

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3752
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EITAN STERN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(CR 92 9 A M1)

(March 12, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

On June 18, 1992, Eitan Stern pleaded guilty to three counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of mail fraud in violation of 18 U.S.C. § 1341. The district court sentenced Stern to sixteen months' imprisonment. Stern objects to the court's enhancement of his sentence by two points for abuse of

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

a position of trust. Finding no error, we affirm.

I.

Stern operated a fishing tackle import and export company in New York; William Humphreys owned a fishing rod and lure business in Louisiana. The two men had known each other for twenty years, during many of which Humphreys had been one of Stern's customers. They had engaged in numerous business transactions during this time.

In about 1980, Humphreys started selling fishing rods manufactured by Kunnan Sports Technology. In 1990, after Humphreys learned that Kunnan was discontinuing its production of rods, he obtained Kunnan's permission to sell fishing rods using previous Kunnan trade names if he could find another manufacturer.

Stern had established contacts in the Republic of Korea with companies able to make fishing rods. When he learned that Humphreys wished to continue selling Kunnan rods, Stern assured Humphreys that he could have the rods manufactured by another Korean company. Humphreys provided samples for Stern to send to Korea for one of Stern's contacts to produce samples.

Later in 1990, Stern introduced Humphreys to a Korean agent for the manufacturer who showed the samples to Stern. In September 1990, Stern and Humphreys traveled to Korea and placed an order for 10,400 rods with the agent and another order for 1,300 rods with a different Korean manufacturer. The total cost of the rods was \$117,591.

After returning to the United States, Stern sent a confirming

invoice by facsimile wire transmission to Humphreys. At Stern's request, Humphreys then wired \$93,000 from his account in Louisiana to Stern's account in New York. Stern had asserted that the money was necessary to purchase a certificate of deposit that was to be used as collateral to purchase a letter of credit to secure the order of 10,400 rods.

On November 5, 1990, Stern transmitted by wire to Humphreys a copy of a letter that informed Humphreys that Stern had placed the \$93,000 in an interest-bearing certificate of deposit, which he had then surrendered as collateral to open the letter of credit. In fact, Stern had used only \$6,000 of the \$93,000 to purchase a certificate of deposit. He used Humphreys's money to pay off other business and personal debts. At no time did Stern tell Humphreys any of this. Instead, Stern telephoned Humphreys to tell him that the entire \$93,000 had been used to secure the 10,400-rod shipment.

In December 1990, Stern asked Humphreys to send him the balance due for the rest of the rods, a total of \$24,591. On October 17, Humphreys mailed a check for this amount to Stern.

On February 13, 1991, Stern sent a letter to Humphreys by wire, informing him that the Korean manufacturer had shipped the large order of rods to New Orleans and that it was due to arrive by March 10. When the rods did not arrive by March 10, Humphreys called Stern. Stern then admitted that he had never paid for the rods but had used Humphreys's money to pay off other debts.¹

¹ In late January 1991, Humphreys did make a payment of \$8,520 to the Korean manufacturer.

Humphreys subsequently paid the manufacturer for the rods and contacted the FBI.

On March 24, 1992, Stern was indicted for three counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of mail fraud in violation of 18 U.S.C. § 1341. Stern eventually pleaded guilty to all four counts. Prior to sentencing, the probation officer issued his presentence investigation report ("PSI") suggesting that the district court use a base offense level of six under the Sentencing Guidelines. Because the loss sustained was between \$70,000 and \$120,000, the report recommended an increase of six points under U.S.S.G. § 2F1.1(b)(1)(G). It also recommended an enhancement of two points for "more than minimal planning" under section 2F1.1(b)(2)(d) and no downward adjustment for "acceptance of responsibility" under section 3E1.1. Finally, the report called for an enhancement of two points for "abuse of a position of private trust under section 3B1.3."

At the sentencing hearing, the district court agreed with the PSI as to the base offense level and the specific offense characteristic. The court refused to add two points for "more than minimal planning," granted a downward adjustment for "acceptance of responsibility," and then assessed two points for "abuse of a position of trust."

The court found an abuse of a position of trust

because of the relationship over a period of years between Mr. Humphreys and Mr. Stern, whereby Mr. Humphreys was moved to just send him, in effect, \$117,000 in cash and to trust that Mr. Stern would handle the business for Mr. Humphreys according to Mr. Humphreys' best interest. That's the abuse of the

position of trust In this particular case, there is evidence that there was a relationship between Mr. Stern and the victim, Mr. Humphreys, and that that position was abused.

II.

Section 3B1.3 allows the court to increase a defendant's sentence by two levels if he

abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

The commentary to section 3B1.3 provides,

The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.

We review the enhancement under the clearly erroneous standard. United States v. Ehrlich, 902 F.2d 327, 330 (5th Cir. 1990), cert. denied, 111 S. Ct. 788 (1991) ("A district court's application of § 3B1.3 is a sophisticated factual determination that will be affirmed unless clearly erroneous."). See also United States v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, 112 S. Ct. 648 (1991); United States v. White, 972 F.2d 590, 600 (5th Cir. 1992), petition for cert. filed (U.S. Jan. 6, 1993) (No. 92-7162).²

In applying section 3B1.3 to the facts before us, we must

² But see United States v. Kosth, 943 F.2d 798, 800 (7th Cir. 1991) ("We review the legal meaning of such language as 'position of trust' under the de novo standard.").

evaluate two factors: (1) whether a position of trust existed and (2) whether Stern abused his position in a manner that significantly facilitated the commission or concealment of the offense. Brown, 941 F.2d at 1304; White, 972 F.2d at 601.

In Ehrlich, 902 F.2d at 331, we decided that a bank loan clerk who had the authority to initiate loan balancing transactions was in a position of trust. In United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990), the court stated that "the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." The court then decided that a truck driver who stole goods from families whose possessions he was transporting occupied a position of trust. Id. at 507.

In the case perhaps most similar to the one before us, the court in United States v. Tardiff, 969 F.2d 1283, 1289 (1st Cir. 1992), upheld an upward adjustment for abuse of a position of trust for an investor who pleaded guilty to numerous acts of mail fraud in violation of section 1341. The court stated,

In a capitalistic society, an individual is unlikely to grant control over his or her funds to people plucked at random from the madding crowd. Virtually by definition, a money manager or financial adviser who is entrusted with, and who proceeds fully to exercise, broad discretionary powers in respect to other peoples' money occupies a position of private trust.

Id. (citations omitted).

The facts support the district court's finding that a position of trust existed between Stern and Humphreys. The two knew each other for twenty years and had engaged in numerous business

transactions during that time. Nothing suggests that Stern's previous actions ever had given Humphreys any reason not to trust Stern to conduct business in an honest manner. The lengthy personal and business association between the two men provided Stern with the freedom to commit his crime without any intrusive inquisitiveness on the part of Humphreys. While Humphreys likely would not have handed over \$117,000 to a random business acquaintance without the usual financial assurances, he would have)) and did)) easily turn over his money to a long-trusted associate like Stern, who occupied a position of trust.

The court also found that Stern abused this position of trust in a way that facilitated the commission of the crime. It determined that because of the position of trust, Humphreys simply sent Stern \$117,000 and trusted that Stern would act in Humphreys's best interest.

In Brown, 941 F.2d at 1305, we concluded that a counselor in a prison who engaged in a scheme to receive heroin and money orders abused a position of trust. We determined that his role as a counselor put him in a position superior to that of other people to smuggle contraband. Id. Similarly, the court in Hill, 915 F.2d at 506, found that since the defendant, relative to all people, was in a superior position because of the trust relationship, when he stole the families' possessions, he abused that position in a manner that significantly facilitated the commission or concealment of the offense. Id. at 507-08.

The district court's finding that Stern abused his position of

trust is not clearly erroneous. Stern's position of trust put him in a position superior to that of all other people to use Humphreys's funds to pay off his own creditors instead of paying for the rods. It was relatively easy for Stern to conceal his wrongdoing by falsely assuring Humphreys that all the money had been placed in a certificate of deposit and then by lying to Humphreys that the rods had been shipped.

III.

Stern also argues that the district court engaged in impermissible double counting in enhancing the sentence, as abuse of trust is inherent in the crimes of wire and mail fraud and because the conduct for which the court found the abuse of trust was the same conduct detailed in Stern's indictment and thus was automatically included in the base level under section 2F1.1. We reject these arguments.

First, the fact that the conduct that led the district court to enhance Stern's sentence was described in the indictment does not mean that this conduct is absorbed solely into "offense conduct." Section 1B1.3(a)(1) of the Sentencing Guidelines specifically instructs a court, when adjusting levels, to take into account "all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction . . . or that otherwise were in furtherance of that offense. . . ." In addition, section 3B1.3 instructs that the "adjustment may not be employed if an abuse of trust or skill is

included in the base offense level or specific offense characteristic." Abuse of trust was not included in the base offense level. The district court took into account all of Stern's actions surrounding his misappropriation of Humphreys's funds and decided that these actions showed an abuse of trust for which enhancement of Stern's sentence was in order.

Additionally, the Sentencing Guidelines specifically mention crimes as to which a court may not enhance a sentence based upon abuse of a position of trust. The district court assessed Stern's base level under section 2F1.1. Neither that section nor the commentary instructs the court not to enhance a sentence based upon section 3B1.3. On the other hand, several other sections explicitly exclude enhancement based upon section 3B1.3. For example, application note 1 to section 2F1.2 (insider trading) states that section 3B1.3 "should be applied only if the defendant occupied and abused a position of special trust." Application note 3 to section 2C1.1 (offering, giving, soliciting, or receiving a bribe; extortion under color of official right) instructs a court not to apply section 3B1.3 "except where the offense level is determined under § 2C1.1(c)(1) or (2)." Because section 2F1.1 does not forbid the application of section 3B1.3, the district court correctly enhanced Stern's sentence based upon an abuse of a position of trust.

Second, the crimes of wire and mail fraud do not inherently

incorporate an abuse of trust.³ Although both crimes involve a "scheme or artifice to defraud" or a scheme to obtain "money or property by means of false or fraudulent pretenses, representations, or promises," they do not inherently require an abuse of a position of trust. One who concocts a scheme to obtain money by using a false promise need not first induce another to trust him and then abuse that position of trust. We can hypothesize many scenarios in which no position of trust is ever created in hatching a scheme to obtain money through the use of false promises.

³ Title 18 U.S.C. § 1341 provides,

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. § 1343 provides,

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

IV.

Because we find no error in the district court's determination that Stern stood in a position of trust in relation to Humphreys and abused that position, and, further, that no impermissible double counting occurred, we AFFIRM the judgment of sentence.