LEXSEE 1990 U.S. Dist. LEXIS 2631

UNITED STATES OF AMERICA, v. WILLIAM J. BENSON, Defendant

No. 87 CR 278

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1990 U.S. Dist. LEXIS 2631

March 6, 1990, Decided

OPINIONBY:
[*1]

PLUNKETT

OPINION:

MEMORANDUM OPINION AND ORDER

PAUL E. PLUNKETT, UNITED STATES DISTRICT JUDGE

Defendant William J. Benson has filed five post-trial motions in this case. They are as follows: (1) a motion to dismiss the indictments and vacate the convictions for lack of subject matter jurisdiction; (2) a motion to dismiss or, in the alternative, a motion for a new trial; (3) a motion to arrest the judgement; (4) a motion to vacate the conviction on Count II as being a lesser included offense of Count III; and (5) a motion for a new trial for failure of the government to comply with *26 U.S.C. § 6103*(h)(5). For the following reasons, all of defendant's motions are denied.

1. Motion to Dismiss the Indictments and Vacate the Convictions for Lack of Subject Matter Jurisdiction.

Defendant argues that this court lacks subject matter jurisdiction over this case because of the failure of the Internal Revenue Service (IRS) to comply with certain provisions of the Administrative Procedure Act (APA) with respect to alleged publication requirements regarding its organizational structure, IRS Form 1040, and the instructions pertaining to Form 1040. The defendant was convicted for willfully failing **[*2]** to file income tax returns for the years 1980 and 1981 and with willfully attempting to evade the ascertainment of his tax liability for the year 1981. The crux of defendant's argument is that his conviction must necessarily be based upon his failure to file IRS Form 1040, and that Form 1040 (the form that all taxpayers must file with the IRS) and its accompanying instructions was not published by the IRS or the Department of the Treasury in the Federal Register as defendant says is required under *5 U.S.C. § 552*. Defendant claims that this "administrative lapse" divests this court of its ability to enforce the criminal tax provisions of Title 26.

We disagree. Defendant has misstated the scope and effect of the Administrative Procedure Act. The purpose of the APA is to "set up procedures which must be followed in order for agency rulings to be given force of law." *Notch v. United States, 212 F.2d 280, 283 (9th Cir. 1954)* (emphasis added). Defendant was not charged with (and was not convicted of) a regulatory violation. He was charged with and convicted of tax evasion under *§ 7201 of Title 26*, a congressionally enacted statutory offense. Defendant cites no cases to support his **[*3]** contention that the APA can be used to bar criminal prosecutions for statutory offenses set out under Title 26. The cases the defendant relies upon deal with criminal penalties which arise directly from the violation of regulations. See United States v. $ 200,000 in *U.S. Currency, 580 F.Supp. 866 (S.D. Fla. 1984); United States v. Reinis, 794 F.2d 506 (9th Cir. 1986)* (both cases address prosecutions brought under money-laundering statutes which specifically left regulation of the offenses in question to the Secretary of the Treasury). When criminal penalties arise directly from the violation of regulations, such regulations must pass muster under the APA. We find that language of *26 U.S.C. § 7201* plain. Defendant was not charged with a regulatory violation, but with the statutory crime of willful tax evasion. n1 We clearly have subject matter jurisdiction.

n1 A similar claim was rejected in *Hudgins v. I.R.S., 1985 WL 543 (D.D.C. 1985)* (Westlaw, Tax Library). The plaintiff in Hudgins sought injunctive relief against assessment of a tax, claiming that the IRS Form Notice 560 was invalid because it was not published in the Federal Register. The court dismissed the claim stating that no law required publication of the forms, and the Federal Register lists the places where the forms may be obtained, "which is all the publication of the notice required by *5 U.S.C. § 552*(a)(1)(C)." *1985 WL 534.* See also *Oakes v. I.R.S., 1987 WL 10227 (D.D.C. 1987)* (Westlaw, Tax Library).

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2. Motion to Dismiss or, in the Alternative, Motion for a New Trial.

Defendant also moves for the dismissal of this case as a sanction for prosecutorial misconduct or, in the alternative, for a new trial. Defendant's motion is denied.

A. Prosecutorial Misconduct.

Defendant claims prosecutorial misconduct on three grounds: first, the prosecutors failed to correct false testimony; second, that the prosecutors improperly cross examined the defendant; and third, that the prosecutors gave improper rebuttal argument. We disagree that the prosecutors violated their duty to correct false testimony. If a prosecutor presents testimony that the prosecutor knows to be false, then that prosecutor has violated the due process rights of the defendant. See *Alcorta v. Texas, 355 U.S. 28, 31 (1957); Ross v. Heyne, 638 F.2d 979, 985 (7th Cir. 1980).* Defendant claims that four witnesses -- Minardi, Dunn, Rhoades, and Petit, testified falsely. Maybe they did, maybe they didn't. Conflicting testimony is present in virtually every case that goes to trial. That does not mean that in every case on party is presenting testimony they know to be false. The prosecutors let each of those four **[*5]** witnesses tell their story on direct examination. The defendant's attorney's had ample opportunity to cross-examine each witness and made proficient use of that opportunity. Defendant pointed out inconsistencies where he could prove they existed. The jury evaluated all of the testimony and convicted the defendant. The government did nothing wrong by letting these witnesses testify as they did in this case.

In addition, there was nothing improper about the cross-examination of the defendant. The prosecutor was cross-examining a hostile witness, and need not use kid gloves. There was nothing close to the bullying and arguing that was found improper in *Berger v. United States, 295 U.S. 78, 84 (1935).* The defendant had every opportunity to "correct" (on redirect) what he perceives to be misimpressions received by the jury as a result of the cross-examination. There was no prosecutorial misconduct. Whenever we felt the behavior of the prosecutors was in any way improper, we admonished the prosecutor in front of the jury and told the jury to disregard the remark where appropriate.

We also find there to be nothing improper about the rebuttal argument. During rebuttal, the prosecutor **[*6]** referred only to evidence he had elicited at trial and evidence elicited by the defense. The only questionable element to the rebuttal concerned the prosecutor's reference to defendant's medical condition. In response, we admonished the jury to disregard any statements made during the rebuttal argument concerning the state of the evidence about defendant's current medical condition. In our view that cured any defect arising from those comments. Any other comments by the prosecutor on rebuttal were proper. In sum, there was no prosecutorial misconduct in this case which justifies any post-trial relief.

B. Verdict Against Weight of Evidence.

Defendant's alternative motion is for a new trial on the grounds that the verdict was against the weight of the evidence. The defendant argues that we should sit as a "thirteenth juror" in this case to evaluate witness credibility. We disagree, and so has the Seventh Circuit: "[A]bsent exceptional circumstances, issues of witness credibility are to be decided by the jury, not the trial judge." *United States v. Kuzniar, 881 F.2d 466, 470 (7th Cir. 1989).* In Kuzniar, the Seventh Circuit reversed a district court's decision to overturn the **[*7]** jury's verdict, noting that a trial court's ability to overturn a jury's determination is extremely limited and "can be invoked only where the testimony contradicts indisputable physical facts or laws." *Id. at 471.* The defendant today presents us with his version of the "proper" way to analyze all of the testimony (and credibility) in the trial. However, that is the jury's function, and the jury disagreed with defendant's analysis and agreed with the government's. There is nothing exceptional in this case which would justify our overturning of the jury verdict in this case. Given all of the testimony in this case, the jury's verdict was at least reasonable.

3. Motion to Arrest Judgement.

Here defendant argues that we should arrest the judgement of his conviction on all counts because the indictments do not charge an offense. Defendant asserts that the indictment failed to set forth the specific provision of Title 26 that imposed a tax on the defendant and, in addition, that Count II was duplicitous because it

did not provide notice of the specifics of the fraud against he Social Security Administration (SSA).

We disagree. First, we find that the reference in the indictment **[*8]** to Sections 7201 and 7203 do charge and state an offense. n2 Second, Count II is not duplicitous because the defendant was not charged with committing a fraud against the SSA. True, some of the taxes which defendant evaded under Count II arose because defendant defrauded the SSA. However, that fact alone does not mean that Count II states two separate legal crimes. Count II state only one crime - failure to file. Defendant's motion is denied.

n2 We disagree with defendant that *United States v. Menk, 260 F.Supp. 784 (S.D. Ind. 1966)* holds otherwise - it does not. It held that the indictment in front of it was valid. To the extent it commented on other potential indictments not before the court it was dicta. Either way, we disagree with defendant's view of Menk. Even if we did agree with defendant's view of what Menk's holding was, we would then disagree with Menk and still hold the indictment states and offense.

4. Defendant's Motion to Vacate Conviction on Count II as a Lesser Included Offense of Count III.

Defendant argues that his convictions on both Counts II and III violate the double jeopardy clause of the Fifth Amendment because Count II (failure to file **[*9]** a tax return for 1981 in violation of § 7203) constitutes a lesser included offense of Count III (tax evasion for 1981 in violation of § 7201). This precise argument has been considered at length by the Seventh Circuit and rejected in *United States v. Foster, 789 F.2d 457, 460 (7th Cir. 1986)*. We are bound by Foster. Defendant presents no new argument, either legal or factual, to distinguish the applicability of Foster to his case. n3 The motion is denied.

n3 Defendant argues that Foster is in direct contradiction to the decision of the United States Supreme Court in *Sansone v. United States, 380 U.S. 343, 347-50 (1965)*. While Sansone does talk generally about the "lesser included offense" standard, defendant presents us with the identical issue that the Seventh Circuit ruled on in Foster. We are persuaded that we are bound by Foster. It is for a court wiser than our own to determine whether or not the Seventh Circuit's decision in Foster violates a Supreme Court case. For today's purposes, we find that it does not.

5. Motion for New Trial for Failure of Government to Comply with the Provisions of *26 U.S.C. § 6103*(h)(5).

In this motion, **[*10]** defendant argues that the government failed to comply with the provisions of *26 U.S.C. § 6103*(h)(5) and our orders in connection with the disclosure of IRS information concerning audits or examinations of prospective jurors. We have previously ruled on this exact issue on the day we began the jury selection process, and we ruled that the IRS did comply with the statute by searching its records concerning the jury venire and by providing that information to the defense. There is nothing new in defendant's argument that we did not consider in our earlier ruling. The motion is denied.

Conclusion

For the above reasons, all of defendant's post-trial motions are denied.

DATED: March 6, 1990