

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2008

5 (Argued: February 3, 2009 Decided: March 2, 2009)

6
7 Docket No. 08-3763-cr

8 -----X
9 UNITED STATES OF AMERICA,

10
11 Appellee,

12
13 - v. -

14
15 DANIEL FRIEDBERG,

16
17 Defendant-Appellant.

18 -----X
19 Before: POOLER and KATZMANN, Circuit Judges, PRESKA, District
20 Judge.¹

21 Appeal from a judgment of the United States District Court
22 for the Eastern District of New York (Townes, J.), convicting
23 defendant, after a guilty plea, of five counts of tax evasion.
24 We hold that the district court properly considered defendant's
25 uncharged embezzlement when it applied an abuse of trust
26 enhancement at sentencing.

27 AFFIRMED.

¹ The Honorable Loretta A. Preska, of the United States District Court for the Southern District of New York, sitting by designation.

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2 United States Attorney, for Benton
3 J. Campbell, United States Attorney
4 for the Eastern District of New
5 York, Brooklyn, New York (Emily
6 Berger, on the brief), for
7 Appellee.
8

9 GEORGE R. GOLTZER, Goltzer & Adler,
10 New York, New York, for Defendant-
11 Appellant.
12

13 PRESKA, District Judge:

14 Daniel Friedberg pleaded guilty to five counts of tax
15 evasion in violation of 26 U.S.C. § 7201. When calculating the
16 applicable advisory Sentencing Guidelines range, the district
17 court included a two-point increase in offense level for abuse of
18 a position of trust, pursuant to U.S.S.G. § 3B1.3, and sentenced
19 Friedberg to twenty-six months' incarceration. On appeal,
20 Friedberg challenges the abuse of trust enhancement and argues
21 that his sentence was substantively unreasonable. We conclude
22 that the district court's sentencing determination was proper.
23 Accordingly, we affirm.

24 **BACKGROUND**

25 Friedberg was Grand Secretary for the Independent Order of
26 Odd Fellows ("Odd Fellows") from 1986 to 2004. Between 2000 and
27 2004, he embezzled \$562,000 of the organization's funds. He paid
28 personal bills, made mortgage payments for himself and a friend,
29 and purchased health insurance for non-employees with his ill-

1 gotten gains. Friedberg also wrote organizational checks payable
2 to either cash or himself and deposited these funds (totaling
3 \$298,436) as savings. He did not, however, report any of the
4 embezzled funds as income.

5 The government ultimately charged Friedberg with five counts
6 of tax evasion, to which he pleaded guilty on January 23, 2008.
7 The United States Probation Office subsequently prepared a Pre-
8 sentence Investigation Report ("PSR") for Friedberg. In the PSR,
9 the Probation Office calculated the base offense level at sixteen
10 based on a tax loss of more than \$80,000. See U.S.S.G. §
11 2T4.1(F). It then added a two-level enhancement for failing to
12 report more than \$10,000 of income in a given year pursuant to
13 U.S.S.G. § 2T1.1(b)(1) and a two-level enhancement for abuse of a
14 position of trust pursuant to U.S.S.G. § 3B1.3. Finally, the
15 Probation Office deducted three points for Friedberg's acceptance
16 of responsibility under U.S.S.G. § 3E1.1, yielding a total
17 offense level of seventeen. For this offense level, combined
18 with a criminal history category of I, the Sentencing Guidelines
19 recommend a range of imprisonment of 24 to 30 months. See
20 U.S.S.G. Ch. 5, Pt. A.

21 Over defense counsel's objection, the district court
22 accepted the PSR's application of the abuse of trust enhancement
23 in calculating the offense level. The court then sentenced

1 Friedberg to a term of imprisonment of twenty-six months.

2 Friedberg now appeals his sentence.

3 **DISCUSSION**

4 We review a challenged sentence for “reasonableness.” United
5 States v. Verkhoglyad, 516 F.3d 122, 127 (2d Cir. 2008) (internal
6 quotation marks omitted). This inquiry has both procedural and
7 substantive components. Id. Under the procedural component, we
8 determine whether the district court relied on erroneous factual
9 findings, correctly calculated the applicable Guidelines range,
10 treated the Guidelines as advisory, and considered the factors
11 listed in 18 U.S.C. § 3553(a). See United States v. Cavera, 550
12 F.3d 180, 190 (2d Cir. 2008) (en banc). The substantive component
13 focuses on whether, under the totality of the circumstances, the
14 sentence is “within the range of permissible decisions.” Id. at
15 189 (quoting United States v. Rigas, 490 F.3d 208, 238 (2d Cir.
16 2007)). We assess both procedural and substantive reasonableness
17 under an abuse of discretion standard. Id. at 188. This standard
18 contemplates de novo review of legal questions and clear-error
19 review of the district court’s factual determinations. United
20 States v. Salim, 549 F.3d 67, 72 (2d Cir. 2008).

21 On appeal, Friedberg challenges his sentence as both
22 procedurally and substantively unreasonable. With respect to the
23 former, he argues the district court’s application of the abuse

1 of trust enhancement was legal error. As to the latter, he
2 argues that his age and personal characteristics rendered
3 imposition of a Guidelines sentence improper.

4 **A. Enhancement for Abuse of a Position of Trust**

5 Friedberg concedes that he abused a position of trust with
6 respect to Odd Fellows by virtue of his embezzlement. However,
7 he argues that this abuse cannot support a sentencing enhancement
8 because he did not occupy a position of trust with respect to the
9 government, which was the primary victim of his tax evasion. We
10 must therefore determine whether the district court properly
11 considered the circumstances of Friedberg's embezzlement from Odd
12 Fellows when imposing the abuse-of-trust enhancement. For the
13 reasons that follow, we think it did.

14 Under the Sentencing Guidelines, a two-point enhancement is
15 warranted if the defendant "abused a position of public or
16 private trust . . . in a manner that significantly facilitated
17 the commission or concealment of the offense." U.S.S.G.
18 § 3B1.3. In determining whether to apply this enhancement, a
19 sentencing court must consider "a defendant's role in the
20 offense" on the basis of "[r]elevant [c]onduct," which is not
21 limited to the "elements and acts cited in the count of
22 conviction." U.S.S.G. Ch. 3, Pt. B, introductory cmt. Relevant
23 conduct includes "all acts and omissions committed . . . by the

1 defendant . . . that occurred during the commission of the
2 offense of conviction, in preparation for that offense, or in the
3 course of attempting to avoid detection or responsibility for
4 that offense." U.S.S.G. § 1B1.3(a)(1). Where, as here, the
5 offenses at issue may be grouped under U.S.S.G. § 3D1.2(d), the
6 sentencing court is to consider "all acts and omissions . . .
7 that were part of the same course of conduct or common scheme or
8 plan as the offense of conviction."² U.S.S.G. § 1B1.3(a)(2).

9 In United States v. Cianci, the Third Circuit held that a
10 defendant's uncharged embezzlement constituted relevant conduct
11 supporting an abuse of trust enhancement in the offense level
12 calculation for a tax evasion conviction. 154 F.3d 106 (3d Cir.
13 1998). Noting that the Sentencing Guidelines instruct courts to
14 consider "[c]onduct that is not formally charged or is not an
15 element of the offense of conviction", U.S.S.G. § 1B1.3,
16 background cmt. para. 1, the Cianci court reasoned that the
17 defendant's abuse of his position as a high ranking corporate
18 official enabled him to embezzle the income he failed to report

² The base offense level and specific offense characteristics for tax evasion are provided in U.S.S.G. § 2T1.1. Guidelines section 3D1.2(d) includes offenses covered by U.S.S.G. § 2T1.1 among those "to be grouped." Section 3D1.2(d) also includes embezzlement, covered by U.S.S.G. § 2B1.1, as eligible for grouping because the offense level for embezzlement is likewise "determined largely on the basis of the total amount of harm or loss."

1 and thus constituted relevant conduct to be considered at
2 sentencing. 154 F.3d at 112-13. Several circuits have employed
3 similar reasoning to uphold abuse of trust enhancements in
4 analogous circumstances. See United States v. Gricco, 277 F.3d
5 339, 361-62 (3d Cir. 2002) (applying Cianci in finding that
6 uncharged embezzlement was relevant conduct to tax evasion
7 supporting abuse of trust enhancement); United States v. Young,
8 266 F.3d 468, 478 (6th Cir. 2001) (finding Cianci persuasive in
9 holding that the district court correctly “used the Defendant’s
10 embezzlement activities as relevant conduct to enhance the money
11 laundering offense level for abuse of position of trust”); United
12 States v. Duran, 15 F.3d 131, 134 (9th Cir. 1994) (the district
13 court properly considered law enforcement officer’s use of his
14 position to steal money from suspected drug dealers to support
15 application of an abuse of trust enhancement in connection with
16 his structuring conviction); see also United States v. Fife, 471
17 F.3d 750, 753 (7th Cir. 2006) (affirming abuse of trust
18 enhancement for tax evasion where defendant abused his position
19 of trust to facilitate fraudulent scheme); United States v.
20 Bhagavan, 116 F.3d 189, 192-93 (7th Cir. 1997) (abuse of trust
21 enhancement to tax evasion sentence warranted where defendant
22 majority shareholder used his position to divert money from the
23 company).

1 Two circuit courts, however, have held to the contrary. In
2 United States v. Barakat, the Eleventh Circuit overturned an
3 abuse of discretion enhancement resulting from the district
4 court's consideration of the defendant's participation in an
5 illegal "kickback" scheme when imposing a sentence for tax
6 evasion. 130 F.3d 1448 (11th Cir. 1997). This result stemmed
7 from the Barakat court's conclusion that the sentencing court
8 could consider only conduct relating to the offense of conviction
9 when determining whether to apply the enhancement. Id. at 1455.
10 Barakat has since been criticized as inconsistent with the plain
11 language of the Guidelines requiring courts to look beyond
12 "elements and acts cited in the count of conviction" when
13 evaluating relevant conduct. U.S.S.G. Ch. 3, Pt. B, introductory
14 cmt.; see Young, 266 F.3d at 479 ("The Eleventh Circuit's
15 position . . . contravenes a plain reading of the Sentencing
16 Guidelines."); Cianci, 154 F.3d at 111 (criticizing the Barakat
17 court's interpretation of relevant conduct as unduly narrow).

18 In United States v. Guidry, the Tenth Circuit held that an
19 abuse of trust enhancement is appropriate with respect to a tax
20 evasion offense only where the defendant occupies "a position of
21 trust vis-à-vis the government." 199 F.3d 1150, 1160 (10th Cir.
22 1999). In Guidry, the defendant used her position as controller
23 to embezzle millions of dollars from her employer and was

1 subsequently convicted for failing to report the illicit income.
2 Unlike the Eleventh Circuit in Barakat, the Guidry court noted
3 that “the district court may have been correct in finding [that
4 the defendant’s] embezzlement activity was relevant conduct,
5 committed to avoid detection of her false income tax returns.”
6 Id. at 1159-60. It nonetheless held that an abuse of trust
7 enhancement was improper because the defendant did not occupy a
8 position of trust with respect to the victim of her tax evasion.
9 Id. at 1160.

10 The Guidry court’s holding thus depends on the assumption
11 that the government is always the sole victim of a tax evasion
12 offense. However, other circuits have expressly rejected this
13 premise. In United States v. Bhagavan, the Seventh Circuit
14 upheld an abuse of trust enhancement in a tax evasion conviction
15 based on the defendant’s exploitation of his majority shareholder
16 status and corporate rank to divert funds from the company. 116
17 F.3d 189. The court viewed the defendant’s argument that the
18 government was the sole victim of the tax evasion as a logical
19 “fallacy.” Id. at 193. It reasoned that the defendant abused his
20 corporate position as part of an overall scheme to enrich himself
21 at the company’s expense and avoid taxes. Therefore the
22 corporation, its shareholders, and the government were all
23 victims the offense. Id. (“It is enough that identifiable victims

1 of [the defendant's] overall scheme to evade his taxes put him in
2 a position of trust and that his position 'contributed in some
3 significant way to facilitating the commission or concealment of
4 the offense.'" (quoting U.S.S.G. § 3B1.3, cmt. n.1)); see also
5 Fife, 471 F.3d at 753 ("[The defendant] incorrectly argues that
6 because his crime is tax evasion, and the United States
7 government is the direct victim of his crime, the abuse of
8 position of trust enhancement is only proper if it was the United
9 States that placed him in a position of trust."); Cianci, 154
10 F.3d at 112 ("Admittedly, the employer-victim here was not the
11 victim of the offense of conviction, but no language in the
12 applicable sentencing guideline so circumscribes the
13 enhancement.").

14 We employed similar reasoning to uphold an abuse of trust
15 enhancement in United States v. Cusack, 229 F.3d 344 (2d Cir.
16 2000). There, the defendant had been convicted for mail and wire
17 fraud resulting from his sale of forged documents purportedly
18 belonging to President John F. Kennedy. To lend authenticity to
19 his forgeries, the defendant used his position as a paralegal to
20 obtain unsupervised access to the vault of the Archdiocese of the
21 Catholic Church, a firm client, and steal genuine deeds showing
22 transfers of land from the Kennedy family to the Archdiocese.
23 This Court held that the enhancement was properly applied even

1 though the primary victims of the fraud were the purchasers of
2 defendant's forgeries. We reasoned that while the enhancement
3 necessarily requires abuse of substantial discretion afforded by
4 the victim to the defendant, "the victim whose trust the
5 defendant abused need not have been the primary victim of the
6 fraud." Id. at 349. We then found that "the Archdiocese was
7 plainly a secondary victim of Cusack's crime" because its
8 documents had been stolen to facilitate the crime of conviction
9 and some of the forgeries implicated it in fictitious intrigues.
10 Id.

11 We think that both Cusack and Cianci apply with equal force
12 here. Friedberg's tax evasion was part of a larger scheme to
13 embezzle funds and hide the income. He effectuated the scheme by
14 abusing his position as Grand Secretary of Odd Fellows and
15 shielding the illicit income from the government. The
16 embezzlement accomplished in this manner was part and parcel of
17 the crime of conviction insofar as it both provided Friedberg
18 with the funds he failed to report and tended to conceal the
19 criminal activity. As such, it was undoubtedly relevant conduct.
20 Cf. Cianci, 154 F.3d at 112-113 ("[Defendant's] abuse of his
21 position of trust . . . by conducting the complex transactions
22 that facilitated his uncharged criminal conduct leading to his
23 receipt of the income he failed to report may properly be

1 considered as relevant conduct."); Duran, 15 F.3d at 134 (the
2 district court properly considered conduct forming part of a
3 "common scheme" to avoid detection when imposing an abuse of
4 trust enhancement in a sentence for structuring). Furthermore,
5 the abuse of trust inherent in Friedberg's embezzlement
6 victimized both the government and Odd Fellows by depriving them
7 of funds rightfully theirs. See Bhagavan, 116 F.3d at 193
8 (finding multiple victims of a tax evasion offense); cf. Cusack,
9 229 F.3d at 349 ("the victim whose trust the defendant abused
10 need not have been the primary victim"). The district court was
11 therefore free to apply an enhancement on the basis of
12 Friedberg's abuse of his position of trust to effectuate the
13 scheme resulting in his conviction for tax evasion. U.S.S.G.
14 § 3B1.3.

15 Friedberg argues that this conclusion is foreclosed by our
16 decisions in United States v. Broderson, 67 F.3d 452 (2d Cir.
17 1995), United States v. Jolly, 102 F.3d 46 (2d Cir. 1996), and
18 United States v. Nuzzo, 385 F.3d 109 (2d Cir. 2004). We
19 disagree. In Broderson, we reversed an abuse-of-trust
20 enhancement where the defendant had acted out of a misguided
21 attempt to protect his employer, to whom the trust was owed. 67
22 F.3d at 455. In Jolly, we reversed where the defendant was not in
23 a position of trust with respect to the lenders whose trust he

1 had purportedly abused. 102 F.3d at 48. Here, by contrast,
2 Friedberg both occupied a position of trust at Odd Fellows and
3 used it to effectuate a scheme harmful to that organization.
4 Nuzzo is also distinguishable because there we found insufficient
5 evidence to support the conclusion that the defendant used his
6 position to effectuate his crimes. 385 F.3d at 116. Friedberg,
7 on the other hand, clearly utilized his position at Odd Fellows
8 to embezzle funds which he hid from the government.

9 Friedberg also contends that upholding an abuse-of-trust
10 enhancement here would open the floodgates to similar
11 enhancements for anyone convicted of tax evasion. Not so. We
12 hold only that where, as here, a defendant's tax evasion was part
13 of a larger scheme constituting relevant conduct, an integral
14 part of which involved abusing a position of trust, the
15 sentencing court may properly apply an enhancement under U.S.S.G.
16 § 3B1.3.

17 **B. Substantive Reasonableness**

18 Friedberg also challenges his sentence as substantively
19 unreasonable. We will "set aside a district court's substantive
20 determination only in exceptional cases." Cavera, 550 F.3d at
21 189. Friedberg's is not among them. The district court properly
22 calculated the applicable Sentencing Guidelines range and
23 considered the factors enumerated in 18 U.S.C. § 3553(a). It

1 then imposed a sentence near the bottom of the applicable
2 guidelines range. While not presumptively reasonable, we have
3 noted that "in the overwhelming majority of cases, a Guidelines
4 sentence will fall comfortably within the broad range of
5 sentences that would be reasonable in the particular
6 circumstances." United States v. Eberhard, 525 F.3d 175, 179 (2d
7 Cir. 2008) (quoting United States v. Fernandez, 443 F.3d 19, 27
8 (2d Cir. 2006)). We see nothing in this record to indicate that
9 the district court imposed an unacceptably harsh sentence here.
10

CONCLUSION

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For the foregoing reasons, we AFFIRM the judgment of the

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district court.