

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5270
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEBRA L. CAMPBELL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:93-CR-95
- - - - -
(March 23, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Debra L. Campbell argues that the district court erred in finding that she held a "position of trust" as defined by U.S.S.G. § 3B1.3. Citing the November 1993 amendment to the commentary to § 3B1.3, she argues that her position was not one "characterized by professional or managerial discretion."

The district court's application of § 3B1.3 requires a sophisticated factual determination reviewed by this Court under the clearly-erroneous standard. United States v. Ehrlich, 902

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

F.2d 327, 330 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). A finding is not clearly erroneous if it is plausible in light of the entire record. United States v. Brown, 7 F.3d 1155, 1159 (5th Cir. 1993).

The enhancement under § 3B1.3 encompasses two factors: (1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense. United States v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, 112 S.Ct. 648 (1991). To determine whether the position of trust "significantly facilitated" the commission of the offense, the court must decide whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job. Id. at 1305. "This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller." § 3B1.3, comment. (n. 1).

"It has been stated that the rationale underlying the 'bank teller exception' is that although the teller's position provides an opportunity to embezzle money, reasonably diligent supervisors could easily detect the wrongdoing after it has occurred." Brown, 7 F.3d at 1161 (citing United States v. Helton, 953 F.2d 867, 870 (4th Cir. 1992)). The bank-teller exception does not apply when "there is no analogous supervision capable of detecting the completed crime." Id. at 1161.

The record established that Campbell's duties and responsibilities as cashier of the Imprest Fund went significantly beyond the duties of an ordinary bank teller. Her

job was classified by her supervisor as a position of trust. She was the only person who possessed the key and combination to the safe in which the funds were stored. She had the authority to get money out of the safe, requisition money, and check money. Reimbursement checks intended for the fund were written in her name as cashier. To hide the fact that money was missing from the cash fund, Campbell would fill out phony reimbursement requests to indicate that the fund had not yet been reimbursed. She would provide phony information to auditors. The auditors relied on Campbell to type out the final audit form, which they signed. On the final audit form, Campbell would alter the amount to match the amount actually in the fund. She kept separate sets of computer ledgers, one set showing the actual amount in the fund minus the money she had stolen. She erased this ledger from the computer hard drive.

In her position as Commanding Officer's secretary, Campbell received travelers' checks. Because she would not enter the receipt of these in the travelers' check accounting ledger, routine audits did not indicate that the checks were missing.

The district court's finding that Campbell abused a position of trust is not clearly erroneous. See Brown, 941 F.2d at 1304-05; Ehrlich, 902 F.2d at 328, 330-31.

Campbell argues that the sentencing court erred by not applying the amended commentary to § 3B1.3 (Nov. 1993) which defines a position of trust as "characterized by professional or managerial discretion."

This Court reviews the district court's application of the Sentencing Guidelines de novo. Brown, 7 F.3d at 1158. Section 1B1.11(a) mandates that "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced." The sentencing court considers subsequent amendments to the guidelines only if it applies an earlier version of the guidelines in calculating the defendant's sentence. See § 1B1.11(b)(2).

Campbell was sentenced on August 30, 1993. The amended commentary to § 3B1.3 did not become effective until November 1993. The district court did not err in applying the November 1992 Guidelines and commentary when sentencing Campbell.

AFFIRMED.