

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

UNITED STATES OF AMERICA :

V. :

WESLEY TRENT SNIPES, :
Defendant :

 :

No. 5:06-CR-22-Oc-WTH-GRJ

DEFENDANT SNIPES' MOTION FOR BAIL PENDING APPEAL

The defendant, Wesley Trent Snipes, moves pursuant to 18 U.S.C. § 3143(b), Fed.R.Crim.P. 46(c) and Fed.R.App.P. 9(b) for bail pending his appeal to the United States Court of Appeals for the Eleventh Circuit from his conviction and sentence. The United States advises that it opposes the motion. In support of his motion, the defendant states:

1. Following a jury trial lasting more than two weeks, the defendant was acquitted on two tax-related felony charges and three misdemeanors, and convicted on three counts (3-5) under 26 U.S.C. § 7203 of willful failure to file federal income tax returns for the years 1999, 2000 and 2001.

2. Mr. Snipes came before the Court for sentencing on April 24, 2008.

a. Prior to imposition of sentence, the Court heard extensive argument from the parties in support of their divergent positions. The defense argued, *inter alia*, that the applicable United States Sentencing Guideline, USSG § 2T1.1, is illegal, because it does not distinguish between the misdemeanor offense of willful failure to file a federal income tax return, on the one hand, and felonious tax fraud offenses, such as attempted income tax evasion, filing false returns, and fraudulent refund claims, on the other.

b. The defense argued that a distinction of that kind was required by 28 U.S.C. § 994(j), which requires the Sentencing Commission to ensure that the Guidelines generally call for "a sentence other than imprisonment" in the case of a first offender who has not been convicted of "a crime of violence or an otherwise serious offense" Mr. Snipes is a first offender and the offenses of conviction, the defense contended, are not "otherwise serious" within the meaning of § 994(j). Sent.Tr. 39-47, 146, 150-51. The Court rejected this argument, ruling that the misdemeanor offenses of conviction were "serious," in this sense, as indicated by the mens rea of "willfulness." Sent.Tr. 217-18.

c. Relying in substantial part upon a guideline calculation under § 2T1.1 and a stated need to achieve general deterrence, this Court imposed three consecutive maximum terms of imprisonment, totaling three years, to be followed by a one-year term of supervised release. The Court also imposed the required \$75 in special assessments, but declined to order any fine. Sent.Tr. 224-25. As a special condition of supervised release, the Court set a deadline of six months following his release from imprisonment for Mr. Snipes to settle his outstanding federal tax obligations. The Court referred the issue of cost of prosecution to the U.S. Magistrate Judge for a report and recommendation, with the intention later to enter a supplemental judgment. Sent.Tr. 225.

3. At the time of sentencing, the Court stayed execution of the sentence pursuant to 18 U.S.C. § 3143(a), allowing Mr. Snipes to surrender voluntarily at the designated institution for service of his sentence. Sent.Tr. 228.

4. The Court filed and entered a judgment of sentence on May 1, 2008 (Doc. 458).

5. Later on May 1, 2008, defendant Snipes filed a notice of appeal to the Eleventh Circuit from his conviction and sentence (Doc. 462).

6. On November 5, 2007, the defendant filed, inter alia, a renewed motion (Doc. 282) to transfer venue to the district of the defendant's residence.

7. On December 11, 2007, this Court held a hearing for argument on the defendant's motions, but declined to conduct any evidentiary hearing.

8. On December 24, 2007, the Court issued a 13-page memorandum Order (Doc. 332) denying defendant Snipes' pending motions.

9. On January 4, 2008, Mr. Snipes attempted to appeal the denial of his venue motions to the United States Court of Appeals for the Eleventh Circuit, focusing on the denial of a pretrial evidentiary hearing on the question of "legal residence" for purposes of establishing venue for a prosecution under § 7203. After expedited consideration, the Court of Appeals issued a decision on January 8, 2008, dismissing the appeal for lack of jurisdiction. United States v. Snipes, 512 F.3d 1301 (per curiam). The Court did not, however, hold the jurisdictional claim or venue issue to be frivolous.

Memorandum of Legal Authority

Defendant Wesley Trent Snipes, who has initiated an appeal of his convictions and sentence, meets the criteria for release pending appeal, as set forth in 18 U.S.C. § 3143(b). That statute governs release pending appeal by a person who "has been found guilty of an offense and sentenced to a term of

imprisonment." (Mr. Snipes does not stand convicted of any offense implicating the "mandatory detention" provisions of 18 U.S.C. § 3143(b)(2); therefore, he need not demonstrate "exceptional requires release during an appeal if the Court 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; and

(B) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in -

(i) reversal,

(ii) an order for a new trial, ... 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). Under this standard, bail should be granted to Mr. Snipes pending appeal.

a. Risk of Flight; Dangerousness.

The standard for allowing bail pending appeal, insofar as risk and dangerousness are concerned, is the same as for allowing voluntary surrender (that is, bail pending execution of sentence). Compare 18 U.S.C. § 3143(a) with id. § 3143(b). The government had no objection to voluntary surrender, Sent. Tr. 226, and the Court readily granted it. Sent. Tr. 228. Mr. Snipes has honored the Court's trust before and during trial, as well as pending sentencing and since. There is no reason to change the Court's judgment now. For all the reasons which led the Court to allow bail to this point, a ruling in Mr. Snipes' favor on the § 3143(b)(1)(A) factors is supported by clear and convincing evidence.

b. Substantial issues. Mr. Snipes' appeal has not been filed for the purpose of delay, but rather will raise substantial questions of law and fact. The standard under 18 U.S.C. § 3143(b) was authoritatively construed in United States v. Giancola, 754 F.2d 898 (11th Cir. 1985) (per curiam). An issue proposed to be raised on appeal is "substantial" if it presents "a 'close' question or one that very well could be decided the other way." Id. at 901; accord, United States v. Laetividal-Gonzalez, 939 F.2d 1455, 1462 (11th Cir. 1991). Mr. Snipes' appeal will raise questions challenging his convictions and sentence which meet these standards. The anticipated issues include, but are not limited to:

1. Did this Court mistakenly deny Mr. Snipes a pretrial evidentiary hearing on the question whether venue was proper in this District for the counts of the indictment charging willful failure to file income tax returns for 1999, 2000, and 2001?

In other words, did Mr. Snipes have his "permanent fixed abode" in the Middle District from April 2000 through April 2002? See United States v. Calhoun, 566 F.2d 969, 973 (5th Cir. 1978). While this question was put to the jury at trial, it was a Middle District jury which was given the question. The Constitution, both in Article III and in the Sixth Amendment, protects a defendant's historic right -- uniquely asserted three times: in the Declaration of Independence, in the original Constitution, and in the Bill of Rights -- to be tried only "by an impartial jury" chosen in the "district wherein the crime shall have been committed." U.S. Const., amend. VI. See United States v. Cabrales, 524 U.S. 1, 6 & n.1 (1998). Accordingly, "questions of venue ... are not to be taken lightly or treated as mere technicalities" United States v. White, 611 F.2d 531, 534 (5th Cir. 1980). If the facts underlying the question where the

alleged crime was "committed" (here, the question of legal residency as of certain dates) are in dispute, there is a substantial question, to be presented on appeal, whether that right can be vindicated constitutionally by putting the question to a jury selected in the wrong location – other whether only a pretrial factual determination by the Court can protect the constitutional venue right.

The appeal on this issue will address the Court's denial of the defendant's pretrial motions on the question of legal venue: First is the motion to dismiss or transfer because Mr. Snipes did not reside in the Middle District of Florida on the dates he is alleged to have failed to file tax returns. The second motion supports the first by invoking the special venue clause of 18 U.S.C. § 3237(b) which entitles a defendant charged with failure to file tax returns to a transfer of venue to his district of residence, upon demand, even if the indictment could constitutionally be brought in some other district. The Court of Appeals will be asked to rule that these motions required pretrial evidentiary hearings for their determination. Mr. Snipes requested such hearings, but this Court refused.

In general, the process for adjudicating a constitutional claim must be designed to preserve, not defeat the right itself. Cf. United States v. Broce, 488 U.S. 563, 571 (1989) (defendant entitled to "a trial-type proceeding," not merely a chance to prove his point at trial, to establish the factual premise of his Double Jeopardy defense). Mr. Snipes will argue on appeal that he was entitled, by analogy, to a "trial type proceeding," that is, an evidentiary hearing, to show before trial, that he was not a permanent resident of the Middle District of

Florida on or around the dates alleged in Counts 3 through 5. At such a hearing, he could have testified on the question of his permanent residence, offering what would have been the best possible evidence on that subject. Putting the venue question only to the trial jury removed that option, unless he was willing to give up his invaluable Fifth Amendment right not to be compelled to be a witness against himself at trial.

This Court's memorandum opinion states that defense counsel "conceded" at the hearing on December 11, 2007, that the venue question should be determined at trial. Doc. 332, at 5. The record of that hearing will show that counsel made no such concession, but rather only agreed that the defense had no precedent to cite for the proposition that the issue should be decided before trial. See id. at n.2.

That there may have been venue in this Court for other counts, Mem. Order at 5, it will be argued, does not address the issue at hand; venue must be proper for each count and is determined separately for each count. See United States v. Rodriguez-Moreno, 526 U.S. 275 (1999). The fundamental basis for the defendant's argument is that a defendant must not be required to entrust the question of venue to a jury drawn from a district where the Constitution protects him from being judged. There is a substantial question whether the Framers intended the jury in a distant district -- constitutionally presumed to present an unacceptable risk of unfairness -- to be the arbiter of whether that very jury should adjudicate the case.

Mr. Snipes's challenge to this Court's rejection of his invocation of his

right to a transfer of venue under 18 U.S.C. § 3237(b) (an alternate basis for his motion as to the failure to file counts) also presents a substantial issue which is "likely" to result in a reversal. This Court dismissed the statutory contention as untimely. But Mr. Snipes will contend that the 20-day deadline of § 3237(b) was either superseded by a later-adopted procedural rule (now Fed.R.Crim.P. 12(b)),¹ or was at least subject to Rule 12(e)'s "waiver" provision for "good cause" (formerly worded as "cause shown").² Cf. United States v. Suescun, 237 F.3d 1284, 1286-87 (11th Cir. 2001) (discussing Rule 12 and waiver provision). In any event, the statutory deadline was superseded in this case by Magistrate Judge Jones' Criminal Standing Scheduling Order (DE 61), filed December 8, 2006, which set an initial January 12, 2007, deadline for pretrial motions. But even if the motion was filed late, this Court overlooked the issue of relief from waiver in its initial ruling and failed to address the point when raised in the later motion.

¹ Under the Rules Enabling Act, when a Rule of Procedure is amended, "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). The clause referencing IRC § 7203 was added to § 3237(b) in 1966 (Pub.L. 89-713, § 2, 80 Stat. 1108). In 1974, Fed.R.Crim.P. 12 was amended to add subsection (c), making the time for filing all pretrial motions subject to the trial judge's control, thus at least arguably superseding the statutory 20-day limit.

² The Federal Rules of Criminal Procedure were again amended in 1975 to provide in Rule 12(f) that while the failure to file a pretrial motion on a timely basis would result in a "waiver," the court "for cause shown" could grant "relief from the waiver." (Rule 12 was revised in 2002 to modernize its terminology, and that provision became Rule 12(e), with the expression "cause shown" changed to "good cause.") Thus, in 1975, the 20-day deadline in § 3732(b), if not superseded entirely in 1974 by the general motions deadlines of Fed.R.Crim.P. 12(c) (in which even the June 2007 filing was not late at all), at least arguably became waivable in the Court's discretion, albeit only for what is now termed "good cause."

Finally, if venue was not constitutionally valid in the Middle District on these counts, then the harmless error rule would be inapplicable. See Coleman v. Kemp, 778 F.2d 1487, 1540 n.24 (11th Cir. 1985); United States v. Stratton, 649 F.2d 1066, 1079 (11th Cir. 1981). Accordingly, Mr. Snipes's venue issues are substantial and "likely to result in reversal," for purposes of bail pending appeal.

2. Did this Court commit plain error in its definition of the critical mental state, willfulness?

The Court charged the jury at the conclusion of trial that a defendant acts "willfully" within the meaning of federal criminal tax statutes, such as § 7203 (the offense of conviction), if "the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is[,] with bad purpose either to disobey or disregard the law." Court's Instructions, at 22; Tr. 1/29/08, at 187-88. This commonly given, pattern instruction (11th Cir. Pattern Inst. 9.1 [¶3]) obfuscated the special mental state of criminal tax cases, which demands knowledge of the law and then a deliberate violation of that obligation, that is, "the voluntary, intentional violation of a known legal duty," United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam). That correct standard is reflected in Eleventh Circuit Pattern Special Instruction No. 9 ("Intentional Violation of a Known Legal Duty (as Proof of Willfulness Under the Internal Revenue Code)") (2003 ed.). The Court's failure in this case to use the applicable pattern instruction, or similar language, can be argued strongly on appeal as plain error.

In prosecutions under statutes "involving willful violations of the tax

law," the Supreme Court has "concluded that the jury must find that the defendant was aware of the specific provisions of the tax code that he was charged with violating." Bryan v. United States, 524 U.S. 184, 194 (1998). The Court of Appeals unequivocally articulated the correct test in United States v. Morris, 20 F.3d 1111, 1114 (11th Cir. 1994); accord, United States v. Goetz, 746 F.2d 705 (11th Cir. 1984). (In Cheek v. United States, 498 U.S. 192 (1991), the Supreme Court applied that ruling to reverse a conviction arising out of a prosecution for tax evasion and failure to file returns, where the defendant claimed he did not "know" that his wages were taxable as "income" under the Internal Revenue Code and the jury instructions had required any such belief to be found "reasonable" before it could establish a defense.) The two different willfulness instructions are not interchangeable; the Supreme Court's decision in Bryan authoritatively established that the "bad purpose" charge delivered in this case imposes a lesser burden on the prosecution than is mandatory in tax cases: "[W]hile disregard of a known legal obligation is certainly sufficient to establish a willful violation [under the standard definition], it is not necessary" 524 U.S. at 198-99. Special Instruction No. 9 reflects this rule, but was overlooked at trial.

At least since Bryan, if not since Morris, the delivery of an incorrect "willfulness" instruction in a criminal tax case is plain error. (Notably, the government's requested instruction did not make the same mistake. DE 393 [U.S. Add'l Prop. Jury Inst.], at 3.) At the behest of the defense in this case, the Court gave a supplemental instruction on good faith, but that instruction was

largely limited to reliance on advice of counsel. Tr. 1/29/08, at 186-87. (The defense did not request the erroneous form of willfulness instruction that the Court delivered, so the error was not “invited.”) Thus, nothing in the instructions conveyed the essential principle that personal knowledge of the defendant that he was violating the tax law was essential to any finding that he had criminal culpability. The acquittals on numerous counts show that the jury did not consider the evidence of intent to be overwhelming; quite the opposite. Compare, e.g., United States v. Prather, 205 F.3d 1265, 1271 (11th Cir. 2000) (no plain error where evidence of mis-described mental state was “overwhelming” and did not “probably lead to an incorrect verdict”). Mr. Snipes can argue that the instructions in the case fundamentally misled the jury on the central disputed issue. There is a “substantial question,” at least, whether this instructional error affected Mr. Snipes’ substantial rights, and whether the integrity of the proceedings would demand reversal. Even under the criteria of Fed.R.Crim.P. 52(b), then, the issue is substantial for purposes of bail pending appeal.

3. Did the Court err in refusing the defendant’s instruction on good faith reliance on the Fifth Amendment?

The defense requested, as a theory of defense, an instruction on the defendant’s good faith reliance on a belief that he had a Fifth Amendment right to refuse to file tax returns. DE 395 (Dft. Add’l Prop. Jury Inst.), at 8. At the charging conference, the Court rejected this request, on the basis that the defendant had not properly asserted the Fifth Amendment and apparently would have had no valid right to do so. Tr. 1/28/08, at 40-42. But the issue –

Mr. Snipes will argue on appeal -- was not the correctness of the defendant's Fifth Amendment claim; it was sincerity of belief, as an issue giving rise to a reasonable doubt about willfulness. The defendant's theory in this regard was solidly grounded in Supreme Court and Eleventh Circuit precedent (see Cheek, 498 U.S. at 205 n.10, confirming United States v. Murdock, 290 U.S. 389, 393-96 (1933); United States v. Goetz, 746 F.2d 705, 710 (11th Cir. 1984)).

Moreover, this defense was not covered by the good faith instruction which the Court in fact delivered, which as noted previously focused solely on the advice of professionals. Accordingly, this issue gives rise to a third substantial question for appeal.

4. Did the Court err in ruling at sentencing that the misdemeanor of willful failure to file a tax return is "an otherwise serious offense" within the meaning of 28 U.S.C. § 994(j)?

The defense argued for purposes of sentencing that USSG § 2T1.1 is invalid, as applied to misdemeanor offenses under § 7203. The Court rejected this argument. Defendant Snipes relies on the Supreme Court decisions in United States v. LaBonte, 520 U.S. 751 (1997) (guideline which defies § 994 is invalid), and Kimbrough v. United States, 552 U.S. -- (Dec. 10, 2007) (court may vary from recommended sentence on basis that Guideline implements irrational policy); see also Begay v. United States, 553 U.S. --, 128 S.Ct. 1581 (April 16, 2008) (interpreting narrowly a sentencing statute which treats more severely offenses which "otherwise involve conduct which presents a serious potential risk of serious injury"). The Court's ruling that USSG § 2T1.1, as written, applies to this case presents a substantial issue which may, if resolved

in the defendant's favor, result in "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)(B)(4). To the extent the Court relied on the conclusion of "seriousness," the sentence imposed may be viewed on appeal as "unreasonable."

* * * *

In each of these ways, the instant appeal raises issues which are "substantial" and which, if decided in the defendant-appellant's favor, would be "likely" to result in a new trial or in a substantially reduced sentence; that is, which are neither harmless nor waived. Thus, the defendant has made the showing required for an order granting bail pending appeal under § 3143(b)(1)(B). See Giancola, 754 F.2d at 900.

CONCLUSION

The Court should continue the bail previously granted to Wesley Snipes during the appeal in this case. For all the foregoing reasons, the motion for bail pending appeal should be granted.

Respectfully submitted on May 5, 2008,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on all parties by transmitting a copy to their attorneys of record, via the Court's ECF system, at the following e-mail addresses:

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The following parties were served via U.S. Mail, first class postage prepaid:

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Dated: May 5, 2008

/s/ Kanan Henry
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