

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
v.)	Civil Action No. 7:06cr113
)	
KELLY LEE COOK,)	
)	
Defendant)	

REPORT AND RECOMMENDATION

I. Background

In accordance with the provisions of Title 28 U.S.C. § 636(b)(3) and upon the defendant’s consent, this case was referred to the undersigned to conduct a plea hearing.

II. Facts

Defendant Kelly Lee Cook (“Cook”) was charged in Counts One through Four of an Indictment filed on December 28, 2006. Count One charged Aggravated Identity Theft, and specifically alleged that on or about between April 24, 2005 and May 26, 2006, within the Western District of Virginia, the Western District of North Carolina, and elsewhere, Cook knowingly used, without lawful authority, a means of identification of another person (to wit, the name and social security number of K.P.C.) during and in relation to a felony violation of 18 U.S.C. § 1029 (access device fraud), in violation of 18 U.S.C. § 1028A. Count Two similarly charged Cook with Aggravated Identity Theft involving the means of identification of another person. Count Three charged Access Device Fraud, and specifically alleged that on or about between April 24, 2005 and May 26, 2006, within the Western District of Virginia, the Western

District of North Carolina, and elsewhere, Cook knowingly used and with intent to defraud used one or more access devices (credit cards which had been obtained using the means of identification of K.P.C.), and by such conduct obtained things of value in excess of \$1,000.00 within a one-year period, thereby having an effect on interstate commerce, in violation of 18 U.S.C. § 1029(a)(2). Count Four similarly charged Cook with Access Device Fraud involving credit cards obtained by using the means of identification of A.J.L.

On April 18, 2007, a plea hearing was conducted before the undersigned. At that hearing, Cook, accompanied by her counsel, Fay F. Spence, entered a plea of guilty to Counts One and Three of the Indictment. Cook had previously plead not guilty to all charges, and appeared on April 18, 2007 to change her plea from not guilty to guilty as to Counts One and Three. At the hearing, Cook acknowledged that she had signed a written Plea Agreement reflecting her guilty plea, identified the Plea Agreement at the hearing, and stated that she agreed to all of its terms.

At the April 18, 2007 hearing, defendant was placed under oath and testified that her name is Kelly Lee Cook. Cook stated that she was fully aware of the nature of the charges against her, the elements of the offenses, and the consequences of pleading guilty to Counts One and Three. Cook was plainly able to understand and communicate with the court and her counsel, and stated that she could read and write in English. At all times, Cook appropriately responded to inquiries from the court and exhibited a full understanding of the proceedings and the instructions given her by counsel in court. Cook stated that she has not been diagnosed or treated for any mental or emotional problem which would affect her ability to communicate or understand the proceedings. Cook further testified that she was not under the influence of any

alcohol, drug or medication that affected her ability to understand the nature of the proceedings being held, the nature of the charges against her or the consequences of pleading guilty to those charges. Cook further stated that she did not suffer from any condition that impeded or prevented her being able to understand the words that were being spoken or the proceedings in general. She was advised that if at any time she failed to understand, she could stop the proceedings and seek clarification. Cook's counsel, Ms. Spence, expressed her opinion that Cook was capable of entering a knowing, voluntary and intelligent plea.

Cook testified that she had received a copy of the Indictment pending against her and that she had discussed the Indictment and the case with her counsel. After being informed of the provisions of Fed. R. Cr. P. 11(c), Cook stated that she was pleading guilty because she was, in fact, guilty of Counts One and Three as charged. Cook testified that she was pleading guilty of her own free will and had not been forced, threatened, or coerced in any respect. Cook stated that no assurances or promises had been made to her by anyone in an effort to induce her plea in this case, except to the extent set forth in the written Plea Agreement filed with the court.

Cook testified that she had read the written Plea Agreement in its entirety, and she had discussed its terms with her counsel before signing it. Cook stated that she understood the terms of the Plea Agreement, and that the document presented to the court set forth her agreement with the government in its entirety. Cook stated that she understood that under the Plea Agreement: (1) the government was moving to dismiss Counts Two and Four of the indictment; and (2) that the amount of the loss, including relevant conduct as to that amount, was between \$10,000 and \$30,000.

Cook stated that she understood as well that the Plea Agreement included a provision waiving her right to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing.

Paragraph 8 of the Plea Agreement provides that Cook waived the right to collaterally attack her conviction by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to Cook at the time of her guilty plea, and Cook stated that she understood this waiver. In Paragraph 18 of the Plea Agreement, and on the record at the hearing, Cook stated that she was satisfied with the advice and representation by her counsel in this case. Paragraph 18 also provides that Cook waived any claim she may have for ineffective assistance of counsel known and not raised by her at the time of sentencing.

Cook further acknowledged that the presiding court is not required to accept the agreement and may reject or defer acceptance of the plea agreement, including any recommendation for sentencing, until after a presentence report is prepared and reviewed.

Cook stated that she understood that the offenses with which she is charged are felonies, and that, if her plea is accepted, she will be adjudged guilty of two felony offenses by the presiding court and this adjudication may deprive her of valuable civil rights, such as the right to vote, hold public office, serve on a jury and possess a firearm.

Cook was informed of the maximum possible penalty provided by law for the offenses with which she is charged and said she understood the penalties and consequences of the plea. Specifically, Cook was informed that she was subject on Count One to a mandatory term of

imprisonment of two (2) years consecutive to any other sentence, a fine of up to \$200,000, a \$100 special assessment, and a term of supervised release following any term of imprisonment. As to Count Three, Cook was advised that the maximum term of imprisonment was ten (10) years, a fine of up to \$250,000, a \$100 special assessment, and a term of supervised release following any term of imprisonment.

Cook also was informed that, under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued sentencing guidelines for judges to follow in determining the sentence in a criminal case. Because of certain recent Supreme Court decisions, these sentencing guidelines are now advisory. Cook acknowledged that she and her counsel had discussed how the sentencing guidelines might apply in her case, and she stated her understanding that the court would not be able to determine the recommended guideline sentence of her case until after a presentence report has been completed and both parties have an opportunity to challenge the reported facts and the application of the guidelines. Cook stated that she understood that the eventual sentence imposed may be different from any estimate her attorney has given her, and that the court has the authority, in some circumstances, to depart from the advisory guidelines and impose a sentence that is more severe or less severe than the sentence called for by the advisory guidelines. Cook acknowledged that she understood that the court is not bound by any recommendations set forth in the Plea Agreement, and may sentence her up to the statutory maximum. Cook stated that she understood that in that event she would not be able to withdraw her guilty plea. Cook acknowledged that she understood that parole had been abolished, and, in the event she receives a sentence of incarceration, she will not be released on parole. Cook also stated that she understood that any term of supervised release

could be revoked if she violated the terms and conditions of such release, and said that she understood that if supervised release is revoked, an additional term of imprisonment could be imposed regardless of how long she may have served before the violation. Cook was advised that if resentenced following a supervised release violation, she may serve a combined total period of incarceration greater than the maximum term she had been told she could receive.

Cook also testified that she understood that she had the right to a trial by a jury, in addition to the following rights, which would be waived or given up if her guilty plea is accepted:

1. The right to plead not guilty to any offense charged against her;
2. The right at trial to be presumed innocent and to require the government to prove her guilt beyond a reasonable doubt;
3. The right to assistance of counsel;
4. The right to see, hear and cross-examine witnesses;
5. The right to call witnesses to testify in her own behalf and to the issuance of subpoenas or compulsory process to compel the attendance of witnesses; and
6. The right to decline to testify unless she voluntarily elected to do so in her own defense.

Having all of this explained to her, Cook stated that she understood the possible consequences of a Guilty Plea and asked the court to accept her plea of guilty to Counts One and Three in the Indictment. Cook's counsel stated that she believed that her client's plea of guilty was well-advised and consistent with the facts of the case.

The government proffered, without objection, the following evidence regarding the offenses with which Cook is charged:

While employed at Wachovia Bank in Charlotte, North Carolina, Cook accessed certain databases and obtained the name and social security number of K.P.C. of Roanoke, Virginia, and used this information to obtain credit cards for herself. Cook had these credit cards and the bills for them issued to her address in North Carolina. K.P.C. subsequently has encountered problems obtaining a loan and with credit since Cook's actions. Cook also obtained information concerning another individual, A.J.L., and put herself on his account as an authorized user. Cook also obtained credit cards in the names of N.L.C. of Maryland and K.N.C. of North Carolina and attempted to obtain credit cards in the names of six other persons. Cook used certain of these credit cards and charged amounts well in excess of \$1,000.00 in a one year period, affecting interstate commerce. The government stated that the total amount charged was approximately \$24,900.00.

Neither Cook nor her counsel offered any material disagreement with the facts set forth in the government's proffer, and Cook testified that while working at Wachovia Bank she accessed personal information of others and used it to obtain credit cards for herself. Cook stated that she used these credit cards to buy groceries and to pay her bills in the approximate amount set forth above.

III. PROPOSED FINDINGS OF FACT

Based on the evidence presented at the plea hearing, the undersigned now submits the following formal findings of fact, conclusions and recommendations.

1. Cook is fully competent and capable of entering an informed plea;

2. Cook is aware of the nature of the charges and the consequences of her plea;
3. Cook knowingly and voluntarily entered pleas of guilty to Counts One and Three of the Indictment; and
4. The evidence presents an independent basis in fact containing each of the essential elements of the offense to which Cook is pleading guilty.

VI. RECOMMENDED DISPOSITION

Based upon the above findings of fact, the undersigned **RECOMMENDS** that the presiding District Court accept Kelly Lee Cook's plea of guilty to Counts One and Three of the Indictment and adjudge her guilty of the offenses charged therein, order a presentence investigation, and set a date for Cook's sentencing.

NOTICE TO PARTIES

The Clerk is directed to immediately transmit the record in this case to the Hon. Glen E. Conrad, United States District Judge. Both sides are **NOTIFIED** that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record.

Enter this 20th day of April, 2007.

/s/ Michael F. Urbanski
United States Magistrate Judge