

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
LARKEN D. ROSE	:	NO. 05-101-01

MEMORANDUM

Baylson, J.

November 28, 2005

The Court imposed sentence on Defendant Larken Rose on November 22, 2005. His counsel filed an appeal and a Motion for Release Pending Appeal on November 25, 2005, seeking a stay of surrender, which was scheduled for noon, Monday, November 28, 2005. After a telephonic hearing with counsel on November 28, 2005, the Court denied the Motion but stayed the surrender to December 5, 2005, to allow the Defendant to apply to the Court of Appeals for a stay pending appeal. The government did not object to the stay.

I. Background of this Case

The Defendant was indicted on five counts of willful failure to file income tax returns for five years. Defendant, among a small group of vocal individuals colloquially known as “tax protestors” took the position that under § 861 of the Internal Revenue Code, because his income was earned domestically within the United States, it was not subject to income tax. The evidence at trial showed that Defendant had many discussions with the Internal Revenue Service (“IRS”) over several years in which IRS employees patiently explained to the Defendant why his § 861 argument was unfounded; however, Defendant persisted in his beliefs and became an ardent tax

protestor, sponsoring a website about the income tax laws entitled “Theft by Deception.” In addition, Defendant developed and sold videotapes expounding his interpretation of the law.

The evidence at trial showed Defendant had a deep-seated animosity and hatred for the IRS. Defendant not only declined to file income tax returns reporting the receipts from the medical transcription business, which he and his wife operated out of their home, but he also refused to report as income his receipts of money from the sale of his videotapes.

Defendant insisted on representing himself pro se, and the Court held several voir dire colloquies with the Defendant where he undoubtedly understood the issues relating to pro se representation. Although the Defendant had been indicted with his wife as a co-defendant, the Court, on its own motion, granted a severance so that neither Defendant nor his wife would be prejudiced as to issues relating to hearsay, admissions, authority, agency or marital communications. At trial, Defendant retained stand-by counsel who was present to advise the Defendant on legal issues and also conducted the direct examination of Defendant when Defendant testified on his own behalf.

Following trial, Defendant pro se filed a Rule 29 Motion and then retained able counsel, Peter Goldberger, Esquire. Prior to sentencing, the government moved for an upward departure, and the Court indicated that it would consider an upward departure. However, shortly before the date set for sentencing, the Defendant filed income tax returns for the years for which he had been indicted, made a substantial deposit towards payment of back taxes, penalties and interest to the IRS, and pleaded for mercy at his sentencing, indicating that he had made many mistakes in the way he handled his situation with the IRS. At the time of sentencing, Defendant’s counsel withdrew his Rule 29 Motion for Acquittal.

II. Jury Instruction Issues

The Court's charge to the jury, which the Defendant asserts will be a focal point of the appeal, was in accord with the Supreme Court's decision concerning "willfulness" as expressed in Cheek v. United States, 498 U.S. 192 (1991). In addition, the Court gave a charge on "good faith," consistent with the discussion in United States v. Gross, 961 F.2d 1097, 1101-05 (3d Cir. 1992). The Court did instruct the jury that Defendant's beliefs about the income tax laws, and specifically that his interpretation of § 861 exempted him from filing income tax returns, was incorrect as a matter of law, based on a number of court decisions including the Third Circuit's decision in United States v. Thurston Bell, 414 F.3d 474 (3d Cir. 2005). At the conclusion of the charge, the Defendant did not take exception to the charge on any point.

As had been noted at the trial, and as the Court charged the jury, Defendant could have raised all of his legal positions concerning § 861 by filing his tax returns, paying his tax, and then suing for a refund in this Court, and had no good reason for not doing so.

The Court felt that the jury verdict was fully supported by the evidence introduced by the government, that Defendant's testimony and arguments to the jury that he sincerely believed his § 861 argument, and therefore his conduct was not willful, were not credible, were inconsistent with his demonstrated animosity and hatred towards the IRS, and that the government had proven Defendant had no sound reason for failing to file income tax returns, except to violate the law.

III. The Court's Sentence Was Proper

At the time of sentencing, the Court indicated that because the Defendant had finally filed his back income tax returns and made a substantial deposit for his income tax liability, the Court would not make an upward departure from the sentencing Guideline range. At the sentencing

hearing, the Court considered evidence and arguments in which the government asked for a higher Guideline range and the Defendant sought a lower Guideline range, and a sentence outside the Guidelines. Defense counsel urged a period of home detention, indicating that the Defendant had learned his lesson and was not dangerous. The Court rejected this plea for leniency. The Court ruled on the appropriate Guideline range, and imposed a sentence at the low end of that range, of 15 months imprisonment, after the Court articulated its reasons.

The undersigned reviewed the factors under 18 U.S.C. § 3553(a) and noted, because of the significant notoriety and publicity which Defendant had purposely attracted to himself in his tax protestation efforts, that deterrence should be a major factor in the imposition of sentence and therefore a prison sentence within the appropriate Guideline range was appropriate for the Defendant and in the public interest.

Defendant's Motion for Release Pending Bail asserts that the Court improperly gave primacy to the Sentencing Guidelines, and the undersigned acknowledges that he did so, relying in part on United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).

Defendant also argues that the Court should have allowed a longer surrender period so that Defendant should not have to serve any time in the Federal Detention Center, but should be given sufficient delay in the start his sentence so that the Bureau of Prisons will have designated an institution where Defendant can directly report, which the Defendant hopes will be a minimum security institution (and which the Court did recommend).

Initially, the place of detention is not sufficient grounds to stay the beginning of the service of the sentence. Although the Court granted the Defendant a short period of delay, the Defendant did not have any right to any specific period to surrender. Given the lawlessness with

which the Defendant conducted himself, and which led to his conviction, the Court ruled that the sentence should start promptly, albeit not immediately after the imposition of sentence. The Court had notified defense counsel that Defendant should be prepared to start his sentence when it was imposed. The Court granted the Defendant the Thanksgiving holiday to be with his family and to prepare for his incarceration, but did not feel that a longer period of time was appropriate under all of the circumstances.

After a consideration of Defendant's arguments, the Court finds that the Defendant's arguments are not novel or debatable, and Defendant has not met the standards for release pending appeal under 18 U.S.C. §§ 3141(b) and 3141(c), as construed in United States v. Miller, 753 F.2d 19 (3d Cir. 1985). Although Defendant's conduct was not violent, and Defendant himself is not dangerous, he willfully ignored important laws which millions of his fellow citizens obey. The evidence of guilt was overwhelming, the trial was fair and Defendant should start to pay his penalty.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.