

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

VLADIMIR ROUDAKOV

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CRIMINAL NO. 03-91

SURRICK, J.

DECEMBER 1, 2005

MEMORANDUM & ORDER

Presently before the Court is Defendant Vladimir Roudakov's Motion For Release Pending Appeal (Doc. No. 52), and the Government's Response thereto. For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

On February 6, 2003, Defendant was indicted on two counts of subscribing a false tax return in violation of 26 U.S.C. § 7206(1). On February 4, 2004, a jury found Defendant guilty on both counts. On September 26, 2005, Defendant was sentenced to twenty-four months in prison, one year of supervised release, a \$5,000 fine, and \$200 in special assessments. Defendant was given sixty days—until November 25, 2005—to surrender to an institution to be designated by the Federal Bureau of Prisons. On November 11, 2005, Defendant filed the instant motion for continued bail pending the litigation of his appeal pursuant to 18 U.S.C. § 3143(b).¹

¹ On November 22, 2005, Defendant's Motion Of Extension Of Time In Which To Self-Surrender (Doc. No. 54) was filed. On November 23, 2005, an Order was entered extending the time to surrender until December 7, 2005.

II. LEGAL STANDARD

Section 3143(b) allows a district court to stay a sentence pending appeal upon reaching certain conclusions about the defendant and the issues to be presented on appeal. The statute provides, in relevant part, as follows:

- (b) Release or detention pending appeal by the defendant.— (1) Except as provided in paragraph (2), the 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
 - (B) that the appeal is not for the 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,
 - (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).

The Third Circuit has construed § 3143 to establish a four-part test to determine whether a stay of sentence is appropriate under the statute. Under this test, a defendant must establish:

- (1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; (2) that the appeal is not for purposes of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if the substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal

United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985). In construing § 3143, *Miller* sought to effectuate Congress’s intent, recalling that 18 U.S.C. § 3143, the Bail Reform Act of 1984, “was enacted because Congress wished to reverse the presumption in favor of bail that had been established under the prior statute, the Bail Reform Act of 1966.” *Miller* 753 F.2d at 22. In

analyzing Defendant's Motion under this statute, we must consider whether Defendant has successfully rebutted the presumption in favor of denying bail on appeal. *See United States v. Brown*, 356 F. Supp. 2d 470, 484 (M.D. Pa. 2005).

III. LEGAL ANALYSIS

There have been no violations of Defendant's pre-trial, pre-sentence, or pre-surrender release conditions. Defendant has resided at the same address in Staten Island, New York, along with his wife and two adult children, since his initial appearance before this Court. We are satisfied that Defendant is neither a flight risk nor a danger to the safety of any other person or the community. The Government does not argue and offers no evidence that Defendant has appealed for purposes of delay. We will therefore assume that Defendant's appeal is not a dilatory tactic.

Turning to the third factor under the *Miller* test, *Miller* states that a "substantial question" is one which is "either novel, which has not been decided by controlling precedent, or which is fairly doubtful." *Miller*, 753 F.2d at 23. One year after the Third Circuit decided *Miller* it clarified this definition in *United States v. Smith*, 793 F.2d 85 (3d Cir. 1986): "Our definition of a substantial question requires that the issue on appeal be *significant* in addition to being novel, not governed by controlling precedent or fairly doubtful." *Smith*, 793 F.2d at 88. In making this clarification, the Third Circuit explicitly rejected the approach of the Eleventh Circuit in *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985), which had decided that a substantial question is "a 'close' question or one that very well could be decided the other way." *Id.* at 901. Instead, the Third Circuit chose to align itself with the Ninth Circuit, which, in *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985), advocated "the historically-based 'fairly debatable' interpretation

of the term ‘substantial.’” *Smith*, 793 F.2d at 89-90. “Fairly debatable,” *Smith* determined, means that the issue is “debatable among jurists of reason” or “adequate to deserve encouragement to proceed further.” *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Thus, *Smith* requires that courts assess first whether the question is novel, and then, if there is no controlling precedent, whether a significant question or one that is “debatable among jurists of reason” is posed. Finally, if a significant question is found, the court must then determine if the question is integral to the merits of the case and would ultimately lead to a reversal. *Id.* at 90.

Defendant was convicted under 26 U.S.C. § 7206(1), which provides in pertinent part:

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1). Defendant’s Motion states only that his appeal “raises issues of the sufficiency of the evidence presented at trial, issues related to the limitation of the evidence among other issues, and issues related to the reasonableness of the sentence,” and that these issues of law and fact would likely result in reversal or the grant of a new trial. (Doc. No. 52 ¶ 9.) For the purposes of this opinion, we will assume *arguendo* that Defendant presents novel issues of law with no directly controlling precedent. *Smith* then instructs that we must consider whether those novel questions are significant or fairly debatable such that they qualify as substantial questions under the Bail Reform Act.

A. Sufficiency of the Evidence Presented at Trial

“A defendant challenging the sufficiency of the evidence bears a heavy burden.” *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992) (citing *United States v. Vastola*, 899 F.2d 211, 226 (3d Cir. 1990)). When a defendant appeals on the basis of the insufficiency of the evidence, the evidence is reviewed in the light most favorable to the government. *United States v. Lopez*, 271 F.3d 472, 486 (3d Cir. 2001) (citing *United States v. Xavier*, 2 F.3d 1281, 1288 (3d Cir. 1993)). “Appellate reversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution is clear.” *Casper*, 956 F.2d at 421. “The evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt.” *Id.* (citing *Vastola*, 899 F.2d at 226).

Defendant has not provided the Court with any basis for his claims of insufficient evidence. Briefly, the following evidence and testimony was presented at trial. Defendant was in the business of selling new and refurbished computers under the name of Payless Computer Source. (Feb. 4, 2004 Trial Tr. at 10.) The individuals who purchased Defendant’s computers would pay Defendant by check made out to PCS, an abbreviation for Payless Computer Source. Defendant would deposit some of these checks in his bank account at Mellon Bank. However, a majority of the checks were cashed at K&A Discount Check Cashing Agency (“K&A”). Defendant went to K&A with checks from East Coast Computers, Amicom Trade, and others. (Feb. 3, 2004 Trial Tr. at 14; Trial Exs. G-84, G-8 to G-64.) The K&A owner testified that Defendant had structured the checks that he brought to K&A in order to avoid having the checks reported to the Internal Revenue Service via the check cashing company’s Currency Transaction

Reports. (Feb. 3, 2004 Trial Tr. at 8-12.) On several occasions, Defendant asked the K&A owner to deposit two checks on different days but to give Defendant the cash for both checks the same day. (*Id.* at 10, 12.) The checks that were deposited into Defendant's Mellon Bank account were reported on Defendant's federal income tax returns. The checks that were cashed at K&A, however, were not reported on Defendant's tax returns. The IRS agent reviewed the Currency Transaction Reports from K&A, Defendant's tax returns, gross receipts from East Coast Computers and United Computer Warehouse and Defendant's other customers, as well as the Mellon Bank records. (Feb. 4, 2004 Trial Tr. 5-19; Trial Exs. G-1, G-2, G-67 to G-69, G-75.) The analysis of the relevant financial documents revealed that Defendant had failed to report on his federal income tax forms over \$900,000 in gross receipts for the year 1996 and over \$560,000 for 1997. (Feb. 4, 2004 Trial Tr. at 28, 50.)

Viewing the evidence in the light most favorable to the Government, we are satisfied that there was more than sufficient evidence to support the jury's finding that Defendant was guilty beyond a reasonable doubt on both counts of violating § 7206(1). Defendant's "sufficiency of the evidence" argument has no merit and provides no substantial question that would justify his release pending appeal. *See, e.g., United States v. D'Amato*, 722 F. Supp. 221, 224 (E.D. Pa. 1989) (finding defendant "can raise no substantial issue on appeal arising out of the sufficiency of the evidence to convict him"); *United States v. Gorman*, 674 F. Supp. 1401, 1404 (D. Minn. 1987) (denying § 3143(b) motion based on sufficiency of the evidence claim); *United States v. Austin*, 614 F. Supp. 1208, 1220 (D.N.M. 1985) (same); *United States v. DiMauro*, 614 F. Supp. 461, 466 (D. Me. 1985) ("The Court is fully satisfied that the Defendant's deficiency of the evidence argument raises no issue of any substantiality whatever."); *see also United States v.*

Gricco, 277 F.3d 339, 351-52 (3d Cir. 2002) (rejecting challenge of sufficiency of evidence supporting convictions for making false tax returns under § 7206(1)).

B. Reasonableness of the Sentence

Similarly, we conclude that Defendant has not raised a substantial question on appeal with respect to the reasonableness of his sentence. “A sentencing court is permitted to make ‘a reasonable estimate based on the available facts’ where the exact amount of tax loss may be uncertain.” *Gricco*, 277 F.3d at 356 (quoting Application Note 1 to U.S.S.G. § 2T1.1). At the August 26, 2005 sentencing hearing, an IRS agent testified that, based on the evidence and testimony presented at trial, the agency performed two separate calculations of the amount of loss due to Defendant’s fraudulent tax returns. (Aug. 26, 2005 Sent’g Tr. at 22-24; Sent’g Exs. 2, 3.) In the first report, the tax loss was calculated at \$220,627 for 1996 and \$29,622 for 1997. (Aug. 26, 2005 Sent’g Tr. at 22-24; Sent’g Ex. 2.) The second report took into account Defendant’s argument at trial that certain of the checks cashed at K&A were not attributable to Defendant and thus should not have been included as part of his income. (Aug. 26, 2005 Sent’g Tr. at 23-24; Sent’g Ex. 3.) Even with this reduction of income, the second report stated that the tax loss for 1996 was \$208,417 and for 1997 was \$11,407. (Sent’g Ex. 3.) Since both reports indicated the tax loss was in excess of \$200,000, the recommendation under the 1998 Sentencing Guidelines was the same using the tax loss amount in either report: a base offense level of 16, a criminal history category of 1, and a guideline range of twenty-one to twenty-seven months. *See* U.S.S.G. §§ 2T1.1(a)(1), 2T4.1 Tax Table. Defendant argued at his sentencing hearing that we should impute an 11% profit margin on his unreported income, because Defendant had reported such a

profit margin on the income which he had actually reported on his tax returns.² (Aug. 26, 2005 Sent'g Tr. at 6-7.) However, Defendant presented no evidence at trial or at the sentencing hearing to support such a calculation.

Based on the evidence submitted to the Court, we concluded that a reasonable figure for the tax loss was \$200,000 or more. (*Id.* at 31.) We are satisfied that the evidence and testimony presented by the government at trial and at the sentencing hearing provided a coherent factual basis for determining this loss. *Cf. Gricco*, 277 F.3d at 358 (remanding computation of tax loss to district court due to failure of government, district court, and presentence investigation report to provide “a coherent factual basis” for the calculation of the amount stolen). Defendant was sentenced to twenty-four months in prison based upon the evidence presented at trial and at the sentencing hearing, the advisory Sentencing Guidelines, the Presentence Investigation Report, and the factors listed in 18 U.S.C. § 3553(a). This sentence was reasonable. *See United States v. Booker*, 543 U.S. 220 (2005).

IV. CONCLUSION

It is clear that Defendant has failed to present substantial questions of law or fact as required by 18 U.S.C. § 3143(b). A stay of Defendant’s sentence pending appeal is therefore inappropriate. Accordingly, Defendant’s Motion will be denied.

An appropriate Order follows.

² By Defendant’s calculations using an 11% profit margin, the tax loss for 1996 would have been \$25,276 and the tax loss for 1997 would have been \$13,804 for a total loss of \$39,080. This results in a base offense level of 12 and a guideline range of ten to sixteen months.

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ORDER

AND NOW, this 1st day of December, 2005, upon consideration of Defendant Vladimir Roudakov's Motion For Release Pending Appeal (Doc. No. 52, No. 03-CR-91), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Defendant's Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge