

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

USCA No. 24-1041

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

KAYLINE JOY LABELLE,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION
HONORABLE CHARLES B. KORNMANN
UNITED STATES DISTRICT COURT JUDGE
Criminal No.: 1:23-cr-10005-001-CBK

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Argument.....	1
I. The district court committed procedural error when it imposed a 4 offense level enhancement as organizer/leader under U.S.S.G. § 3B1.1(a) because the record does not support this enhancement.....	1
II. The district court engaged in significant reversible procedural error when it failed to adequately explain the reasons for the upward departure under U.S.S.G. § 4A1.3 inadequacy of criminal history. ..	4
III. The district court’s sentence was unreasonable from a substantive standpoint because it failed to give proper weight to mitigating factors and over emphasized the number of checks attributed to Ms. LaBelle which resulted in an improper sentence.....	7
Conclusion.....	8
Certificate of Service.....	9
Certificate of Compliance	10

TABLE OF AUTHORITIES

Cases

<i>United States v. Azure</i> , 536 F.3d 922 (8th Cir. 2008)	6
<i>United States v. Mees</i> , 640 F.3d 849 (8th Cir. 2011)	5
<i>United States v. Milton</i> , 153 F.3d 891 (8th Cir. 1998)	1
<i>United States v. Sullivan</i> , 853 F.3d 475 (8th Cir. 2017).....	5, 6
<i>United States v. White Twin</i> , 682 F.3d 773 (8th Cir. 2012)	6

Other Authorities

U.S.S.G. § 2B1.1	2, 5, 7
U.S.S.G. § 3B1.1	i, 1
U.S.S.G. § 3B1.3	3, 7
U.S.S.G. § 4A1.3	i, 4, 6
U.S.S.G. § 4C1.1(10).....	2

ARGUMENT

I. The district court committed procedural error when it imposed a 4 offense level enhancement as organizer/leader under U.S.S.G. § 3B1.1(a) because the record does not support this enhancement.

The draft PSR did not assign any aggravating role enhancement to Ms. LaBelle to begin with. (R. Doc. 107; PSR ¶ 32). There were no witnesses who testified at the sentencing hearing. After the government objected to no aggravating role enhancement on the original PSR the probation officer amended the report and assigned a 4 level enhancement to Ms. LaBelle as an organizer/leader assigning her 4 offense level points that she did not previously have under the first draft of the PSR (R Doc. 114; PSR ¶ 30).

The defendant argued against this enhancement. The government decided not to put on any evidence or witnesses to support its contention. *United States v. Milton*, 153 F.3d 891 (8th Cir. 1998) mandates that the government must put on evidence to support an objected to factual finding.

The impact of the 4 level enhancement was very dramatic and had severe detrimental consequences because it increased Ms. LaBelle's recommended offense level from level 15 to level 19. (PSR ¶ 69). In addition, imposing the 4 level enhancement as an organizer/leader denied Ms. LaBelle what otherwise should have been a 2 point reduction in her

offense level from 15 to offense level 13 according to the new Amendments under U.S.S.G. § 4C1.1(10) which, if granted, would have placed her in a far lower sentencing range of 12-18 months. These severe consequences should be properly supported by the record. At page 10 of the Appellee's Brief the government argues:

The co-defendants complied with her instructions.

And comments regarding the proof that:

Finally, further providing circumstantial proof to the district court that she knew what role she played and that she controlled how funds were embezzled, LaBelle resigned after her embezzlement scheme "came to light."

(Appellee's Brief p. 10).

The details for these arguments are not specified. There is no dispute that Ms. LaBelle embezzled the largest amount of funds from the BLD at \$203,283.13 (R. Doc. 114; PSR ¶ 27).

This sum does far exceed the loss attributed in the PSR to Ms. LaBelle's other siblings Duane \$6,865.00, Elaine \$4,596.43, Shayline \$6,275.00, and her friend Jacenta \$2,600.00. (R. Doc. 114; PSR ¶ 20).

It is undisputed that Ms. LaBelle was the treasurer of the BLD and she acted wrongly in stealing the funds. She has admitted this and accepted responsibility and not objected to the 10 point loss enhancement (PSR ¶ 27) U.S.S.G. § 2B1.1(b)(1)(F) and the 2 point enhancement for abuse of trust at

U.S.S.G. § 3B1.3 (PSR ¶ 29) but the record does not tell us how she supposedly exercised control or authority over her siblings and friend to merit a very harsh substantial 4 level increase.

The sentencing court should consider the involvement of Kayline's siblings. The plea agreement references Ms. LaBelle's conduct began on or about the first day of January 2022. (PSR ¶ 3). As pointed out in Appellant's Brief on page 14 the PSR at paragraph 11 shows that between January 12, 2018 and September 7, 2022 Kayline had already received the 492 checks from the BLD for the combined amount of \$350,006.56. The actions of the siblings are documented in the PSR as occurring late during the period of criminal activity including references that on September 27, 2022 at Dakota Magic Casino Shayline attempted to cash a check at Dakota Magic Casino for \$975.00 and eventually succeeded in cashing it at First Savings Bank in Veblen, SD. (PSR ¶ 17). Similarly, Duane cashed a BLD check at Coteau Valley Credit Union on September 9, 2022 in the sum of \$650.00. (PSR ¶ 18). Kayline, Shayline, and Elaine apparently passed four fraudulent checks at Deuces Casino in Watertown on October 11, 2022 according to PSR ¶ 19. So the acts of the siblings were late in time. Ms. LaBelle resigned her position with the BLD on September 9, 2022. (PSR ¶ 10). The record does not demonstrate the facts or evidence that show the siblings who Ms.

LaBelle supposedly directed, influenced, and controlled and who were not involved until very late and then the amounts were small. This information should be considered by this court because the majority of the embezzled funds had long since occurred before any documented involvement of the siblings and friend. The amount attributed to Ms. LaBelle both the volume of checks and the amount of the funds indicates she acted alone and independent of others and therefore should not be categorized or enhanced as a leader or organizer.

II. The district court engaged in significant reversible procedural error when it failed to adequately explain the reasons for the upward departure under U.S.S.G. § 4A1.3 inadequacy of criminal history.

The PSR concluded that Ms. LaBelle had zero criminal history points therefore she fell into criminal history category I. (PSR ¶ 40). The PSR further showed that there were no tribal court criminal convictions. (PSR ¶ 42). There were no state court convictions. (PSR ¶ 43). There were no previous court convictions that were not counted as criminal history points because they were too old or beyond the period of time that the guidelines would permit them to count. (PSR ¶ 40-46). At the sentencing hearing there was no testimony or witnesses that testified that Ms. LaBelle had some increased likelihood to commit crimes in the future and this was not a concern presented by the government at the sentencing hearing. (ST p. 1-

38). The district court's concern appeared to be the number of embezzlement checks written by Ms. LaBelle. The checks written however are accounted for under the loss table at U.S.S.G. § 2B1.1(b)(1)(F) as Ms. LaBelle was assigned 10 additional offense level points for this conduct and was considered by the sentencing guidelines and resulted in a substantial increase to her offense level which also distinguished her from other co-defendants. As pointed out in the Appellant's Brief (AP, p. 17) the court appeared to be entirely focused too heavily on the number of checks written by Ms. LaBelle as the court stated at the sentencing hearing:

The problem in these embezzlement cases is that every time you write a check, it's a crime.

(ST, p. 24).

Ms. LaBelle was ordered by the court to pay restitution in the sum of \$203,283.13. (Judgment in a Criminal Case, Addendum 6, AB). The district court did not adequately explain its reasons why an upward departure for underrepresented criminal history is not satisfied by some intermediate criminal history level such as criminal history category II, III, or IV. *United States v. Mees* 640 F.3d 849 (8th Cir. 2011) and *United States v. Sullivan* 853 F.3d 475 (8th Cir. 2017). In quoting *United States v. Mees* the court in *United States v. Sullivan* stated:

Pursuant to U.S.S.G. § 4A1.3 a court may impose an upward departure if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(U.S. v. Sullivan p. 479).

The district court's stated reasons for the upward departure are insufficient and are not adequately explained as required in *United States v. Azure* 536 F.3d 922 (8th Cir. 2008). The court in Azure stated:

Because on this record we conclude the district court abused its discretion in determining the extent of the upward departure based upon upward criminal history, we must remand.

(U.S. v. Azure p. 932).

In the government's brief at page 11 the government argues that an upward departure can be supported by other adult criminal conduct that does not result in an actual criminal conviction and one of the cases the government cites is *United States v. White Twin* 682 F.3d 773 p. 775-776 (8th Cir. 2012) (Appellee's Brief p. 11). The White Twin case is very distinguishable from the instant case. In White Twin, who pled guilty to assault with a dangerous weapon, the opinion indicated that the PSR in that case showed that defendant White Twin had a very extensive criminal history in the tribal courts which is not at all the case with Ms. LaBelle. Also there is no articulated reason that Ms. LaBelle would tend to recidivate or

commit future embezzlement crimes or crimes of any sort. In fact the overall information in the PSR is exactly the opposite and it is very likely one of the reasons why the PSR at paragraph 83 recited:

There is no information available warranting a departure from the advisory guideline range.

(PSR ¶ 83).

III. The district court's sentence was unreasonable from a substantive standpoint because it failed to give proper weight to mitigating factors and over emphasized the number of checks attributed to Ms. LaBelle which resulted in an improper sentence.

At sentencing the district court placed too much emphasis on the number of checks written by Ms. LaBelle after she was fully enhanced by 10 offense levels under the loss table at U.S.S.G. 2B1.1(b)(1)(F) and the 2 point enhancement for abuse of position of trust under U.S.S.G. 3B1.3. (PSR ¶ 27, 29).

Additionally the court failed to take into adequate consideration the heartfelt expressions and her genuine acceptance of responsibility for her criminal conduct. In her allocution statement Ms. LaBelle stated:

I wanted to apologize to everyone that was involved, to the Buffalo Lake District membership, to everyone here in the federal building, the lawyers, judges, and investigators, the agents and to all that were involved in my case.

I am sorry that my acts caused more work and time it took working on my case. The time away from your family. I truly am sorry from the bottom of my heart.

(ST p. 21).

The PSR awarded the full 3 point reduction for acceptance of responsibility. (PSR ¶ 34, 35). Ms. LaBelle also stated:

I take full responsibility for my actions. I will pay back every penny even if I have to work multiple jobs. You will never see me in this courtroom again or ever be in trouble. You have my word, Your Honor.

(ST ¶ 23).

Ms. LaBelle paid the \$100 victim assessment fee and brought a \$300 payment to apply towards the restitution at sentencing which was evidence of her intentions to avoid any further criminal conduct in the future. (ST p. 32). She has strong connections to her family and her community. The sentence imposed at 60 months is the statutory maximum and is 23 months above the high end of the guideline range recommended in the PSR. (PSR ¶ 69). The court imposed a sentence based upon an improper weighing of sentencing factors and the case should be remanded for resentencing.

CONCLUSION

For the above reasons Ms. LaBelle respectfully requests the court to remand her case for resentencing.

Dated this 12th day of August, 2024.

Respectfully submitted,

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Joseph P. Barnett

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Joseph P. Barnett

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,810 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman font. The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Appellant Kayline Joy LaBelle's Reply Brief has been scanned for computer viruses and that the document is virus free.

Dated this 12th day of August, 2024.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Joseph P. Barnett