UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal Action No.: 13-20371
Honorable Victoria A. Roberts

DOREEN M. HENDRICKSON,

Defendant.
_____/

GOVERNMENT'S OPPOSITION TO DEFENDANT DOREEN HENDRICKSON'S MOTION FOR RELEASE PENDING APPEAL

The United States of America, by and through undersigned counsel, submits the following memorandum in opposition to Defendant Doreen Hendrickson's Motion for Release Pending Appeal (Doc. # 132). The defendant asserts that she should not begin serving her 18-month term of incarceration on June 30, 2015, as currently ordered, because her anticipated appeal to the Sixth Circuit will raise substantial issues of law and fact. As set forth below, the defendant does not meet the standard for bond pending appeal set forth in 18 U.S.C. § 3143(b). Accordingly, the Court should deny her motion.

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ISSUE

Whether the Court should order the defendant's release pending appeal of her conviction and sentence to the Sixth Circuit Court of Appeals.

STATEMENT OF MOST APPROPRIATE AUTHORITY

The most appropriate authority for this issue is 18 U.S.C. § 3143(b).

LEGAL STANDARD

Bond pending appeal is governed by 18 U.S.C. § 3143(b), which provides, in relevant part:

> [T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142 (b) or (c) of this title; and
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> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
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> (i) reversal,
> (ii) an order for a new trial,
> (iii) a sentence that does not include a term of imprisonment, or
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). This statute "creates a presumption against release pending appeal." United States v. Chilingirian, 280 F.3d 704, 709 (6th Cir. 2002) (citing United States v. Vance, 851 F.2d 166, 168 (6th Cir. 1988)). The burden is on the defendant to establish that she is entitled to bond pending appeal. Chilingirian, 280 F.3d at 704. Specifically, the defendant must demonstrate:

> 1) by clear and convincing evidence, that [s]he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment.

Id. (citing 18 U.S.C. § 3143(b) and United States v. Pollard, 778 F.2d 1177, 1181 (6th Cir. 1985)). To satisfy the second prong of this test, the defendant must show that the "appeal presents a 'close question or one that could go either way' and that the question 'is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the

defendant's favor."" United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985) (quoting United States v. Powell, 761 F.2d 1227, 1233-34 (8th Cir. 1985)).

DISCUSSION

In her motion, the defendant sets forth three grounds for appeal: two that relate to her conviction and one that relates to the sentence she received. First, she argues that the Court erred in giving Sixth Circuit Pattern Criminal Jury Instruction 8.03B regarding unanimity. Second, the defendant claims that her Sixth Amendment right to self-representation was violated when her stand-by counsel failed to ask certain questions of the defendant during her direct examination. Finally, the defendant objects to the Court's calculation of the sentencing range under the United States Sentencing Guidelines.

As set forth below, none of these grounds for appeal "raise[] a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment." See Chilingirian, 280 F.3d at 704. Accordingly, the Court should deny the defendant's motion.

A. The Court Properly Instructed the Jury that Unanimity as to the Means by Which the Defendant Committed Contempt Was Not Required

The Indictment in this case alleged that the defendant committed the crime of contempt by violating the May 2, 2007 Amended Judgment and Order of Permanent Injunction issued by United States District Judge Nancy Edmunds. Paragraph 27 of this order (1) prohibited the defendant from filing additional tax

returns based on the claims set forth in Cracking the Code, and (2) required the defendant to file amended 2002 and 2003 tax returns within 30 days.[1] Consistent with Federal Rule of Criminal Procedure 7(c), which provides that "[a] count may allege . . . that the defendant committed [the offense] by one or more specific means," the Indictment in this case alleged that the defendant violated both prongs of Judge Edmunds' order. Specifically, the Indictment charged the defendant with contempt based on her filing of a false 2008 tax return and her failure to file amended returns.

At trial, the Court's charge to the jury included Sixth Circuit Pattern Criminal Jury Instruction 8.03B. According to the "Use Note" that accompanies Instruction 8.03B, "[t]his instruction should be used if the indictment alleges that the defendant committed a single element of an offense in more than one way." In such a case, the jury is not required to be unanimous as to the means that the defendant used to commit the crime. Committee Commentary to 8.03B. The commentary notes that this instruction is consistent with Supreme Court precedent.

[1] In her motion, the defendant reiterates a claim made at trial that Judge Edmunds' May 2, 2007 order was really two orders or injunctions, one that required her to file amended returns and one that prohibited her from filing false tax returns. This assertion has no support from the record in the civil case. Most tellingly, the title of Judge Edmunds' order uses the singular form of the words "order" and "injunction." This is clearly one injunction that required the defendant to do two things.

Specifically, in Richardson v. United States, 526 U.S. 813, 817 (1999), the Supreme Court held that "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." (citing Schad v. Arizona, 501 U.S. 624, 631-32 (1991) (plurality opinion)).

As the jury was instructed at trial, the crime of contempt is comprised of three elements: (1) the existence of a clear and definite order; (2) the defendant's knowledge of that order; and (3) the defendant's willful disobedience of that order. See In re Smothers, 322 F.3d 438, 441-42 (6th Cir. 2003); United States v. Allen, 73 F.3d 64, 68 (6th Cir. 1995); United States v. Strickland, No. 89-3815, 1990 WL 33712, at *2 (6th Cir. Mar. 27, 1990). In this case, the filing of a false 2008 tax return and the failure to file amended 2002 and 2003 returns are two different means by which the defendant violated Judge Edmunds' order. While the jury needed to be unanimous as to each element of the crime, including the fact that the defendant violated Judge Edmunds' order, the jury was not required to be unanimous as to the mean by which the defendant engaged in that violation.

The defendant asserts that the Court should have given a specific unanimity instruction instead of Instruction 8.03B. However, a specific unanimity instruction is only required when:

> (1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

United States v. Duncan, 850 F.2d 1104, 1114 (6th Cir. 1988). These factors are not present in this case. This was a straightforward contempt prosecution involving a one-count indictment. The government's evidence consisted largely of tax returns and documents filed in the underlying civil case. During its arguments to the jury, the government repeatedly made reference to the existence of one court order that the defendant violated in two ways. Additionally, the two alleged violations were neither "contradictory or only marginally related to each other." Instead, they both related to a single order that was issued on one date. Simply put, the straightforward charge in this case did not present a risk of jury confusion. Accordingly, it was appropriate for the Court to give Instruction 8.03B instead of the defendant's proposed specific unanimity instruction.

This ground for appeal does not raise "a close question or one that could go either way." Instruction 8.03B is based on Supreme Court precedents that are binding on the Sixth Circuit. As described above, this was clearly a case in which the instruction applied because the Indictment alleged that the defendant committed a single element of the offense in more than one way. Accordingly, the

defendant has not proven by clear and convincing evidence that this ground for appeal "raises a substantial question of law or fact."

B. The Defendant Cannot Establish a Sixth Amendment Violation on Appeal

The defendant alleges that her Sixth Amendment right to represent herself at trial was violated when her standby counsel failed to ask her certain questions during her direct examination testimony.[2] However, there is no indication in the trial record that standby counsel deviated from the questions provided to him by the defendant. Similarly, the record is devoid of evidence that the defendant raised

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[2] The defendant may have waived her Sixth Amendment argument by permitting her standby counsel to ask her questions during direct examination. See McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) ("a pro se defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably"). Although the defendant's motion claims that the alleged Sixth Amendment violation "arose due to the Court's preference that [the defendant] be examined in this manner," the record makes clear that the defendant did not object to allowing standby counsel to examine her. When the subject of the defendant's testimony was raised during trial, the Court asked, "And how are you going to testify? Is - - Mr. Wise are you asking questions?", to which standby counsel replied "That's the plan so far, Your Honor." Trial Tr. Vol. III at p. 108. If the defendant did not want to proceed in this manner, she could have objected at that time. The issue of the manner of questioning came up again immediately preceding the defendant's testimony, when the Court explained to the jury that even though the defendant was representing herself, standby counsel would ask questions for purposes of her direct examination. Trial Tr. Vol. IV at p. 47. The record shows no objection by the defendant to this course of action.

this issue at trial.[3] Instead, after trial, the defendant submitted a declaration to the Court in which she outlined the alleged violation of her Sixth Amendment rights. After trial, the defendant also provided the Court with a list of questions that she claims her standby counsel omitted from his examination.

The Supreme Court has long held that appellate courts must limit their review to evidence in the trial record. In Boone v. Chiles, 35 U.S. 177, 208 (1836), the Supreme Court rejected a party's effort to introduce a deed that had not been an exhibit in the underlying case, holding that appellate courts "can act on no evidence which was not before the court below, or receive any paper that was not used at the hearing." Similarly, in Russell v. Southard, 53 U.S. 139, 159 (1851), a party attempted to submit affidavits regarding newly discovered evidence. Holding that the Supreme Court could not consider the affidavits, the Court stated: "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal." Id.

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[3] The defendant claims that after stand-by counsel "failed to ask these question[], Mrs. Hendrickson quietly turned to the Court and asked to speak with standby counsel, but the Court refused this request." Def.'s Mot. at 15. In a footnote, the defendant concedes that "[t]his exchange between Mrs. Hendrickson and the Court does not appear in the notes of testimony from the trial." Id. n.5.

The defendant cites McKaskle v. Wiggins, 465 U.S. 168, 174 (1984), for the proposition that a pro se defendant is entitled "to control the organization and content of his own defense," including the questioning of witnesses. But the Court need not evaluate whether standby counsel's conduct ran afoul of the defendant's rights in order to deny her motion for bond pending appeal. The question presently before the Court is whether the alleged Sixth Amendment violation "raises a substantial question of law or fact" that is likely to lead to the reversal of the defendant's conviction or a new trial. Because there are no facts in the record to permit the Sixth Circuit to find such a violation, the defendant cannot prevail on this issue.

Additionally, because the defendant failed to object to the alleged omission of direct examination questions, the Sixth Circuit would review this question for plain error. See United States v. Mack, 729 F.3d 594, 607 (6th Cir. 2013). See also United States v. Climer, 591 Fed. Appx. 403, 410 (6th Cir. 2014) (applying the plain error analysis in a case involving an alleged Sixth Amendment violation); United States v. Phipps, 319 F.3d 177, 189 n. 14 (5th Cir. 2003) ("An error not susceptible to harmless error review is nevertheless susceptible to plain error review if the defendant did not object at trial.").

To find plain error, the Sixth Circuit must find "(1) an error; (2) that is 'plain,' and (3) that affects the substantial rights of the defendant." Mack, 729

F.3d at 607. Given that the defendant's allegation of a Sixth Amendment violation rests entirely on her self-serving declaration, the Sixth Circuit is unlikely to find that a plain error exists in this case. Moreover, the third prong of the plain error analysis "is akin to the harmless error analysis employed in preserved error cases," and requires the appellate court to ask "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. (quoting Neder v. United States, 527 U.S. 1, 15 (1999)). This Court has previously recognized that questions like those contained in Exhibit K to the defendant's motion would be cumulative of other evidence admitted at trial. Order Denying Def.'s Mot. to Vacate or for a New Trial on Multiple Grounds (Doc. #112) at 8-9. Additionally, given the Court's other trial rulings, it appears that many of these questions would have resulted in sustained objections because they would invade the province of the Court to instruct the jury on the law. Accordingly, even if the Sixth Circuit could find support in the record to permit it to conclude that an error occurred, the Sixth Circuit is unlikely to conclude that omission of these questions "contribute[d] to the verdict obtained."

In light of the defendant's reliance on documents outside the trial record to establish a Sixth Amendment violation and her failure to object to the alleged violation at trial, her claim that her right to self-representation was violated when

standby counsel failed to ask her certain questions on direct examination does not "raise a substantial question of law or fact." See 18 U.S.C. § 3143.

C. The Court Correctly Calculated the Guidelines Range

At sentencing, the Court determined that the most analogous offense to the contempt charge for purposes of applying the United States Sentencing Guidelines was § 2T1.1, which applies to cases involving the failure to file tax returns and the filing of false tax returns. Although the Indictment alleged that the defendant committed contempt by both filing a false tax returns and by failing to file amended returns, for sentencing purposes the Court focused on the defendant's failure to file amended returns. Sentencing Tr. at 20. In determining the tax loss under § 2T1.1, the Court looked to § 2T1.1(c)(4), which provides that in cases involving improperly claimed refunds, "the tax loss is the amount of the claimed refund to which the claimant was not entitled." Id. Because Judge Edmunds previously found that the amount of the improperly claimed refunds was $20,380.96, the Court in this case found that the tax loss was between $12,500 and $30,000, which corresponded to a Base Offense Level of 12.

The defendant claims that the Court committed procedural error in performing the Guidelines calculation because § 2T1.1(c)(4) does not apply to failure to file cases. The defendant instead suggests that the Court should have applied § 2T1.1(c)(2), which provides that in cases involving the "failure to file a

tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay." According to figures submitted by the defendant to the Court prior to sentencing, the amount of tax owed and not paid by the Hendricksons for 2002 and 2003 was either less than $2,000, which corresponds to a Base Offense Level of 6, or between $2,000 and $5,000, which corresponds to a Base Offense Level of 8.

The defendant's exclusive reliance on § 2T1.1(c)(2) for purposes of calculating the tax loss is misplaced. Application Note 1 to § 2T1.1 provides: "In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case." Accordingly, the Court was not faced with a choice between § 2T1.1(c)(2) (which calculates loss based on tax due and owing) or § 2T1.1(c)(4) (which calculates loss based on the amount of fraudulently obtained refunds). Instead, the Court was free to look to all provisions of subsection (c) that fit the facts of this case.

The defendant's failure to file amended 2002 and 2003 tax returns did not occur in a vacuum. Instead, the order that the defendant file these amended returns was issued in a civil action that was initiated, in part, to recover tax refunds that the IRS had erroneously issued to the defendant and her husband for those years. Accordingly, even though the Court treated this contempt charge as being analogous to the offense of willful failure to file a tax return (26 U.S.C. § 7203),

the Guidelines permitted, if not encouraged, the Court to apply § 2T1.1(c)(4) and calculate the loss based on the amount of the fraudulently obtained refunds.

The Court's calculation of tax loss was based on a plain reading of § 2T1.1 and its accompanying Application Notes. As such, the defendant's claim that the Court committed procedural error in its Guidelines calculation does not raise a "substantial question of law or fact." See 18 U.S.C. § 3143.

CONCLUSION

The three grounds for appeal in the defendant's motion fall short of meeting the standard for bond pending appeal set forth in 18 U.S.C. § 3143(b). Accordingly, the Court should deny Defendant Doreen Hendrickson's Motion for Release Pending Appeal (Doc. #132).

Respectfully submitted,

BARBARA L. McQUADE
UNITED STATES ATTORNEY

By: s/ Melissa S. Siskind
DC Bar # 984681
Tax Division Trial Attorney
P.O. Box 972, Ben Franklin Station
Washington, DC 20044
Phone: 202-305-4144
E-Mail: melissa.s.siskind@usdoj.gov

Dated: May 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2015, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

s/ Melissa S. Siskind
DC Bar # 984681
Tax Division Trial Attorney
P.O. Box 972, Ben Franklin Station
Washington, DC 20044
Phone: 202-305-4144
E-Mail: melissa.s.siskind@usdoj.gov