

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

UNITED STATES
OF AMERICA

v.

MICHAEL J. REGAN

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: 97-CR-14-06
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MEMORANDUM

Broderick, J.

December 19, 1997

On December 18, 1997, the Court held a hearing on Defendant Michael Regan's motion for bail pending his appeal of his conviction. The Court granted Defendant's Motion. The Court now submits this Memorandum in support of its Order.

On April 17, 1997, Defendant Michael Regan, a former corrections officer at the Delaware County Prison, was convicted by a jury of one count of knowingly making a false material declaration while under oath, in violation of 18 U.S.C. § 1623. Specifically, the jury found that Defendant Regan violated 18 U.S.C. § 1623 when, on February 1, 1996, while under oath before a grand jury, Defendant responded "No" when asked if he ever saw any "physical abuse" of a prisoner by the name of Ronald Seaton while Defendant was in the center control room of the prison.

Defendant filed a post-trial motion for acquittal, which this Court denied. On November 21, 1997, the Court sentenced Defendant to five months imprisonment and two years supervised release with a condition of supervised release that Defendant spend the first five months in home detention. The Court further

ordered that Defendant receive psychiatric care while in custody, and that, as a condition of home detention, Defendant undergo a program of psychiatric counseling to be approved by the Probation Department.

Defendant has appealed his conviction to the Third Circuit Court of Appeals. He now seeks bail pending his appeal, pursuant to 18 U.S.C. § 3143(b). Section 3143(b) provides in relevant part:

... 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 © 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...

Under § 3143(b), the defendant seeking bail bears the burden of showing: (1) by clear and convincing evidence that he is not likely to flee or pose a threat or danger to the safety of any other person or community if released; (2) that his appeal is not for purpose of delay; (3) that his appeal raises a substantial question of law or fact; and (4) that if the substantial question is determined favorably to him on appeal, the decision will likely result in reversal or an order for a new trial as to all counts on which imprisonment has been imposed. United States v.

Miller, 753 F.2d 19,24 (3d Cir. 1985).

The Third Circuit has explained that, with respect to the third factor, a "substantial" question of law or fact is one "which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." United States v. Miller, 753 F.2d at 23. The issue raised on appeal must be "debatable among jurists," or "adequate to deserve encouragement to proceed further." United States v. Smith, 793 F.2d 85, 90 (3d Cir. 1986).

Having considered the four factors enumerated above, the Court makes the following findings:

With respect to the first factor, the Court finds by clear and convincing evidence that Defendant Regan is not likely to flee. Defendant has appeared at every hearing before this Court and has complied with the pretrial services department and the probation department. Defendant is currently employed and resides with his parents in their home. Defendant has virtually no assets. For these reasons, the Court finds that the Defendant is unlikely to flee. However, in order to assure that Defendant will not flee pending disposition of his appeal, the Court will order as conditions of bail that Defendant continue to reside at his parents' home, maintain his current employment, and report by telephone once a week to the pretrial services officer assigned to this case.

The Court additionally finds by clear and convincing

evidence that Defendant is not likely to pose a threat or a danger to others or to the community. Defendant was convicted of a non-violent offense, and he has no reported history of violence. The Court notes, however, its concern as to the threat Defendant may pose to himself. During the course of this Defendant's sentencing, the Court learned that Defendant had attempted to commit suicide shortly after his conviction. Defendant has undergone several counseling sessions since that suicide attempt and he reports that he no longer has suicidal thoughts or tendencies. He continues to suffer from depression, however. Accordingly, in order to ensure that Defendant will not pose a danger to himself while on bail pending appeal, the Court will order as a condition of bail that Defendant undergo regular psychiatric treatment.

With respect to the second and third factors, the Court finds that Defendant's appeal is not for the purpose of delay and that Defendant's appeal poses a "substantial" question of law or fact.

As in his motion for post-trial relief, Defendant contends on appeal that the government did not provide sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly provided false testimony at the grand jury hearing on February 1, 1996. Specifically, Defendant Regan contends that the government did not present sufficient evidence as to how Regan would have understood the term "physical abuse" when he was asked under oath

if he had ever seen any "physical abuse" of Ronald Seaton while Regan was in the prison control center. Defendant Regan contends that, as a prison guard, he would have considered it acceptable in some cases for a prison guard to apply some level of physical force to a prisoner. Defendant thus contends that he could have seen some physical force applied by his fellow prison guards to the prisoner Ronald Seaton, and still have truthfully believed that he did not see any "physical abuse" of the prisoner. Accordingly, Defendant contends that the government did not meet its burden of showing beyond a reasonable doubt that Defendant knew his testimony was false at the time he gave the testimony before the grand jury.

Defendant also contends in his appeal, as he did in his post-trial motion, that the Court committed error in refusing to give Defendant's proposed jury instruction which defined "physical abuse" as "cruel and unusual punishment in violation of the Eighth Amendment," and provided a lengthy definition of cruel and unusual punishment.

In its July 30, 1997 Memorandum and Order denying Defendant Regan's motion for post-trial relief, this Court found that the government had presented more than sufficient evidence to prove beyond a reasonable doubt that Defendant Regan knew that his statement was false when he answered "No" to the question of whether he had ever seen any "physical abuse" of Ronald Seaton while Defendant Regan was in the prison control center. The Court also found that it had provided adequate jury instructions

as to what constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Although this Court maintains that it correctly denied Defendant Regan's motion for post-trial relief, the Third Circuit has made clear that the District Court's determination of whether a question on appeal is "substantial" does not depend on whether the District Court believes its own order is likely to be reversed. United States v. Miller, 753 F.2d. at 23. In order to determine that a question on appeal is "substantial," the District Court need only determine that the issue is one which is "fairly debatable" or "adequate to deserve encouragement to proceed further." In the instant case, the Court finds that Defendant Regan's contention that the government failed to meet its burden of proving beyond a reasonable doubt that Defendant Regan knowingly made a false material declaration to the grand jury raises a "substantial" question for purposes of 18 U.S.C. 3143(b).

Finally, with respect to the fourth factor, the Court finds that if the substantial question described above is determined favorably to Defendant Regan on appeal, the decision will likely result in a reversal or an order for a new trial. United States v. Miller, 753 F.2d 19,24 (3d 1985). In order to be convicted under 18 U.S.C. § 1623, a defendant must have known at the time he gave his testimony under oath that his testimony was false. If the government failed to prove beyond a reasonable doubt this essential element of knowledge, Defendant could not have been

convicted under 18 U.S.C. § 1623.

Accordingly, the Court finds that Defendant has shown by clear and convincing evidence that he is not likely to flee or pose a danger or threat to others or the community. Furthermore, although the Court remains of the opinion that the government presented more than sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly provided false testimony at the grand jury hearing on February 1, 1996, and that the Court provided adequate jury instructions as to what constitutes cruel and unusual punishment in violation of the Eighth Amendment, the Court finds that Defendant's appeal is not for purpose of delay, and raises a substantial question which, if determined favorably to Defendant Regan on appeal, is likely to result in an reversal or an order for a new trial. The Court will therefore order that Defendant Michael Regan be released on bail pending appeal of his conviction.

An appropriate Order follows.