

EXHIBIT A

755 Fed.Appx. 75

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United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.

Carlton P. CABOT, Defendant-Appellant,
Timothy J. Kroll, Defendant.

16-3820-cr

|

November 15, 2018

Synopsis

Background: Defendant was convicted on guilty plea in the United States District Court for the Southern District of New York, *Furman*, J., for securities fraud and was sentenced to 120-month prison term and \$17 million in restitution. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court did not err in applying abuse of trust enhancement in sentencing defendant;

[2] any error in application of abuse of trust enhancement was harmless;

[3] district court did not err in relying on vulnerability of victims in imposing enhanced sentence;

[4] district court did not plainly err in taking into account losses above those agreed to in plea agreement in imposing enhanced sentence;

[5] defendant's above-guidelines sentence was not substantively unreasonable; and

[6] sentencing disparity between co-defendant and defendant did not render sentence substantively unreasonable.

Affirmed.

West Headnotes (7)

[1] **Sentencing and Punishment**

 **Abuse of position of trust**

District court did not err in applying abuse of trust enhancement in sentencing defendant for securities fraud, though defendant asserted that his role in distributing funds from tenants-in-common securities offerings was nondiscretionary based on terms of master lease; defendant's role did not mean that he did not have discretion, as he was primary manager of investments responsible for finding properties and installing qualified tenants, he was not subject to any supervision, and he and co-defendant moved funds in and out of bank accounts, and victims invested their money and entrusted defendant to manage properties for profit. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); U.S.S.G. § 3B1.3.

Cases that cite this headnote

[2] **Criminal Law**

 **Sentencing and Punishment**

Any error in district court's application of abuse of trust enhancement in sentencing defendant for securities fraud was harmless error, where district court explicitly stated that the sentence would have been the same with or without the enhancement for abuse of

trust. Securities Exchange Act of 1934 § 10, [15 U.S.C.A. § 78j\(b\)](#); [U.S.S.G. § 3B1.3](#).

Cases that cite this headnote

[3] Sentencing and Punishment

🔑 **Vulnerability**

District court did not err in relying on sentencing factor of vulnerability of victims in imposing enhanced 120-month sentence for securities fraud arising from tenants-in-common securities offerings, though defendant asserted that he had reason to believe that investors were sophisticated and substantial; defendant did not attempt at sentencing to controvert government's description of natural pool of investors as older investors, who both are more likely to own property and have less time and ability to recover from catastrophic losses, such that defendant knew or should have known of nature of his clientele, even if he did not target vulnerable victims. Securities Exchange Act of 1934 § 10, [15 U.S.C.A. § 78j\(b\)](#); [18 U.S.C.A. § 3553\(a\)](#).

Cases that cite this headnote

[4] Criminal Law

🔑 **Sentencing and Punishment**

Defendant waived all but plain error review of claim that district court erred when it took into account losses above the \$17 million agreed upon in his guilty plea agreement to securities fraud, in sentencing defendant to above-guidelines sentence of 120-month prison term, where defendant did not raise any objection before district court. Securities Exchange Act of 1934 § 10, [15 U.S.C.A. § 78j\(b\)](#); [18 U.S.C.A. § 3553\(a\)](#).

Cases that cite this headnote

[5] Criminal Law

🔑 **Sentencing and Punishment**

District court did not plainly err in taking into account victims' losses above the \$17 million agreed upon in plea agreement for security

fraud, as sentencing factor in imposing enhanced 120-month prison sentence for securities fraud rising from tenants-in-common securities offerings, though district court acknowledged that it was unclear how much monetary loss was attributable to criminal conduct as opposed to national financial crisis; district court did not focus on monetary losses alone, but also on time and energy that victims spent trying to recover their money, the anxiety and emotions that events had for victims, and the losses to third parties, such as employees who were fired or lost their jobs. Securities Exchange Act of 1934 § 10, [15 U.S.C.A. § 78j\(b\)](#); [18 U.S.C.A. § 3553\(a\)](#).

Cases that cite this headnote

[6] Securities Regulation

🔑 **Criminal prosecutions in general**

Sentencing and Punishment

🔑 **Nature, degree or seriousness of offense**

Sentencing and Punishment

🔑 **Remorse, acceptance of responsibility, and cooperation**

Sentencing and Punishment

🔑 **Vulnerability**

Sentencing and Punishment

🔑 **Abuse of position of trust**

Defendant's above-guidelines sentence of 120 months in prison for securities fraud, based on abuse of trust enhancement and consideration of sentencing factors including vulnerability of victims and their losses, was not substantively unreasonable; district court found that in the face of a national financial crisis, defendant chose to embezzle investors' money to fund his own lifestyle instead of sharing losses with investors, district court concluded that defendant was not genuinely remorseful based in part on his attempt after order of forfeiture to hide income, and based on victim impact letters, district court reasonably determined that many of victims were vulnerable and suffered losses not fully accounted for in guidelines calculation. Securities Exchange Act of 1934 § 10, [15](#)

U.S.C.A. § 78j(b); 18 U.S.C.A. § 3553(a);
U.S.S.G. § 3A1.1.

Cases that cite this headnote

[7] **Securities Regulation**

 🔑 Criminal prosecutions in general

Sentencing and Punishment

 🔑 Sentence or disposition of co-participant or codefendant

Sentencing disparity between defendant's above-guideline sentence of 120 months in prison on guilty plea for securities fraud and co-defendant's sentence did not render defendant's sentence substantively unreasonable; district court was not required to consider sentencing disparity among co-defendants, and defendant and co-defendant were not similarly situated, as co-defendant pled guilty and cooperated with government. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b).

Cases that cite this headnote

*77 Appeal from a judgment of the United States District Court for the Southern District of New York (Furman, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Defendant-Appellant: **Steven Y. Yurowitz, Esq.**, New York, NY.

For Appellee: **Geoffrey S. Berman**, United States Attorney for the Southern District of New York, (**Edward A. Imperatore**, Sarah K. Eddy, Assistant United States Attorneys, on the brief), New York, NY.

Present: **John M. Walker, Guido Calabresi, Debra Ann Livingston**, Circuit Judges.

***78 SUMMARY ORDER**

Defendant-Appellant Carlton P. Cabot ("Cabot") appeals from a judgment of the United States District Court for the Southern District of New York, entered on October 31, 2016 following a guilty plea, sentencing him to a 120-month term of imprisonment and \$17 million in restitution on one count of securities fraud, in violation of 15 U.S.C. § 78j(b). *United States v. Kroll*, Docket No. 15-680 (S.D.N.Y. Oct. 30, 2016) at ECF No. 73 (Judgment). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Cabot was the founder, President, and Chief Executive Officer of Cabot Investment Properties ("CIP"). From 2003 through 2012, CIP sponsored and oversaw eighteen tenants-in-common securities offerings ("TIC").¹ For each TIC investment, CIP formed a wholly-owned subsidiary that was responsible for managing the property. The subsidiary leased the property from the investors pursuant to a "Master Lease Agreement." According to the Master Lease Agreement, if any money remained after the subsidiary had paid the mortgage, operating expenses, and base rent, CIP was entitled to collect and keep the excess profit.

As a result of the 2008 financial crisis, a number of TICs started underperforming and were having trouble covering their operating expenses. Cabot, along with his co-defendant, the Chief Operating Officer of CIP Timothy Kroll ("Kroll"), started transferring funds out of some of the subsidiaries' bank accounts before operating expenses and base rent were paid. They used the misappropriated funds to pay for (1) millions of dollars' worth of personal expenses, such as a luxury rental apartment and private school tuition; (2) CIP business expenses; and (3) the operating expenses and base rent of other underperforming TIC investments. From 2008 to 2012, Cabot received \$3,700,000 in partnership distributions from CIP, even though CIP lost more than \$21,000,000 during the same time period. By the end of 2012, Cabot and Kroll had misappropriated approximately \$17 million from the TIC investments.

On May 31, 2016, Cabot pled guilty to one count of securities fraud, in violation of 15 U.S.C. § 78j(b).

The District Court at sentencing applied an abuse-of-trust enhancement of two levels and imposed an above-Guidelines sentence under 18 U.S.C. § 3553(a) on account of, among other reasons, the vulnerability of the victims and the harm suffered by the victims beyond the loss amount stipulated in Cabot's plea agreement. Cabot challenges his sentence on procedural and substantive grounds.

Cabot's Procedural Error Claims

"We consider the reasonableness of the sentence under an abuse of discretion standard, regardless of whether the sentence was inside or outside the Guidelines range." *United States v. Lifshitz*, 714 F.3d 146, 149 (2d Cir. 2013) (per curiam) (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). When conducting a review for procedural reasonableness, we remember that "[a] district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, ... treats the Guidelines as mandatory[,] ... if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *79 *United States v. Caver*a, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (internal citations omitted).

1. The Abuse of Trust Enhancement

[1] Cabot's first procedural challenge is to the district court's application of an abuse-of-trust enhancement. See U.S.S.G. § 3B1.3. Cabot argues that his role was not discretionary, because the distribution of TIC funds was stipulated in the Master Lease Agreements between CIP and the TICs. But we do not take this to mean that Cabot did not have discretion: he was the primary manager of the investments, responsible for finding properties and installing qualified tenants. Cabot was not subject to any supervision and, along with Kroll, moved funds in and out of CIP and TIC bank accounts. See *United States v. Wright*, 160 F.3d 905 (2d Cir. 1998) (finding abuse of trust when the chairperson and sole director of a caretaking facility enjoyed unsupervised discretion over the disbursement of Medicaid funds intended for the benefit of its mentally disabled residents, but used those funds for lavish personal expenditures); *United States v. Valenti*, 60 F.3d 941, 947 (2d Cir. 1995) (finding abuse of trust when the treasurer had authority to issue checks on his own signature and was responsible for the financial records).

Unlike the cases on which Cabot relies, this is not a case of an arm's-length relationship between a fraudster and his victims, in which the victims did not entrust significant discretion to the defendant. See *United States v. Jolly*, 102 F.3d 46, 48 (2d Cir. 1996) ("[T]he abuse of trust enhancement applies only where the defendant has abused discretionary authority entrusted to the defendant by the victim."). The victims here invested their money in the TIC properties and entrusted Cabot to manage those properties for a profit. See *United States v. Hirsch*, 239 F.3d 221, 227-28 (2d Cir. 2001) (finding a relationship of trust where the investors purchased mortgage liens with promised return from the defendant). Cabot thus relied on and abused the trust placed in him to handle the victims' affairs, meriting application of the enhancement.

[2] Moreover, even if we could discern any error in application of the enhancement—and we cannot—that error would be harmless. The district court here explicitly stated that the sentence would have been the same with or without the enhancement for abuse of trust. See *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (concluding that harmless error doctrine applies when district court specifically "stated it would impose the same ... sentence on [the defendant] however the issue of ... [the enhancement] ultimately works out" on appeal (internal quotation marks omitted)); see also *Molina-Martinez v. United States*, — U.S. —, 136 S.Ct. 1338, 1346-47, 194 L.Ed.2d 444 (2016).

2. Section 3553(a) Assessment

[3] Cabot next argues that the district court erred in its assessment pursuant to 18 U.S.C. § 3553(a) by relying on clearly erroneous and speculative facts regarding the victims' vulnerability and the loss amount. We review a district court's findings of fact at sentencing for clear error. *United States v. Mi Sun Cho*, 713 F.3d 716, 722 (2d Cir. 2013). "Under the clear error standard, if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* (internal quotation marks and brackets omitted). We discern no error in the court's evaluation of either matter.

As to the vulnerable nature of the victims of Cabot's crime, the district court chose not to apply the Guidelines'

“vulnerable *80 victims” enhancement, *see U.S.S.G. § 3A1.1*, but nonetheless said the vulnerability of the victims was “a powerful Section 3553 factor.” A105 (Sentencing Transcript). We discern no error, much less clear error, in this assessment. Cabot claims that he marketed his TIC investments to “accredited investors,” who are supposed to fit within certain categories, for example by having a minimum net worth. Furthermore, he contends that since the “1031 Exchange,” the principal tax mechanism that makes CIP investments attractive, by its terms applies to owners of investment or business properties, *see 26 U.S.C. § 1031*, he had reason to believe his investors were “sophisticated and substantial.” Def.-App.’s Brief at 22. But Cabot did not attempt at sentencing to controvert the government’s description of the “natural pool of investors that would be attracted to this investment” as older investors, who both are more likely to own property and have less time and ability to recover from catastrophic losses. A82. The district court reasonably concluded that Cabot, even if he did not target vulnerable victims, knew or should have known the nature of his clientele. *United States v. Abiodun*, 536 F.3d 162, 170 (2d Cir. 2008) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”).

[4] [5] Cabot next argues that the district court erred when it took into account losses above the \$17 million agreed upon in his plea agreement, claiming they were uncorroborated and speculative. While the district court used \$17 million in its Guidelines calculations, and indeed agreed that losses beyond those in the plea agreement should not affect the Guidelines calculation, it noted that “it’s quite clear that the losses here do, in fact, exceed that.” A105 (Sentencing Transcript). Cabot did not raise any objection before the district court to consideration of this conclusion in the § 3553(a) analysis, so our review is for plain error only. *United States v. Verkhoglyad*, 516 F.3d 122, 127–28 (2d Cir. 2008). We find no such error here.

As Cabot noted, the district court admitted that “it isn’t clear ... how much of [the monetary loss] is attributable to the criminal conduct as opposed to financial circumstances,” i.e. the 2008 financial crisis. A78. But this does not mean that considering a potentially higher amount of loss was clearly erroneous. *See Mi Sun Cho*, 713 F.3d at 722. In concluding that the victims’ losses weighed in favor of a sentence somewhat above

the Guidelines range, the district court did not focus on *monetary* losses alone, but on the “time and energy that the victims have spent trying to recover their money, the anxiety and emotions that these events have had for them, [and] losses to third parties, such as ... employees ... who were fired or lost their jobs.” A105. The court received dozens of letters detailing such losses, and considering them was not improper. *See United States v. Kaye*, 23 F.3d 50, 53 (2d Cir. 1994) (noting that even though the Guidelines account for the amount of monetary loss, it was not error for the district court to find that they did not adequately account for the *degree* of harm suffered by the victim, “so great an impact from a loss as to leave [the victim] financially dependent on the generosity of others, quite possibly for the rest of her life”).

Cabot’s Substantive Error Claim

[6] Cabot finally challenges the substantive reasonableness of his sentence. We set aside “a district court’s substantive determination only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions.” *Cavera*, 550 F.3d at 189 (internal quotation marks and emphasis omitted). In order for the sentence to be unreasonable, it must be “so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing [it] to *81 stand would damage the administration of justice.” *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). Cabot has demonstrated no such unreasonableness in his above-Guidelines sentence.

The district court’s sentence was based on a close examination of the record before it and was well within the scope of its discretion. *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008) (“[I]n determining substantive reasonableness, a reviewing court will set aside only those outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.”). The sentence was entirely reasonable based on the record and information available to the district court. The district court discussed in great detail the aggravating factors that it found contributed to the above-Guidelines sentence. In the face of the financial crisis, instead of sharing the loss with his investors, Cabot chose to embezzle their money to fund his own lifestyle. Furthermore, the district court concluded that Cabot was not genuinely remorseful, largely because of his attempt—after the order of forfeiture—to hide his income. Based on the victim impact letters, the district court reasonably determined that many

of the victims were vulnerable and suffered losses not fully accounted for in the Guidelines calculation.

[7] To the extent that Cabot argues that the district court placed undue emphasis on the harm suffered by the victims, we discern no abuse of discretion in the district court's evaluation of this factor. *Cavera*, 550 F.3d at 191 ("[W]e consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case."); *see also Broxmeyer*, 699 F.3d at 289 ("The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge."). And with regard to the disparity between his sentence and his co-defendant's sentence, which Cabot contests, the district court is not required to consider

sentencing disparity among co-defendants. *United States v. Johnson*, 567 F.3d 40, 54 (2d Cir. 2009). In any event, Cabot and Kroll were not similarly situated, as Kroll pled guilty and cooperated with the government. *See United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006), abrogated on other grounds by *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

We have considered Cabot's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

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Footnotes

1 A TIC investment is a real estate investment in which investors collectively own a piece of commercial real estate and receive a portion of the rental income, or "base rent," after the mortgage payments and operating expenses have been paid.

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