

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 5:06-cr-22(S1)-Oc-10GRJ

WESLEY TRENT SNIPES

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT SNIPES' MOTION FOR BAIL PENDING APPEAL**

The United States of America, by and through the undersigned attorneys for the United States, opposes Defendant Snipes' Motion for Bail Pending Appeal (Doc. 464). Defendant Snipes has been adjudicated guilty of three counts of wilfully failing to file federal income tax returns, in violation of 26 U.S.C. § 7203, and has been sentenced to 36 months' imprisonment. This Court should deny his motion for release on bond pending appeal because he has failed to overcome the statutory presumption that he should be detained without bond.

I. SHOWING NECESSARY FOR RELEASE ON BOND PENDING APPEAL

The statutory provision governing bond pending appeal, 18 U.S.C. § 3143(b), presumes that a defendant's convictions are valid and that a defendant should be detained without bond. United States v. Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985). A federal court therefore must detain a defendant who has been found guilty of an offense and sentenced to a term of imprisonment pending the defendant's appeal unless the defendant overcomes the presumption by showing:

- (1) by clear and convincing evidence, that the defendant is not likely to flee or to pose a danger to the safety of any other person or to the community if released;¹

¹The United States did not object at sentencing to voluntary surrender for defendant Snipes, but is concerned about the possibility of him fleeing if he is allowed to remain on bond pending appeal. This concern is based on defendant Snipes' apparent lack of candor to this Court regarding his assets, combined with evidence of substantial offshore assets. At the sentencing hearing, defendant Snipes' counsel gave a representative of the Internal Revenue Service (IRS) checks totaling \$5 million as partial

- (2) that the defendant's appeal is not for the purpose of delay;
- (3) that the appeal raises a substantial question of law or fact; and
- (4) that resolution of this question is likely to result in
 - (i) reversal of all counts of conviction on which imprisonment has been imposed,
 - (ii) an order for new trial of all counts on which imprisonment has been imposed,
 - (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); Giancola, 754 F.2d at 901.

II. DEFENDANT SNIPES HAS NOT SHOWN THAT HIS APPEAL WILL RAISE A SUBSTANTIAL QUESTION OF LAW OR FACT.

Defendant Snipes has not demonstrated that his appeal will raise a substantial question of law or fact, as required by section 3143(b)(1)(B). "[A] 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." Giancola, 754 F.2d at 901; accord United States v. Fernandez, 905 F.2d 350, 354 (11th Cir. 1990). Defendant Snipes sets forth four issues that he intends to raise on appeal. None present a substantial question.

payment of his tax liability. The checks were drawn on the account of "Kymberlyte Production Services Int'l Inc." (defendant Snipes' 100% owned loan-out company), and signed by Lori Davis (defendant Snipes' personal assistant). Defendant Snipes' counsel represented that defendant Snipes also paid \$1.7 million to the IRS with his 2007 tax return extension request. Despite the fact that defendant Snipes had at least \$6.7 million to pay these liabilities, he represented to the Probation Office that he had less than \$10,000 in liquid assets. Defendant Snipes has not explained this incongruity. His apparent lack of candor about his assets, combined with trial evidence that he has transferred millions of dollars offshore, show some risk of flight.

A. Defendant Snipes has not shown a substantial question as to whether this Court abused its discretion in denying his motions for a pre-trial evidentiary hearing on venue.

Defendant Snipes states that he will argue on appeal that this Court "mistakenly den[ied] [him] a pretrial evidentiary hearing on the question whether venue was proper in this District" for the three counts of conviction. (Doc. 464 at 5.)

"The determination of whether or not to allow an evidentiary hearing is within the broad discretionary powers of the district court." United States v. Diaz, 811 F.2d 1412, 1414 (11th Cir. 1987) (internal quotation marks and quoted authority omitted). The Eleventh Circuit therefore will review this Court's denial of a pretrial evidentiary hearing on defendant Snipes' venue motions for an abuse of discretion.

It is unclear the precise points that defendant Snipes intends to make with respect to his argument concerning a pre-trial evidentiary hearing on venue. In his first pre-trial venue motion, defendant Snipes sought a change of venue as to the failure to file counts under 18 U.S.C. § 3237(b). (Docs. 144.) This Court denied the motion because it was untimely and because the question of defendant Snipes' place of residency for venue purposes was a disputed issue of fact for the jury's resolution. (Doc. 188 at 10-13.) These were both correct legal conclusions that did not require a pre-trial evidentiary hearing. As to the untimeliness of the motion, the record already demonstrated that defendant Snipes had been arraigned on December 28, 2006, had not filed the venue motion until June 4, 2007, and therefore had missed the statutory twenty-day period for electing a change of venue. As to the correctness of venue, binding precedent already established that the jury—not this Court via pre-trial proceedings— had to decide defendant Snipes' place of residency. See United States v. Stickle, 454 F.3d 1265, 1271-72 (11th Cir. 2006); United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004).

In his third pre-trial venue motion,² defendant Snipes again sought a change of venue as to the failure to file counts pursuant to section 3237(b), raising the new issue of whether Federal Rule of Criminal Procedure 12 had superseded the statutory twenty-day period for electing a change of venue in section 3732(b) or allowed this Court to waive untimeliness for “good cause.” (Doc. 282 at 3.) According to defendant Snipes, he had shown “good cause” through his previous counsel’s failure to comply with the statutory twenty-day period. Id. Defendant Snipes’ counsel conceded that there was no legal authority to support the request for a pretrial evidentiary hearing on the issue of venue. (Doc. 328 at 15.) This Court correctly denied the motion a second time. (Doc. 332 at 8.) This again was a correct legal conclusion that did not require a pre-trial evidentiary hearing. See Fed. R. Crim. P. 12(e) (rule applies only to “any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)”).

In his current motion, defendant Snipes cuts and pastes from his response to the United States’ motion to dismiss his interlocutory pre-trial appeal of this Court’s denial of his request for a pre-trial evidentiary hearing on venue. Defendant Snipes again argues that this Court abused its discretion in denying his request and again cites United States v. Broce, 488 U.S. 563, 571 (1989), for the proposition that “the process for adjudicating a constitutional claim must be designed to preserve, not defeat, the right itself.” (Doc. 464 at 6.) The Eleventh Circuit did not find this argument persuasive when it dismissed his appeal, and expressly stated that defendant Snipes’ claims “are unlike cases involving the right not to be subjected to double jeopardy and similar rights which would be lost by going to trial.” United States v. Snipes, 512 F.3d 1301, 1302 n.1 (11th Cir.

²Defendant Snipes’ second pre-trial venue motion sought to have the indictment dismissed or to have venue transferred based on alleged racial discrimination in venue selection. (Doc. 278.) Defendant Snipes’ current motion does not mention alleged racial discrimination; he presumably does not contend that his evidentiary hearing argument in this regard is a substantial question.

2008). Defendant Snipes does not explain how the Eleventh Circuit would somehow be more persuaded by his argument on appeal of his final judgment.

Without the ability to show an abuse of discretion in this Court's decision not to hold a pre-trial evidentiary hearing on venue, defendant Snipes will not be able to present a substantial question on appeal.

B. Defendant Snipes has not shown a substantial question as to whether this Court plainly erred by using the standard jury instruction on willfulness instead of the special instruction for tax cases.

Defendant Snipes states that he will argue on appeal that this Court plainly erred by using the standard jury instruction on willfulness (Basic Instruction 9.1) instead of the special instruction for tax cases (Special Instruction 9). (Doc. 464 at 9.)

Because defendant Snipes had not objected to the "willfulness" instruction in this Court, the Eleventh Circuit will review the instruction only for plain error. See United States v. Olano, 507 U.S. 725, 731-32 (1993). Under this "difficult" and "daunting" standard, defendant Snipes will have to show that: (1) this Court committed error; (2) the error was "plain"; and (3) the error affected his substantial rights. See United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). Even if he could demonstrate all three prongs, the Eleventh Circuit could exercise its discretion to correct the error only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotation marks and quoted authority omitted).

Defendant Snipes will not be able to demonstrate any of these plain error prerequisites and therefore will not be able to present a substantial question on appeal.

This Court instructed the jury that "willfully" means "that 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." (Doc. 416 at 22.) This was a correct statement of the law and, therefore, a correct instruction to give. See United States v. Pomponio, 429 U.S. 10, 12 (1976) (willfulness under criminal tax statutes

“simply means a voluntary, intentional violation of a known legal duty”; evil motive or bad purpose is not independent element of willfulness in criminal tax offenses; rather, “evil motive’ is merely a ‘convenient shorthand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake”).

Defendant Snipes relies upon Bryan v. United States, 524 U.S. 184 (1998), but Bryan does not help him demonstrate error, much less plain error.

In Bryan, the Supreme Court considered a conviction under the federal firearms statute, 18 U.S.C. § 924(a)(1)(D). 524 U.S. at 196. The Court held that, for that offense, “willfully” requires proof that a defendant knew that his conduct had been unlawful but not that he also knew of the federal licensing requirement. Id. The Court explained that the definition of “wilfulness” in a criminal statute depends upon the context in which it is used. Id. at 193-195. Expressing concern that “highly technical statutes” could result in the punishment of innocent mistakes, id. at 194-95 n.20, the Court stated only in dictum that in “certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating.” Id. at 194.³ The Court qualified its statement in a footnote, recognizing that not all tax cases require this “heightened mens rea,” citing the definition of “wilfulness” approved in Pomponio, id. at 194 n.17, and used by this Court.

Thus, the dictum in Bryan does not help defendant Snipes show error; and, as dictum, it does not help defendant Snipes show error that was plain. See e.g., United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (error cannot be plain unless it

³In support of the statement that “we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating,” the Court cited Cheek v. United States, 498 U.S. 192, 201 (1991). Bryan, 524 U.S. at 194. Cheek, however, requires proof that the defendant knew of the legal obligation imposed by the tax statute, not that the defendant was aware of the specific tax code provision. 498 U.S. at 201.

is clear under current law, and error cannot be clear under current law without precedent directly resolving the issue); Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992) (dicta "is neither the law of the case nor binding precedent").

Defendant Snipes states that this Court's assertedly erroneous instruction both affected his substantial rights and seriously affected the integrity of his trial. (Doc. 464 at 11.) According to defendant Snipes, "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." (Doc. 464 at 11.) The instruction that this Court gave the jury, however, did just that by defining "willfully" to mean "that 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." (Doc. 416 at 22. In any event, even assuming that this Court should have instructed the jury that defendant Snipes had to have specific knowledge of the tax laws, the overwhelming evidence showed that he did, in fact, have such knowledge, including the unassailable testimony of his former accountants (i.e., Starr & Company) that they advised him of the tax law and his obligations thereunder.

Without the ability to show any of the plain error prerequisites, defendant Snipes will not be able to present a substantial question on appeal.

C. Defendant Snipes has not shown a substantial question as to whether this Court abused its discretion in declining to instruct the jury on good faith reliance on the Fifth Amendment.

Defendant Snipes states that he will argue on appeal that this Court abused its discretion in declining to instruct the jury on his asserted "good faith reliance on a belief that he had a Fifth Amendment right to refuse to file tax returns." (Doc. 464 at 11.) Specifically, defendant Snipes states that he will argue that the failure to give the

instruction was error because a good faith claim of privilege against self-incrimination is a defense to the element of willfulness. Id. at 11-12.

The Eleventh Circuit will review this Court's refusal to give the proposed jury instruction for an abuse of discretion. See, e.g., United States v. Moore, No. 07-10326, 2008 WL 1792001 *10 (11th Cir. Apr. 22, 2008). "Refusal to give a jury instruction constitutes an abuse of discretion only if, *inter alia*, the proposed instruction dealt with an issue properly before the jury." United States v. Gomez, 164 F.3d 1354, 1356 (11th Cir. 1999). "Even if a requested jury instruction is proper, the trial court has some discretion in framing the instruction. If the charge to the jury adequately and correctly covers the substance of the requested instruction, there is no reversible error." United States v. Lively, 803 F.2d 1124, 1128 (11th Cir. 1986).

This Court acted well within its discretion in declining to give defendant Snipes' requested instruction because the instruction did not deal with an issue properly before the jury. See United States v. Sullivan, 274 U.S. 259, 263-64 (1927) (there is no Fifth Amendment privilege to refuse to file returns). As this Court explained at trial:

Yes, I'm disinclined to give that instruction here. It seems to me that if one is entitled to an instruction on the privilege against self-incrimination as a defense theory to a failure to file charge, there must be evidence that is specifically and directly indicative of an assertion of the privilege as a basis for the failure to file; and I don't think there's any evidence here that could be described in that way.

There's evidence about the defendant being cautioned concerning his constitutional privilege, and there may be mention of the Fifth Amendment, as counsel has said, in the voluminous correspondence in evidence with respect to this. And I'm not aware of any evidence in which the defendant specifically and directly asserted the Fifth Amendment privilege as a basis for failing to file. and even if there was, there would be an additional legal issue as to whether the privilege is available to the extent being sought in this case.

(Doc. 405 at 41-42.)

Even if the issue was properly before the jury, the instruction that this Court did give the jury, in its discretion, adequately covered the substance of the requested

instruction; that is, defendant Snipes' asserted good faith. Cf. Lively, 803 F.2d at 1128 (no abuse of discretion where general conspiracy instruction adequately covered requested buyer-seller defense instruction). This Court instructed the jury:

Good faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with intent to defraud or willfulness, which is an essential part of the charges.

The burden of proof is not on the Defendant to prove good faith, of course, since the defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud or willfulness as charged in the indictment.

So, with regard to the issue of willfulness, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith with an attorney whom the Defendant considered competent, made a full and accurate report to that attorney of all material facts of which the Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that attorney.

(Doc. 406 at 186.)

In any event, defendant Snipes could not have been harmed by the failure to give his requested instruction because his asserted good faith reliance on his Fifth Amendment right to remain silent was based solely on IRS Special Agent Cameron Lalli's reading of his rights in May 2002 (Doc. 406 at 92), and the jury found him guilty only of conduct that occurred before that date.

Without the ability to show an abuse of discretion in this Court's refusal to give his requested instruction, or any harm in this refusal, defendant Snipes will not be able to present a substantial question on appeal.

D. Defendant Snipes has not shown a substantial question as to whether this Court erred in using USSG §2T1.1.

Defendant Snipes states that he will argue on appeal that "USSG §2T1.1 is invalid, as applied to misdemeanor offenses under § 7203." (Doc. 464 at 12.) At sentencing, defendant Snipes argued that misdemeanor offenses are categorically non-serious offenses and, therefore, in promulgating §2T1.1 the United States Sentencing

Commission did not follow the policy in 28 U.S.C. § 994(j) to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” (Doc. 461 at 33-47.) According to defendant Snipes, this Court’s application of §2T1.1 resulted in an “unreasonable” sentence. (Doc. 464 at 13.)

Far from presenting a “substantial question,” defendant Snipes’ argument is frivolous on any number of grounds.

The Commission clearly followed section 994(j) when it promulgated the guidelines generally. The guidelines are the result of tremendous effort to fulfill Congressional directives. See Rita v. United States, 127 S. Ct. 2456, 2463 (2007). To account for whether imprisonment is appropriate considering criminal history (or lack thereof) and seriousness of the offense (or lack thereof), the guidelines include offense levels specific to each offense in chapter two, criminal history levels specific to each offender in chapter four, the Sentencing Table corresponding to those chapters, the probation guidelines at section 5B1.1, and the aberrant behavior guideline at section 5K2.20.

The Commission clearly followed section 994(j) when it promulgated section 2T1.1 specifically. Section 2T1.1 directs base offense levels of six and eight for the offense of failure to file a federal income tax return when such failure results in no or little tax loss. When paired with a criminal history category of I, those offense levels result in an advisory guidelines sentencing range of 0-6 months, a range that reflects that imprisonment may not be appropriate in a case that, in light of the loss amount, is less serious. See USSG Sentencing Table; see also United States v. Ortez, 902 F.2d 61, 65-66 (D.C. Cir. 1990) (“Commission could reasonably conclude that the guidelines were structured so that the ‘less serious crimes’ for which probation might be available

for first offenders are also those crimes for which the applicable sentence ranges for first offenders include zero months of incarceration."). The Commission expressly stated its view that financial offenses are "serious" and explained that, in promulgating the guidelines for those offenses, it was carrying out the policy in section 994(j):

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

USSG §1A1.1 (edit. n. 4(d)).

That Congress itself called for up to one year of imprisonment for the misdemeanor offense of failure to file a federal income tax return means that Congress explicitly found imprisonment appropriate for the offense. See 26 U.S.C. § 7203. That section 2T1.1 became effective without Congressional intervention, and that Congress has never sought to modify section 2T1.1, means that Congress approved section 2T1.1. See United States v. Lueddeke, 908 F.2d 230, 233 n.1 (7th Cir. 1990) ("[T]he argument that the Guidelines as promulgated contravene congressional intent is fatally weakened by the fact that the Guidelines became effective only with the consent of Congress. . . . This fact shows that Congress itself thought that the Guidelines were not inconsistent enough with its mandate on probation so as to require change. In addition, Congress, of course, has the continuing ability, as well as the authority, to disapprove or modify any aspect of the Guidelines it chooses.") (internal quotation marks and quoted authority omitted)); see generally 28 U.S.C. § 994(p) and note following § 994

(Commission should review and amend Guidelines as necessary, and Congress has power to revoke or amend guidelines).

Further indicative of the frivolity of defendant Snipes's asserted "substantial question," the Eleventh Circuit and its sister courts resolutely have rejected what pares down to essentially the same argument. See In re U.S., 60 F.3d 729, 733 (11th Cir. 1995) (defendant's claim that Commission failed to follow section 994(j) had no bearing on whether guidelines as whole or applied are invalid; "moreover, the claims are best brought to Congress' attention[.]"); United States v. Erves, 880 F.2d 376, 380 (11th Cir. 1989) (guidelines "reflect the general appropriateness of non-incarceration for non-serious crimes"); see also United States v. Griffith, 85 F.3d 284, 292-293 (7th Cir. 1996) (defendant lacked standing to argue Congress did not follow directive of section 994(j) because he failed to explain how he was injured specifically); United States v. Strandquist, 993 F.2d 395, 399 (4th Cir. 1993) (Commission did not disregard section 994(j) in promulgating guideline for mishandling environmental pollutants); United States v. Ellen, 961 F.2d 462, 467-68 (4th Cir.1992) (Commission did not disregard section 994(j) in promulgating guideline for mishandling environmental pollutants); United States v. Starck, Nos. 92-1791, 92-1792, 1992 WL 214445 *3 (1st Cir. Sept. 4, 1992) (whether offense level for crimes involving fraud and deceit contravene mandate in section 994(j) is not substantial question); United States v. Barrett, 937 F.2d 1346, 1350 (8th Cir. 1991) (Commission did not contravene 994(j) by not requiring probation for Class C felonies); Lueddeke, 908 F.2d at 232-233 (Commission did not disregard section 994(j) with respect to first offender who committed non-violent offenses of perjury and obstruction of justice); United States v. Belgard, 894 F.2d 1092, 1100 (9th Cir. 1990) (Commission followed section 994(j)); United States v. White, 869 F.2d 822, 827 (5th Cir. 1989) (same).

In any event, it is beyond question that, as this Court found (Doc. 461 at 218), defendant Snipes's offenses were serious. The trial evidence proved that defendant Snipes earned more than \$37 million of gross income from 1999 to 2004 and was required to file federal income tax returns reporting that income, yet willfully failed to do so. In the process, defendant Snipes withheld from the U.S. Treasury millions of dollars in taxes due and owing. The evidence also demonstrated that defendant Snipes engaged in a brazen and protracted campaign of obstruction against the IRS.

Finally, in keeping with United States v. Booker, 543 U.S. 220 (2005), this Court considered the guidelines only as advisory along with the other sentencing factors in 18 U.S.C. § 3553(a), and in doing so considered the seriousness of the offenses and defendant Snipes' lack of criminal history. See United States v. Kamen, No. 94-6180, 1995 WL 63154 *2 (6th Cir. Feb. 14, 1995) (guidelines take into account Congressional mandates; district court imposed sentence within guidelines range and therefore implicitly considered Congressional mandates regarding use of probation).

Without the ability to show error in this Court's use of section 2T1.1, defendant Snipes will not be able to present a substantial question on appeal.

WHEREFORE, because defendant Snipes has not demonstrated that his appeal will raise a substantial question of law or fact, the United States respectfully requests that this Court deny his motion for bond pending appeal (Doc. 464).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participant(s):

Counsel for Wesley Trent Snipes:
Daniel R. Meachum
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I hereby certify that on May 19, 2008, a true and correct copy of the foregoing will be mailed to the following non-CM/ECF participant(s):

N/A

s/ M. Scotland Morris
M. SCOTLAND MORRIS
Assistant United States Attorney