IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 04-949

EDWARD R. FORCHION :

O R D E R

_____AND NOW, this day of January, 2005, upon consideration of defendant's amended motion for stay of illegal sentence (docket entry # 2) and the memorandum submitted to supplement that motion (docket entry # 5), and the government's response thereto, it is hereby

ORDERED

that the motion for stay is denied as the defendant has failed to establish the Magistrate Judge's abuse of discretion or the requisite grounds for a stay pending appeal.

BY THE COURT:

_____
STEWART DALZELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	**CRIMINAL NO. 04-949**
EDWARD R. FORCHION	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR STAY OF ILLEGAL SENTENCE

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Kristin R. Hayes, Assistant United States Attorney for the District, submits this response to defendant's amended motion for stay of illegal sentence (docket entry # 2) and the memorandum submitted to supplement that motion (docket entry # 5), in accordance with the Court's Orders of December 14 and 23, 2004.

I. INTRODUCTION

Defendant Edward Forchion, a/k/a "NJ Weedman," believes that marijuana should be legalized and that the federal narcotics laws are racist. Defendant also professes to be a member of the Rastafarian religion and maintains that the practice of that religion involves the use of marijuana as a sacrament in a ceremony. Apparently without

the benefit of legal advice, defendant concluded that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, legalized the religious use of marijuana on federal property, thereby precluding the federal prosecution of Rastafarians for using marijuana within the federal realm. Defendant then smoked marijuana in Independence National Historical Park on three occasions and was charged with possession of a controlled substance within a national park in violation of 36 C.F.R. § 2.35(b)(2).

Defendant was tried before United States Magistrate Judge Arnold C. Rapaport who found him guilty of all three offenses. Judge Rapoport rejected defendant's argument that the RFRA created an affirmative defense to this criminal prosecution, and imposed a sentence of 12 months probation, a $150 fine, and a $10 special assessment. Pursuant to 18 U.S.C. § 3563, the period of probation was subject to the mandatory conditions that the defendant not commit another federal, state, or local crime, that he not illegally possess a controlled substance, and that he refrain from unlawful use of a controlled substance and

submit to drug testing. The court refused the defendant's request to stay the sentence.[1]

The defendant then filed this appeal pursuant to Federal Rule of Criminal Procedure 58(g), and sought a stay of the sentence. This request should be denied. The trial judge did not abuse his discretion in denying the stay. The defendant cannot establish either the requisite substantial likelihood of success on appeal, or the substantial likelihood of irreparable injury. In addition, the government can establish that others will be harmed by the stay and that a stay would be contrary to the public interest. As the defendant was properly convicted and sentenced, there is no reason to stay the beginning of probation.

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[1]The record is somewhat unclear as to whether defendant actually requested and was denied a stay. Patrick L. Duff, the defendant at Criminal No. 04-950-M, did request a stay and it appears the court denied it (Tr. 11/12/04 at 46). Since the two defendants were tried together and presented a common defense and construing the defense presentation liberally since the defendants represented themselves, the government will assume the request was made on behalf of both defendants.

II. PROCEDURAL AND FACTUAL HISTORY

This case arises from defendant's actions in smoking marijuana in Independence National Historical Park on December 20, 2003 and March 20 and April 17, 2004. On each occasion, defendant was issued a violation notice and charged with possession of a controlled substance within a national park in violation of 36 C.F.R. § 2.35(b)(2), a petty offense.[2] The defendant was tried before United States Magistrate Judge Arnold C. Rapoport. Trial began on September 29, 2004. That day the defendant, representing himself, served on the court and the government a pleading denominated "Motion: To Dismiss 'Affirmative Defense' of Religious Freedom (42 U.S.C. §2004bb(a))." The trial was continued to allow the government to respond to this motion.

The government filed a response (a copy is attached) and the trial reconvened on November 10, 2004. The court denied the motion to dismiss and found the defendant guilty of the three possession charges. To afford

[2]Defendant was also charged with interfering with agency functions on March 20, 2004 and with disorderly conduct on April 17, 2004, but was found not guilty of those charges.

the defendant his right of allocution, the court continued sentencing until November 12, 2004. Sentence was then imposed and this appeal followed.

In brief summary, the following facts were developed at trial. On December 20, 2003, defendant Forchion and defendant Duff were part of a group of individuals protesting near the Liberty Bell Pavilion. Duff spoke for a period of time using a bullhorn, making statements to the effect that the so-called "war on drugs" was a war on black people, that white judges were locking up black people, and that it was ridiculous that it was legal to drink alcohol and smoke cigarettes, but illegal to smoke marijuana.

Forchion then began speaking, asking for a moment of silence for the 700,000 people arrested every year apparently for marijuana-related crimes. He further stated that it did not matter what religion an individual belonged to, that the use of marijuana in a religious ceremony was absolutely legal according to the Religious Freedom Restoration Act, and that there was no reason that the Park Police should arrest anyone during the course of a religious

ceremony. Duff then lit a marijuana cigarette and he and Forchion took turns smoking it. Both were then issued the citations.

Forchion and Duff engaged in a similar protest on March 20, 2004. In addition, Forchion destroyed the marijuana cigarette he had been observed smoking with Duff by placing it in his mouth and swallowing it, despite repeated orders by Ranger Tony Salvemini to surrender the marijuana.

Finally, on April 17, 2004, a group of approximately twenty individuals including Forchion and Duff engaged in a third protest. Forchion was again observed smoking marijuana. As the ranger who had observed Forchion smoking approached him, a second ranger observed Forchion walk away and attempt to hide the marijuana cigarette. This second ranger then observed Forchion throw the marijuana cigarette to the ground and Duff attempted to step on it.

The defendant did not dispute the above facts, but claimed that he was a Rastafarian using marijuana in a religious ceremony. Magistrate Judge Rapoport found that on each of the three occasions when the defendant was issued

violation notices, he was not engaged in conduct which involved the private practice of his religion, but was publicly protesting the federal narcotics laws on federal property. The court also accepted the government's argument that defendant has not carried his burden of establishing an affirmative defense under the RFRA. Specifically, the defendant did not establish that the governmental action of prosecuting him for possession of a controlled substance in a national park substantially burdened his exercise of his asserted Rastafarianism because he did not establish that his religion required smoking marijuana in a national park.

III. ARGUMENT

Pursuant to Federal Rules of Criminal Procedure 38(d) and 58(g)(3), Magistrate Judge Rapoport as the sentencing judge possessed the discretion to stay the sentence of probation. United States v. Restor, 529 F. Supp. 579, 580 (W.D. Pa. 1982); United States v. Tallant, 407 F. Supp. 896, 897 (N.D. Ga. 1975). In considering the propriety of the stay, the court can weigh the legal merits of the appeal. Restor, 529 F. Supp. at 580. The party requesting the stay must make a strong showing that he is

likely to prevail on the merits and irreparable injury if a stay is not granted. When evaluating the stay request, the court should also consider the likelihood that others will be harmed by the stay and the public's interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Here, the court which heard the trial and imposed sentence has already denied a stay. That decision was discretionary. On appeal of that decision, the defendant must show that the court abused its discretion in denying a stay. As the defendant cannot show any abuse of discretion, there is no basis for staying the sentence of probation.

In attempting to show that he is likely to succeed on the merits, the defendant contends that Judge Rapoport erroneously concluded that the RFRA did not apply in the Third Circuit because it was not a nationwide law and cites the recent en banc decision in O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004). These arguments continue the misapprehension of the law under which the defendant operated. Judge Rapaport understood that the RFRA applied

in federal jurisdictions[3], and simply noted that the Third Circuit had yet to consider the issue of when the RFRA creates an affirmative defense in a criminal prosecution. He correctly found that the defendant failed to establish an affirmative defense and the defendant cites no legal authority to the contrary. The government incorporates the legal arguments made in its response to defendant's motion to dismiss, legal arguments which Judge Rapoport adopted.

The recent en banc decision in the O Centro Espirita case does not advance the defendant's cause on appeal. That case is factually distinguishable from this because it involved the private practice of religion.

The defendant next argues that he will suffer irreparable injury if a stay is not granted because the mandatory conditions of probation preclude him from practicing his religion. It is not irreparable injury to want to continue to break the law. Unlike defendants in other cases, this defendant did not seek an injunction to

[3]The parties disagree about much but not that the Supreme Court declared the RFRA unconstitutional as applied to the states, City of Boerne v. Flores, 521 U.S. 507, 532 (1997), an issue wholly irrelevant to this case.

determine whether his asserted religious conduct was exempted from prosecution under the RFRA. He took the law into his own hands and deliberately broke it without attempting to ascertain whether his understanding of the RFRA was correct. A trial court correctly determined that he misapprehended the RFRA and was guilty of three federal offenses. The conditions of probation imposed were statutorily mandated. Defendant should not be permitted to escape the consequences of his misguided decision to take the law into his own hands by claiming irreparable injury.

In addition, consideration of future harm and public interest factors weigh against a stay. While defendant is free to continue to protest the federal narcotics laws, he remains subject to them while they remain the law. The desire to commit further illegal conduct is not an acceptable ground to stay a sentence of probation and poses a risk of future harm. Future illegal conduct would also be contrary to the public interest. It is in the pubic interest for the defendant to become accustomed to probationary supervision and comply with probationary authority. Interrupting probation pending appeal would not

be in keeping with the purposes of probation and would be contrary to the public interest. Thus, the future harm and public interest factors, like the other factors regarding the issuance of stays discussed above, demonstrate that no stay should issue here.

IV. CONCUSION

The defendant has failed to meet his burden in showing that the trial court abused its discretion in refusing to stay the sentence. There appears no reason to grant a stay other than the inconvenience to the defendant caused by probation. The defendant had no concern about the inconvenience and expense he caused to the National Park Service when he reached his own incorrect conclusions about the law and set out to deliberately violate it on three occasions before visitors to Independence National Historical Park. Staying the period of probation, especially on the meritless appeal grounds presented here, will not serve the dual purposes of the sentence, deterrence and supervision. Given the overwhelming evidence of guilt here and the lack of contrition on the part of the

defendant, he should continue serving the period of probation he has already begun.

For all the foregoing reasons, the government respectfully requests that the defendant's request for stay of sentence pending appeal be denied.

Respectfully submitted,

PATRICK L. MEEHAN
United States Attorney

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KRISTIN R. HAYES
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Government's Response to Defendant's Amended Motion for Stay of Illegal Sentence to be served on defendant addressed as follows:

Mr. Edward Forchion
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KRISTIN R. HAYES
Assistant United States Attorney

Date: January 5, 2005