NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued July 10, 2024
Decided August 1, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-3065

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Western District of Wisconsin.
v.	No. 3:22CR00131-001
OLIVIA SPELLMAN, *Defendant-Appellant*.	William M. Conley, *Judge*.

O R D E R

Olivia Spellman pleaded guilty to mail fraud. She challenges her 16-month prison term (2 months above the parties' recommendation), arguing that the sentencing judge forced her to make a statement in allocution and to answer questions when she wished to remain silent. This, she says, violated her Fifth Amendment right to not be a compelled witness against herself. But the judge did not coerce Spellman to speak, nor did Spellman say anything unknown from other record materials to drive the sentence upward. We thus affirm the sentence.

Background

In November 2022, Spellman was indicted for seven counts of mail fraud, *see* 18 U.S.C. §§ 2, 1341, for a scheme to collect undeserved unemployment benefits amid the COVID-19 pandemic. During a search of her home, Spellman told federal agents that she had worked with "Devine Kruger" (whom she never met in person or on video, and who appears to live overseas). Kruger applied for unemployment benefits in others' names and directed debit cards loaded with those benefits to Spellman's home. Spellman would then cash out the debit cards, keep a bit of the money, and send the rest to Kruger. Spellman did this for about seven months, causing losses of more than $500,000. She told agents that she knew the scheme was wrong and that Kruger said it "might have been illegal." Eventually, Spellman entered an agreement to plead guilty to one count of mail fraud. *See* 18 U.S.C. § 1341. In exchange, the government dismissed the other six counts. As part of the agreement, the parties recommended a sentence of 14 months in prison.

Further details of the scheme came out before sentencing. At the plea hearing, Spellman confirmed that her plea was voluntary and explained her role in the scheme, agreeing that the debit cards were loaded with benefits in others' names and that she knew her actions were wrong. The judge found a sufficient factual basis and accepted her guilty plea. The Probation Office then prepared a presentence investigation report (PSR). The advisory sentencing range was 27–33 months, but the PSR noted that an amendment to the Guidelines (to take effect shortly after Spellman's sentencing) would reduce the range to 21–27 months. The PSR also included details from interviews with Spellman. The report discussed Spellman's November 2022 diagnosis for bipolar II disorder and her 13-year-old diagnosis for major depressive disorder, and it explained that the offense involved over 60 victims. Spellman did not object to any of this information.

Defense counsel's sentencing memorandum, meanwhile, asked the court to accept the recommended sentence. The memo explained that Spellman and her husband had struggled financially and that her job searches had been undermined by chronic pain. Desperation, the memo said, led Spellman to search for work-from-home options on the internet, making her vulnerable to Kruger. The memo added that, a few years before the fraud scheme started, Spellman did other tasks for Kruger, including posting Facebook ads.

At the sentencing hearing in October 2023, the district judge explained that he would use the pending guideline amendments for an advisory range of 21–27 months. He noted the parties' 14-month recommendation but said he was "not sure" he could get to such a low sentence. He anticipated that some variance below the guidelines range was justified but voiced hesitation about going this low "because [Spellman] seemed to have a longer-term relationship" with Kruger. The judge then heard from a victim, offered the lawyers an opportunity to speak (both declined), and invited Spellman to speak. This colloquy (initially about whether Spellman would give an allocution) forms the basis of this appeal:

> SPELLMAN: I'm going to decline to answer.
>
> JUDGE: Decline to make any statement?
>
> SPELLMAN: Correct.
>
> JUDGE: And you've discussed that with your counsel?
>
> SPELLMAN: Correct.
>
> JUDGE: Are you willing to at least acknowledge that this was not a victimless crime, that you did victimize people?
>
> SPELLMAN: Correct. I do, Your Honor. I'm sorry.
>
> JUDGE: Is there anything you wish to say to the victims?
>
> SPELLMAN: I am sorry, and I wish I could do more than what I am more than likely going to be doing, and I – I don't know what to say. I am sorry.

The judge continued to question Spellman about her diagnoses of bipolar II disorder and depression, why she got involved with Kruger, and why she had continued to work with him. Her answers mirrored the details in the PSR, her plea agreement and plea colloquy, and her sentencing memorandum. Spellman finished by again apologizing to the victims, and the judge imposed a 16-month prison sentence.

Discussion

On appeal, Spellman argues that the district judge violated her Fifth Amendment right to remain silent. She contends that the judge should have ceased questioning as

soon as she said that she did not want to make a statement. The inherent pressure of standing before a judge who held years of her liberty in his hands, she says, forced her to respond with incriminating answers. Spellman further asserts that the statements elicited by the judge "went beyond what was in the PSR," and that the judge used that information to impose a higher sentence than what both parties had agreed was reasonable. But as we explain below, Spellman's argument finds insufficient support in the record and does not establish a violation of her Fifth Amendment rights.

As a preliminary matter, the government contends that Spellman forfeited her argument by failing to object during the colloquy with the district judge. Thus, the government says, our review should be for plain error. That view is mistaken. A violation of the right against self-incrimination at sentencing happens if a judge fashions a sentence based on new facts or inferences drawn from a defendant's silence or forced from her own lips. *See generally Mitchell v. United States*, 526 U.S. 314 (1999). Thus any constitutional error would not be complete until the sentence is announced. *Cf. Vega v. Tekoh*, 597 U.S. 134, 141–50 (2022) (if jury acquits at criminal trial, no constitutional tort for admitting out-of-court confession made without warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966)); *cf. also Chavez v. Martinez*, 538 U.S. 760, 769 (2003) (plurality opinion) ("[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the [defendant]."). To preserve her appellate argument, then, Spellman did not need to object during the judge's questioning. *See United States v. Gamble*, 969 F.3d 718, 723 (7th Cir. 2020); *see also United States v. Wilcher*, 91 F.4th 864, 870 (7th Cir. 2024). Indeed, her grounds for appeal would not have existed "prior to and separate from" the judge's sentencing decision. *See Wilcher*, 91 F.4th at 870 (quoting *United States v. Wood*, 31 F.4th 593, 597–98 (7th Cir. 2022)). And once that sentencing decision was pronounced, Spellman did not need to take further exception. *See id*; FED. R. CRIM. P. 51(a). We thus review Spellman's argument de novo.

The Self-Incrimination Clause of the Fifth Amendment provides that "No person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V. This right extends to sentencing and protects against "judicially coerced self-disclosure." *Mitchell*, 526 U.S. at 321–22 (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). When a person invokes the privilege against self-incrimination, that privilege protects only those communications that are testimonial, incriminating, and compelled. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). Here, Spellman cannot show that her statements were compelled or incriminating.

First, Spellman cannot show that the district judge's questions compelled her to speak. While compulsion, for purposes of the Fifth Amendment, does not require "overt physical coercion or patent psychological ploys," *see Miranda*, 384 U.S. at 457, it does require that "the free will of the [defendant] was overborne," *United States v. Washington*, 431 U.S. 181, 187–88 (1977). We recognize that criminal defendants often face "hard tactical choice[s]," *see United States v. Paladino*, 401 F.3d 471, 477 (7th Cir. 2005), but evidence of compulsion must go beyond those inherent pressures of the courtroom, *see Washington*, 431 U.S. at 187–88.

Spellman no doubt faced a difficult decision. She could give an allocution and risk saying something wrong in front of a judge who could impose a prison sentence as high as 20 years. Or she could stay silent, perhaps appear unremorseful, and risk a heightened sentence based on perceived lack of remorse. *See Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008). But countless criminal defendants face this same dilemma. And we see nothing here to suggest that any pressure Spellman experienced went beyond the ordinary to overbear her will. The judge made no threats, did not order Spellman to speak, and did not even hint that she might receive a higher sentence than he was already contemplating if she did not offer an allocution. *Cf. Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (finding compulsion where police officers were forced to choose between losing their jobs and incriminating themselves); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (finding compulsion where lawyers were forced to choose between disbarment and self-incrimination).

Second, Spellman cannot show that her statements to the judge were incriminating. She said nothing that contradicted or went beyond the PSR to increase her sentence. Rather, the information she disclosed was already established in the record and "presented no reasonable danger of incrimination." *See Hiibel*, 542 U.S. at 189–91 (not reasonable to believe petitioner's disclosure of his name to officers would have been used against him). For one, Spellman's "admission" to the judge that "this was not a victimless crime" was no admission at all: The PSR already explained that the offense involved over 60 victims, and no one contested that fact. The information about Spellman's diagnoses of bipolar II disorder and depression was also in the PSR. And Spellman's explanations about when her relationship with Kruger started, and why it continued, were discussed in her own sentencing memo, plea colloquy, and the PSR.

AFFIRMED