NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 22, 2024
Decided March 21, 2025

Before

MICHAEL B. BRENNAN, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-1116

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCIS BURNS,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 19-CR-245

Lynn Adelman,
Judge.

O R D E R

Francis Burns appeals his convictions for wire and mail fraud, engaging in unlawful transactions, and filing a false claim. 18 U.S.C. §§ 1343, 1341, 1957, 287. His appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 744 (1967). Because counsel's submissions explain the nature of the case and address the issues that an appeal of this kind would be expected to involve, we limit our review to the subjects that he discusses, as well as the additional arguments that Burns proposes in his responses under Circuit Rule 51(b). *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Burns filed a series of fraudulent tax returns between 2015 and 2019. He premised the returns on forged 1099 forms, purportedly issued by various financial institutions, which reported that he was deceased and that his estate had withheld vast sums for federal income taxes. Over the years, he requested more than $550 million in refunds, and the Internal Revenue Service refunded him $3,672,540. The IRS was able to recover $2,544,579.55, leaving a sum outstanding of $1,127,960.45.

Burns was charged with six counts, one for wire fraud, 18 U.S.C. § 1343, two for mail fraud, *id.* § 1341, two for engaging in unlawful transactions, *id.* § 1957, and one for filing a false claim, *id.* § 287. In January 2021, Burns filed two motions pro se—both of which sought to compel discovery or, in the alternative, to dismiss the case. The court denied the motions because he was represented by counsel.

Burns's experience with prior counsel has been strained. The court permitted Burns's first appointed counsel to withdraw because of Burns's desire to pursue a frivolous legal theory. In February Burns's second appointed counsel also moved to withdraw, citing their deteriorating relationship. In March the court held a hearing on that motion, and Burns expressed his wish to proceed pro se. After engaging Burns in a lengthy colloquy, the court expressed misgivings about his strategy (noting, for instance, that his understanding of the law was, "to put it mildly, incorrect" and that his filings bore "hallmarks of sovereign citizen ideology") but found that he had demonstrated his competency to waive his right to counsel and that he had done so voluntarily, knowingly, and intelligently. The court thus granted the motion to withdraw and allowed Burns to proceed pro se, with counsel serving standby.

On his own, Burns filed multiple pretrial motions. On March 8, for instance, he filed another motion for discovery or dismissal, along with a motion for a bill of particulars. Then, on April 1 (after the court's deadline for pretrial motions), he moved to compel based on the March discovery motion. On April 20, the court denied the motion for discovery because it lacked certification that he conferred with the government. Because the motions to dismiss and to compel were premised on the motion for discovery, the court likewise denied both of them. And the court denied the motion for a bill of particulars, which is appropriate only to clarify the nature of an indictment.

Burns's trial was originally scheduled to begin August 16, 2021, but he failed to appear at the final pretrial conference and was not located until his arrest in June 2022. The trial eventually commenced on October 4, 2022. During the two-day trial, the government called 17 witnesses and elicited testimony showing that Burns carried out his fraudulent scheme. The witnesses included several employees of the financial institutions whose 1099 forms Burns had forged; they testified that the institutions never issued the forms to him. An investigator with the IRS testified that Burns had filed his tax returns based on the forged 1099s, that the IRS had paid him based on those returns, that Burns had transferred over $800,000 to pay for a house and a limousine, that Burns had bragged on social media about receiving refunds, and that the IRS had contacted Burns to inform him that his filings were frivolous.

At the beginning of the second day of trial, Burns faked a medical emergency, which delayed trial proceedings for hours. (The prior morning, Burns was recorded making a telephone call in which he discussed taking this action.) When proceedings resumed, Burns asked the court to permit him to be represented by his standby counsel, but counsel said that he was not prepared to step in mid-trial just because Burns had a change of heart. The court did not grant Burns's request. Burns did not present any evidence in his defense, and the jury convicted him on all counts.

Before Burns's sentencing, the probation office prepared a presentence investigation report (PSR). The officer grouped counts 1 through 3, to which he applied a base offense level of 7 under U.S.S.G. § 2B1.1(a)(1). He then applied a specific offense characteristic under § 2B1.1(b)(1) based on the intended losses, which exceeded $550 million and thereby increased the offense level by 30. He further applied an adjustment for obstruction of justice under § 3C1.1 based on Burns's abscondment and false medical emergency at the trial, increasing the offense level by 2. The adjusted offense level for group 1, therefore, amounted to 39. The officer applied equivalent calculations for counts 4 and 5 (reaching an adjusted offense level of 39) and count 6 (reaching an adjusted offense level of 38). He then applied the highest offense level among the groups under § 3D1.3 to set the total offense level at 39. And because Burns had no prior convictions, the officer assigned him a criminal history category of I, yielding a guidelines range of 262 to 327 months.

At the sentencing hearing, the district court adopted the PSR. The court weighed the sentencing factors under 18 U.S.C. § 3553(a), considering the seriousness of the offense and Burns's obstructive behavior. The court then determined that the guidelines range—calculated based on intended rather than actual losses—was unreasonably high and therefore departed downward to impose a 60 months' prison sentence. The court also ordered him to pay $1,127,960.45 in restitution and $600 in special assessments, and to serve two years' supervised release.

After Burns filed his appeal, counsel filed an *Anders* brief, to which Burns responded under Circuit Rule 51(b). But we struck the *Anders* brief because the record did not include a transcript of the sentencing hearing. Counsel submitted a second brief but did not address whether Burns could challenge the voluntariness of his waiver of his right to counsel (or that he was entitled to representation by standby counsel upon his request), so we directed counsel to supplement his brief accordingly. Although that order was directed to counsel, Burns filed an additional "supplement," which we will treat as a Rule 51(b) response. Counsel has since supplemented his brief, and Burns has filed a response, which we now take with the case.

Counsel first discusses whether Burns could make a nonfrivolous argument that the district court erred in denying any of his pretrial motions. We agree with counsel that any challenge would be frivolous. As counsel notes, the January 2021 motions were dismissed for being filed while he was represented by counsel, and such decisions fall within the discretion of the district court. *See United States v. Cross*, 962 F.3d 892, 899 (7th Cir. 2020). We also would not find any error when the court denied the March motion to compel discovery, given that Burns failed to certify that he had first attempted to confer with the government. E.D. WIS. CRIM. R. 16(b). Nor would we find error when the court denied the accompanying motion to dismiss, which was premised on the validity of the motion for discovery. Further, the court acted well within its discretion in denying the April motion to compel, which simply rehashed the contents of the March motion. And the court appropriately denied the motion for a bill of particulars, since the indictment provided Burns with sufficient notice of the charges. *See United States v. Vaughn*, 722 F.3d 918, 927 (7th Cir. 2013).

Counsel next considers whether Burns could raise a nonfrivolous challenge to the sufficiency of the evidence and appropriately concludes that he could not. Seventeen witnesses testified about his tax-fraud scheme, and the government introduced his bank documents, tax filings, and social media posts to prove that he knowingly submitted false tax returns to obtain refunds that could be used to support his expensive purchases. An appeal challenging a jury conviction for insufficient evidence normally faces a "nearly insurmountable hurdle" to succeed—we would affirm unless no reasonable jury could have convicted the defendant based on the evidence as viewed in the light most favorable to the government. *See United States v. Rivers*, 108 F.4th 973, 981 (7th Cir. 2024). Based on the cumulative testimony and evidence of Burns's scheme, it would be frivolous to argue that the government's case did not meet that standard.

Counsel then evaluates whether the district court procedurally erred at sentencing or imposed a substantively unreasonable sentence, and he correctly concludes that any such argument would be frivolous. The court properly calculated the guidelines range and imposed a below-guidelines sentence, which we would view as presumptively reasonable. *United States v. Gibson*, 996 F.3d 451, 468 (7th Cir. 2021). The court also aptly justified its sentence with reference to the 18 U.S.C. § 3553(a) factors, highlighting the nature of the offense (defrauding the government of millions of dollars) and the need for deterrence (because IRS warnings had not deterred him).

Counsel next considers whether Burns could make a nonfrivolous argument that he did not voluntarily and knowingly waive his right to counsel. Counsel correctly concludes that Burns could not. To waive the right to counsel, the defendant must be aware of the "dangers and disadvantages of self-representation" and choose to represent himself with his "eyes open." *Faretta v. California*, 422 U.S. 806, 835 (1975). When Burns said he wished to proceed pro se during the March hearing, the court informed him of the risks of self-representation as well as the charges and potential criminal consequences if he were convicted. Burns responded that he understood the law and wished to forgo counsel.

Counsel also evaluates a possible argument that the court erred by denying Burns's request for standby counsel to be reappointed as his lawyer. Given that the request was made halfway through trial, counsel rightly rejects the argument. *See United States v. Tolliver*, 937 F.2d 1183, 1187 (7th Cir. 1991) ("It is well within the discretion of the court to deny as untimely requests for counsel made after meaningful trial proceedings have begun.").

In his Rule 51(b) responses, Burns proposes several grounds for appeal. He invokes, for starters, his "sovereign citizen" beliefs to assert that the district court lacked subject-matter jurisdiction over his criminal case. But any arguments starting from that premise would be frivolous. *See United States v. Benabe*, 654 F.3d 753, 767 (7th Cir. 2011).

Burns also proposes arguing that his trial counsel was ineffective, but this claim is best saved for collateral review, where an evidentiary foundation can be fully developed. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003).

Three of Burns's proposed arguments concern purported defects in the charging process. He first suggests that the court failed to administer an oath when the government entered a complaint, as required by Federal Rule of Criminal Procedure 3. But the government did not file a complaint, nor was one even required to initiate the prosecution. *See United States v. Richardson*, 780 F.3d 812, 814 (7th Cir. 2015). He next proposes arguing that the indictment was insufficient because the grand jury foreperson's signature was redacted. This argument would be frivolous because the requirement that the foreperson sign the indictment, FED. R. CRIM. P. 6(c), is merely technical, and the lack of a signature does not render an indictment insufficient, *see United States v. Irorere*, 228 F.3d 816, 830–31 (7th Cir. 2000). Burns similarly proposes arguing that he was entitled to receive materials from the grand jury proceedings, but these materials are secret and may be disclosed to the defendant only if he can show that some matter occurred during the proceedings that merits dismissal of the indictment. FED. R. CRIM. P. 6(e)(3)(E)(ii). Burns has made no such showing.

Burns then asserts that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), but he does not specify what evidence was withheld, aside from the grand jury materials to which he was not entitled and the discovery requests that the court properly denied.

Burns further proposes arguing that the IRS violated his rights under the tax code, including by improperly executing a tax levy. But these are not claims of error by the district court. To the extent that Burns argues that IRS investigators violated his Fourth Amendment rights, the remedy in his criminal proceedings would have been to suppress any wrongfully obtained evidence. *See Davis v. United States*, 564 U.S. 229, 236–37 (2011). But Burns never moved to suppress, nor does he argue on appeal that the court should not have admitted such evidence.

Finally, Burns wishes to argue that he was arrested without a warrant, but the record shows that an arrest warrant was issued on December 18, 2019.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.