APPENDIX
UNPUBLISHED CASES

92 Fed.Appx. 692, 2004 WL 377664 (C.A.10 (Okla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 92 Fed.Appx. 692, 2004 WL 377664 (C.A.10 (Okla.)))

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Tenth Circuit.
Stephanie Kay PHILLIPS; Robert Phillips, as Guardian for Jennifer Sue Phillips, a Minor; Stephanie Kay Phillips, as Personal Legal Representative of the Estate of Donna Kaye Frenzen Phillips; Dustin Robert Phillips; Sam C. Bingaman, III, as Personal and Legal Representative of Andrew Dane Phillips, Plaintiffs-Appellants,
v.
GRADY COUNTY BOARD OF COUNTY COMMISSIONERS; City of Chickasha; City of Tuttle; Jason Carpenter, Chickasha Police Department; Brad Crawford, Chickasha Police Department; Dustin Dowdle, Chickasha Police Department; Stan Florence, Grady County Sheriff's Office; Randy Johnson, Tuttle Police Department, Earl Pettit, Grady County Sheriff's Office; Defendants-Appellees,
and
Terry Alexander, Grady County Sheriff's Office; Keith Cleghorn, Grady County Sheriff's Office; Robert Jolley, Grady County Sheriff's Office; Jeff McConnell, Grady County Sheriff's Office; Jenny Moyer, Grady County Sheriff's Office; Tony Willis, Grady County Sheriff's Department; and John Does 1-20, Defendants.
No. 02-6306.

March 2, 2004.

Background: Family of murdered confidential informant filed § 1983 action against city, county, and their officials alleging that her coerced performance as confidential informant amounted to false arrest and imprisonment and violated her constitutional rights. The United States District Court for the District of Oklahoma entered summary judgment in favor of defendants, and plaintiffs appealed.

Holdings: The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that:
(1) victim's statements that police officers coerced her into acting as confidential informant were not admissible under state-of-mind exception to hearsay rule;
(2) plaintiffs failed to establish due process claim under state-created danger theory; and
(3) sheriff and deputy were immune from state tort liability.

Affirmed.

West Headnotes

[1] Evidence 157 269(2)

157 Evidence
157VIII Declarations
157VIII(A) Nature, Form, and Incidents in General
157k269 Statements Showing Intent, Motive, or Nature of Act
157k269(2) k. Statements by Persons Since Deceased. Most Cited Cases
Murder victim's statements that police officers coerced her into acting as confidential informant related to victim's past intentions, and thus were not admissible in wrongful death action against officers under state-of-mind exception to hearsay rule. Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[2] Constitutional Law 92 4544

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)3 Law Enforcement
92k4543 Custody and Confinement of Suspects; Pretrial Detention
92k4544 k. In General. Most Cited Cases
(Formerly 92k262)

Counties 104 148

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104 Counties
104VII Torts
104k148 k. Injuries by Mobs or Other Wrongdoers. Most Cited Cases
County law enforcement officials' recruitment of detainee as confidential informant was not conscience shocking, and thus was insufficient to support claim against officials for violation of detainee's substantive due process rights under state-created danger theory, even if informant was murdered as result of her actions, absent evidence that officials knew of specific threat on her life. U.S.C.A.Const. Amend. 14.

[3] Sheriffs and Constables 353 99

353 Sheriffs and Constables
353III Powers, Duties, and Liabilities
353k99 k. Liabilities for Negligence or Misconduct in General. Most Cited Cases

Sheriffs and Constables 353 100

353 Sheriffs and Constables
353III Powers, Duties, and Liabilities
353k100 k. Liabilities for Acts or Omissions of Deputies or Assistants. Most Cited Cases
Under Oklahoma law, sheriff and deputy were shielded by Oklahoma Tort Claims Act from tort liability arising from confidential informant's death, where they were acting within scope of their employment at all relevant times. 51 Okl.St.Ann. § 163(C).

***693** John W. Coyle, III,J. Christopher Daniels, The Coyle Law Firm, Oklahoma City, OK, Saul J. Singer, Stephanie C. Hess, James M. Ludwig, Peter C. Grenier, Anne R. Noble, Bode & Grenier, Washington, DC, Samuel C. Bingaman, III, Ferguson & Heck, Chickasha, OK, for Plaintiffs-Appellants.

Chris J. Collins, Jason C. Wagner, James L. Gibbs, II, Robert E. Applegate, Michael L. Carr, Collins, Zorn, Wagner & Gibbs, Oklahoma City, OK, Michael R. Chaffin, Rodney D. Fergason, John L. Blodgett, Jason L. West, Huckaby, Fleming, Frailey, Chaffin & Darrah, Chickasha, OK, for Defendants-Appellees.

Before McCONNELL, ANDERSON, and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

STEPHEN H. ANDERSON, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See*Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Donna Kaye Phillips was murdered after she served as a confidential informant for the District Six Task Force, a multi-jurisdictional narcotics task force. On behalf of Ms. Phillips' children and estate, her relatives brought civil rights claims, under 42 U.S.C. § 1983, and wrongful death claims, under state law, against Grady County, the cities of Chickasha and Tuttle, and numerous county and city law-enforcement officers. The district court entered summary judgment in favor of all defendants. In this appeal, plaintiffs pursue only their claims against the Grady County Board of County Commissioners, Stan Florence (the Sheriff of Grady County), and Earl Pettit (a deputy with the Grady County Sheriff's Office and senior member of the task force).[FN1] We affirm.

FN1. In district court, plaintiffs confessed the summary judgment motions of defendants Terry Alexander, Jason Carpenter, Keith Cleghorn, Robert Jolley, Jeff McConnell, Jenny Moyer, and Tony Willis. The district court granted these defendants summary judgment by an order dated April 29, 2002. John Does 1 through 20 were never served. District Court Order of Aug. 27, 2002 at 1, n. 1 (provided as an attachment to appellants' brief). In addition, pursuant to Fed. R.App. P. 42(b), the parties filed a stipulated dismissal of the appeal with regard to defendants Jason Carpenter, Brad Crawford, Dustin Dowdle, Randy Johnson, City of Chickasha, and City of Tuttle on October 31, 2003.

BACKGROUND

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In a cascading series of events, Ms. Phillips was arrested on an outstanding warrant by a Chickasha police officer, detained in the county jail, recruited as a confidential informant for the task force by Chickasha and Tuttle police officers, and, the next day, utilized in two undercover ***694** drug buys from a dealer, Rodney Cheadle. As the county sheriff, defendant Florence was notified of the prospective task force operation. Defendant Pettit and the municipal officers orchestrated the drug buys, obtained and executed a search warrant shortly after the second buy, and arrested Cheadle during the search. Three months later, Ms. Phillips was stabbed to death. Cheadle was convicted of soliciting the murder from his jail cell.

Plaintiffs alleged in district court that the municipalities, the county, and the individual municipal and county law enforcement officers should all be held liable for Ms. Phillips' death, for a multiplicity of reasons. They asserted that Ms. Phillips was not a voluntary confidential informant: the municipal officers threatened to take away her children unless she cooperated with them, she was intoxicated and in pain at the time she signed a cooperating agreement, and she was not informed of the potential consequences. Further, they claimed that improper handling of the buy operation and Cheadle's arrest compromised her confidentiality and that jail routines which allowed Cheadle to arrange her murder endangered her security.

Based on this version of the facts, they laid out their legal claims. They alleged that: (1) Ms. Phillips' initial arrest and detention and her coerced performance as a confidential informant amounted to false arrest and imprisonment, in violation of her Fourth Amendment right to be free from illegal search and seizure; (2) defendants' threats to deprive Ms. Phillips of her children interfered with the children's right of intimate and familial association with her, protected by the Fourteenth Amendment; (3) defendants' conduct violated Ms. Phillips' Fourteenth Amendment substantive due process rights; and (4) defendants were liable to plaintiffs under state-law wrongful death theories.

****2** Groupings of defendants filed summary judgment motions, in which they challenged most of plaintiffs' factual contentions and all their legal arguments. Factually, defendants' briefs and supporting materials maintained that Ms. Phillips was properly arrested and detained, that she had volunteered her services as a confidential informant and knowingly signed a cooperating agreement, and that Ms. Phillips herself had breached her confidentiality by telling family members, friends, and Cheadle's wife of her role in Cheadle's arrest. Additionally, a month after the undercover operation, Ms. Phillips was arrested for public intoxication and booked into the county jail (where Cheadle continued to be held). A task force member was called to the jail to make her stop screaming that she had worked for the district attorney. Defendants' legal arguments were specific to their varying circumstances.

After plaintiffs submitted briefs in opposition and a separate statement of the case and counter-statement of facts, the district court was faced with the herculean task of sorting through the facts and analyzing the law applicable to each defendant.[FN2] In a ***695** fifty-one page order, the district court excluded some of plaintiffs' supporting evidence as hearsay and determined that plaintiffs did not present admissible evidence showing that any of the defendants violated Ms. Phillips' Fourth Amendment rights or Fourteenth Amendment substantive due process rights, under either a special relationship or state-created danger theory. Further, it found there was no violation of plaintiffs' Fourteenth Amendment right to intimate and familial association. Finally, the district court held that plaintiffs had failed to show liability under state law.

FN2. Plaintiffs apparently submitted affidavits and transcripts supporting their position in district court. The appendix filed in this court, however, includes only plaintiffs' statement of the case and counter-statement of facts, without the supporting materials. It is the appellants' responsibility to submit an appendix which contains the "parts of the record to which [a party] wish[es] to direct the court's attention." Fed. R.App. P. 30(a)(1)(D). This court is not obliged to "remedy any failure of counsel to provide an adequate appendix." 10th Cir. R. 30.1(A)(3).

The district court's order provides quotations from some of plaintiffs' supporting material. Further, defendants have filed supplemental appendices. We have considered plaintiffs' citations to the district

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> court record only to the extent that the referenced material can be found in either the court order or the supplemental appendices. In the absence of a complete appendix, this court cannot conduct the "fresh analysis of the entire record of the case" urged by plaintiffs. Aplt. Reply Br. at 15.

On appeal, plaintiffs first argue that the district court erred in excluding the statements of family members repeating Ms. Phillips' accounts of law enforcement officers' threatening to take her children away. Plaintiffs contend that, if all their evidence is considered, they have shown disputed issues of fact material to their constitutional and state-law claims against defendants. In their briefs, they consistently refer to defendants as a group, without acknowledging the dissimilar roles played by the different defendants.

DISCUSSION

We review a district court's ruling on the admissibility of evidence for an abuse of discretion, *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir.2003), and review a summary judgment ruling de novo, applying the same standard as the district court, *Nelson v. Holmes Freight Lines, Inc.*, 37 F.3d 591, 594 (10th Cir.1994). Due to the parties' stipulated dismissal, our task on appeal is much less complex than that of the district court. We need evaluate only the evidence relating to the remaining defendants, the Grady County Board of County Commissioners, Sheriff Florence, and Deputy Pettit.

Evidentiary Rulings

Plaintiffs' primary challenge to the district court's evidentiary rulings concerns the exclusion of their relatives' testimony on coercion in the recruitment of Ms. Phillips as a confidential informant, but admission of the law enforcement officers' testimony describing a voluntary agreement. They assert that their submissions should be admitted or, alternatively, all testimony on the issue should be excluded as hearsay. This argument does not appear to relate to any of the defendants remaining in the appeal. However, to the extent plaintiffs claim that Deputy Pettit engaged in coercive behavior, we briefly analyze the underlying hearsay issues.

****3** Plaintiffs' only evidence of coercion and lack of knowing consent arises from Ms. Phillips' statements to her stepmother and sister, quoted in the district court's order at 17. The relatives' testimony relays what Ms. Phillips said that the officers told her and also states that Ms. Phillips said that the officers allowed her to become intoxicated. The district court excluded this evidence as inadmissible hearsay. *See*Fed.R.Evid. 801(c), 802.

There is a double hearsay problem with the testimony about the officers' alleged coercion. The first level of hearsay is the officers' statements to Ms. Phillips; the second is Ms. Phillips' statements to her relatives. *See*Fed.R.Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule...."). Though the officers' statements to Ms. Phillips are ***696** nonhearsay admissions of a party-opponents, *see*Fed.R.Evid. 801(d)(2)(A), Ms. Phillips' report of the statements to the relatives are not.

[1] Plaintiffs incorrectly argue that this second level of hearsay is admissible under the state-of-mind exception to the hearsay rule. Federal Rule of Evidence 803(3) allows a declarant's out of court statement "not to prove the truth of the matter asserted, but to show a future intent of the declarant to perform an act." *United States v. Freeman*, 514 F.2d 1184, 1190 (10th Cir.1975). In other words, statements of intent are admissible to provide a foundation for the declarant's subsequent actions. *Id.* at 1190-91. The relatives' testimony concerns Ms. Phillips' retrospective justification for her serving as a confidential informant. Because it concerns her past, not future, intentions, it does not fall within the state-of-mind exception. The evidence is clearly offered to prove the truth of the matter asserted, and is inadmissible.

A similar analysis leads to the exclusion of relatives' testimony that Ms. Phillips said that she was intoxicated during at least one of the undercover drug buys. Plaintiffs identify no recognized hearsay exception which would apply to this testimony.

In contrast, the law enforcement officers' testimony about Ms. Phillips' statements may be classified as non-hearsay admissions of a party-opponent. The testimony is therefore admissible under Fed.R.Evid. 801(d)(2)(A). *See Estate of Shafer v. Commissioner*,

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749 F.2d 1216, 1220 (6th Cir.1984) (stating that a decedent, "through his estate, is a party to [an] action," so that the decedent's statements "are a classic example of an admission"). The district court properly applied the rules of evidence and certainly did not abuse its discretion in making its evidentiary rulings.

Summary Judgment

Plaintiffs assert a litany of complaints about the district court's summary judgment determinations. Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

****4** First, we note that plaintiffs have failed to provide significant factual citations or legal argument concerning the district court's grant of summary judgment in favor of the Board and Sheriff Florence in his official capacity.[FN3] A civil-rights suit against a county or a county official in his official capacity requires a showing that a "policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. County Bd. of County Comm'rs*, 151 F.3d 1313, 1316 (10th Cir.1998). Accordingly, we decline to disturb the district court's ruling on the liabilities of these defendants.

> FN3. On plaintiffs' state-law wrongful-death and survivors' actions, their opening brief states that "[t]he District Court *ignored* evidence of Florence's custom of failing to train, supervise and discipline" and provides a footnote citing to a document that is not in an appendix. Aplt. Br. at 58; *see also* Reply Br. at 22 (repeating the assertion). Needless to say, plaintiffs' unsupported contentions do not create a disputed material fact.

Concerning the individual defendants, Sheriff Florence and Deputy Pettit, we must determine whether any factual issues exist as to their personal participation in the alleged wrongdoing. *See Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir.1997) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation."). We ***697** discern no evidence showing that either Sheriff Florence or Deputy Pettit participated in Ms. Phillips' arrest and detention. Additionally, plaintiffs' supporting materials do not demonstrate that Ms. Phillips was in custody while serving as a confidential informant. As a result, these defendants did not participate in false arrest or false imprisonment activities and are not liable for Fourth Amendment violations.

Plaintiffs have also asserted a Fourteenth Amendment substantive due process claim, based on the theory that defendants created the danger which led to Ms. Phillips' death. " '[T]his court has held that 'state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm.' " *Currier v. Doran*, 242 F.3d 905, 917-18 (10th Cir.2001) (quoting *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir.1996)) (further quotation omitted).

To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Id. at 918. "[T]he Due Process Clause is not a guarantee against incorrect or ill-advised [government] decisions." *Christiansen*, 332 F.3d at 1282 (quotations omitted). Defendants' conduct must "demonstrate a degree of outrageousness ... that is truly conscience shocking." *Id.* (quotations omitted). "[N]egligence does not shock the conscience, and ... even permitting unreasonable risks to continue is not necessarily conscience shocking." *Ruiz v. McDonnell*, 299 F.3d 1173, 1184 (10th Cir.2002) (quotations omitted), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1908, 155 L.Ed.2d 826 (2003).

****5** When evaluating the evidence, this court carefully examines the conduct of each individual defendant, not the aggregate effect of defendants' actions. *See Currier*, 242 F.3d at 919-23. As to Sheriff Florence and Deputy Pettit, it is arguable that plaintiffs have made a sufficient showing on the first three of the six factors. They were involved in the use of Ms. Phillips as a member of a limited group consisting of confi-

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dential informants. Thus, there is an inference that they increased her vulnerability to danger and put her at substantial risk of harm.

There is no evidence, however, on the remaining three factors. Plaintiffs have not shown that the risk of Ms. Phillips' death was obvious to these defendants or that they knew of a specific threat on her life. The only relevant evidence on notice of Cheadle's murder solicitation efforts is the self-contradictory testimony of Jackie Lee Melvin, a jail inmate. If one version of his account is credited, he told the jail administrator that Cheadle was "back there trying to talk people into doing favors for him from keeping this girl named Donna from showing up at court." County Comm'rs Supp.App., at 331. Despite plaintiffs' argument to the contrary, there is no evidence that Sheriff Florence or Deputy Pettit were informed of this allegation.[FN4] Additionally, Mr. Melvin's testimony***698** that Sheriff Florence placed Cheadle in solitary after he returned from the site of the murder scene does not lead to an inference that the Sheriff was aware of a death threat prior to Ms. Phillips' murder.

> FN4. In plaintiffs' statement of the case and counter-statement of facts, they state, without citation, that Sheriff Florence was informed of Cheadle's death threat and sheriff's department officers were asked to protect Ms. Phillips. Aplt.App. at 17. We have found no evidence supporting these statements. They further assert that the jail administrator testified that if he heard that an inmate threatened the well-being of "someone outside the jail," he would bring it to the attention of " 'the proper authorities.' " *Id.* at 55, n. 81. This testimony is not included in the appendices and we will not consider it on appeal. In any event, the statement does not establish a disputed issue of fact concerning knowledge on the part of either Sheriff Florence and Deputy Pettit.

[2] There is no evidence that these defendants recklessly disregarded a risk that Cheadle would have Ms. Phillips killed. Consequently, their conduct does not demonstrate the degree of outrageousness "that is truly conscience shocking." *Ruiz*, 299 F.3d at 1184 (quotation omitted). Because plaintiffs have not satisfied the requisite factors, their danger-creation claim does not survive summary judgment.

The remaining constitutional claim is that defendants violated the right of Ms. Phillips' children to have an intimate and familial association with their mother. "[A]n 'allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983.' " *Christiansen*, 332 F.3d at 1283 (quoting *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir.1985)). As evidence of intent, plaintiffs point only to the hearsay statements that law enforcement officers threatened to take Ms. Phillips' children from her unless she became a confidential informant. Without these inadmissible statements, plaintiffs have not identified any facts presenting a genuine issue of material fact on this claim.

[3] As to plaintiffs' state claims, the only evidence relevant to Sheriff Florence and Deputy Pettit demonstrates actions taken within the scope of their employment. Consequently, they are shielded by the Oklahoma Tort Claims Act, which provides that "[i]n no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant." Okla. Stat. tit. 51, § 163(C).[FN5] The district court correctly entered summary judgment on these claims.

> FN5.Section 163(C) contains an inapplicable exception to blanket employee immunity relating to resident physicians and interns.

CONCLUSION

****6** Ms. Phillips' death is truly regrettable, and we recognize that it has significant consequences to plaintiffs.[FN6] Nevertheless, ***699** plaintiffs have not come forward with evidence creating genuine issues of disputed material fact on any of their claims. Consequently, the judgment of the district court is AFFIRMED. Based on the parties' stipulated notice of dismissal, the appeal is DISMISSED as to defendants Jason Carpenter, Brad Crawford, Dustin Dowdle, Randy Johnson, City of Chickasha, and City of Tuttle.

> FN6. As a final matter, we register our disapproval of the approach plaintiffs' counsel has taken to this appeal. The appellate briefs mischaracterize the district court's rulings. One example is counsel's assertion that the district court made an erroneous finding of

> fact that Cheadle learned that Ms. Phillips was an informant through her admission to Cheadle's wife. Aplt. Br. at 34. The court's order, however, states that Ms. Phillips' identity could have become known to Cheadle "by deduction *or* from Donna's outburst in the Grady County Jail ... *and/or* from her telephone call and admission to Cheadle's wife." Order at 37 (emphasis added). In a similar vein, counsel states that the district court ignored a disputed issue of fact by concluding that "Ms. Phillips was 'eager to assist the officers and volunteered to serve as a confidential informant.' " Aplt. Reply Br. at 6 (quoting Order at 8). In fact, that portion of the order prefaced the remark with "[a]ccording to [defendant] Johnson." Later, the court did conclude that, with the exclusion of the hearsay evidence, there was no issue of material fact about the voluntariness of Ms. Phillips' consent. *See* Order at 33. As we have stated in the text, the district court correctly excluded the hearsay evidence.
>
> > In addition to shading the district court's rulings, plaintiffs have made disorganized arguments obscured by overblown language, treated defendants as a generic group, and failed to provide an adequate appendix. These defects made it difficult to analyze plaintiffs' appellate position. After independently examining the applicable law and reviewing the parties' submissions, we find no basis for reversing the district court's entry of summary judgment. We caution counsel against repeating this type of conduct in future appeals.

C.A.10 (Okla.),2004.
Phillips v. Grady County Bd. of County Com'rs
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END OF DOCUMENT

113 F.3d 1247, 1997 WL 235581 (C.A.10 (Okla.)), 97 CJ C.A.R. 703
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 113 F.3d 1247, 1997 WL 235581 (C.A.10 (Okla.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Steven Lee PYRON, Defendant-Appellant.
No. 95-5210.
(D.C.No. 95-CR-9-B)

May 8, 1997.

Before BRORBY, EBEL and KELLY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

WADE BRORBY, Judge.

***1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See*Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Pyron was convicted by a jury of three counts of Mail Fraud and Causing a Criminal Act, in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2(b), and three counts of Wire Fraud and Causing a Criminal Act, in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2(b). Mr. Pyron was sentenced to thirty-six months per count, each sentence to run concurrently. The sentence was based, in part, on the district court's finding of a loss range between $70,000 and $120,000.

On appeal, Mr. Pyron challenges the trial court's decision to exclude portions of testimony from his wife, Mrs. Pyron, on hearsay grounds. Specifically, Mr. Pyron argues the exclusion of the testimony was reversible error because the offered statements fit within the Fed.R.Evid. 803(3) state of mind exception to the hearsay rule. Mr. Pyron also contests his sentence on the grounds the district court erred in its determination of loss for purposes of the Sentencing Guidelines. After consideration on appeal, we affirm Mr. Pyron's conviction and sentence.

I. Background

In the indictment, Mr. Pyron was charged with scheming to defraud investors by inducing them to buy interests in oil and gas leases. At trial, the government attempted to show that through a series of misrepresentations, Mr. Pyron defrauded investors and diverted the money for his own personal use. Mr. Pyron, through his company, Serene Oil, solicited investors for the "Misener Sandstone project." The investors in the Misener project were contacted by telephone, and were told that in exchange for their investment a well would be drilled and they would receive a working interest in the oil well. At trial, evidence was introduced showing that despite the money invested in the Misener project, and despite his representations to the contrary, no drilling was done at the Misener project. Further, evidence was admitted to show that contrary to the investor agreements, Mr. Pyron used investor funds to pay his personal living expenses. After sending their money, the investors made repeated, failed attempts to contact Mr. Pyron.

II. Fed.R.Evid. 803(3)

At trial, the government admitted evidence Mr. Pyron left Oklahoma for Kentucky at the same time investors were attempting to contact Mr. Pyron regarding the status of their investments. Mr. Pyron attempted to admit testimony from his wife, Mrs. Pyron, that Mr. Pyron had told her he intended to go to Kentucky to raise money to complete the Misener project, then intended to return to Tulsa to oversee the project's completion. The district court excluded the testimony based on hearsay. Mr. Pyron argues the district court erred in failing to admit the testimony under

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Fed.R.Evid. 803(3), the state of mind exception to the hearsay rule.

***2** Evidentiary rulings rest within the sound discretion of the trial court, and we review those decisions only for an abuse of that discretion. *United States v. Tome*, 61 F.3d 1446, 1449 (10th Cir.1995). "Our review is especially deferential when the challenged ruling concerns the admissibility of evidence that is allegedly hearsay." *Id.*

Hearsay testimony, or testimony as to out of court statements offered to prove the truth of the matter asserted, is generally inadmissible. Fed.R.Evid. 802. However, under Fed.R.Evid. 803(3), "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition ..., but not including a statement of memory or belief to prove the fact remembered or believed," is admissible as an exception to the hearsay rule. Here, Mr. Pyron argues his wife's testimony fit the exception because it showed his lack of intent to evade his investors. We disagree.

Fed.R.Evid. 803(3) allows a declarant's out of court statement not to prove the matter asserted, but to show a future intent of the declarant to perform an act in conformity with the statement, if the occurrence of that act is in issue. *United States v. Freeman*, 514 F.2d 1184, 1190 (10th Cir.1975). In other words, statements of intent are admissible to provide a foundation for the declarant's subsequent actions. *Id.* at 1190.

Mr. Pyron's statements regarding his future intent to raise money and return to Oklahoma would be admissible to prove he, in fact, did both of those things. Mr. Pyron does not contest the fact he did neither of those acts. Consequently, the statements do not fit Rule 803(3) to the extent they were offered to show Mr. Pyron performed an act in conformity with his intent.

Second, Mr. Pyron's statements did not express any "intent" as to whether he intended to defraud his investors; he merely expressed his intent to raise more money and to return to Oklahoma. *See Tome*, 61 F.3d at 1454 (child's statement asking sitter not to let her be taken back to her father inadmissible under Rule 803(3) because statement did not express fear, but merely a desire to remain with her mother). Consequently, the statements do not fit within the parameters of Rule 803(3). We hold because the statements do not fit the confines of Fed.R.Evid. 803(3), the district court did not abuse its discretion in failing to admit them.

Mr. Pyron attempts to argue the district court erred in excluding the testimony on the grounds it was hearsay. However, the court excluded the testimony on the grounds the out of court statement was offered to prove the matter asserted and did not fit the Fed.R.Evid. 803(3) exception. Mr. Pyron argues because the statements fit Rule 803(3) it was irrelevant whether the statements were offered for their truth. This argument fails, however, because, as the district court properly held, the statements did not fit the hearsay exception of Rule 803(3). We hold the district court did not abuse its discretion in excluding the testimony based on hearsay.

III. Calculation of Loss

***3** Mr. Pyron argues the district court erred in its calculation of loss. Specifically, Mr. Pyron challenges the district court's inclusion in the calculation of loss the following two amounts: 1) Gerald Altobelli's and Roger Hutchinson's investment of $8,894 in the "Pettiquah Project"; and 2) Daniel Cameron's investment of $18,412 into the "Watson Project" in Cowley County, Kansas. Consequently, Mr. Pyron maintains the proper loss figure is $66,084.75 rather than $93,390.75, which would result in a one-level reduction in his offense level. *U.S. Sentencing Guidelines Manual* § 2F1.1(b)(1)(F), (G) (1994).

Neither the Pettiquah Project nor the Watson Project were part of the charged conduct. Instead, evidence of Mr. Pyron's conduct regarding the Pettiquah Project was admitted as "similar acts" evidence under Fed.R.Evid. 404(b). Evidence of Mr. Pyron's conduct regarding Mr. Cameron's investment was admitted during sentencing for the purpose of calculating loss.

Section 2F1.1 of the United States Sentencing Guidelines provides for an increase in a defendant's base offense level for the amount of "loss" suffered by the defendant's victims. USSG § 2F1.1 (1994). Generally, "loss" is "the value of the money, property, or services unlawfully taken." *Id.*, comment. n. 7. For purposes of sentencing, the district court need not determine loss with precision. Rather, "[t]he court need only make a reasonable estimate of the loss, given the available information." *Id.*, comment. n. 8; *United States v.*

McAlpine, 32 F.3d 484, 488 (10th Cir.), *cert. denied*,513 U.S. 1031 (1994). The Guidelines also authorize the court "to consider the nature and scope of the entire scheme in determining the amount of loss." *Mc Alpine*, 32 F.3d at 488.

While the government has the burden to prove the amount of loss by a preponderance of the evidence, on appeal we review the district court's findings of fact regarding loss calculation under a clearly erroneous standard. *Id.* at 487;*United States v. Abud-Sanchez*, 973 F.2d 835, 838 (10th Cir.1992). " 'A finding of fact is "clearly erroneous" if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made.' " *Abud-Sanchez*, 973 F.2d at 838 (quoting *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir.1985), *cert. denied*, 470 U.S. 816 (1986)).

Mr. Pyron argues the district court erred in including Mr. Altobelli's and Mr. Hutchinson's investments in its calculation of loss because they both have their interests in the projects, were never promised any "money from the working interest," technically received what they had bargained for, and because they did not "believe" they suffered a loss. Therefore, Mr. Pyron argues, the government's proof of loss was insufficient, and the district court erred when it included the investments in the calculation of loss for the purpose of sentencing. We disagree.

***4** The trial record shows the government sustained its burden of establishing Mr. Altobelli's and Mr. Hutchinson's investments constituted loss, and the district court's findings of fact are not clearly erroneous. At trial, Mr. Altobelli and Mr. Hutchinson testified Mr. Pyron solicited their investments, and were told all monies they invested would be used to restore the Pettiquah Project to productive capacity. However, the government introduced evidence showing Mr. Pyron diverted investor money to pay personal expenses. Also, evidence was introduced showing that Mr. Pyron induced investments in the Pettiquah Project by representing he would rework the wells at the project and would be the operator of the Pettiquah Project. However, evidence was introduced showing Mr. Pyron in fact had nothing to do with any work performed at the Pettiquah Project and had no right to rework or to operate the project.

As a result, because the record supports that the Pettiquah investments represent "money ... unlawfully taken," we hold the government has sustained its burden and the district court was not clearly erroneous in including the Pettiquah investments in its calculation of loss. USSG § 2F1.1 comment. n. 7.

Mr. Pyron also challenges the district court's inclusion of Mr. Cameron's investment of $18,412. The district court estimated loss as between $70,000 and $120,000 based on the presentence report's calculation of loss at $93,390.75. Even if we were to subtract the challenged amount, because the total loss still exceeds $70,000, the record supports the district court's estimation of loss as between $70,000 and $120,000 regardless of Mr. Cameron's investment.[FN1] Therefore, because the record supports the district court's estimation of loss regardless of Mr. Cameron's investment, we need not address Mr. Pyron's challenge to the district court's calculation of loss as it relates to Mr. Cameron's investment.

> FN1. Indeed, when assessing loss with regard to Mr. Cameron's investment, the court seemed to indicate the record supported the loss range of $70,000 to $120,000 regardless of Mr. Cameron's investment by stating: "[I]n any event the record supports the $70,000 to $120,000 fraud guideline range which requires adding of six points to the base offense level." We agree.

Accordingly, we AFFIRM Mr. Pyron's conviction and sentence.

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