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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0292**

State of Minnesota,
Respondent,

vs.

Mark John Mimbach,
Appellant.

**Filed August 7, 2017
Affirmed
Florey, Judge**

Ramsey County District Court
File No. 62-CR-15-8105

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas B. Hatch, Peter Marker, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

David W. Buchin, Buchin Law Office, St. Cloud, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Reyes, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant challenges the district court's restitution order following his conviction of, and sentence for, failing to file tax returns for the tax years 2009-2013. Appellant argues that the district court (1) abused its discretion by basing its restitution award on an

erroneous valuation of his trailer business and (2) erred by concluding that appellant was not a professional gambler for purposes of Minnesota's Alternative Minimum Tax (AMT). We affirm.

FACTS

Appellant Mark Mimbach pleaded guilty to five counts of failure to file tax returns for the tax years 2009-2013. At sentencing, the district court denied appellant's motion for a dispositional departure and imposed a 23-month executed sentence. The district court also ordered restitution in the amount of \$340,580.27.

Appellant challenged the restitution order, claiming that his accountant, M.D., determined that he owed only \$2,912 in taxes for the tax years 2009-2013. Appellant's position was based on amended tax returns, which he filed on August 1, 2016, two weeks before sentencing. The 2016 amended tax returns drastically reduced appellant's tax liability for the tax years 2009-2013, from \$165,913, to zero. The reduction in appellant's tax liability stemmed from two sources: (1) earnings generated from appellant's operation of a trailer-sales business and (2) appellant's gambling endeavors. The 2016 amended tax returns reflected that the beginning and ending inventory levels for appellant's trailer-sales business were changed to show a dramatic decline in the inventory from the beginning of 2009, to the end of 2013, which reduced appellant's tax liability to zero. The amended tax returns also recharacterized appellant's gambling activity as a trade or business, instead of a recreational activity, which allowed appellant to deduct his losses under Minnesota's AMT, thereby reducing his tax liability to zero.

Shortly before the restitution hearing, appellant's accountant provided the state with additional information regarding appellant's trailer business. Based on this information, the state recalculated appellant's restitution obligation and determined that appellant's total obligation was \$254,586.04.

Following the restitution hearing, the district court found that, because appellant kept no records of "business inventory over time and did not maintain in the normal course of business records of transactions subject to taxation," the Minnesota Department of Revenue (DOR) was required to assume that appellant's "inventory did not change significantly during the subject years, resulting in a cost of goods sold reflective of inventory purchases and other miscellaneous expenses." The district court then found that the DOR "engaged in a meticulous, conscientious review of available documents, piecing together and reconstructing information [appellant] should have maintained in the regular course of business to calculate revenue and expenses associated with [appellant's] business operations." The district court also found that the inventory representations offered by appellant are "pure speculation and conjecture and lack credibility." Therefore, the district court concluded that the state "prove[d] by a preponderance of the evidence the propriety of the requested restitution associated with [appellant's] trailer business."

The district court also rejected appellant's claim that he is a professional gambler. The district court found that appellant's "representations characterizing his gambling activity as a trade or business are not credible and do not negate the preponderance of the evidence showing that [appellant] engaged in recreational gambling." Thus, the district court concluded that appellant could not deduct his gambling losses under the AMT. The

district court then set appellant's restitution obligation at \$254,586.04. This appeal followed.

DECISION

District courts have broad discretion in awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). Unless that discretion is abused, a restitution order will not be reversed. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

I.

“The primary purpose of restitution is to restore crime victims to the same financial position they were in before the crime.” *State v. Johnson*, 851 N.W.2d 60, 65 (Minn. 2014) (quotation omitted). The district court “must have some factual basis” for its restitution determination. *State v. Gaiovnik*, 794 N.W.2d 643, 651 (Minn. 2011); *see State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (remanding where the record did not provide factual basis to support amount of restitution ordered). The record itself can provide a factual basis for a restitution award. *Fader*, 358 N.W.2d at 48; *see also Gaiovnik*, 794 N.W.2d at 651. “The district court’s factual findings will not be disturbed unless they are clearly erroneous.” *Andersen*, 871 N.W.2d at 913. The state bears the ultimate burden of proving the “propriety of the restitution” by a preponderance of the evidence. *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000).

Appellant challenges several of the district court’s findings related to his tax liability for his trailer business for the tax years 2009-2013. Appellant contends that because these findings are not supported by the record, the district court abused its discretion by

concluding that the state proved, by a preponderance of the evidence, appellant's tax liability for his trailer business for those years.

Appellant first challenges the district court's finding that M.D. "was informed by an unidentified source that at some point, perhaps in 2003, the value of [appellant's] business inventory was approximately \$830,000." Appellant contends that this is "not an accurate description of M.D.'s testimony" because M.D. testified that he learned the information from appellant's previous accountant. But M.D. never provided the name of appellant's previous accountant from whom he received his information. Moreover, M.D. testified that he never saw "a document that showed that an inventory had been taken." Instead, M.D. testified that he received his information by talking with the previous accountant. Because M.D. never provided the name of the "previous accountant" and admitted that he never saw a document showing that an inventory of appellant's business had been taken, the source of M.D.'s information was not identified in the restitution proceedings. Therefore, the district court's finding is supported by the record.

Appellant also challenges the district court's findings that (1) "[n]o records exist showing [appellant's trailer] inventory valuation, or how or when the inventory depleted, or any fluctuations in inventory over time, or any other information associated with the inventory" and (2) M.D. "assumed that an inventory valued at \$830,000 existed in 2003, guessed at when inventory may have depleted, and conveniently assigned valuations based upon those assumptions and guesstimates to arrive at the conclusion that [appellant] had no tax liability for this trailer business between 2009 and 2013." Appellant claims that these findings "misstate" and conflict with M.D.'s testimony pertaining to how M.D.

calculated appellant's inventory valuation. But appellant's argument assumes that the district court found M.D.'s testimony to be credible, when the district court repeatedly stated that M.D.'s testimony was not credible and even referred to M.D.'s calculations as a "giant leap[] in logic [that has] no basis in fact." It is well-settled that the fact-finder is in the best position to assess the credibility of witnesses, and the reviewing court defers to the fact-finder's credibility determinations. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). If believed, the evidence presented by the state proves appellant's tax liability for his trailer business for the relevant tax years by a preponderance of the evidence. In finding the state's evidence credible, and any conflicting evidence to be incredible, the district court thoroughly explained its credibility determinations, and we defer to these determinations. *See id.* Accordingly, the district court did not abuse its discretion in determining appellant's tax liability for his trailer business for the tax years 2009-2013.

II.

Appellant also challenges the district court's determination that he is not a professional gambler. The Minnesota AMT, like the federal AMT, was created to reduce the ability of certain individuals to avoid payment of individual income tax by using numerous tax deductions or exemptions available under the regular tax formula. *Busch v. Comm'r of Revenue*, 713 N.W.2d 337, 343 (Minn. 2006). Under Minnesota law, a Minnesota taxpayer is required to calculate the amount of his or her Minnesota income tax each year under both the regular Minnesota formula and the AMT formula, pay the tax due

under the regular formula, and then pay an additional tax on the amount of the tax computed under the AMT minus the regular tax. Minn. Stat. § 290.091, subd. 1 (2016).

Under Minnesota regular tax formulas, a taxpayer may claim an itemized deduction for gambling losses to offset winnings. See Minn. Stat. § 290.01, subd. 19 (2016). But, except in limited circumstances, a taxpayer may not deduct gambling losses when calculating the Minnesota AMT. Minn. Stat. § 290.091, subd. 2 (2016). Thus, in computing the Minnesota AMT, “a taxpayer’s gambling winnings are included in taxable income, but the taxpayer cannot deduct gambling losses.” *Busch*, 713 N.W.2d at 344.

The exception to the rule that a taxpayer may not deduct gambling losses under the Minnesota AMT is the trade or business deduction. See Minn. Stat. § 290.091, subd. 2. Under this exception, the Minnesota AMT allows trade or business expenses to be deducted from taxable income. *Busch*, 713 N.W.2d at 344. Accordingly, “if a person is engaged in the trade or business of gambling, he or she would be able to deduct his or her gambling losses from adjusted gross income as trade or business expenses for the purposes of both federal and Minnesota AMT.” *Id.*

In considering whether and when gambling constitutes a trade or business under the Minnesota AMT, our supreme court has considered the following nine nonexclusive factors: (1) whether the activity is carried on in a business-like manner and the taxpayer maintains complete and accurate books and records on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the

taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation. *Id.* at 347.

Here, in considering these nine factors, the district court found that (1) appellant did not “maintain complete and accurate books or records” associated with his gambling endeavors, such as “ledgers, receipts, separate bank accounts or credit cards,” and did not maintain records of his expenditures, such as meals, lodging, mileage, or other expenses; (2) although he “made up” a “mysterious [gambling] scheme,” appellant is “not a gambling expert”; (3) appellant’s time and effort associated with his gambling activity was “sporadic and inconsistent,” and his lack of accurate records prevented the court from determining the amount of time appellant actually gambled; (4) appellant never generated a net profit from his gambling activities between 2009-2013, and instead, derived his livelihood from his trailer business; and (5) at the sentencing hearing, appellant “characterized himself not as a professional gambler but instead as a ‘very avid gambler,’” words that “describe a recreational hobby not unlike hunting or birdwatching.” Based on these findings, the district court concluded that “[t]his is not a situation where [appellant] was engaged in regular, consistent, profit-seeking endeavors at a casino pursuant to an established business plan, schedule, or technique.” Rather, the district court determined that appellant had “no business plan, or schedule, or established technique,” failed to “undertake any effort to treat his gambling activity as his trade or business,” and “never considered himself to be a professional gambler until two weeks before sentencing when he discovered the potential convenience in making such a claim.” Thus, the district court concluded that appellant

could not deduct his gambling losses for purposes of the Minnesota AMT because appellant engaged only in recreational gambling.

Appellant does not dispute that he is subject to the Minnesota AMT. But he claims that the district court's findings pertaining to the nine factors "misstate[]" the evidence. He contends that, based upon the testimony of M.D. and the statement of appellant's gambling expert, the conclusion that appellant is a professional gambler is "at least as likely" as is the "conclusion that he is not."

We disagree. Appellant's argument is based upon his interpretation of the evidence presented, and an assumption that his accountant's and gambling expert's testimony were credible. To the contrary, the district court specifically rejected appellant's interpretation of the evidence and did not find his witnesses' testimony to be credible. The district court's findings are supported by the testimony of Carla Engebretson, a Revenue Tax Specialist Senior for the DOR. Engebretson described the evidence she reviewed in analyzing each factor and concluded that after weighing all the factors, appellant was involved in recreational gambling. Although, if believed, the evidence presented by appellant may support his claim, the district court specifically found the evidence and testimony presented by appellant to be incredible, and again, we defer to the district court's credibility determinations. *See Al-Naseer*, 788 N.W.2d at 473. Therefore, the district court's findings pertaining to the nine factors articulated in *Busch* are not clearly erroneous.

Because the district court's findings are not clearly erroneous, the conclusion that appellant is not a professional gambler is reviewed de novo. *See Busch*, 713 N.W.2d at 343 (stating that the question of how the law is to be applied to undisputed facts is a

question of law that is reviewed de novo). The evidence pertaining to the nine factors establishes that appellant did not carry on his gambling activities in a business-like manner, was not a gambling expert, was sporadic and inconsistent in his time and effort associated with his gambling, never generated a net profit in his gambling activities between 2009-2013, and did not consider himself to be a professional gambler until it was convenient for him to do so. Based on these factors, the district court properly determined that appellant is not a professional gambler. Accordingly, appellant is not entitled to deduct his gambling losses for purposes of Minnesota's AMT.

Affirmed.