UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 5:06-cr-22(S1)-Oc-10GRJ

WESLEY TRENT SNIPES

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT SNIPES' MARCH 20, 2009 MOTION FOR LIMITED TRAVEL FOR WORK OBLIGATIONS

The United States of America, by and through the undersigned attorneys for the United States, opposes defendant Snipes's March 20, 2009 Motion for Limited Travel for Work Obligations. (Doc. 509.) Defendant Snipes's current motion is purported to be for "Limited Travel for Work Obligations" to Namibia from April 5 to April 29, 2009, id. at 2, for more filming on "Gallowwalker;" and then on to Torino, Italy, from May 4 to August 15, 2009, to film "Game of Death." [1] Id. at 3. Defendant Snipes accordingly requests that he be allowed outside the United States for 19 weeks; i.e., almost 5 months. In support of the current travel request, defendant Snipes's motion recites prior foreign trips permitted by the Court. However, defendant Snipes fails to mention his most recent international travel, and the fact he was ordered by this Court to return to the United States and turn in his passport, due to his unauthorized travel to Dubai, in the United Arab Emirates.

I

On July 2, 2008, the Court granted Snipes's June 25, 2009 Motion for Limited Travel for Work Obligations (Doc. 486) wherein he asked to be allowed to travel to London, England from July 13, 2008 through July 17, 2008, for post-production editing

[1] Although in paragraph 7 defendant Snipes asks to travel to Namibia for April 5-29 and Italy after that through August 15, the "wherefore" clause of the motion does not mention the Namibia trip or dates.

on the film "Gallowalker." (Doc. 491 at 3.) Defendant Snipes further requested to be allowed to travel to Bangkok, Thailand, for the filming of "Chasing the Dragon" for "approximately eight weeks," id. at 3, beginning September 8, 2008, "to return upon completion of filming." Id. at 4. But defendant Snipes did not return to the United States from Thailand "upon completion of filming." Instead, defendant Snipes traveled from Thailand to Dubai, in the United Arab Emirates -- a distance of some 2,000 miles -- to attend what was described in some media accounts as "the party of the decade." That defendant Snipes was partying in a foreign country while appealing a sentence imposed by this court was widely reported by the media. See e.g., Despite Economic Gloom, Dubai Parties in Style, Jerusalem Post, Nov. 30, 2008, at 8, available at 2008 WLNR 22999282 (describing attendance by 2,000 guests, including defendant Snipes and other "celebrities and stars" at the $20 million party for the November 20, 2008 opening of the $1.5 billion Atlantis Hotel.) Indeed, defendant Snipes was photographed entering the event. [2]

After Snipes's unauthorized trip to the United Arab Emirates, the Court (Antoon, J.) found it necessary to order him to return to the United States and surrender his passport.[3] See Dec. 4, 2008, Order Granting Petition for Action on Conditions of Pretrial Release (Doc. 505.) Apparently, the Court was required to take such action because defendant Snipes contended that the Court's Order of July 2, 2008 did not limit his travel. (Dec. 3, 2008, Pretrial Services Office Report of Apparent Violation at 1.) In fact, the Court's July 2, 2008 Order did limit defendant Snipes's travel, because it

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[2] See Exhibit 1, In Pictures: Atlantis Hotel party, BBC News, Nov. 21, 2008, available at http://news.bbc.co.uk/newsbeat/hi/entertainment/newsid_7741000/7741908.stm.

[3] Defendant Snipes's unauthorized travel to Dubai was discovered due to widely distributed media reports. The United States respectfully suggests that an examination of the endorsements on defendant Snipes's passport might reveal additional unauthorized international travel.

granted a motion styled as being for “Limited Travel for Work Obligations” (Doc. 486 at 1.) That motion specifically named England and Thailand as the destinations of “limited travel” where the “work obligations” were to be fulfilled. That motion made no mention of the travel to the Middle East for recreational purposes actually undertaken by defendant Snipes. Thus, defendant Snipes's assertion (at ¶11) that he has “lived up to the trust the Court has shown in him” is incorrect. Defendant Snipes abused the Court's trust, and did so in a very public way. For that reason alone, the Court should deny his current request for international travel.[4]

II

Defendant Snipes suggests that the Eleventh Circuit will not render a decision on his appeal prior to August 15, 2009.[5] (Motion, ¶10.) The United States cannot opine on this topic with the certainty expressed by defendant Snipes, but observes that the median time for the disposition of appeals in the Eleventh Circuit from the filing of the

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[4] There are additional and independent reasons for denying the current request for foreign travel. Defendant Snipes's prior trips to Namibia were in accordance with contractual obligations that he apparently entered into prior to being indicted. Defendant Snipes does not even allege that his current request to go to Namibia is mandated by a contractual obligation, as opposed to, for example, a discretionary decision on his part to reshoot scenes already filmed. See Motion, ¶7 (without a contractual obligation being alleged, defendant Snipes states the purpose would be a "reshoot of several scenes"). Though defendant Snipes does allege that his request to travel to Italy is motivated by a contractual obligation, defendant Snipes does not identify when he assumed that contractual obligation. Defendant Snipes was indicted in 2006, convicted in February of 2008, and sentenced in April of 2008. The current motion suggests that defendant Snipes assumed an obligation to make a movie outside the United States during a period when he had no reasonable expectation of being able to do so.

[5] In that circumstance, of course, defendant Snipes would be in a foreign country when his 3-year sentence is affirmed. Notably, the Republic of Namibia has become known as a haven for international fugitives. See, e.g., Michael Powell, Tips for the Sophisticated Fugitive, New York Times, Mar. 22, 2009 at 5, available at 2009 WLNR 5394213 (describing the case of Jacob Alexander, a fugitive on wire and securities fraud charges brought by the United States in 2006); see also, Robyn Dixon, Africa's Land of Sand and Fugitives, Los Angeles Times, Dec. 8, 2006 at 5, available at 2006 WLNR 21199485 (describing the successful resistance to extradition of Hans Koch, a fugitive on fraud and tax evasion charges brought by Germany).

notice of appeal (August 21, 2008 here) to disposition is 9.3 months. See U.S. Court of Appeals Caseload Profile 2008, at http://www.uscourts.gov/cgi-bin/cmsa2008.pl. If that median applied with respect to defendant Snipes's relatively straightforward appeal, the Eleventh Circuit would render a decision by the end of May. Regardless of the timing of the Court of Appeals' decision, the filing of the appellate briefs demonstrates that defendant Snipes is no longer entitled to bail pending appeal, much less foreign travel pending appeal.

A. Showings Necessary for Bond Pending Appeal

The statutory provision governing bond pending appeal, 18 U.S.C. § 3143(b), presumes that a defendant's convictions are valid and that a defendant should be detained without bond. United States v. Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985). A federal court therefore must detain a defendant who has been found guilty of an offense and sentenced to a term of imprisonment pending the defendant's appeal unless the defendant overcomes the presumption by showing:

(1) by clear and convincing evidence, that the defendant is not likely to flee or to pose a danger to the safety of any other person or to the community if released;

(2) that the defendant's appeal is not for the purpose of delay;

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

(4) that resolution of this question is likely to result in

(i) reversal of all counts of conviction on which imprisonment has been imposed,

(ii) an order for new trial of all counts on which imprisonment has been imposed,

(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.

18 U.S.C. § 3143(b)(1); Giancola, 754 F.2d at 901. "[A] 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." Giancola, 754 F.2d at 901; accord United States v. Fernandez, 905 F.2d 350, 354 (11th Cir. 1990).

On May 22, 2008, the court granted Snipes's motion for release. (Doc. 475.) The portion of the opinion addressing whether Snipes's issues on appeal were "substantial" reads as follows:

> Obviously, having denied the [defendant's] motions asserting the issues he intends to raise on appeal, the Court is dubious as to the "substantiality" of those issues for purposes of appellate review. Nevertheless, the Court recognizes that the offenses of conviction are misdemeanor offenses, not felonies, and that the time required for the disposition of an appeal may well equal -- or nearly equal -- the length of the term of commitment imposed. Additionally, the Court is not prepared to say that the issues on appeal are patently frivolous or asserted merely for purposes of delay.

(Doc. 475 at 1-2.) The United States respectfully submits that, now that the parties have filed their principal appellate briefs in the Court of Appeals, the record establishes that Snipes's appeal does not raise a substantial question of law or fact with respect to his convictions or his sentence. Even if this Court is not inclined to revoke Snipes's bail pending appeal, the lack of merit as to Snipes's appeal warrants this Court's denying the current motion for foreign travel.

B. Defendant Snipes fails to raise a substantial issue with regard to the denial of his tardy venue election, especially because a timely election would not have resulted in a transfer to the Southern District of New York

Section 3237(b) provides that if a section 7203 prosecution is begun in a judicial district other than the district where the defendant resides, the defendant "may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information." 18 U.S.C. § 3237(b) (emphasis in original.) Defendant Snipes, who was arraigned on the § 7203 failure to file charges on December 8, 2006 (Doc. 58), did not seek to invoke the statutory transfer election until June 4, 2007 (Doc. 144), more than five months after the 20-day statutory period ended. The court denied the motion, ruling that the election was untimely and that the disputed issue of whether Snipes's legal residence during the prosecution period was in New York or in Florida was a factual issue required to be resolved by the jury. (Doc. 188.)

The court correctly denied defendant Snipes's transfer election under 18 U.S.C. § 3237(b) as being untimely. The 20-day election period is unambiguous and the court did not err in enforcing it. See Alaska N. R. Co. v. Municipality of Seward, 229 F. 667, 671 (9th Cir. 1916) ("provided" is expression of congressional intent "to withhold something out of that which in general terms has been granted"). Moreover, defendant Snipes's challenge to the enforcement of the 20-day period is clearly insubstantial because any error in the enforcement of the time requirement would be harmless. See Fed. R. Crim. P. 52. The jury, which received instructions on venue (D395 at 1-2; D406 at 184-86; D416 at 18-19), properly found that defendant Snipes's residence at the time of the charged offenses was in the Middle District of Florida. Because the prosecution was brought "in the district in which [Snipes] was residing at the time the alleged offense

was committed," 18 U.S.C. § 3237(b), even a timely transfer election would not have benefitted him.

Defendant Snipes challenges the jury's finding that his legal residency during the prosecution years was within the Middle District of Florida. That argument will be reviewed by the Court of Appeals for plain error, because defendant Snipes did not raise that issue in his motion for judgment of acquittal, which moved for judgment on only the false claim charge and the failure-to-file charge for 1999 based upon the statute of limitations. D389; D400 at 56-57; D405 at 3-7. Defendant Snipes cannot demonstrate any of the plain-error prerequisites for reversal. The jury was properly instructed on venue (D405 at 55; D406 at 184-86; D416 at 18-19) and there was ample evidence upon which the jury could have based its finding. Defendant Snipes owned a home in Windermere, which is in the Middle District of Florida. D381 at 140-42; GX2-1. Defendant Snipes has a Florida driver's license and listed that Windermere address for renewals for 1997-2004 and 2004-2010. GX1-1-GX1-3. Defendant Snipes, through his companies, represented and warranted that his "current place of residence is Windermere" in the "Blade I," "Blade II," and "Blade III" contracts he signed in 1996, 2002, and 2003. GX71-1-GX71-3. Defendant Snipes filed documents with the Comptroller of Orange County, Florida, identifying his Windermere address as his home, seeking a homestead tax exemption for that home, stating that he had "taken up dwelling" in that home, and averring that it was his "permanent," "predominant," and "principal" home even if he bought houses elsewhere. GX2-1-GX2-4. Defendant Snipes sent numerous documents to the IRS and other entities in which he listed his Windermere address as his address. GX58; GX87-1; GX87-2; GX87-4; GX87-8; GX117-GX119. In sum, Defendant Snipes raises no substantial issue as to the jury's finding of proper venue.

In an attempt to bypass the jury's finding of proper venue, defendant Snipes argues that the court abused its discretion by declining to hold a pretrial evidentiary hearing on his motion to transfer the case, contending that he had a right to have the court decide before trial the disputed issue of his residency. But the court acted pursuant to longstanding precedent by submitting that disputed factual issue to the jury. Venue is an "essential element[] of any offense," United States v. Rivamonte, 666 F.2d 515, 517 (11th Cir. 1982), and a disputed issue of venue is a question of fact for the jury to decide. Green v. United States, 309 F.2d 852, 856-57 (5th Cir. 1962); United States v. Muhammad, 502 F.3d 646, 656 (7th Cir. 2007). "[A] court may not dismiss an indictment . . . on a determination of facts that should have been developed at trial." United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987).

Defendant Snipes attempts to strengthen his argument for a pretrial evidentiary hearing by contending that adjudicating venue at trial meant that he could not testify about his residency without giving up his right not to incriminate himself.[6] For that argument, defendant Snipes cites Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968), in which the Court held that, to prevent a defendant from being deterred from asserting his Fourth Amendment rights, his testimony as to standing at a suppression hearing was inadmissible against him at trial. Simmons, 390 U.S. at 394, 88 S. Ct. at 976. Defendant Snipes's contention is plainly insubstantial given that he never sought to offer his testimony in his requests for pretrial evidentiary hearings, never requested judicial immunity to do so, never proffered what his testimony would be, and never put on evidence of residency at trial through other sources. See generally D192; D282; D328. His contention also fails because the Eleventh Circuit Court of Appeals has declined to extend Simmons in recognition that "Simmons . . . has

[6] The unstated linchpin for defendant Snipes's argument is that this court would have determined, contrary to the jury's determination, that Snipes's legal residency was in the Southern District of New York, if only it had heard him testify.

been considerably narrowed and its reasoning questioned." In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992).

In sum, defendant Snipes raises no substantial question as to his convictions.[7]

C. Defendant Snipes fails to raise a substantial argument that he could receive a term of imprisonment less than the expected duration of the balance of the appeal process

Defendant Snipes fails to demonstrate that he could receive a term of imprisonment less than the expected duration of the appeal process. Defendant Snipes argues that the Sentencing Guideline under which he was sentenced, USSG § 2T1.1, is invalid, on the ground that the Sentencing Commission, in promulgating that guideline to apply to both misdemeanors and felonies, did not comply with 28 U.S.C. § 994(j), which directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a . . . serious offense." But the Eleventh Circuit Court of Appeals already has held that the Commission followed the directive in section 994(j) when it promulgated the guidelines, see United States v. Erves, 880 F.2d

[7] Defendant Snipes argues that the court committed reversible error in declining to give his requested jury instruction on good faith reliance upon the Fifth Amendment, but that argument is plainly without merit. This court gave two good faith instructions requested by Snipes, a general good faith instruction and a good faith reliance on counsel instruction. (D381 at 14-15; D405 at 39; D406 at 186-87; D416 at 20.) Defendant Snipes argues that the court abused its discretion by not giving a third good faith instruction, one that specifically referenced a good faith reliance on the Fifth Amendment. But the good-faith-reliance-on-the-Fifth-Amendment instruction was otherwise addressed by the general good faith instruction that was given. Notably, in his closing, Snipes's counsel read the willfulness instruction and the general good faith instruction to the jury and argued repeatedly that Snipes's failures to file returns had not been willful because Special Agent Lalli had advised him that he had a right to remain silent, and defendant Snipes had believed in good faith, based upon that advice, that he had a right not to file returns. D406 at 63, 70-71, 75-76, 90, 92-96, 116-17. Apparently accepting his defense, the jury acquitted defendant Snipes of the charges for returns due after Agent Lalli's advice and found him guilty only of the failure-to-file crimes that had occurred before that advice. Accordingly, with respect to the counts of conviction, defendant Snipes clearly raises no substantial issue of fact or law.

376, 380 (11th Cir. 1989), and this court found that Snipes's crimes were, in fact, serious. (D461 at 44, 83.)

Defendant Snipes argues that the court clearly erred in imposing an obstruction-of-justice enhancement pursuant to USSG §3C1.1 based upon his instruction to Carmen Baker not to respond to a grand jury subpoena for documents of Amen RA Films and threatening her with recourse if she did so. But the enhancement was properly applied. See United States v. Dukes, 153 F. App'x 591, 595 (11th Cir. 2005) ("Encouraging a witness not to cooperate with an investigation may justify application of an obstruction enhancement"); United States v. Rudisill, 187 F.3d 1260, 1263-64 (11th Cir. 1999) (upholding enhancement for defendant who encouraged witness to flee rather than comply with grand jury subpoena); United States v. Garcia, 13 F.3d 1464, 1471 (11th Cir. 1994) (upholding enhancement for defendant who brought witness into freezer and asked him not to speak to FBI agents).

Defendant Snipes argues that the court violated his Sixth Amendment rights by relying upon judicial fact findings of tax loss, non-conviction misconduct, and obstruction of justice to determine his advisory sentencing guidelines range, contending that his sentence could not be deemed reasonable absent those findings. But that argument is foreclosed by United States v. Booker, which permits reliance upon extra-verdict findings in the non-mandatory guidelines regime. 543 U.S. 220, 259-60, 125 S. Ct. 738, 764-65 (2005); accord United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005).

Defendant Snipes argues that the court abused its discretion in sentencing him to serve 36 months' imprisonment. But the court acted well within its broad discretion, especially given Snipes's history of contempt for tax laws, the substantial tax loss, his threats and false allegations against IRS employees, his inundation of the IRS with obstructive and frivolous correspondence, his apparent lack of remorse for his crimes

and continued portrayal of himself as a victim, the need to promote respect for tax laws, and the need to deter others from not filing their returns or paying taxes.

In sum, the record establishes that defendant Snipes does not satisfy the requirements under 18 U.S.C. § 3143(b)(1) for release pending appeal.

WHEREFORE, the United States respectfully requests that the Court deny defendant Snipes's March 20, 2009 Motion for Limited Travel for Work Obligations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participant(s):

Counsel for Wesley Trent Snipes:
Daniel R. Meachum
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I hereby certify that on March 24, 2009, a true and correct copy of the foregoing will be mailed to the following non-CM/ECF participant(s):

N/A

s/ Jeffrey A. McLellan
JEFFREY A. MCLELLAN
Trial Attorney