IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5724 Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALEXANDER RUSSELL PINKSTAFF,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas SA 92 CR 5 1

August 17, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Alexander Pinkstaff appeals his conviction of three counts of

tax evasion. Finding no error, we affirm.

^{*} Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Pinkstaff was employed by International Technical Services ("ITS") as a civil engineer. ITS is a service company that contracts to supply engineers to other companies for temporary work on short-term projects. As an ITS employee, Pinkstaff worked on projects at corporations such as LTV Vought Corporation and Bell Helicopter. ITS paid Pinkstaff's wages, required him to file a Form W-4, and provided him with Forms W-2. Pinkstaff earned \$68,505.59 in 1985, \$46,172.52 in 1986, and \$79,889.03 in 1987. Pinkstaff received over \$22,000 of additional taxable income in distributions from his individual retirement account and Keough retirement account.

In October 1984, Pinkstaff filed with ITS a Form W-4 claiming fourteen tax exemptions. He later filed a Form W-4 claiming that he was exempt from taxes, but ITS ignored that form and continued to withhold taxes based upon fourteen exemptions. In the fall of 1985, Pinkstaff stopped using his regular checking account and began to cash his payroll checks. In October 1985, he opened a new bank account without providing a social security number and using a mail drop address. He kept a small balance in the new account and used it only to cash his payroll checks.

Pinkstaff did not file an income tax return for 1985, 1986, or 1987. The Internal Revenue Service ("IRS") investigation revealed that Pinkstaff was entitled to claim only three tax exemptions, not fourteen. The government's expert witness testified that Pinkstaff owed additional taxes of \$1,267.90 for 1985,

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\$11,487.57 for 1986, and \$2,950.13 for 1987. A jury convicted Pinkstaff of three counts of tax evasion for the years 1985, 1986, and 1987.

II.

Pinkstaff urges that the district court lacked both subject matter and personal jurisdiction. He suggests that Congress has never delegated to the district courts the authority to try criminal tax offenses. He argues that the court's exercise of personal jurisdiction was improper because the court wrongly determined that he was a "taxpayer" subject to the Internal Revenue Code. According to Pinkstaff, personal jurisdiction did not exist because the government never rebutted his "solemn asservation of status" in which he claimed to be a non-resident alien without any United States income.

Pinkstaff's argument that the district court lacked subject matter jurisdiction is without merit. Pinkstaff was convicted of violating 26 U.S.C. § 7201. The federal district courts have original jurisdiction over title 26 violations. <u>United States v.</u> <u>Masat</u>, 948 F.2d 923, 934 (5th Cir. 1991), <u>cert. denied</u>, 113 S. Ct. 108 (1992); <u>see also</u> 18 U.S.C. § 3231 (1985) (United States district courts shall have original jurisdiction of all offenses against laws of United States).

Similarly, Pinkstaff's argument that the district court lacked personal jurisdiction is frivolous. Pinkstaff provided no support for his claim that he was a non-resident alien. The gov-

ernment established at trial that Pinkstaff received income that was subject to federal income tax and did not pay the taxes due. Pinkstaff was indicted for tax evasion, appeared before the district court, and has offered this court no substantive support for his argument that the district court lacked personal jurisdiction. <u>See Masat</u>, 948 F.2d at 934 (finding similar claim of lack of personal jurisdiction frivolous).

III.

Pinkstaff urges that he was tried by a non-article III judge in violation of the Fifth Amendment. According to Pinkstaff, Judge Prado could not act as an independent decisionmaker because he is subject to the federal tax laws.

Pinkstaff was tried before an article III judge. The imposition of a federal income tax on a federal judge's salary does not violate article III. <u>O'Malley v. Woodrough</u>, 307 U.S. 277, 282 (1939). Pinkstaff's assertion that Judge Prado could not be impartial because he pays federal income taxes is frivolous.

IV.

According to Pinkstaff, his court-appointed attorney ineffectively represented him because the attorney was inexperienced in handling criminal tax cases. Pinkstaff alleges that he and the attorney suffered from a conflict of interest because the attorney was paid by the United States through the public defender's office and because the attorney is subject to the federal income tax

laws.

Pinkstaff identifies numerous instances of alleged errors and omissions by his attorney. Pinkstaff charges that the attorney refused to offer a defense on the basis that Pinkstaff had no statutory duty to pay income tax, refused to challenge the court's subject matter jurisdiction, and refused to challenge Judge Prado's article III capacity. Pinkstaff also suggests, <u>inter</u> <u>alia</u>, that his attorney should have challenged the indictment as time-barred, objected to allegedly irrelevant but prejudicial evidence, and filed a Speedy Trial Act motion to dismiss. He asserts that the attorney also submitted an erroneous jury instruction.

Claims of ineffective counsel not presented to the district court cannot be resolved on direct appeal. <u>United States v.</u> <u>Garza</u>, 990 F.2d 171, 178 (5th Cir. 1993); <u>United States v. Kinsey</u>, 917 F.2d 181, 182 (5th Cir. 1990). An exception may be made "only where the record is sufficiently developed with respect to the merits of the claim." <u>Garza</u>, 990 F.2d at 178; <u>Kinsey</u>, 917 F.2d at 182. We decline to consider Pinkstaff's ineffective assistance claim, as the record is insufficient.

V.

Pinkstaff argues that the district court committed reversible error when it did not hold motions hearings or enter findings of fact and conclusions of law to support its rulings and when it failed to rule on thirteen of Pinkstaff's motions. Pinkstaff has

cited no authority that requires that a trial court hold hearings on all motions or enter written orders to memorialize all oral orders. A trial court must rule on pre-trial motions unless the court orders, for good cause, that a ruling on the motion be deferred for determination at trial or after the verdict. FED. R. CRIM. P. 12(e). Where factual issues are involved in determining a motion, the court must state its essential findings on the record. <u>Id.</u> Pinkstaff has failed to identify any motion raising factual issues upon which the court failed to rule.

In his brief, Pinkstaff mentions only eight motions that the district court allegedly failed to address. We need not attempt to identify the other five motions. See Brinkmann v. Abner, 813 F.2d 744, 748 (5th Cir. 1987) (refusing to raise and discuss legal issues that appellant failed to assert). The district court denied several of the motions that Pinkstaff alleges it failed to His motion to dismiss for lack of subject matter address. jurisdiction was denied on March 3, 1992. His motion to quash the indictment was denied on August 21, 1992, as was his "demand" that the indictment be vacated or a show cause hearing be held. Pinkstaff's May 11, 1992, "Demand for Declarations of [the] Court's Immunity and Impartiality" is repetitive, as the court had ruled against him on the substantive issues raised in this motion on May 8, 1992. Pinkstaff's "Notice of Want of Statutory Jurisdiction," filed May 22, 1992, also is repetitive. The court denied a similar motion on March 3, 1992. Pinkstaff has pointed to no authority that would require that the court continue to rule

on duplicative motions.

The record does not contain rulings on three of the motions identified by Pinkstaff. Those motions are a "demand" that the court hold hearings on all motions; a motion that the court issue written orders supported by findings of fact and conclusions of law to confirm oral orders given during the May 22, 1992, docket call; and a motion to disclose the name of a United States Marshal who allegedly assaulted Pinkstaff during a court appearance.

The court was not required to hold hearings and issue written orders on all of Pinkstaff's motions. The name of the United States Marshal was irrelevant to Pinkstaff's criminal trial. We find that the district court's failure to rule on these three motions constituted, at most, harmless error. <u>See</u> FED. R. CRIM. P. 52(a) (any error, defect, irregularity or variance that does not affect substantial rights shall be disregarded).

VI.

Pinkstaff argues that the indictment was insufficient because it did not cite a statute that requires that he pay income tax. An indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and enables him to raise a double jeopardy defense to future prosecutions for the same offense. <u>United States v.</u> <u>Haqmann</u>, 950 F.2d 175, 183 (5th Cir. 1991), <u>cert. denied</u>, 113 S. Ct. 108 (1992).

Section 7201 of the Internal Revenue Code provides for the

fining or imprisonment of "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof " 26 U.S.C. § 7201 (1989). With regard to each count, the indictment alleged that, in violation of section 7201, Pinkstaff had received a specific amount of taxable income upon which a specific amount of tax was due; that he was aware that he owed the tax; and that he willfully had attempted to evade the tax by failing to file a return.¹ We conclude that the indictment was sufficient. <u>See United States v. Williams</u>, 928 F.2d 145, 147-48 (5th Cir.) (rejecting appellant's argument that similar indictment was defective), <u>cert. denied</u>, 112 S. Ct. 58 (1991).

Pinkstaff's assertions that the government failed to prove that he is a "taxpayer" and that he is liable to pay income tax are frivolous. A defendant's disagreement with the validity of the income tax laws does not authorize him to "ignore the duties imposed upon him by the Internal Revenue Code" without risking criminal prosecution. <u>Cheek v. United States</u>, 498 U.S. 192, 206 (1991).

VII.

Pinkstaff raises a number of challenges to the jury instructions, arguing that they wrongly shifted the burden of proof and required that the jury find him guilty. A district court has broad discretion in fashioning instructions. We review

¹ The indictment also alleged other affirmative acts of evasion.

challenges to jury instructions under an abuse of discretion standard. <u>United States v. Robins</u>, 978 F.2d 881, 884 (5th Cir. 1992); <u>United States v. Johnson</u>, 872 F.2d 612, 621-22 (5th Cir. 1989).

Α.

The district court instructed the jury that "the Government must prove beyond a reasonable doubt that the law imposed a duty on Alexander Russell Pinkstaff, to an file income tax return and pay income taxes, and that Alexander Russell Pinkstaff knew of this duty, and that he voluntarily and intentionally violated that duty." Pinkstaff, who does not accept that he has a statutory obligation to file income tax returns and pay income taxes, argues that this instruction was incorrect because he was not charged with willful failure to file a return and because the instruction presumes that he has an obligation to file returns and pay taxes.

Willful failure to file an income tax return is a lesser included offense of felony tax evasion. <u>United States v. Doyle</u>, 956 F.2d 73, 74-75 (5th Cir. 1992); <u>see</u> 26 U.S.C. §§ 7201 (providing for fine and imprisonment for attempt to evade or defeat tax), 7203 (providing for fine and imprisonment for willful failure to file return, supply information, or pay tax). Pinkstaff's unsupported contention that he has no statutory duty to file returns and pay taxes is frivolous. We conclude that the court's instruction was not an abuse of discretion. <u>See Doyle</u>, 956 F.2d at 75 (willfulness requires government to prove that law

imposed duty on defendant and that defendant knew of this duty and voluntarily and intentionally violated that duty) (quoting <u>Cheek</u>, 498 U.S. at 201).

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Pinkstaff further urges that the use of "legal tax language" in the jury instructions created a presumption that he had a duty to file a tax return and implied that he had a tax liability. Specifically, he objects to the court's use of the following phrases: "tax obligation," "gross income," "taxable income," "additional tax," "particular tax year," "income which was taxable," and "number of allowances or exemptions." Pinkstaff has pointed to no legal authority to support his contention that the court's use of these "tax terms" created an improper presumption for the jury. We therefore reject this conclusional argument.

C.

Pinkstaff also suggests that the jury instructions on willfulness and intent wrongly shifted the burden of proof. The court instructed the jury that "[a]s a general rule it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of his acts knowingly done or knowingly omitted " This instruction was within the "broad discretion" of the court. <u>Robins</u>, 978 F.2d at 884; <u>see also</u> <u>United States v. Moye</u>, 951 F.2d 59, 62-63 (5th Cir. 1992) (rejecting challenge to almost identical instruction).

Finally, Pinkstaff urges that the court's instruction that it is "reasonable" to infer that a person intends the consequences of his actions confused the jury as to the meaning of a "reasonable doubt." He argues that this instruction may have misled the jury into thinking that a "reasonable juror" would have found him guilty. The jury instruction concerning intent correctly stated the law in this circuit. <u>See Moye</u>, 951 F.2d at 62-63; <u>United States v. Graham</u>, 858 F.2d 986, 992 (5th Cir. 1988), <u>cert. denied</u>, 489 U.S. 1020 (1989). We reject Pinkstaff's "effort to base error on abstract semantics," as we find that the district court "expounded the law accurately and conscientiously." <u>United States v. Hunt</u>, 794 F.2d 1095, 1101 (5th Cir. 1986).

VIII.

Finally, Pinkstaff argues that his conviction is invalid because the government failed to prove an affirmative act of tax evasion. In order to obtain a conviction for felony tax evasion pursuant to 26 U.S.C. § 7201, the government must prove willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax. Doyle, 956 F.2d at 74.

With regard to each count, the indictment alleged, and the government proved at trial, the following affirmative acts: That in October 1984, Pinkstaff filed with his employer a Form W-4 claiming fourteen exemptions; that in October 1985, he filed with

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his employer a Form W-4 claiming that he was exempt from taxes; and that starting in the fall of 1985, he began to cash his salary checks rather than deposit them in his checking account. Counts I and II also alleged, and the government proved, that Pinkstaff refused to give his social security number when he opened a bank account in the fall of 1985.

It is not necessary for us to consider Pinkstaff's contention that he did not violate any law by cashing his salary checks and failing to give his social security number or his claim that his signature on the 1985 Form W-4 was invalid. The 1984 Form W-4 claiming excessive exemptions filed by Pinkstaff was an affirmative act of tax evasion to support each count. <u>See</u> <u>Williams</u>, 928 F.2d at 148-49 (filing of fraudulent Form W-4 is continuing affirmative act for each tax year that form remains in effect).

During the years in question, Pinkstaff's employer withheld taxes from his salary based upon the 1984 Form W-4. Pinkstaff's argument that charges based upon this form are time-barred is incorrect. When no tax return is filed, the statute of limitations for a prosecution under section 7201 begins to accrue on the day the return was due. <u>Williams</u>, 928 F.2d at 149.

AFFIRMED.