No. 09-3939

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SHOLOM RUBASHKIN,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Iowa

REPLY MEMORANDUM FOR RELEASE PENDING SENTENCING

The prosecution's compulsion to portray as venal any innocent and humanitarian act performed by Mr. Rubashkin continues unabated. The prosecution's strategy is patently to describe Mr. Rubashkin in such extremely derogatory terms that a reader of its "Memorandum in Resistance to Defendant's Rule 9(a) Appeal of Detention" will consider him an evil person and relegate him immediately to prison regardless of the law and without examining whether there is a factual basis for the prosecution's caricature.

(1) The Government Totally Avoids the Central Question of Law. – The prosecution makes virtually no argument responding to our principal legal contention – that Mr. Rubashkin proposed more than adequate "suitable conditions" and "combination of conditions of release" to assure his presence at sentencing. Sections 3143(a) and 3142(c) (incorporated by Section 3143(a)) require that he be released pending sentencing because the conditions his attorneys have proffered effectively guarantee his presence.

At the very end of its Memorandum (pp. 18-20), after it defames Mr. Rubashkin repeatedly with false allegations, the prosecution declares that the District Judge "considered" the additional conditions that it failed to include in the order it issued on January 28, 2009, releasing Mr. Rubashkin. What the prosecution fails to note is that these stringent conditions – a 24-hour guard and two million dollars in home equity as security – were omitted by the District Judge from the order releasing Mr. Rubashkin after the January 2009 hearing not because they were **inadequate to assure his presence**, but because they were **unnecessary and superfluous to assure his presence**. The District Judge correctly felt that the electronic bracelet and other conditions of release (and even reducing the bond from one million dollars to five-hundred thousand dollars) would sufficiently assure Mr. Rubashkin's presence.

The District Judge was right. Mr. Rubashkin complied punctiliously with the conditions of release and even engaged in self-policing – including notifying the probation officer of a defect in the electronic bracelet – to insure that there would never be any possible argument that he had come close to attempting flight.

Moreover, whether or not the District Judge "considered" the additional conditions Mr. Rubashkin had proposed is not relevant to the issue now before this Court for decision. As this Court ruled *en banc* in *United States v. Maull*, 773 F.2d 1479, 1486-88 (8th Cir. 1985), the sufficiency of proposed conditions of release must be "independently reviewed" by this Court because it "involve[s] legal or judgmental assessments." Having failed to articulate any reasons for rejecting (1) a 24-hour armed guard, (2) eight million dollars in equity posted by 43 individuals, and (3) the additional security of Torah Scrolls offered by seven rabbis, the District Court's ruling on these "legal or judgmental assessments" is entitled to no weight whatever. And the prosecution's unfounded conclusory assertions that Mr. Rubashkin will, in some unspecified way, "get the better of a private security firm of his choosing" and will – contrary to his lifelong commitment to his community and charitable acts towards others – abuse "the trust of others" and misuse "others' money" are wholly inadequate rebuttals to the obvious guarantees that these conditions provide.

(2) The Prosecution's Evidence Relating to the Contents of Mr. Rubashkin's Home At the Time of His Arrest Was Considered by the District Court and Bail Was Granted. – In its zeal to describe Mr. Rubashkin as derogatorily as possible, the prosecution repeats in its Memorandum allegations it made in the District Court that were rejected by the District Court as grounds for imprisoning Mr. Rubashkin. This Court said in its *en banc Maull* decision that a District Court's factual findings cannot be disturbed unless they are "clearly erroneous." That principle applies to the prosecution as fully as it applies to the defense, and the prosecution cannot now exhume allegations that were deemed insufficient when first presented.

At page 10 of its Memorandum, the Government recites facts that, according to the prosecutors, demonstrate that when he was arrested on November 14, 2008, Mr. Rubashkin was "preparing to flee." These facts – weaving a web of suspicion from the presence of cash and children's birth certificates in a bag on the floor of a closet in Mr. Rubashkin's home – were fully explained by Mrs. Rubashkin during the hearing held on January 26 and 27, 2009. Judge Reade credited that explanation and summarized it in her opinion granting bail pending trial. The prosecution may not rely on that evidence now without establishing that Judge Reade's treatment of it was "clearly erroneous."

(3) Mr. Rubashkin Did Not Participate in the Flight of Others. – The prosecution alleges at page 17 of its Memorandum that Mr. Rubashkin "assisted and funded" the travel to Israel of Hosam Amara and Shlomo Ben Chaim, and at page 8 that he "took over Ben Chaim's real property in Iowa." The allegations are false. The evidence relating to Amara consists of a tape recording of telephone conversations between an ICE Special Agent and Mr. Amara while Amara was in Israel. Amara asked that the agent "do something for me and help me." After the agent said that the United States Attorney's Office would "help you to help yourself," Amara reported that "everybody told me" that it was easier for him to leave the United States, including Mr. Rubashkin. The double hearsay, uttered by an American citizen trying to curry favor with prosecutors who are manifestly seeking evidence against Mr. Rubashkin, is not worthy of belief.

In a second telephone conversation, after he obtained a more definite commitment of consideration for his assistance from the agent, Amara said that Mr. Rubashkin did not buy him a plane ticket but that he had received $4,000 from Mr. Rubashkin. At the hearing held on November 18, 2009, Mr. Rubashkin testified that the $4,000 had nothing to do with Amara's travel but had been given to him because Amara said that his wife was having a "breakdown." Appellant's Statement of the Case and Motion for Release Pending Sentencing, Ex. 9, pp. 33-34. In fact, the payment to Amara was made from a fund designed to assist

employees with family or medical emergencies. Mr. Rubashkin was, in fact, exceedingly generous and charitable and was viewed as the "father of the community" because of his willingness to help anyone in need. *See* Affirmation of Gabay G. Menahem, Exhibit 1. Defense counsel's proffer to introduce evidence of this consistent practice was opposed by the prosecution, and the evidence was excluded in an order of September 23, 2009, ruling on a number of evidentiary issues.

The prosecution's suggestion that Mr. Rubashkin assisted travel to Israel by Shlomo Ben Chaim to avoid involvement in the Agriprocessors investigation is equally false. Mr. Ben Chaim was intending to return to Israel in early 2008 – well before the May 2008 raid – and he was offering to sell property he had bought in Iowa. Mr. Rubashkin arranged to purchase that property in February 2008, before the raid and the intensive investigation. *See* opinion letters of February 6, 2008, from Charles Kelly, Esq., to Mr. Rubashkin's real-estate company, Exhibit 2, and the Affirmation of Gabay G. Menahem, Exhibit 1. Ben Chaim's ticket to Israel was purchased by the Agriprocessors' travel agent in the same manner as he routinely purchased tickets for domestic and foreign travel by rabbis and *shochtim* (ritual slaughterers). Although the credit card routinely used for Agriprocessor employee travel bore Mr. Rubashkin's name, he was not personally involved in

authorizing any particular trip. *See* Affirmation of Tovia Kupczyk, Exhibit 3, and the letter of November 8, 2009, from Rabbi Menachem M. Weissmandl, Exhibit 4.

(4) The Prosecution's Litany of Allegations Is Overwhelmingly False. – In the limited space of this Reply, we cannot respond in detail to each of the false assertions that the prosecution makes in its malicious Memorandum. We note preliminarily, however, that it is curious and egregiously unfair for the prosecution to specify alleged immigration-law violations that it dismissed in support of its contention that Mr. Rubashkin should be imprisoned pending his sentence on bank-fraud charges. We enumerate below the responses given by Mr. Rubashkin's trial counsel to the prosecution's false and misleading assertions:

(a) Allegations on Gov't Mem., pp. 7-8 – Mr. Rubashkin did not personally gather Forms I-9 because he did not generally handle I-9 Forms and was unable to determine whether they were "obviously fake."

Mr. Rubashkin did not "personally assure bank personnel that he did not know the undocumented workers' documents were bad." He told bank personnel that he did not know the precise status of certain workers and was handicapped from taking action based on the no-match letter language and the advice of counsel.

Mr. Rubashkin did not personally cause an increase in so-called "fake invoices" after the raid. He relied upon Mr. Bensasson to determine the funds to be borrowed on a daily basis.

Mr. Rubaskin agreed to give Ms. Althouse a raise and to convert her compensation structure from hourly to salaried. The form on which the prosecution relies was, in fact, the form that Agriprocessors used to record salary increases and it specifically noted that Ms. Althouse would be working the "same hours" as before in order to receive compensation. Mr. Rubashkin believed that he was doing nothing more than providing Ms. Althouse with a raise and converting her from an employee paid by the hour to one receiving a set salary. He believed that if she did not work the same hours, she would not be paid. Mr. Rubashkin denies that he ever intended to pay Ms. Althouse's salary if she were imprisoned.

(b) Allegations on Gov't Mem., p. 9 – Mr. Rubashkin had no motive to destroy or dispose of the thumb-drive because its information was duplicated in other files and records. Moreover, at Ms. Hamilton's instruction, the thumb-drive was placed in Mr. Bensasson's hat, and Mr. Rubashkin is not responsible if it is currently unavailable.

There was no motive to delete "evidence of diverted payments" or to destroy "fake invoices and bills of lading" obtained from Darlis Hendry because the same information was on Agriprocessors' computer system. Wendy Torson testified that

shredding of documents was a normal practice and that the customer statements shredded on November 5, 2008, were not shredded for any illegal or improper purpose.

5. There Is No Evidence Whatever To Support a Finding That Mr. Rubashkin Is a Flight Risk. – After all the prosecution's evidence purporting to show that Mr. Rubashkin is a "bad man" is cumulated, none of it points to flight. The prosecution exaggerates the significance and the amount of cash found in the Rubashkin home when he was arrested, but it was entirely benign. The cash included one-dollar-bills used for charity, silver half dollar coins used for religious rituals, and household money. Mrs. Rubashkin also explained that the money was placed in a closet to keep it away from the Rubashkins' autistic son who would otherwise have scattered it. And the fact that in the closet there were two unlocked portable lock-boxes – boxes that, according to the testimony, were never used – is surely not evidence of preparation for flight. (*See* Transcript of January 26, 2009, pp. 7-60)

The prosecution's allegations regarding Messrs. Amara and Ben Chaim are, as we have demonstrated, false or erroneous. But even if they were true, they do not support an inference that there is some danger that Mr. Rubashkin himself will personally flee. He traveled to Canada when the investigation of him was at its peak, and he returned voluntarily. He never sought to purchase tickets for his own

travel. Indeed, he did not even renew his driver's license, which he could easily have done before his first arrest or while he was released after that arrest and again when released pending trial.

The bottom line is that the prosecution wants Mr. Rubashkin in prison because he is a defendant whose case has engendered much publicity, not because anyone really believes that he will flee if he is released. The electronic bracelet is, as Judge Reade found, more than adequate to insure that he will be present, and it is all that is needed. If this Court believes any additional safeguards are necessary, it may direct any of the additional conditions that have been proffered by Mr. Rubashkin's counsel.

CONCLUSION

For the foregoing reasons, the denial of release pending sentencing should be reversed and the Appellant should be released on appropriate conditions.

Respectfully submitted,

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