

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 YUJIE DING : NO. 15-35-1

MEMORANDUM

Bartle, J.

February 9, 2017

Before the court is the motion of defendant Yujie Ding, pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3143, for bail pending appeal.

On November 20, 2015, Ding was found guilty by a jury of six counts of wire fraud, in violation of 18 U.S.C. § 1343, as part of a scheme to defraud the National Aeronautics and Space Administration with respect to proposals for research contracts. He filed a post-trial motion which largely rested on his claim of insufficiency of the evidence. After extensive delay due to the briefing on his post-trial motion and his other maneuvers, the court sentenced him on September 28, 2016 to a term of incarceration of one year and one day. Ding filed a notice of appeal the following day. He is currently scheduled to self-surrender on March 1, 2017.¹ It was not until

1. The self-surrender date was set for March 2017 so that Ding could care for his children while his wife and co-defendant Yuliya Zotova served her sentence. Zotova began her three-month sentence on November 7, 2016 and was released in February 2017.

February 8, 2017, more than four months after he was sentenced and only three weeks before his scheduled self-surrender, that Ding filed his pending bail motion.

The Bail Reform Act provides that the court must detain pending appeal a defendant who has been found guilty and sentenced unless that defendant proves: (1) "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" and (2) that his or her "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." See § 3143(b).

Our Court of Appeals has explained that under § 3143(b) there is a presumption against bail pending appeal. See United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985). To overcome the presumption, the 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 purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.²

See id. The Court recognized that “[o]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances.” See id. at 22 (quoting H.R. Rep. No. 91-907, at 186-87 (1970)).

To prevail on his motion for bail pending appeal, Ding has the burden to demonstrate that his appeal raises a substantial question. To be substantial, our Court of Appeals “requires that the issue on appeal be significant in addition to being novel, not governed by controlling precedent or fairly doubtful.” See United States v. Smith, 793 F.2d 85, 88 (3d Cir. 1986). The absence of controlling precedent is not itself enough to meet this test. See id. A question is substantial if the defendant can demonstrate that it is “fairly debatable” or is “debatable among jurists of reason.” See id. at 89 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); United States v. Handy, 761 F.2d 1279, 1281-82 (9th Cir. 1985). A

2. As noted above, with regard to the fourth inquiry, the court also considers whether the defendant has proven that a substantial question determined favorably to him would likely result in a sentence that does not involve imprisonment or a reduced sentence less than the duration of the appeal.

substantial question is "one of more substance than would be necessary to a finding that it was not frivolous." See Smith, 793 F.2d at 89 (quoting Handy, 761 F.2d at 1282 n.2). Whether a question is substantial should be decided on a case-by-case basis. See id. (citing Handy, 761 F.2d at 1282 n.2).

Furthermore, the court must determine if a substantial question decided favorably to the defendant is likely to result in reversal, a new trial, or a reduced sentence on all counts. See § 3143(b)(1)(B); Miller, 753 F.2d at 24. Although these words appear to require the court to predict the likely result of the appeal, our Court of Appeals has cautioned that "federal courts are not to be put in the position of 'bookmakers' who trade on the probability of ultimate outcome. Instead, that language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal." See Miller, 753 F.2d at 23. Thus, to grant bail pending appeal, any substantial question must affect the entire action, that is all counts and not just some.

In support of his motion for bail pending appeal, Ding simply asserts:

7. The logic behind this motion is a criminal appeal in Pennsylvania takes longer than one year to be resolved in the Third Circuit. It would not only be unfair but also unjust if bail was denied, incarcerating Dr. Ding pending appeal for

what could potentially be longer than the sentence imposed.

8. Counsel believes that Petitioner will prevail on the merits of this appeal, resulting in a new trial.

9. Petitioner is a life-long resident of the Pennsylvania area.³

Ding offers no further argument in support of his motion. As such, he has not met his burden to overcome the presumption against bail pending appeal. Most significantly, Ding has not identified any substantial question to be raised on appeal. It is not the role of this court to dig through the record to see if it can find one.

Ding's motion falls far short of meeting his burden to overcome the presumption against bail pending appeal. Thus, Ding's motion for bail pending appeal will be denied.

3. This is inaccurate. Ding was born in China, where he attended grade school, high school, and college. He then immigrated to the United States. Prior to moving to Pennsylvania, he lived in Indiana, Maryland, and Ohio.

