

MAY 22 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIXIE RANDOCK,

Defendant - Appellant.

No. 08-30268

D.C. No. 2:05-CR-00180-LRS-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

STEVEN KARL RANDOCK,

Defendant - Appellant.

No. 08-30308

D.C. No. 2:05-CR-00180-LRS-2

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Argued and Submitted May 5, 2009
Seattle, Washington

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: WARDLAW, PAEZ, and N.R. SMITH, Circuit Judges.

Steven and Dixie Randock appeal their sentences imposed following their guilty pleas to conspiracy to commit wire and mail fraud, in violation of 18 U.S.C. §§ 371, 1341, and 1343. The Randocks entered into Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreements with materially identical terms that set out specific sentences of thirty-six months of imprisonment, followed by three years of supervised release. The agreements acknowledged, however, that the parties disagreed on the calculation of the sentencing guidelines range and would dispute whether the sentences should consist of home detention rather than incarceration. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm Steven Randock's sentence, but reverse and remand Dixie Randock's case for further proceedings.

1. Both Randocks challenge the district court's application of an eighteen-level increase in their offense levels pursuant to U.S.S.G. § 2B1.1, which allows for such enhancement if defendants' fraud caused between \$2.5 and 7 million in "loss." U.S.S.G. § 2B1.1(b)(1)(J). The Randocks assert that the court erred in using gain as an alternate measure of loss, arguing that their fraud caused no loss or that the gain does not reasonably reflect any loss. We disagree. The district court did not clearly err in finding that defendants' sales of fraudulent academic credentials

caused loss to consumers and employers in an amount that could not “reasonably . . . be determined.” U.S.S.G. § 2B1.1 cmt. n.3(B). The court therefore did not err in using “the gain that resulted from the offense as an alternative measure of loss” and increasing the Randocks’ offense levels accordingly. *Id.*; see also *United States v. Armstead*, 552 F.3d 769, 778 (9th Cir. 2008); *United States v. Zolp*, 479 F.3d 715, 719 (9th Cir. 2007). Thus, even assuming that the guidelines calculation is relevant in the context of the court’s constrained sentencing discretion here, the court committed no reversible error in applying the eighteen-level enhancement.

2. Steven Randock argues that the district court erred in finding that he does not suffer from “an extraordinary physical impairment” and abused its discretion by declining to grant a downward departure from incarceration to home detention based on such impairment pursuant to U.S.S.G. § 5H1.4. See *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993). We disagree. In light of the evidence before the district court, including the declarations of two Bureau of Prisons physicians that Steven could be adequately treated within the prison system and would not be among the most seriously impaired prisoners, we cannot say that the court clearly erred in finding Steven’s impairment not “extraordinary” or abused its discretion in sentencing him to a term of incarceration.

3. Finally, Dixie Randock challenges the district court's imposition of a 240-hour community service requirement as a special condition of her supervised release term, arguing that the court lacked authority to impose a condition not agreed to in the Rule 11(c)(1)(C) plea agreement. Because Dixie did not object to this condition below, the "plain error" standard of review applies. *See United States v. Vonn*, 535 U.S. 55, 58-59 (2002); *United States v. Garcia*, 522 F.3d 855, 860 (9th Cir. 2008). "Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009) (quoting *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc)). "If these three conditions are met, the court may then exercise its discretion to grant relief if the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.*

When a defendant and the government enter into a Rule 11(c)(1)(C) plea agreement setting forth a specific sentence, the district court may accept the agreement or reject it, but "may not do so on a piecemeal basis." *In re Morgan*, 506 F.3d 705, 709 (9th Cir. 2007). If the court accepts the agreement, it is bound by the agreed upon recommendations. Fed. R. Crim. P. 11(c)(1)(C); *see also United States v. Cervantes-Valencia*, 322 F.3d 1060, 1062 (9th Cir. 2003) (per curiam); *United States v. Mukai*, 26 F.3d 953, 956-57 (9th Cir. 1994). Because the

plea agreement here “bound [the court] by the ‘specific sentence’ of 36 months and the other terms agreed upon by the parties,” and because no community service condition was among those agreed upon terms, the court erred in imposing a community service condition.¹ Moreover, because the law binding courts to the terms of Rule 11(c)(1)(C) plea agreements is clear and well-established, such error was plain, *see Ameline*, 409 F.3d at 1078, and because “the condition would not have been imposed had the error not occurred, it necessarily affected substantial rights,” *United States v. Barsumyan*, 517 F.3d 1154, 1162 (9th Cir. 2008).

Finally, erroneous imposition of a sentencing condition seriously affects the fairness of judicial proceedings. *See id.*; *United States v. Abbouchi*, 502 F.3d 850, 858 (9th Cir. 2007). In light of the importance of assuring that parties to a plea agreement receive the benefit of their bargain, and because the error was plain and affects substantial rights and procedural fairness, we remand for the district court either to remove the community service condition or to reject the plea agreement and afford Dixie Randock an opportunity to withdraw her plea. *See Mukai*, 26 F.3d at 956-957; *Cervantes-Valencia*, 322 F.3d at 1064.

¹Indeed, the record reflects that community service was not a standard condition of supervised release, and thus was not part of the agreed upon terms. The judgment lists thirteen “standard conditions of supervision” and six additional “special conditions of supervision.” The community service requirement is listed among the “special conditions.”

No. 08-30308: AFFIRMED.

No. 08-30268: AFFIRMED in part; REVERSED and REMANDED in part.