77 F.3d 490

77 A.F.T.R.2d 96-355

UNITED STATES of America, Plaintiff-Appellee,

v.

Gary Victor DUBIN, Defendant-Appellant.

No. 95-10040.

United States Court of Appeals, Ninth Circuit.

Submitted Aug. 17, 1995.[*]
Decided Dec. 22, 1995.

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

MEMORANDUM[**]

Gary Victor Dubin, an attorney representing himself, appeals his convictions and 30-month sentence,

following a bench trial, for three counts of willful failure to file tax returns in violation of 26 U.S.C. § 7203. Dubin argues, among other things, that insufficient evidence supported his convictions because the government failed to prove the elements of § 7203 for the offenses. We affirm.

3 * In reviewing sufficiency of evidence, "we consider the evidence in the light most favorable to the government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." United States v. Hanson, 2 F.3d 942, 945 (9th Cir.1993). We will not set aside the district court's factual findings unless clearly erroneous. United States v. Marchini, 797 F.2d 759, 766 (9th Cir.1986), cert. denied, 479 U.S. 1085 (1987).

4 To sustain a conviction of § 7203, the government must show that (1) the taxpayer was required to file a return, (2) he failed to file a tax return, and (3) his failure to file was willful. United States v. Brodie, 858 F.2d 492, 497 (9th Cir.1988). " 'Willfulness' in the context of criminal tax cases is defined as a 'voluntary, intentional violation of a known legal duty.' " United States v. Powell, 955 F.2d 1206, 1210 (9th Cir.1992) (quoting Cheek v. United States 498 U.S. 192, 196 (1991)). "[T]he government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, or (2) that the defendant voluntarily, intentionally violated a known legal duty." Id. at 1211. "Willfulness may be inferred from all the facts and circumstances of a defendant's conduct." Marchini, 797 F.2d at 766; accord United States v. Gardner, 611 F.2d 770, 776 (9th Cir.1980) (willfulness may be inferred from evidence of consistent pattern of failing to report large amounts of income).

A. Requirement to File

5 Here, Dubin was a solo law practitioner during the tax years 1986, 1987, and 1988. At trial, the government adduced the following evidence: Dubin had a gross income from his law practice of $553,725.39 in 1986, $633,594.38 in 1987, and $330,297.68 in 1988. He filed for extensions of time to file tax returns for both 1986 and 1987; however, he never filed the returns. He also filed no tax return for 1988. Dubin had previously filed tax returns in 1982, 1983, and 1984.

6 Relying primarily on the filing instructions for Internal Revenue Service (IRS) form 1040, Dubin testified that, despite his gross income, he did not file the tax returns because huge business losses or deductions or both resulted in self-employment "net earnings" below $400 for each year in question. See 26 U.S.C. § 6017 ("Every individual ... having net earnings from self-employment of $400 or more for the taxable year shall make a return with respect to the self-employment tax...."). On appeal, Dubin continues to argue vigorously that the statutory filing requirement is solely triggered by "net income," rather than "gross income." We disagree.

7 Form 1040 list the income level and filing status which trigger the statutory filing requirement for each year. Although self-employed individuals with a net income below $400 are not required to file a tax return, single individuals with an income of at least $3,560 in 1986, $4,440 in 1987, and $4,950 in 1988 were required to file a return. Even assuming, for the sake of argument, that Dubin's net income fell below $400 for the years in question, it is irrelevant based upon his filing status and annual six-figure income. Therefore,

the government proved that Dubin was required to file tax returns for the years in question.

B. Failure to File a Return

8 Dubin argues that the government failed to offer sufficient evidence that he "did not nevertheless timely file with the IRS for 1986, 1987, or 1988." We reject this argument because Dubin testified at trial that he did not file tax returns for the years in question. See United States v. Bentson, 947 F.2d 1353, 1354 (9th Cir.1991) (judicial admissions before district court that defendant failed to file tax returns for years at issue binding on appellate court), cert. denied, 504 U.S. 958 (1992).

C. Willfulness

9 Dubin contends that "the [g]overnment failed to prove that ... [he] acted willfully if in fact he failed to satisfy any filing and return requirements actually imposed by law." We disagree.

10 The government introduced evidence that Dubin had filed tax returns in the past and had filed for extensions of time to file. This evidence demonstrates knowledge of a legal duty to file returns, and, thus, goes toward willfulness. See United States v. Poschwatta, 829 F.2d 1477, 1481 (9th Cir.1987), cert. denied, 484 U.S. 1064 (1988); United States v. Callery, 774 F.2d 1456, 1458 (9th Cir.1985). Further, Dubin filed a tax return for the 1984 tax year despite indicating a net loss. This evidence directly contradicted Dubin's asserted belief that he was not required to file a return unless his net income exceeded $400. See United States v. Kellogg, 955 F.2d 1244, 1248 (9th Cir.1992); Marchini, 797 F.2d at 766. Dubin's distinguished academic achievements,

impressive professional credentials, and his lucrative law practice primarily devoted to complicated business litigation also support an inference that he willfully failed to file tax returns. See, e.g., United States v. Claiborne, 765 F.2d 784, 798-99 (9th Cir.1985) (district judge's legal background and experience pertinent on willfulness determination in criminal tax evasion), cert. denied, 475 U.S. 1120 (1986); United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir.1966) (college graduate's special knowledge of accounting and insurance, and highly profitable business enterprise, among other things, provided inference that defendant willfully failed to file tax returns), cert. denied, 386 U.S. 982 (1967).

11 The record, however, does include evidence that the IRS, in response to letters from Dubin stating that his net income fell below $400 for the years in question, sent him notices indicating that he was not required to file tax returns. The district court apparently weighed this evidence, and Dubin's contention that he relied on the IRS notices against the government's evidence.

12 In weighing the evidence, a rational trier of fact could conclude that Dubin was aware of his legal obligation to file tax returns, and that this failure to file did not result from a good-faith reliance on the IRS notices. See Poschwatta, 829 F.2d at 1481; United States v. Buras, 633 F.2d 1356, 1359 (9th Cir.1980).

II

13 Dubin's contentions regarding the alleged violation of his Fifth and Sixth Amendment rights, and claimed sentencing errors warrant little discussion.

14 At the eleventh hour, Dubin sought to receive a further postponement of the trial because he claimed he was so depressed from his son's death two years earlier, that he was unable to prepare for trial. The district court denied the continuance. The court discounted the psychiatrist's report that opined that Dubin was depressed and consequently could not prepare for trial in light of other evidence: Dubin's son had died two years previously; Dubin had, in the meantime, continued to carry on a vigorous and successful law practice and sought psychiatric care for the first time only a week before the trial date. In addition, Dubin's demeanor and behavior appeared entirely normal. Also, the court noted Dubin was granted numerous previous continuances. We cannot say that the court abused its discretion by not granting a continuance or holding a competency hearing. See, e.g., Moran v. Godinez, 40 F.3d 1567, 1571-72 (9th Cir.), amended on other grounds, 57 F.3d 690 (1994) (order); Harding v. Lewis, 834 F.2d 853, 857 (9th Cir.1987), cert. denied, 488 U.S. 871 (1988).

15 Dubin's generalized assertions that the court's repeated interruptions of his arguments and cross-examination of government witnesses deprived him of a fair trial are insufficient to establish abuse of discretion. Dubin's argument that, because the information only cites § 7203 (penalty provision), rather than a filing requirement provision, he did not have sufficient notice of the charges against him is foreclosed by United States v. Vroman, 975 F.2d 669, 671-72 (9th Cir.1992). We reject Dubin's claim that he should have been charged by indictment in order "to convict [him] of a misdemeanor punishable by imprisonment up to one year and one year additionally of supervised release."

See United States v. Purvis, 940 F.2d 1276, 1279-80 (9th Cir.1991) ("[A] person convicted of a misdemeanor who faces an authorized punishment of one year of incarceration plus one year of supervised release is not subject to a term of imprisonment of more than one year for purposes of the Indictment Clause."); United States v. Linares, 921 F.2d 841, 844 (9th Cir.1990) (same). To the extent Dubin urges this panel to reconsider Purvis and Linares, we note that a three-judge panel lacks the authority to disregard or overrule Ninth Circuit precedent. See United States v. Lockett, 919 F.2d 585, 591 (9th Cir.1990). It is unclear whether he also is asserting that the thirty-month sentence required that he be charged by indictment rather than information. If so, the argument is unavailing. Because each offense with which Dubin was charged is not punishable by a sentence of imprisonment in excess of one year, he did not have a right to be prosecuted by indictment rather than information. See U.S. Const.Amend. V; Fed.R.Crim.P. 7(a). That Dubin received consecutive sentences of one year on the first count, one year on the second count, and six months on the third count does not convert the offenses into "infamous" crimes for which an indictment is required. See United States v. Jordan, 508 F.2d 750, 753 (7th Cir.), cert. denied, 423 U.S. 842 (1975) (proper to charge in an information four misdemeanor counts of failure to file tax returns and impose consecutive sentences totalling fifteen months imprisonment).

16 To the extent Dubin contends he was improperly induced to waive counsel, jury trial, and assignment of Judge Real as the trial judge, we conclude that such contentions are amply belied by the record.

17 The district court did not abuse its discretion by

prohibiting Dubin's cross-examination of witnesses on his erroneous interpretations of the tax laws, and irrelevant evidence concerning his net income. See United States v. Komisaruk, 885 F.2d 490, 495 (9th Cir.1989); Poschwatta, 829 F.2d at 1483. Although the magistrate judge failed to comply with all the requirements of Fed.R.Crim.P. 58(b)(2) at the initial appearance, Dubin has failed to show that he suffered any prejudice which would constitute reversible error. See United States v. Doe, 743 F.2d 1033 (4th Cir.1984). The court also did not abuse its discretion by denying Dubin's request for a continuance to obtain the assistance of counsel. The record discloses that: (1) Dubin had repeatedly insisted on representing himself; (2) Dubin made the request for counsel on the morning of trial; (3) Dubin had been granted prior continuances; (4) new counsel was not prepared to proceed; and (5) the case had been pending for over one and one-half years. The denial of the continuance was not an abuse of discretion. See United States v. Leavitt, 608 F.2d 1290, 1293-94 (9th Cir.1979); see also United States v. George, 56 F.3d 1078, 1084 (9th Cir.1995); United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir.1987).

18 We reject as frivolous Dubin's unsubstantiated claims of misconduct by either the district judge or the prosecutor. We also reject Dubin's about-face argument challenging the assignment of his case to Judge Real; Dubin specifically agreed in writing to have Judge Real, rather than a magistrate judge, hear his case. He cannot now complain.

19 We also reject Dubin's contention that the district court erred by failing to hold an evidentiary hearing to resolve each controverted matter in the presentence report as prescribed by Fed.R.Crim.P. 32. Dubin's

counsel objected to an upward adjustment for obstruction of justice, and disputed the amount of tax loss. The court rejected defense counsel's arguments. The court also afforded Dubin his right of allocution, which he used to reargue his case, and to reassert his innocence to the charges. Dubin neither made a specific reference to his written objections nor requested a definitive ruling on the 69 objections contained therein. Under such circumstances, no further factual findings were necessary. See, e.g., United States v. Helmy, 951 F.2d 988, 998-99 (9th Cir.1991), cert. denied, 504 U.S. 945 (1992); United States v. Rigby, 896 F.2d 392, 394 (9th Cir.1990).

20 We decline to consider, for the first time on appeal, Dubin's contentions that the district court either misapplied U.S.S.G. § 2F1.1 in computing the offense level or erroneously imposed the corresponding fines. See United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir.1991); United States v. Mondello, 927 F.2d 1463, 1468 (9th Cir.1991). Based upon the record before us, we cannot say the district court clearly erred by finding that Dubin obstructed justice by checking himself into a hospital on the eve of trial. See U.S.S.G. § 3C1.1, comment. (n. 3(e)); see, e.g., United States v. Draper, 996 F.2d 982, 986-87 (9th Cir.1993); Mondello, 927 F.2d at 1466-67. Therefore, the § 3C1.1 enhancement was proper.

21 Dubin's remaining contentions are utterly meritless and warrant no discussion.

22 AFFIRMED.

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* The panel unanimously finds this case suitable for

decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34-4

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3