United States District Court
Middle District of Florida
Orlando Division

United States of America

v. Case No: 6:21-cr-16-WWB-DCI

Don V. Cisternino

SENTENCING MEMORANDUM

Under 18 U.S.C. § 3553(a), the Court is asked to consider Mr. Cisternino's history and characteristics in imposing sentence. What would possess a man with zero criminal history, not even a traffic infraction, to risk his liberty to commit a rather crude fraud in his middle age?

Financial incentive does not seem to provide a full answer. He made no effort to hide what he was doing. Mr. Cisternino applied for the loans using his name and identifiers (and that of his Company, Magnifico, which was also in his name) in mid-May of 2020. The loan was funded on May 27, 2020. On June 9, 2020, Mr. Cisternino transferred $1,440,000 to his father and a bulk of that, $1,071,923.99, was recovered.

On July 7, 2020, he invested $3,499,000, over half the amount of the loan, in the luxury home on Kingfisher Point in Florida. He also purchased that home in his name. The government sold the home for $4,115,000, an 8.5% profit of $616,000, in March of 2022.

With the sale of the Kingfisher home, the government recovered

$5,186,923.98 or 71.9% of the losses.[1]

Mr. Cisternino was not trying to hide what he was doing or secret assets. Indeed, everything was in his name. Transfers were to persons well associated with him (or in his true name like the Kingfisher and automobile purchases); not to shell corporations, shadowy figures, fictitious entities, or cryptic offshore accounts. Mr. Cisternino left a clearly marked trail to him.

Thus, by December of 2020 (just six-and-a-half months after the loan was funded), the government visited the Kingfisher home and subpoenaed Mr. Cisternino for documents supporting the loan. Those were not produced. Indeed, while Mr. Cisternino obtained the paperwork to apply for the loan, he did not have paperwork to apply for loan forgiveness. Exh. 1 (PPP Loan Forgiveness). If the borrower does not apply to have the loans forgiven within a certain time period, repayment begins. *Id*. Obviously, Mr. Cisternino had no plan on how to conceal his activity or “get away” with the money. Thus, he fled, itself a clear red flag as to the fraud.

He ultimately came to his senses when he abandoned an effort to challenge extradition from Croatia to, as he put it, “to face the music.” He was arrested there on this case on April 12, 2021. He has been in custody ever since. Presentence Report (“PSR”), Doc. 39 at ¶¶ 72, 73, and page 47. Thus, he will have 633 days of credit as of January 5, 2023, or 1 year 8 months 24 days or 20

[1] This not include $163,755.89 in interest and a finance fee of $72,100 that the SBA may be entitled to in “restitution,” although not as a “loss.”

months 24 days.

Counsel submits Mr. Cisternino was not acting mainly out of avarice or greed or else he would have had a plan about how to keep the money and would have been more discrete with his use of the money. With no plan on how to repay the loan and by freely transferring the money in his own name or to close associates, it is almost as if he wanted to get caught.

He appears to have acted impulsively, perhaps from a mixture of mental health issues, pride, and the use of Adderall. Mr. Cisternino has a deep sense of insecurity for failing to keep up with his family's material and professional successes. He tried and failed to pass the New York bar several times among other failed attempts at finding success. He started using Adderall to help him concentrate. He says he ultimately became addicted and it clouded his thinking. It seems aberrational to embark on a criminal career in middle age especially in such an awkward way. Mr. Cisternino did not succeed as a criminal either.

Mr. Cisternino requests this Court's recommendation to the Bureau of Prisons' Residential Drug Abuse Program (RDAP).

Unresolved Objections

Paragraphs 42 and 49

The government may be contending that the $5,186,923.98 it recovered from the sale of assets it forfeited (the sale of Kingfisher home and the seizure of accounts of Mr. Cisternino's parents and sister) should not be counted toward losses, restitution, or forfeiture. But, in the plea agreement, the government agreed that "the net proceeds from the forfeiture and sale of any specific assets will be credited to and reduce the amount the United States shall be entitled to forfeit in substitute assets." Doc. 30 at p. 7. That would mean the government could forfeit no more in substitute assets than $2,258,931.91: the "loss" for restitution purposes which includes interest and a finance fee for a total of $7,455,855.89, PSR ¶ 102, minus the $5,186,92.98. Probation may agree to this. See Paragraph 11, 17. Mr. Cisternino seeks clarification of this issue.

The $5,186,923.98 should also reduce the loss amount for the offense level calculation as well under the loss table at U.S.S.G. § 2B1(b)(1) pursuant to Application Note 3(E)(ii):

> **Credits Against Loss**. Loss shall be reduced by the following: . . . (ii) In a case involving collateral . . . the amount the victim has recovered at the time of sentencing from the disposition of the collateral . . ."

The government argues that the proceeds from the sale of Kingfisher home, $4,115,000.00 and the seizure of Mr. Cisternino's parents' and sister's accounts should not reduce the loss because the collateral was not pledged in advance. This is apparently based on the grounds that Mr. Cisternino did not take measures to ensure the victim would not suffer losses. But that simply is not the case. Mr. Cisternino affirmatively sought to protect two-thirds of the principal.

Less than two weeks after the loan funded, Mr. Cisternino openly transferred $1,440,000 to his parents, perhaps understanding that they were far more capable and prudent in handling the money that he was. Indeed, the bulk of this money was recovered months later. One month and ten days after the funding, Mr. Cisternino used the loan proceeds to invest in a luxury property for which he paid cash. This property sold for substantially more that the purchase price.

Under the facts of this case, there is little distinction between the fraudulently obtained loan secured by collateral and Mr. Cisternino within days of fraudulently obtaining a loan securing the principal with collateral and parking proceeds in safe accounts he had no access to. In each, “the amount actually at risk is the unsecured amount.” *United States v. Cacho-Bonilla*, 404 F.3d 84, 92 (1st Cir. 2005).It seems that Mr. Cisternino understood himself well enough to protect the bulk of the principal.

Nor is it the case that the loan would automatically be forgiven if the fraud had not been detected as the government suggests. An application for forgiveness must be filed and supported by the very type of documents for which the government subpoenaed Mr. Cisternino. Exh. 1. Not only did Mr. Cisternino not have documents like these, but the subpoena for them prompted him to flee. As already noted, it is apparent that Mr. Cisternino had no plan for “getting away with it,” but at least he thought enough to secure the bulk of the principal in collateral and in safe accounts that he had no access to within days of the funding.

Alternatively, the government argues that even if the defense is correct about how to calculate the loss under Application Note 3(E)(ii), Mr. Cisternino would still be on the hook under intended loss. Application Note 3(A)(ii). First, the government points to no evidence that Mr. Cisternino "purposely sought to inflict" $7.2M worth of loss. His immediate and open conversion of two-thirds of the loan proceeds into safe assets, easily traceable to him, is evidence to the contrary.

Second, more and more Circuits reject this expansive reading of loss under the Supreme Court's decisions in *Stinson v. United States*, 508 U.S. 36, 45 (1993) and *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Banks*, 55 F.4th 246 (3rd Cir. 2022) and see *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022) (as to the $500 minimum loss per credit card under App.Nt. 3(F)(i)). These Courts conclude that guidelines commentary cannot expand the definition of loss found in the guideline itself under agency law principles.

The loss of $7,210,00 should be reduced by the recovered collateral which would result in a total loss of $2,023,076.022 for 16 additional offense levels under 2B1.1(b)(1)(I).

<u>Paragrpah 50</u>

Under Application Note 1 to U.S.S.G § 2B1.1, "'Victim' means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person includes individuals, corporations, companies, associations, firms, partnerships, societies, and join stock companies."

The only person to suffer an injury, under this definition, was the government. The government does not disagree with this. These two offense levels should not be counted.

The government counters, however, that a definition found at Application

Note 4(E), justifies this two-level enhancement:

> **Cases Involving Means of Identification.**—For purposes of subsection (b)(2), in a case inovling means of identification **"victim"** means (i) any victim as defined in Application Note 1 or (ii) any individual whose means of identification was used unlawfully or without authority.

Having two different definitions of "victim" in the commentary, renders it unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague laws contravene the 'first essential of due process of law' that statues must give people 'of common intelligence' fair notice of what the law demands of them." (citations omitted)). "The prohibition of vagueness in criminal statutes is an essential of due process, required by both ordinary notions of fair play and the settled rules of law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (cleaned up).

Furthermore, the 4(E) definition expands on the definition of victim without regard to any actual harm in violation of the *Kisor* and *Stinson* line of cases cited above. His use of social security numbers did not affect those individuals at all. He did not so much as impair their credit ratings for example. He did not cause them any economic harm at all.

These two levels should not be counted.

Paragraph 51

The government disagrees with Mr. Cisternino that the offense conduct was sophisticated simply because it involved forged documents. But that is not the definition of sophistication. If it were, the definition would simply say that: it is sophisticated to forge documents. Instead the definition requires much more:

> Under Application Note 9(B) to U.S.S.G. § 2B1.1 "'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts . . ."

Mr. Cisternino made no effort to hide assets or transactions. Indeed, the spending and transfers he did with this money, he did in his own name. He transferred money to his parents. He applied for the loan under his name and Magnifico's, the name of the company he owned. He did not try to conceal the scheme by splitting it up among different jurisdictions. He did not move assets to off-shore accounts, place assets in fictitious entities, or corporate shells.

The crudeness of the scheme is revealed in Mr. Cisternino creating W-2s showing that all "the employees" had one of two salaries: either $90,000 or $85,000. Paragraph 30. The lender even questioned this. But it simply took Mr. Cisternino's explanation without further documentation or inquiry.

The brevity of the scheme is evidence that it was not sophisticated because it was easily uncovered. It began in May of 2020 with the application for the loan. By December of 2020 it ended when the government told Mr. Cisternino that he was under investigation and served him a subpoena for Magnifico documents.

Mr. Cisternino's flight in January of 2021, without having produced any documents, was a rather bright white spotlight on the scheme. This history demonstrates the scheme was transparent and not sophisticated. These two levels should not be counted.

Total Offense Level

Removing the two levels for loss amount, two levels for number of victims, and two levels for sophistication amounts to six total levels. Total offense level after acceptance should be 20, not 26.

The guideline range for the loss should be 33-41 months.

Respectfully submitted,

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Certificate of Service

I certify that undersigned electronically filed the foregoing with the Clerk of Court (CM/ECF) by using the CM/ECF system which will send a notice of electronic filing to Chauncey Bratt, Assistant United States Attorney, this 29th day of December 2022.

/s/ Michael S. Ryan
Attorney for Defendant