

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 UNITED STATES OF AMERICA,)
5 Plaintiff,) CR20-174-JCC
6 v.) Seattle, Washington
7) March 8, 2022
8 ERIC SHIBLEY,) 9:00 a.m.
9 Defendants.) Sentencing

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE JOHN C. COUGHENOUR
12 UNITED STATES DISTRICT JUDGE

13
14 APPEARANCES:

15
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I N D E X

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1 THE DEPUTY CLERK: The first matter on the calendar is
2 CR20-174-JCC, United States of America versus Eric Shibley.

3 Counsel, please make your appearances for the record.

4 MS. CONNELLY: Laura Connelly for the United States.

5 MR. WERNER: Good morning, Your Honor. Brian Werner
6 on behalf of the United States.

7 MR. NANCE: Good morning, Your Honor. Michael Nance
8 for Eric Shibley.

9 THE COURT: Mr. Nance, has he had an opportunity to
10 review and comment on the Presentence Report?

11 MR. NANCE: Yes, Your Honor.

12 THE COURT: All right. Wish to be heard?

13 MR. NANCE: Yes. Your Honor, as set forth in our
14 sentencing memorandum, we are recommending 24 months of
15 detention with credit for time served, a period of supervised
16 release, and appropriate restitution and other non-mandatory
17 costs and penalties be waived.

18 Our objections to the Presentence Report and to the
19 guideline application is set forth in the briefing, and I
20 will rely largely on that.

21 I would just want to comment briefly on this attempt to
22 enhance with obstruction. We don't feel it's appropriate
23 particularly as to the points specifically raised in both the
24 PSI and the Government's briefing. There were two components
25 to it. The first was that, in response to a grand jury

1 subpoena, that Mr. Shibley submitted IRS forms, W-3 and 941
2 forms, that the Government says were fabricated and not filed
3 with the IRS. That may be so. It may well be that they
4 weren't, but the subpoena requested supporting documents that
5 were submitted in connection with the PPP loans, and these
6 were, in fact, submitted, and these were simply a copy of
7 what had been provided.

8 If you take the Government's approach to this, it's a
9 catch-22. There would be an automatic obstruction merely
10 flowing from the fact that the loan applications were
11 fraudulent. If you don't produce what you supplied with it,
12 that's obstruction, and yet, if you do and it's not true,
13 that's obstruction, so you can't win. That's --

14 THE COURT: Isn't that one of the problems you get
15 into when you engage in the kind of conduct your client did?

16 MR. NANCE: Well --

17 THE COURT: You kind of create a catch-22.

18 MR. NANCE: You kind of do, but he's being -- he's
19 being punished, essentially -- it's a double punishment
20 otherwise. The obstruction, as I understand it, refers to
21 obstructing the investigation process.

22 The falsity was a part of the -- initially -- a part of
23 the crime. It was essentially complete. They asked for
24 supporting documents that he provided, and in these
25 instances, he provided those. So that's the first component.

1 The other is this offhand comment he made, and you know,
2 he testified for the better part of a day here, and there was
3 one cherry-picked line where he said -- and they quoted it --
4 but he chose not to provide the names of employees of Dituri
5 Construction. Of course, on the one hand, the Government is
6 saying, "Well, you had no employees," and now he's being
7 challenged because he chose not to provide the names of these
8 nonexistent employees. I mean, that can't be obstruction.

9 And the other part of it is that, again, the subpoena asks
10 for documents. It didn't ask for the names. It asked for
11 documents listing employees, and there's no indication that
12 any such documents existed or that Mr. Shibley had access to
13 such documents. There's no affirmative duty for him to
14 compile a list. The subpoena doesn't require that, if you
15 look at it closely, or to affirmatively testify about
16 nondocumentary matters.

17 The other --

18 THE COURT: Well, I can understand somebody taking
19 the Fifth Amendment and refusing to testify, but once you
20 take the stand and testify at length, don't you have an
21 obligation to testify truthfully?

22 MR. NANCE: Yes, you do. You do.

23 THE COURT: Don't you have an obligation to respond
24 to questions like, "Tell us who these employees were."

25 MR. NANCE: Well, Mr. Shibley did -- he did some of

1 that in this trial.

2 THE COURT: But he didn't do some of it, too.

3 MR. NANCE: Well, I mean, we can -- I guess we can
4 interpret what he said as he said it, but he even provided
5 some documentation.

6 In any event, I think it's a close question. I don't --
7 it's their burden to show. I would submit that they haven't
8 met that.

9 The other component -- I've addressed it, but I will
10 mention it again -- is this notion of his ability to pay, and
11 they keep referring to these great properties he has. He had
12 a residence. He still, in name -- his name is still on that
13 property, and he's got three rental properties, but they're
14 in very, very sad shape. They're -- he's really hanging by a
15 thread on all of them. He's over a year overdue in mortgage
16 payments and installment loan payments on these properties.
17 He's been trying to stave off foreclosure. They're all in
18 foreclosure, but that's been staved off. He's bought a
19 little time by filing bankruptcy, and we don't know where
20 it's going to go, but it doesn't look good. I mean, all
21 these properties now have squatters. They're not paying
22 rent. They're -- it's been difficult to get a realtor even
23 to get into the properties. I mean, you basically need a
24 sheriff's deputy to go into these places. They're dangerous.
25 They have been vandalized and severely neglected, and to say

1 that he's going to be able to clear much on this is a real
2 stretch. I mean, I would venture to think that he'd be lucky
3 to break even.

4 This is a case with -- I recognize there are really
5 disparate recommendations here. We are recommending
6 24 months. The Government is some multiple of that. There
7 is no mandatory minimum. The Court has fairly unbridled
8 discretion to do the right thing here, and if you look at
9 Mr. Shibley, he's kind of a mixed bag, I would venture. He's
10 intelligent; he's creative; he's ambitious; and I
11 characterize it as him having a large blind spot. He's used
12 to living on the edge. He's used to pushing the envelope,
13 and the most generous interpretation I think you could make
14 in this case would be that he pushed too hard, he cut too
15 many corners and took too many liberties, and of course, the
16 jury found -- they found fraud.

17 I would suggest that a trial in this case was appropriate,
18 and it was necessary. It was a cathartic process for
19 Mr. Shibley. Some cases need to be tried. This was one of
20 them. Mr. Shibley accepts the process. He's prepared to
21 move ahead with his life. He actually has constructive
22 plans. He actually thinks he still has something to
23 contribute. He wants to write, and he's got some expertise,
24 and he thinks he could use that to benefit himself and
25 others.

1 He has spent 18 months, roughly, in jail. It's been
2 fairly hard time. Much of the time he's been in jail has
3 been in lockdown. He's probably spent as much time in
4 lockdown or in quarantine as out. He did suffer a rather
5 pronounced case of COVID-19 while in custody. He's got drug
6 and mental health issues, which the Court heard about during
7 the trial.

8 Of course, he's lost his medical license. It's unlikely
9 he will ever practice medicine again. He's lost or is about
10 to lose his home and properties. I would suggest that he
11 doesn't need to spend more time in prison to be held
12 accountable.

13 Our 24-month recommendation is in line with three other
14 PPP loan cases in this district, including one in this court,
15 I believe. In this district, no one has received more than
16 24 months, including at least one of the individuals that had
17 a loan loss that was well in excess of what Mr. Shibley
18 faces. No one's gotten more than 24 months, and neither
19 should Mr. Shibley. Thank you.

20 THE COURT: Does he wish to speak?

21 MR. NANCE: Yes.

22 THE COURT: Go ahead. You can take your mask off.

23 THE DEFENDANT: Your Honor, I made a big mistake. I
24 should never have done such a terrible thing. I am
25 expressing my clear and unequivocal apology to the honorable

1 Court, to the people of my country, to my Government. I made
2 a terrible mistake. I regret every minute for that.

3 I have -- I have taken a completely different course from
4 what I have done, all the things that I've done in my life.
5 It is a complete change in course of my life. I'll not go
6 back to the things that led me to this situation. I embark
7 on a new path. I think that I -- I'm able to do things in an
8 intellectual and scholarly manner, which I'm good at. I
9 started writing books on various scientific topics, including
10 medical sciences, medicine, psychology, psychiatry, molecular
11 evolutionary biology, astrophysics, war history, things like
12 that.

13 I'd be very much willing to start publishing books, and
14 that's what I want to do going forward.

15 I made a mistake. I paid a heavy price for it. I'm
16 asking the Court to look at me with leniency and give me an
17 opportunity to embark on a new course in my life. Thank you.

18 THE COURT: All right. Ms. Connelly.

19 MS. CONNELLY: Thank you, Your Honor. Just to touch
20 on the obstruction piece before heading into my other
21 remarks. The basis for the obstruction enhancement is
22 twofold, as the Government has outlined in its sentencing
23 memorandum, but first, the grand jury's subpoena response.
24 These W-3s were not provided to the Government as part of a
25 loan package. In fact, they were provided and we were told

1 that the loan documents would be sought out and provided
2 later. So these were provided as tax documents and not
3 provided separately.

4 But, in the alternative, Mr. Shibley testified extensively
5 -- it wasn't just a one-off comment about not providing
6 documents -- in response to repeated questioning from
7 Mr. Werner, Mr. Shibley testified that he chose not to turn
8 over documents, repeatedly. And while the Government concurs
9 that it's likely these documents don't exist, either the
10 defendant was lying about those documents existing in his
11 testimony repeatedly or he was concealing responsive
12 documents in response to a grand-jury subpoena, and either
13 way, that is a basis for the obstruction enhancement.

14 In addition to the perjured testimony about these
15 documents and him not turning them over and the fact that
16 they existed, Mr. Shibley repeatedly lied about having
17 employees, having businesses, and he really doubled down in
18 his testimony, and thus, the Government believes that an
19 obstruction enhancement is appropriate in this case.

20 Turning to the Government's recommendation, which is for a
21 97-month term of imprisonment followed by three years of
22 supervised release, it's really hard to believe that at this
23 point we have been living with COVID for two years, and it's
24 easy to forget where we started, but in March 2020, almost
25 two years ago to the day, everything shut down across America

1 and here in Seattle. Businesses and the economy were
2 devastated, and there was uncertainty about when things could
3 reopen again, and so, in response, the Government put forward
4 the PPP or the Paycheck Protection Program and expanded the
5 EIDL program. Both of these programs were meant to help
6 small businesses with their expenses and, most importantly,
7 keep employees on the payroll in the face of this
8 unprecedented devastation.

9 And in the face of this, the defendant chose, instead, to
10 engage in a cash-grab. He submitted over 25 PPP applications
11 and 13 EIDL applications. He made up numbers to put on those
12 documents, and he created false tax forms to go along with
13 them.

14 The defendant submits that a 24-month sentence is
15 appropriate and cites to other cases in this district that
16 have dealt with COVID relief fraud, but in this case, and in
17 particular, this defendant, there are many distinguishing
18 factors that require a significantly higher sentence.

19 So turning to, first, the conduct, which the Court is well
20 aware of -- and I will not rehash at length here -- but there
21 are certain pieces of this conduct that call for a higher
22 sentence, the first being the volume of applications.
23 Mr. Shibley submitted significantly more applications than
24 the other defendants that have been sentenced in this
25 district. The second is the fact that the defendant didn't

1 stop this behavior even with significant law enforcement
2 intervention. At every step with which he was confronted, he
3 chose to double down instead. So the banks called him and
4 asked questions, and he continued to apply. The Government
5 seized money at the end of May, and he continued to apply for
6 these loans. He was approached by law enforcement agents and
7 served with grand jury subpoenas, and he continued to apply
8 for these loans. So the defendant had every opportunity to
9 stop this behavior and, instead, continued to double down.

10 Furthermore, the use of other people's identities is
11 significant here. The defendant actually stole people's
12 identities to submit to the bank to conceal his crimes. That
13 included an individual who had died in 1987 and a woman who
14 had never heard of him or worked for him, and he submitted
15 their Social Security numbers and names as his employees.

16 The second distinguishing factor is his complete lack of
17 acceptance of responsibility in this case. The other three
18 defendants who were sentenced all pled guilty before trial
19 and accepted responsibility early. While Mr. Shibley is now
20 kind of vaguely apologizing for his behavior, in his trial
21 testimony he repeatedly doubled down that he had these
22 employees and had these businesses. He continued to assert
23 that to probation, as was seen in the PSR, and then, to top
24 it all off, he tried to obtain some of the illegally-obtained
25 funds back through a bankruptcy proceeding just recently.

1 And while the bankruptcy filing may have been coincidental,
2 the fact that he is trying to use the bankruptcy process to
3 receive illegally-obtained funds back suggests that he does
4 not accept that those funds were, in fact, illegally
5 obtained.

6 The third factor to consider is his conduct while on
7 pretrial release in this case. It shows that he's been
8 incapable of abiding by the terms set by this Court. He was
9 arrested after two incidences of domestic violence while on
10 pretrial release. He also attempted to purchase another
11 property while out on pretrial release, against the
12 requirements of both the Court and the pretrial services
13 officer. So, in order to get around that, he had his then
14 girlfriend, who was the victim of the domestic violence
15 offenses, act as a straw buyer for that purchase in order to
16 circumvent the Court and pretrial services.

17 And finally, in addition to the actions while on pretrial
18 release, the defendant has shown he's incapable of following
19 direction from courts and other authority in many other
20 instances. First, looking at his career in the medical
21 profession, certain issues demonstrate his willingness to
22 skirt the law when it suits him. Most notably, he continued
23 to prescribe controlled substances after his license to
24 prescribe controlled substances was revoked in January of
25 2020, and that's especially relevant because some of the

1 people that Mr. Shibley claimed as employees in this case
2 were actually patients of his who he was prescribing to.

3 Second, while the defendant's criminal history puts him at
4 a Category II, the fact that he committed this crime while on
5 probation for another domestic violence offense should be
6 considered in fashioning an appropriate sentence, and it's
7 clear that court supervision did not deter him from
8 committing other crimes while on probation for that offense.
9 And while the Government acknowledges that that crime was, in
10 fact, a misdemeanor, it was a misdemeanor violation of a
11 no-contact order from a court, and so that, yet again,
12 demonstrates Mr. Shibley's unwillingness to abide by court
13 orders and the need for significant personal deterrence in
14 fashioning a sentence in this case.

15 So because of the severity of the crime and the
16 defendant's personal history, the Government requests that
17 the Court impose a term of 97 months imprisonment followed by
18 three months -- or three years of supervised release. The
19 Government also requests that the Court enter an order of
20 restitution in the amount detailed in the sentencing memo to
21 the victims.

22 THE COURT: Mr. Nance, do you have any objection to
23 the restitution amounts that were set forth in the
24 Government's brief?

25 MR. NANCE: No.

1 THE COURT: Okay. So I'll affix restitution at the
2 amounts set forth in your brief.

3 I am overruling the defendant's objections to the
4 Presentence Report. I find the total offense level is 29,
5 the criminal history category is II, which gives a guideline
6 range of 97 to 121 months. I'm imposing a period of
7 confinement of 48 months, a period of supervised release of
8 three years, subject to standard conditions, together with
9 those additional conditions set forth in the Presentence
10 Report.

11 I'm waiving the fine due to the defendant's financial
12 condition and the restitution obligation. He'll be required
13 to pay the special assessment for each of the counts of
14 conviction, which will be a total of \$1,500. The sentence is
15 a product of the guidelines schedule, together with the
16 factors of 18 USC 3553, and I'm adopting the Presentence
17 Report, the probation officer's reasons for the sentence, as
18 the Court's reasons for the sentence. And I'm emphasizing,
19 in particular, the blatant nature of the fraud and its size,
20 the fact that there's significant distinctions between the
21 other cases that were involved in this court, and the Court's
22 reaction to the defendant's testimony in the case, which was,
23 I have to say, one of the worst performances of a criminal
24 defendant on examination. I'm not punishing him for going to
25 trial, but I do think it's appropriate to take into

1 consideration the fact that he had very little willingness to
2 adhere to the truth while testifying.

3 Mr. Shibley, you have the right to appeal this sentence.
4 If you wish to file a notice of appeal, it must be filed
5 within 14 days of today. If you wish the assistance of an
6 attorney in filing a notice of appeal and cannot afford one,
7 one will be appointed to assist you if you so request. If
8 you wish the assistance of the clerk in filing a notice of
9 appeal, he will assist you if you so request.

10 Do you understand, sir?

11 THE DEFENDANT: Uh-huh (affirmative).

12 THE COURT: Anything further, Counsel?

13 MR. NANCE: Yes, Your Honor. I would ask that the
14 Judgment reflect the recommendations for his placement in the
15 drug and alcohol program.

16 THE COURT: That's fine.

17 MR. NANCE: And secondly, we would ask for a
18 placement recommendation to the federal prison camp at
19 Sheridan.

20 THE COURT: That's fine.

21 MS. CONNELLY: Your Honor, the only -- we would ask
22 that the Judgment reflect the forfeiture order.

23 THE COURT: I'm sorry?

24 MS. CONNELLY: That the Judgment reflect the
25 forfeiture order that was already entered by this Court.

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1 THE COURT: Yes.

2 MS. CONNELLY: Thank you.

3 MR. NANCE: Your Honor, we would ask the Court to
4 waive the interest.

5 THE COURT: No.

6 MR. NANCE: No?

7 MR. WERNER: Your Honor, may I approach?

8 THE COURT: Yes. Thank you, Counsel.

9 (Proceedings concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/s/ Sheri Schelbert

SHERI SCHELBERT
COURT REPORTER