

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
ELLIS, SUSAN B,	)	CAUSE NO. IP06-0076-CR-01-H/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) CAUSE NO. IP 06-76-CR-1 H/F  
 )  
 SUSAN B. ELLIS, )  
 )  
 Defendant. )

ENTRY ON DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

A jury found defendant Susan B. Ellis guilty on eight counts of violating 26 U.S.C. § 7202 by failing to account for and pay over taxes withheld from employees' paychecks for eight consecutive calendar quarters from 2001 to 2003. On June 29, 2007, the court sentenced Ellis to a total of 63 months imprisonment followed by three years of supervised release. The court also imposed a total fine of \$1,184,423.74 and special assessments totaling \$800. Ellis has filed a notice of appeal and has moved for release pending appeal pursuant to 18 U.S.C. § 3143(b). The government opposes release. As explained below, the court denies the motion for release.

Under section 3143(b)(1), the court must deny the motion and order defendant detained pending appeal unless the court finds both:

(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.

The government does not contend that Ellis is likely to flee or that she poses a danger to the safety of other persons or the community. The court finds that Ellis has shown by clear and convincing evidence that she is not likely to flee or to pose a danger to the safety of any other person or the community if she is released pending appeal. The court also finds that defendant's appeal is not for the purpose of delay. She is facing a stiff sentence for serious crimes, and she is entitled to appeal.

The decisive issue is whether the appeal raises a substantial question of law or fact likely to result in reversal, a new trial, or a sentence with no imprisonment or imprisonment for a period less than the expected duration of the appeal. The Seventh Circuit has adopted a two-step approach in applying section 3143(b)(1)(B). “[W]hether a question is ‘substantial’ defines the *level of merit* required in the question presented and “likely to result in reversal or an order for a new trial” defines the *type of question* that must be presented.” *United States v.*

*Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985), quoting *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985) (emphasis in *Handy*). In determining whether a question is “substantial” as that word is used in section 3143(b)(1)(B), a district judge must essentially evaluate the difficulty of the question he or she previously decided. *United States v. Shoffner*, 791 F.2d 586, 589 (7th Cir. 1986). A “substantial” appeal is one that presents “a ‘close’ question or one that very well could be decided the other way.” *Id.*, quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985).

Ellis has identified five issues or clusters of issues that she says are substantial and likely to lead to reversal or a new trial under this standard. First, she contends the court erred by denying her pretrial request for discovery on her theories of misuse of the IRS’s civil summons authority, racially selective prosecution, and vindictive prosecution. See *United States v. Ellis*, 2007 WL 647497 (S.D. Ind. Jan. 24, 2007). Second, she contends the court erred by denying her motions *in limine* seeking to exclude evidence the court deemed relevant to the issue of willfulness. See *United States v. Ellis*, 2006 WL 3776379 (S.D. Ind. Dec. 20, 2006). Third, Ellis contends the court erred by denying her attorneys’ motion to withdraw eleven days before the trial. Fourth, she contends the court erred in its jury instructions on willfulness. Fifth, she contends the court erred in imposing the substantial fine as part of her sentence.

The court finds that none of the issues qualify as “substantial” within the meaning of section 3143(b)(1)(B); that is, the court did not and does not view any of the issues as close calls that could very well be decided the other way.

First, the defendant’s motion for discovery was not based on a colorable showing but was instead a classic fishing expedition. Ellis did not come forward with any real evidence of racial or other improper discrimination, vindictive prosecution, or improper use of civil investigative powers. See *Ellis*, 2007 WL 647497 at \*1, citing *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (holding that district court had abused discretion by ordering discovery relevant to theory of racially discriminatory prosecution).

With the benefit of the evidence presented at trial, the government’s case removes any room for argument that Ellis might have been singled out for prosecution on improper grounds. The government showed that in the eight calendar quarters in 2001 to 2003 covered by the indictment, Ellis withheld more than \$2,000,000 in federal taxes from her employees’ paychecks and kept the money for herself. What made this criminal prosecution nearly inevitable was the evidence showing that Ellis had done the same thing from 1996 through 1999, withholding federal taxes from her employees’ paychecks without paying any of that money over to the federal government. When those earlier failures came to the attention of her accountants and then the IRS, Ellis offered excuses and the government chose to invoke only civil sanctions against her. But just over a year

after that earlier problem was discovered, Ellis returned to her old habits. In the second quarter of 2001, she again stopped accounting for and paying to the government the federal taxes she was withholding from her employees' paychecks. That second round of failures led to the indictment. Further, Ellis has not identified any evidence offered against her at trial that was obtained by any supposed misuse of civil tax collection procedures. The decision to deny defendant's motion for pretrial discovery was not a close call.

Second, the court also does not view the denials of defendant's motions *in limine* as close calls. To prove the charges against Ellis, the government was required to prove beyond a reasonable doubt that Ellis acted willfully, meaning that she acted voluntarily and intentionally with the purpose of avoiding a known legal duty, *i.e.*, that she purposefully failed to do what she knew the law required her to do. Final Inst. 17; see also *Cheek v. United States*, 498 U.S. 192, 201 (1991). Willfulness turned out to be the only significant issue at trial. Ellis ultimately conceded that she was a person responsible for seeing that federal employment taxes were withheld, accounted for, and paid over to the federal government. She also conceded that she had failed to account truthfully for the funds and had failed to pay them over to the federal government. At trial she testified that she had not acted willfully because she had been busy and had forgotten to file the returns and to pay over the \$2,000,000 to the federal government over the period of two years and more than 100 payrolls. Her defense

necessarily implied, as well, that she had not noticed the extra \$2,000,000 in her bank accounts as a result of keeping the taxes withheld from employee paychecks.

Defendant's motions sought a pretrial ruling to exclude evidence of her earlier failures to account for and pay over federal withholding taxes from 1996 through 1999. She sought a ruling to exclude evidence that she had also failed to file individual and corporate income tax returns for ten years, including the period of the indictment. She also sought a ruling to exclude evidence of her personal expenditures during the indictment periods, including construction of a new mortgage-free mansion that cost a little more than the amount of taxes she withheld from employee paychecks and failed to pay to the United States. She also sought a ruling excluding evidence from Revenue Agent E. Woodrow Smith relating to her failure to pay the employer portion of FICA taxes.

The court explained its reasoning on these matters in detail in the entry of December 20, 2006, available at 2006 WL 3776379. The court did not view the questions as close at that time. After hearing the evidence and arguments at trial, the court adheres to that view. To meet its heavy burden of proving willfulness beyond a reasonable doubt, the government was entitled to show that the conduct charged in the indictment was part of defendant's broader and long-term pattern of disregard for tax laws. The overall pattern of related failures to meet her tax obligations and her substantial personal expenditures with the money withheld from employee paychecks helped the government show that her denials and

explanations were false. In light of the dispute over willfulness at trial, admission of evidence of the related conduct did not present close calls.

Third, the denial of defendant's second team of attorneys' motion to withdraw, filed just eleven days before the first day of trial, also does not present a substantial issue for appeal. The first trial date was continued at defendant's request when Ellis replaced her first team of attorneys. See Docket No. 13. The government did not object to that delay. Several months later, Ellis then moved for another delay of the trial to allow for a forensic psychological evaluation (no such testimony was ultimately offered at trial) and to complete trial preparation. The government objected strenuously. The court allowed the delay, even though the delay also had the unexpected effect of forcing the government to transfer the lead trial role to a different prosecutor. Then, on February 1, 2007, eleven days before trial, defendant's second team of attorneys moved to withdraw from the case on the ground that Ellis wished to hire a third team of attorneys.

The court held a hearing on the request to explore the reasons for the last-minute request. See *United States v. Miller*, 405 F.3d 551, 556-57 (7th Cir. 2005); *United States v. Huston*, 280 F.3d 1164, 1167 (7th Cir. 2002). The court found no good reason for the request. The change of counsel obviously would have required a further delay of the trial for at least several months while yet another team of defense attorneys got up to speed on the case. The court found that the defendant's request was in fact merely an effort at delay. The issue was not a

close call at the time, and the court finds that it does not present a substantial issue on appeal. Ellis is correct that she has a Sixth Amendment right to counsel of her choice. See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006). She exercised that right to hire excellent lawyers who made the best of a bad case. Her Sixth Amendment right did not extend to last-minute changes in counsel that would have caused prolonged delay and disrupted the schedules of the court, the government, and many witnesses, especially when she could offer no credible reason to justify such a disruptive change.

Fourth, defendant argues that the court's jury instructions on willfulness were erroneous and that the court should have instructed the jury on what she contends was a lesser included offense. The court's definition of willfulness closely tracked the language in the Seventh Circuit's pattern instructions for tax cases. See Federal Criminal Jury Instructions of the Seventh Circuit §4.09 (1999). The court's instructions on willfulness gave Ellis a fair trial on the issue. She had ample room to argue her defense theories to the jury, even though the court did not adopt some of the one-sided language in defendant's Proposed Instruction No. 10. The challenge to the willfulness instructions does not present a substantial question.

The lesser included offense theory also does not present a substantial question. The defense proposed that the court instruct the jury on the misdemeanor of failing to account for withheld taxes under the provisions of

26 U.S.C. § 7512 and 7215(a). That charge does not require proof of willfulness. The court rejected the defense proposal because the misdemeanor charge requires proof of an additional element not required under 26 U.S.C. § 7202. The extra element in the misdemeanor charge is that the defendant must have been “notified, by notice delivered in hand to such person, of any such failure” to account for the withheld taxes. 26 U.S.C. § 7512(a)(2). The additional element defeats the argument that the misdemeanor charge would have qualified as a lesser included offense in this case. See *Schmuck v. United States*, 489 U.S. 705, 716 (1989) (adhering to “elements” test, so that “one offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense”), affirming *United States v. Schmuck*, 840 F.2d 384, 387 (7th Cir. 1988) (*en banc*) (adhering to traditional “elements” test for lesser-included offense).<sup>1</sup>

Fifth, Ellis argues that the court erred by imposing a fine well above the applicable range in the Sentencing Guidelines. The guideline fine range for offense level 24 is \$10,000 to \$100,000. U.S.S.G. § 5E1.2(c)(3). The court imposed a total fine of \$1,184,423.74. That amount was the total amount of unpaid employee withholding taxes for the eight calendar quarters covered by the

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<sup>1</sup>Under defendant’s lesser-included offense theory, the jury would have been required to acquit Ellis on the misdemeanor charges because the government did not give her the hand-delivered notices required under 26 U.S.C. § 7512(a)(2). Under the charges in the indictment, the government was not required to provide such notices, but instead took on the much heavier burden of proving willfulness.

indictment, less amounts that Ellis had paid the government the week before the trial.

This argument does not justify release pending appeal. First, of course, even if the court had erred in imposing the fine, the remedy for such an error should not affect the prison sentence. Second, on the merits, the question is not substantial. The court imposed the higher fine because the court accepted defendant's argument that the court could not order restitution as part of the sentence of an offense under Title 26 of the United States Code. See *United States v. Hoover*, 175 F.3d 564, 569 (7th Cir. 1999), following *United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998) ("Notably, the VWPA does not authorize a court to order restitution for Title 26 offenses – tax offenses."). The Sentencing Guidelines authorize an above-guideline fine where a fine within the guideline range "would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (*e.g.*, by restitution or forfeiture) and an adequate punitive fine." U.S.S.G. § 5E1.2 App. Note 4. In light of *Hoover* and *Minneman*, that is precisely the case here. That is why the court imposed the fine that it did, as should be evident from the transcript of the sentencing hearing.

Finally, Ellis has argued that the court should allow her to remain free pending appeal to give her still more time to try to sell her business and organize her financial affairs. She argues that more time would make it more likely that

she will be able to pay the fine. Ellis was convicted in mid-February. It is now nearly six months later, in early August. She has had ample time to take those steps, which are not relevant under section 3143 in any event.

Accordingly, the court finds that defendant's appeal does not raise a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced prison sentence shorter than the expected duration of the appeal process. Defendant's motion for release pending appeal is hereby denied.

So ordered.

Date: August 2, 2007

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

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