

Nos. 08-10314 & 08-10330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FU SHENG KUO,

Defendant-Appellant

and

SHENGJI WANG,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction over these cases pursuant to 18 U.S.C. 3231. This Court has jurisdiction to review the district court's final order under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether, under the Supreme Court's recent decision in *Dolan v. United States*, 130 S. Ct. 2533 (2010), a district court retains the authority to order restitution pursuant to 18 U.S.C. 3663 following expiration of the 90-day period established by 18 U.S.C. 3664(d)(5).

STATEMENT OF THE CASE

The factual and procedural history of these cases are set forth in the brief the government filed with this Court on December 15, 2008, and in this Court's December 3, 2009, opinion. See *United States v. Kuo*, 588 F.3d 729 (9th Cir. 2009), cert. granted and judgment vacated and remanded, 2010 WL 197736 (2010). In the interest of brevity, the government does not repeat those recitations here.

In its ruling, this Court "affirm[ed] the district court's restitution order insofar as it held that the \$4,226 seized from Defendants during the execution of the search warrant may be used to pay restitution to the two victims in equal parts," which was not challenged by defendants. *Kuo*, 588 F.3d at 739. This Court "vacate[d] the portion of the order that calculates the total amounts of restitution and remand[ed] for a new calculation consistent with [its] opinion." *Ibid*.

Defendants subsequently filed a petition for a writ of certiorari challenging the timeliness of the district court's restitution order. On June 21, 2010, the Supreme Court granted the petition, vacated this Court's ruling, and remanded the matter for further consideration in light of its recent decision in *Dolan v. United*

States, 130 S. Ct. 2533 (2010). See *Kuo v. United States*, No. 09-8640, 2010 WL 197736 (2010). In response, this Court directed the parties to file supplemental briefs addressing the effect of *Dolan*.

SUMMARY OF ARGUMENT

The Supreme Court held in *Dolan v. United States*, 130 S. Ct. 2533 (2010), that restitution orders entered beyond the 90-day period prescribed by 18 U.S.C. 3664(d)(5) are permissible, at least where “the sentencing court made clear prior to the deadline’s expiration that it would order restitution, leaving open (for more than 90 days) only the amount.” *Dolan*, 130 S. Ct. at 2537. This Court already has concluded that the district court “plainly expressed its inclusion of restitution as a part of the pronouncement of sentence,” *Kuo*, 588 F.3d at 734, and this conclusion is unaffected by *Dolan*. Accordingly, as in *Dolan*, it was only the amount of restitution that was not settled within the 90-day period. Thus, applying *Dolan*, this Court should hold that the district court’s restitution order was timely.

ARGUMENT

THE DISTRICT COURT’S RESTITUTION ORDER WAS TIMELY

A. Statutory Background

This case involves restitution ordered under 18 U.S.C. 3663, while *Dolan* involved restitution ordered under 18 U.S.C. 3663A. Both statutes, however, provide that restitution ordered thereunder “shall be issued and enforced in accordance with section 3664.” 18 U.S.C. 3663(d); 18 U.S.C. 3663A(d).

Accordingly, both this case and *Dolan* involve the question whether the district court retains the ability to order restitution beyond the 90-day deadline established by 18 U.S.C. 3664(d)(5).¹

B. The Supreme Court's Decision In Dolan

In *Dolan*, the district court recognized that restitution was mandatory under the relevant statute, but concluded that there was “insufficient information” in the record at the time of sentencing, and therefore left the matter open “pending the receipt of additional information.” 130 S. Ct. at 2537 (citation and internal quotations omitted). At sentencing, the court told the defendant that he could “anticipate that such an award will be made in the future.” *Ibid.* (citation and internal quotations omitted). The judgment entered following sentencing stated that restitution was applicable under the Mandatory Restitution Act, but would not be ordered at that time because of a lack of information regarding payments owed. *Ibid.*

The district court in *Dolan* did not hold a hearing to address restitution until after the 90-day period for ordering restitution passed. 130 S. Ct. at 2537. The

¹ Section 3664(d)(5) states, in pertinent part, as follows: “If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” 18 U.S.C. 3664(d)(5).

defendant raised the timeliness issue at that point, but the court rejected his argument and ordered restitution. *Ibid.*

Following rehearing, the Tenth Circuit affirmed the restitution order, see *United States v. Dolan*, 571 F.3d 1022 (10th Cir. 2009), and the Supreme Court subsequently affirmed the ruling of the court of appeals. Specifically, the Supreme Court held that “a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – at least where, as [in *Dolan*], the sentencing court made clear prior to the deadline’s expiration that it would order restitution, leaving open (for more than 90 days) only the amount.” *Dolan*, 130 S. Ct. at 2537. The Court concluded that this power was unaffected by the reason for the delay. See *id.* at 2539 (“The fact that a sentencing court misses the statute’s 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution.”).

C. Dolan Controls The Outcome Of This Case

The Supreme Court’s ruling in *Dolan* is directly applicable here.²

Defendants in this case argued on appeal that the district court failed to order

² The fact that the statute at issue in *Dolan* required full mandatory restitution – while noted by the Supreme Court, see *Dolan*, 130 S. Ct. at 2539 – is not a sufficient basis on which to distinguish *Dolan* and reach a contrary conclusion in this case. This is particularly true in light of the fact that this Court’s prior precedent is not based on the nature of the restitution at issue, but rather rests in large part on the notion that the procedural requirements contained in Section 3664 (continued . . .)

restitution at sentencing. 588 F.3d at 733-734. This Court rejected their argument, concluding that “[t]he court plainly expressed its inclusion of restitution as a part of the pronouncement of sentence.” *Id.* at 734. See also *ibid.* (“[T]he district court unambiguously expressed that Defendants would have to pay restitution.”); *id.* at 735 (“Defendants received oral notice at sentencing that they would be ordered to pay restitution.”).³ Thus, as in *Dolan*, the district court in this case “made clear prior to the deadline’s expiration that it would order restitution, leaving open (for more than 90 days) only the amount.” *Dolan*, 130 S. Ct. at 2537. Accordingly, under *Dolan*, the district court in this case “retain[ed] the power to order restitution.” *Ibid.*

(continued . . .)

– which apply to restitution orders issued under both Section 3663 and Section 3663A – “were designed to protect victims, not defendants.” *Kuo*, 588 F.3d at 735 (citation and internal quotations omitted). This underlying notion arguably remains valid, as it is largely consistent with *Dolan*. See *Dolan*, 130 S. Ct. at 2540 (“[T]he statute seeks speed primarily to help the victims of crime and only secondarily to help the defendant.”).

³ While this Court’s ruling was vacated and remanded for further consideration in light of *Dolan*, the government respectfully submits that nothing in *Dolan* calls this conclusion into question.

CONCLUSION

This Court should conclude that, under *Dolan*, the restitution order at issue was timely.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this supplemental brief complies with the 2,000-word limit set by this Court in its July 6, 2010, order. The brief was prepared using Microsoft Office Word 2007 and contains 1,243 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Dirk C. Phillips
DIRK C. PHILLIPS
Attorney

Date: August 6, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 6, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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