLANT'S DESIGNATION
OF RECORD FROM DISTRICT COURT**

There are no materials cited in the reply brief that were not identified in the Appellant's Designation of Record set forth in the Appellant's Opening Brief. Therefore, no further designation of record is necessary.