

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8592
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE D. HERRERA, JR.,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-92-CR-259-B
- - - - -

June 24, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Joe D. Herrera, Jr., disputes the court's application of § 3B1.3 to increase his base offense level. Herrera argues that his relationship with his brother-in-law as a business partner is not the type of position of trust that the guidelines contemplated in § 3B1.3 because it did not involve an element of private trust.

Section 3B1.3 allows the court to increase a defendant's

* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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 § 3B1.3 provides:

The position of trust must have contributed in some substantial way to facilitate 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.

Section 3B1.3, comment. (n.1).

This Court reviews the enhancement under the clearly erroneous standard. U.S. v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 648 (1991). In reviewing the facts, the Court evaluates two factors: (1) whether a position of trust existed and (2) whether a defendant abused his position in a manner that significantly facilitated the commission or concealment of the offense. Id.

This Court held in U.S. v. Stern, No. 92-3752 (5th Cir. March 12, 1993) (unpublished; copy attached), that a defendant who used the funds of a long-time business associate to pay off his own creditors occupied a position of trust within the meaning of § 3B1.3. The Court noted that it was easy for the defendant to conceal his wrong doing by lying to his associate. Id. at page 7-8.

Likewise, Herrera occupied a position of trust because of his close business relationship with his brother-in-law. Herrera

acknowledged that he exploited the family relationship when he stated that he believed that his fraud would go unpunished because a family member would not report him. Accordingly, the district court did not err when it applied § 3B1.1 to enhance Herrera's base offense level.

The judgment of the district court is AFFIRMED.