

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 06-40003-01-SAC

VILAYSACK SIHARATH,

Defendant.

MEMORANDUM AND ORDER

The defendant pleaded guilty to one count of bank robbery.

The presentence report (“PSR”) recommends a Guideline sentencing range of 27 to 33 months from a criminal history category of one and a total offense level of 18 (a base offense level of 20 pursuant to U.S.S.G. § 2B3.1, plus a two-level increase for taking property of a financial institution pursuant to U.S.S.G. § 2B3.1(b)(1), a one-level increase for a loss exceeding \$10,000 pursuant to U.S.S.G. § 2B3.1(b)(7), a two-level decrease for minor participant pursuant to U.S.S.G. § 3B1.2(b), and a three-level decrease for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1). The addendum to the PSR reflects the defendant has one unresolved objection.

The defense counsel has filed a sentencing memorandum

highlighting certain findings from a psychological evaluation recently performed by Dr. George Hough on the defendant. As explained in the memorandum, the evaluation is relevant to the PSR's recommendation for a minor role adjustment in showing the defendant's unusual vulnerability to pressure from others. The court has reviewed the memorandum and the evaluation to be offered as an exhibit under seal at the sentencing hearing. The court intends to follow the PSR's recommendation for a role adjustment.

The defendant objects to the one-level increase for a loss exceeding \$10,000. The defendant argues his co-defendant's conduct in the bank was not foreseeable to him "on the unique facts of this case." As for what facts are "unique" in the defendant's judgment is not a matter directly addressed in the addendum to the PSR or in the defendant's recent sentencing memorandum. Presumably, the defendant is arguing his psychological vulnerability to pressure from others as confirmed in his evaluation and by his limited role in the robbery bears on what he reasonably foresaw.

The sentencing guidelines include as relevant conduct that which was reasonably foreseeable and in furtherance of the jointly

undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1). The burden of proving the amount of loss rests with the government which seeks the sentencing enhancement. *United States v. Nichols*, 229 F.3d 975, 979 (10th Cir. 2000). As a general rule, the government bears the burden of proof for a sentence increase, and the burden shifts to the defendant to prove any decrease in sentence. *United States v. Rice*, 52 F.3d 843, 848 (10th Cir. 1995). Thus, if the government meets its burden of proof on a sentence enhancement or increase, the burden shifts to the defendant to disprove the same as inapplicable or inappropriate. *United States v. Maldonado*, 216 F.3d 1089, 2000 WL 825717 at *3 (10th Cir.), *cert. denied*, 531 U.S. 973 (2000).

Relying on the facts appearing in the PSR to which the defendant lodges no objection, the court finds the government has met its burden of proving that the co-defendant's taking of more than \$10,000 was a reasonably foreseeable act done in furtherance of the jointly undertaken activity of bank robbery. As disclosed in ¶ 11, the defendant joined in the bank robbery after the co-defendant "asked if he wanted to make some money" and the defendant replied, "yes." There is nothing of record to show that the quantity of money taken from the bank was not reasonably

foreseeable to the defendant given his agreement to jointly undertake the robbery of a bank. The court overrules the defendant's objection for lack of proof, but it will reconsider this ruling in the event the defendant comes forward with additional proof at the sentencing hearing.

IT IS THEREFORE ORDERED that the defendant's objection to the PSR is overruled.

Dated this 21st day of November, 2006, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge