

IP 06-0139-CR 1 H/N USA v Hagerman
Judge David F. Hamilton

Signed on 12/28/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
HAGERMAN, DERRIK,)	CAUSE NO. IP06-0139-CR-01-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CAUSE NO. IP 06-139-CR-1 H/N
)
 DERRIK HAGERMAN,)
)
 Defendant.)

ENTRY ON MOTION FOR RELEASE PENDING APPEAL

Pursuant to 18 U.S.C. § 3143(b)(1), defendant Derrick Hagerman has moved to stay execution of his sentence pending appeal. Hagerman was convicted on ten counts of making false statements under the Clean Water Act in violation of 33 U.S.C. § 1319(c)(4). On November 15, 2007, the court sentenced him to 60 months in prison. See *United States v. Hagerman*, — F. Supp. 2d —, 2007 WL 4334232 (S.D. Ind. Nov. 28, 2007) (written entry documenting reasons for sentence). The court denies Hagerman’s motion for release pending appeal and provides this written explanation to comply with Rule 9(b) of the Federal Rules of Appellate Procedure. See *United States v. Swanquist*, 125 F.3d 573, 575 & n.2 (7th Cir. 1997) (remanding for immediate statement of reasons for denial).

Hagerman’s crimes were not violent and did not involve drug distribution. He has been released on standard conditions during the pendency of his case. He

satisfies the requirements of 18 U.S.C. § 3143(b)(1)(A) in that he is not likely to flee or to pose a danger to the safety of any other person in the community if he is released pending appeal. Nor does the court find that an appeal by Hagerman is for the purpose of delay. He has every right to appeal.

Under section 3143(b)(1), the controlling issue here is whether the appeal raises a substantial question of law or fact likely to result in reversal, a new trial, a sentence without prison time, or a reduced sentence for less prison time than the expected duration of an appeal. To meet this standard, the question must be close, so that the appeal could readily go either way; the question must be “a toss-up or nearly so.” *United States v. Greenberg*, 772 F.2d 340, 341 (7th Cir. 1985); see also *United States v. Shoffner*, 791 F.2d 586, 588-90 (7th Cir. 1986) (reversing grant of release pending appeal where district court had not viewed questions as substantial under this standard); *United States v. Bilanzich*, 771 F.2d 292, 297-98 (7th Cir. 1985) (affirming denial of release pending appeal). The defendant has the burden of showing that he satisfies the statutory requirements. See *United States v. Henningsen*, 402 F.3d 748, 751 (7th Cir. 2005); *United States v. Ashman*, 964 F.2d 596, 598 (7th Cir. 1992). Hagerman has identified six issues he intends to raise on appeal, though he has not developed any arguments at this point. None of the issues satisfy the standard under section 3143(b)(1).

The first issue is whether the court erred in denying Hagerman a third continuance of the trial so that he could try to raise money to hire a private

attorney. Even if Hagerman had succeeded in hiring a private lawyer for trial, that step probably would have delayed the trial another six months or more to give a new attorney time to prepare. That issue was fully explored in a hearing on April 25, 2007, and the court's decision is subject to review for abuse of discretion. The continuance issue does not present a close question.

The second issue is whether the jury's verdict was supported by sufficient evidence. It clearly was. The evidence against Hagerman was overwhelming. See generally *United States v. Hagerman*, — F. Supp. 2d at —, 2007 WL 4334232, at *2, *4. This issue also does not meet the statutory standard.

The third issue is whether the court erred in giving Court's Final Instruction No. 14, which stated:

The National Pollutant Discharge Elimination System permit ("NPDES" permit issued to Wabash Environmental Technologies and the MMRs and DMRs for reporting monitoring results require that any person signing a monitoring report make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations.

The phrase “properly gather and evaluate the information submitted” means that the information was gathered and evaluated in accordance with the terms and conditions of the NPDES permit, which includes the requirement that the analytical and sampling methods used conform to applicable federal regulations.

As a matter of law, it would not be a defense that a defendant believed that he was reporting results that were true, accurate, and complete, unless the defendant also believed that the results were analyzed and sampled in conformity with the methods listed in the applicable federal regulations.

During the instruction conference, the court described the issue as “a fairly interesting and significant issue on appeal in the event of a guilty verdict.” Tr. 538. Hagerman has focused on that comment to argue that the issue justifies release pending appeal.

The court made that comment to the prosecutor in the context of a case that did not yet seem to present any significant appealable issue, as the court probed how much the prosecutor wanted the requested language. After a short recess to reflect on the issue, the court concluded that the government was correct and that it would not be a defense to the Clean Water Act prosecution that the defendant carried out or supervised test results using his own preferred unofficial test method and then accurately reported the results of that method. Tr. 542-43. The court does not view that question as close or as a “toss-up,” though from this court’s perspective, it appeared then and appears now to be the most substantial issue that Hagerman can raise on appeal.

The fourth, fifth, and sixth issues challenge the sentence: whether the court erred in calculating the applicable sentencing guidelines, in deciding not to impose a non-guidelines sentence, and in considering applicable factors under 18 U.S.C. § 3553(a). These issues also are not close and do not justify a stay pending appeal. The court explained the reasons for the guideline calculations and the final sentence in detail both orally and in the written entry. Hagerman has not raised a substantial question for appeal on the sentence. See *Gall v. United States*, 552 U.S. — (2007) (applying reasonableness review to sentence).

Accordingly, the court denies Hagerman's motion for stay of sentence pending appeal.

So ordered.

Date: December 28, 2007

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

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