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DAVID FOLEY

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	Ninth Cir. Nos. 14-10055, 14-10056
)	[N. Dist. Nos. CR 09-00670 EJD,
Plaintiff-Appellee,)	CR 11-00554 EJD]
)	
v.)	
)	
DAVID FOLEY,)	
)	
Defendant-Appellant.)	
_____)	

**MOTION FOR RELEASE PENDING APPEAL OR FOR
REVERSAL AND REMAND TO DISTRICT COURT
FOR REQUIRED FINDINGS**

INTRODUCTION

On January 21, 2014, U.S. District Judge Edward J. Davila of the Northern District of California, sentenced defendant David Russell Foley to 24 months in the custody of the Bureau of Prisons. Mr. Foley timely filed a notice of appeal. (*See* Docket [Dkt] at 259)¹ On January 31, 2014, Mr. Foley filed a motion for release pending the resolution of his appeal. (Dkt at 258)

On February 5, 2014, the District Court issued an order denying the request for release without a hearing, stating only the following:

“Having carefully reviewed Defendant’s Motions for Setting of Bail on Appeal (see Docket Item No. 258 in 5:09-CR-00670 EJD; Docket Item No. 133 in 5:11-CR-00554 EJD) the court finds them suitable for decision without further briefing or oral argument. Defendant’s Motions are DENIED.”

(*See* Appendix: Order of February 5, 2014)

Pursuant to Federal Rule of Appellate Procedure 9, Circuit Rule 9-1, and 18 U.S.C. 3143(b), Mr. Foley hereby moves this Court to set bail pending appeal in the above-entitled matters, or to remand the cases to the District Court for a hearing and/or the issuance of a written order stating the reasons for denial of defendant’s motion for release pending appeal of his convictions.

¹ Unless otherwise noted, all Docket references are to Case No. 09-cr-00670.

PROCEDURAL SUMMARY

On July 1, 2009, a 34 count indictment was filed against Mr. Foley and a co-defendant in the Northern District of California, San Jose Division, alleging, *inter alia*, conspiracy to commit mail and wire fraud, trafficking in counterfeit goods, theft of trade secrets, and money laundering. (Dkt at 1) On August 17, 2011, the government filed a 53 count Superseding Indictment. (Dkt at 103) Also on August 17, 2011, the government filed a separate, five count indictment against Mr. Foley alleging conspiracy to commit bank fraud, bank fraud, and false statement to a government agency. (Dkt at 1, Case No. 11-00554)

On January 6, 2012, a plea was entered as to both cases, in which Mr. Foley pled guilty to Count 1 of the Superseding Indictment (Conspiracy to Commit Mail Fraud and Wire Fraud, in violation of 18 U.S.C. Section 1349) and Count 1 of the newly filed indictment (Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. Section 1349). (Dkt at 132)

On December 6 and 11, 2012, the District Court held an evidentiary hearing to determine the amount of loss attributable to defendant Foley in both cases. On January 29, 2013, the District Court found the total loss to be in the amount of \$450,000. (Dkt at 198)

On August 5, 2013, the United States Probation Office disclosed its Final

Presentence Report, in which it recommended that the Court find defendant's base offense level pursuant to U.S.S.G. Section 2B1.1(a)(1) to be 7. Having no criminal history, he was in Criminal History Category 1. Based on the amount of loss, a 14-level enhancement was recommended, raising Foley's offense level to 21, and placing him in the guideline range of 37-46 months. (Dkt at 228)

On August 26, 2013, Mr. Foley's new counsel, Jerome Mullins, who had not represented him at the evidentiary hearing on loss, filed a "Request for Evidentiary Hearing and Findings of Fact and Motion for Downward Departure or Variance." In that document, Mullins raised concerns about "numerous unresolved objections" to the Final Presentence Report, and requested a hearing for their resolution. Mr. Foley also requested a downward departure and grant of probation "primarily on the grounds that the loss provision recited in the guideline calculation is baseless." (Dkt at 232)

On December 10, 2013, defendant filed a "Request for Amended Probation Report, Findings of Fact re Sentencing Objections to PSR and Downward Departure or Variance." In this motion, defendant Foley again stated that there were unresolved objections to the Final Presentence Report, and presented arguments for why the court should reconsider its loss calculations. Quoting extensively from Amendment 617 found in Appendix C of the U.S. Sentencing

Guidelines, the defendant also argued that the Sentencing Commission had never intended the loss sentencing enhancement to be applied in a “strictly literal sense.” (Dkt at 240)

On January 21, 2014, Mr. Foley was sentenced to 24 months of custody in the Federal Bureau of Prisons for each count, to run concurrently. The remaining counts were dismissed on the government’s motion. The district court on the same day “terminated” defendant’s second motion for an amended probation report, findings of fact, and downward departure. Mr. Foley’s date for self-surrender was set for March 27, 2014. (Dkt at 249)

Defendant timely filed his notice of appeal from the judgment of the district court. On January 31, 2014, Mr. Foley filed a Motion for Bail Pending Appeal in the district court. (Dkt at 258) In his motion, Mr. Foley noted that since the district court granted his release on bail in 2009, his record of timely appearance during the pendency of all proceedings was unblemished. Moreover, Mr. Foley made all the requisite showings regarding flight risk and danger to community. And finally, Mr. Foley articulated several issues of law or fact that were “likely to result in a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process.” 18 U.S.C. 3143(b)(iv). Specifically, Mr. Foley raised the matter of the disputed loss calculations - which

caused his offense level to rise from 7 to 21.

ARGUMENT

The statute governing release pending appeal, 18 U.S.C §3143(b), provides, in relevant part, as follows:

Release or detention pending appeal by the defendant – (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –

(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 time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title . . .

This Court addressed the “substantial issue” prong of the test for release

pending appeal in *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985). In *Handy*, appellant was denied release by the district court which had rejected his suppression motion. The Court remanded the matter for reconsideration, defining a “substantial question” as a “fairly debatable question that calls into question the validity of the judgment.” *Id.* at 1282-83.

[P]roperly interpreted [under § 3143] "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.

Handy, 761 F.2d at 1281.

As the D.C. Circuit stated in construing the meaning of 18 U.S.C. § 3143: [A] substantial question is one that is "fairly debatable," "fairly doubtful," or "one of more substance than would be necessary to a finding that it was not frivolous."

United States v. Perholtz, 836 F.2d 554, 555 (D.C.Cir 1987)(citing cases); *accord*, *United States v. Giancola*, 754 F.2d 898 (11th Cir.1985); *United States v. Randall*, 761 F.2d 122, 124-125 (2d Cir. 1985); *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985)(class of substantial questions includes one that is novel and not controlled by existing precedent).

The crux of the “substantial question” analysis is a reasonable basis for

appeal, rather than a likelihood of success once the issues are fully developed:

Congress did not intend to limit bail pending appeal to cases in which the defendant can demonstrate at the outset of appellate proceedings that the appeal will probably result in reversal or an order for a new trial [R]equiring the defendant to demonstrate to the District Court that its ruling is likely to result in reversal is tantamount to requiring the District Court to certify that it believes its ruling to be erroneous. Such an interpretation of the Act would make a mockery of the requirement of Fed.R.App.P. 9(b) that the application for bail be made.

Handy, 761 F.2d at 1280-81; *accord*, *Giancola*, *supra*; *Randall*, *supra*.

In *Handy*, the Ninth Circuit further expounded on the kind of issues that satisfy the “substantial question” requirement:

The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.

Handy, 761 F.2d at 1281 (quoting *D'Aquino v. United States*, 180 F.2d 271, 272 (11th Cir. 1950)(Douglas, Circuit Justice). Stated otherwise, the district court should consider “ ‘whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding

respect that might possibly prevail.’ ” *Handy*, 761 F.2d at 1281 (quoting *Herzog v. United States*, 75 S. Ct. 349, 351 (1955)).

The question then is not whether this Court at this stage believes Mr. Foley *will* prevail on appeal, but rather whether the issue that he raises is of the type that make “fairly debatable” the validity of the judgment within the meaning of the bail statute, *Handy*, and related precedent.

Federal Rule of Appellate Procedure 9(b) provides that “[a] party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a).” Federal Rule of Appellate Procedure 9(a)(1) provides, in relevant part, that “[t]he district court must state in writing, or orally on the record, *the reasons for an order regarding the release or detention of a defendant in a criminal case.*” (italics added) Moreover, a party seeking such an order in the court of appeals, overruling a district court’s denial of release, must file the court’s statement of reasons.

In *United States v. Wheeler*, 795 F.2d 839 (1986), the district court denied bail pending release to defendant, without any written or oral findings.

Recognizing that it lacked any written or oral explanation for reviewing the district court's conclusory denial, this Court remanded the matter to the district court for findings consistent with FRAP 9 (b). *Id.* at 840.

In direct contravention of FRAP 9(a)(1) and 9(b), as well as this Court's holding in *Wheeler*, the District Court here held no hearing, and issued no written findings explaining its reasons for denying release pending appeal. Mr. Foley thus cannot file the District Court's statement of reasons, or any transcript of proceedings as required by FRAP 9(a) and by Circuit Rule 9-1.2(a). Nor can the defendant attach a court reporter's certificate as required by Circuit Rule 9-1.2(b) because the District Court held no hearing.

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CONCLUSION

Accordingly, Mr. Foley requests this Court to reverse the District Court's denial of release pending appeal, and to remand the above entitled matters to the District Court for proper written findings, consistent with *Wheeler* and FRAP 9(a)(1) and 9(b).

Dated: March 21, 2014

Respectfully submitted,

RIORDAN & HORGAN

/s/ Dennis P. Riordan
DENNIS P. RIORDAN

Attorney for Appellant
DAVID FOLEY

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on March 21, 2014 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ Jocilene Yue
Jocilene Yue

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____
Jocilene Yue

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

CASE NOS. 5:09-cr-00670 EJD;
5:11-cr-00554 EJD

Plaintiff(s),

v.

**ORDER DENYING DEFENDANT'S
MOTIONS FOR SETTING OF BAIL
PENDING APPEAL**

DAVID RUSSELL FOLEY,


Defendant(s).

Having carefully reviewed Defendant's Motions for Setting of Bail on Appeal (see Docket Item No. 258 in 5:09-cr-00670 EJD; Docket Item No. 133 in 5:11-cr-00554 EJD), the court finds them suitable for decision without further briefing or oral argument.

Defendant's Motions are DENIED.

IT IS SO ORDERED.

Dated: February 5, 2014


EDWARD J. DAVILA
United States District Judge

United States District Court
For the Northern District of California