

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 22 2012

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SETH SUNDBERG,

Defendant - Appellant.

No. 11-10338

D.C. No. 5:09-cr-00928-JF-1

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeremy D. Fogel, District Judge, Presiding

Submitted October 17, 2012**
San Francisco, California

Before: FISHER, TALLMAN, and CALLAHAN, Circuit Judges.

Defendant-appellant Seth Sundberg (“Sundberg”) appeals the district court’s entry of judgment on his guilty plea. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Under Federal Rule of Criminal Procedure 11(b)(1)(K), a judge must inform the defendant of, and determine that the defendant understands, the court's authority to order restitution. Despite this express requirement, a judge's failure to comply "is harmless error if it does not affect substantial rights." Fed. R. Crim. Pro. 11(h). We have held that a district court's failure to advise a defendant of its restitution authority is harmless if "the defendant was advised he was subject to a fine in an amount in excess of the restitution imposed." *United States v. Crawford*, 169 F.3d 590, 592 (9th Cir. 1999) (emphasis added). In this case, Sundberg admitted the facts of the indictment, including his unlawful receipt of a \$5 million tax refund. Although the district court failed to advise Sundberg of its restitution authority, the court affirmatively warned Sundberg that he could face "a \$250,000 fine or twice the value of the gross gain or loss," thus putting Sundberg on notice that he could suffer a fine in excess of \$10 million. Because this figure is far higher than Sundberg's eventual \$2,488,613.38 restitution order, the error was harmless.

AFFIRMED.