

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8293

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT C. MITCHELL,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Western District of Texas  
(A-CR-89-122-SS)

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(July 21, 1994)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges, and NOWLIN,\*  
District Judge.\*\*

GARWOOD, Circuit Judge:

Defendant-appellant, Robert C. Mitchell (Mitchell), was charged by information with four misdemeanor counts of willful failure to file federal income tax returns for the years 1983, 1984, 1985, and 1986, in violation of 26 U.S.C. § 7203. Mitchell

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\* District Judge of the Western District of Texas, sitting by designation.

\*\* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

orally waived his Sixth Amendment right to a trial by jury, and the matter proceeded to a bench trial. A magistrate judge found Mitchell guilty on all counts and sentenced him to serve three consecutive one-year terms of imprisonment for the first three counts and a consecutive five-year term of probation for the fourth count. The court also ordered Mitchell to pay a \$5,000 fine and a \$100 special assessment. The district court affirmed the conviction but allowed Mitchell to remain free on bond pending this appeal. Mitchell brings this appeal *pro se* claiming (1) the evidence was insufficient to support his conviction, (2) the trial court erred by admitting certain documentary evidence, (3) he was denied effective assistance of counsel, and (4) his waiver of jury trial was involuntary due to an improper agreement with the government. We find that the evidence adduced at trial was sufficient to support Mitchell's conviction; thus, he is not entitled to an acquittal. However, the record reflects that Mitchell waived his right to a jury trial based on his understanding that the government, with the magistrate judge's approval, had agreed that if he did so he would remain free on bond pending appeal from any conviction. Under the particular facts here, as reflected by the record, we think a sufficient doubt as to validity of the waiver exists so that the conviction should be vacated and the cause remanded for a new trial.

#### **Facts and Proceedings Below**

Robert Mitchell undoubtedly does not like to pay taxes, nor does he believe he is obligated to do so. Since the mid-1970's, he has attended numerous seminars on tax avoidance and has extensively

studied the Internal Revenue Code (IRC). Although he has no formal legal training, Mitchell has acquired an impressive knowledge of federal income tax law. Unfortunately, this knowledge, as is often the case, has proven to be quite a dangerous thing. Around 1984, Mitchell began a five-year campaign of correspondence with the Internal Revenue Service (IRS) regarding his disagreements with the IRC. He expressed several theories as to why he was not legally obligated to pay taxes, none of which the IRS ever accepted.<sup>1</sup> The IRS repeatedly informed him of his duty to file returns and pay taxes, but he remained unconvinced. According to IRS records, Mitchell's wages for the years 1983 through 1986 were sufficient to require him to file tax returns, but he failed to do so for any of the prosecution years.

At Mitchell's trial, Kay Jones (Jones), a representative of the Fresno IRS Service Center, testified that she caused a search to be made to determine if Mitchell had filed any tax returns for the years in question. Her search indicated that Mitchell had not filed any tax returns with the Fresno Center or anywhere else in the United States. Jones added that had Mitchell filed any returns they would have been kept by the service center because the IRS was required by law to keep all filed returns. Next, an Austin IRS official, Lorna Bradford (Bradford), testified that she conducted a similar search that yielded the same results that Mitchell had

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<sup>1</sup> Mitchell's theories were, by his own admission, quite unconventional. For example, Mitchell did not consider himself a "person" as the IRC defined the term, nor did he choose to regard his salary as "compensation." Not surprisingly, the IRS deemed his theories "confused, frivolous, and meritless."

not filed any returns with the Austin Center nor anywhere else in the United States. The court also admitted a transcript of Mitchell's "individual master file" (IMF), an on-going record of his tax filings from 1978 through 1987, and the IRS information manual translating the IMF codes. According to the information manual, the IMF would contain a transaction code 150 (150 code) for each year that a return was posted, meaning a return had been filed and tax liability had been assessed. Bradford testified that Mitchell's IMF did not contain 150 codes for any of the prosecution years.

In January 1987, the IRS placed a criminal investigation freeze code (914 code) on Mitchell's account which served to notify IRS officials that the taxpayer was under investigation. The 914 code prevented further posting of returns during the investigation, instead any subsequent returns would be received by the 914 control clerks. Bradford testified that she checked the records of the 914 control center and did not find any returns filed by Mitchell. In addition, the special agent investigating Mitchell's case testified that no such returns were ever received by the 914 control center.

Mitchell admitted that he did not file conventional tax returns for the years 1983 to 1986. He claimed that, while continuing to deny any tax liability, he did file incomplete, "protest" tax returns. He described the protest returns as essentially blank IRS forms containing little information other than his name. Although the protest returns were devoid of any information regarding his income, Mitchell maintained that he satisfied his obligation to file a return by attaching his W-2

forms to the protest return.<sup>2</sup> He presented what he claimed were copies of these protest returns at trial but testified that he did not keep copies of the W-2 forms.

Mitchell waived his right to a jury trial and the case proceeded to trial before a magistrate judge. The magistrate judge did not believe Mitchell's testimony that he had filed any returns, even protest returns, for the years in question. The magistrate judge also considered such evidence as a recorded interview of Mitchell by IRS agents in which Mitchell refused to answer certain questions pertaining to his alleged failure to file and the fact that he claimed to have kept copies of the protest returns but had not kept copies of the assertedly attached W-2 forms. The magistrate judge found that Mitchell was required to file a tax return in each of the prosecution years, that he failed to file the returns as required, and that his failure to do so was willful given his knowledge of the IRC and repeated inquiries to the IRS. Thereafter, on Mitchell's appeal, the United States District Court for the Western District of Texas affirmed the conviction and sentence.

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<sup>2</sup> The protest returns that Mitchell claims to have filed clearly would not have satisfied his obligation to file a return because they did not contain sufficient information to allow the IRS to assess his tax liability and were not signed under penalty of perjury. See *United States v. Reed*, 670 F.2d 622, 623 (5th Cir.), cert. denied, 102 S.Ct. 2945 (1982). What is not quite so clear, however, is whether Mitchell *believed* the protest returns were sufficient. To violate 26 U.S.C. § 7203, the defendant must *willfully* fail to file a return. The trial court made no factual finding regarding Mitchell's knowledge as to the sufficiency of these returns. In any event, we need not presently address the adequacy of the findings in this respect because Mitchell's conviction will be overturned on unrelated grounds.

## Discussion

### I. Sufficiency of the Evidence

In judging the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the government and affirms "if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt." *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir. 1994). We will uphold the trial court's credibility determination unless clearly erroneous. *United States v. Bass*, 10 F.3d 256, 258 (5th Cir. 1993). To establish an offense of willful failure to file a tax return, the government must prove that Mitchell (1) was required to file a return, (2) failed to file as required, and (3) his failure to do so was willful. *United States v. Doyle*, 956 F.2d 73, 74 (5th Cir. 1992). Mitchell contends the evidence presented at trial was insufficient to prove (1) that he actually failed to file tax returns for the years 1983 through 1986, or (2) that he did so willfully. He is wrong. In both instances, the evidence is sufficient to support the conviction.

First, Mitchell argues that the absence of a 150 code on his IMF does not prove that he failed to file a return but merely that his return was not posted and tax was not assessed. Because the returns he claims to have filed were incomplete, he argues they would not have been processed and thus would not have received a 150 code, nor would any returns received after 1987 due to the 914 freeze codes. Given the presumption of agency regularity, the trial court did not clearly err by rejecting Mitchell's explanation of the 150 codes. In addition, the government properly refuted his

argument that the 914 freeze code would have prevented posting of his returns. The freeze would not have affected returns filed prior to 1987, and any unposted returns would have been routed to the 914 control center, which Mitchell's alleged returns were not. Thus, the trier of fact could reasonably conclude that no returns had been filed for the years in question.

Similarly, the trier of fact was justified in rejecting Mitchell's argument that his tax returns may have gotten "lost in the mail" for four consecutive years. During the period in question, the IRS had received and responded to Mitchell's numerous tax protester correspondences, all of which had been sent by certified mail with return receipt requested. But Mitchell contends he sent the disputed tax returns by ordinary mail, and the IRS either did not receive them or did not properly process them. We cannot say the trial court was clearly erroneous in doubting Mitchell's credibility on this matter. Nor did the court clearly err in concluding that, while Mitchell kept copies of nearly all of his dealings with the IRS, he failed to keep copies of his W-2 forms because he did not actually prepare the alleged protest return copies until after he learned he was under investigation.

There was also sufficient evidence from which it could be found that Mitchell's failure to file was willful. To prove willfulness, the government must show that Mitchell intentionally and voluntarily violated a known legal duty. *Cheek v. United States*, 111 S.Ct. 604, 610 (1991); *Doyle*, 956 F.2d at 73. Although Mitchell claims the evidence does not prove he "knew" he was required to file a return, his "profound disagreement" with the IRC

does not negate willfulness. *Cheek*, 111 S.Ct. at 610-611. As much as he may have detested the IRC, Mitchell was adequately familiar with its provisions. He had also received several responses from the IRS prior to 1984 concerning his duty to file a tax return and had been advised by an attorney that his failure to file would risk prosecution. Thus, a rational finder of fact could conclude that Mitchell willfully failed to file his returns.

## II. Waiver of Jury Trial

Except for petty offenses and certain contempts, all criminal prosecutions are to be tried before a jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." FED. R. CRIM. P. 23(a).<sup>3</sup> The importance of a written waiver cannot be understated. More than simply memorializing the defendant's consent, the presence of a writing "impress[es] the defendant with the gravity of the right he is about to relinquish." 8A MOORE'S FEDERAL PRACTICE ¶ 23.03[2][b] at 23-14 (1994). When presented with a written jury waiver, the district court normally need make no further inquiry into the defendant's desire to proceed without a jury. *United States v. Gordon*, 712 F.2d 110, 115 (5th Cir. 1983); *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2908 (1982). The record in the instant case, however, contains no written waiver and indicates that none was ever made. Nevertheless, this Court recognized that strict compliance with the

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<sup>3</sup> Rule 58(a)(2) provides that the general rules, including Rule 23(a), apply to non-petty misdemeanor cases tried before a magistrate judge. See *Gomez v. United States*, 109 S.Ct. 2237, 2245 (1989).



writing component of Rule 23(a) is not always required. *United States v. Page*, 661 F.2d 1080, 1083 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982). We will uphold the validity of an oral jury waiver if it clearly demonstrates that, with the effective aid of counsel, the defendant voluntarily, knowingly, and intelligently consents to waiving his constitutional right to a trial by jury. *Id.*

Mitchell initially requested a jury trial, and a panel had been selected. Prior to the start of trial, Mitchell's counsel conducted off-the-record discussions with the prosecutor and the magistrate judge. Shortly thereafter, Mitchell announced his intention to waive his Sixth Amendment right to a trial by jury. He now argues that this waiver was involuntary because the magistrate judge told him that if he agreed to a bench trial and was convicted he could avoid incarceration pending appeal. The record sufficiently supports Mitchell to warrant vacation of the conviction and remand of the matter for a new trial.

At sentencing, the magistrate judge granted Mitchell's request to remain free on bond, stating:

"[T]he agreement entered into prior to the trial of this case by the defendant, his attorney of record, the United States Government and approved by the court that I will find under the provisions of 3145, Subsection C, that special exception circumstances exist and that I will allow the defendant to remain on bond under the provisions of 3143 and 3142, as I will find by clear and convincing evidence that he does not pose a danger to the safety of the persons in the community and is not likely to flee and that the appeal is not made for the purposes of delay but raises substantial questions of law or fact."

While the courts may frequently be lenient in allowing a defendant

to remain free on bond prior to trial or sentencing, under 18 U.S.C. § 3143(b)(1) the court "shall" order the detention pending appeal of a defendant sentenced to imprisonment unless there exists a substantial chance of reversal on appeal. Absent such a finding, the fact that the defendant is not a threat to the community and is not a likely candidate for flight does not of itself justify release pending appeal. *Id.*<sup>4</sup> In this case, however, the magistrate judge departed from section 3143(b) and clearly acknowledged some form of agreement connecting Mitchell's release with his waiver of a jury trial. The magistrate judge's written order states that:

"[T]he defense and the Government, with Court approval, had agreed to allow the defendant to remain on bond pending appeal of his conviction if the defendant waived his right to a jury trial at the time of the trial of this cause. In honor of that agreement, this Court will make findings that exceptional circumstances exist and will continue the defendant on the same bond as previously entered by this Court . . . ."

In addition, Mitchell's colloquy with the magistrate judge at the sentencing hearing also evinces an agreement with the government linking his ability to remain free on bond with his waiver of a jury trial. The exchange went as follows:

"MITCHELL: I do want to again request and urge the court to give me an opportunity to appeal this case. And the only way, of course, that I can do that is pursuant to the agreement that was made on February 11th, 1991, a stay pending appeal so that I can at least have some

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<sup>4</sup> 18 U.S.C. § 3142 relates to pretrial detention. 18 U.S.C. § 3145(c) deals with appeal from a detention order; its last sentence, which refers to "exceptional reasons," relates only to those detained under section 3143(a)(2) (detention after trial and before sentence) or under section 3142(b)(2) (serious felonies) provided they meet the conditions of section 3143(b)(1).

input in the appeal. And that's all I'm going to say.

THE COURT [To Mitchell's counsel]: Mr. Morris, let me just ask you, on that February, '91, whatS0was that agreement in writing?

MR. MORRIS: It's on the record, I believe.

MR. HARRIS [prosecutor]: I believe that's correct. We discussed it in open court at the startS0

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MR. MORRIS: The agreement was that Mr. Mitchell could agree to waive his right to trial by jury and, as a part of that, the court agreed that he would be allowed to remain on bond pending appeal in this case if he had a conviction, was my recollection.

THE COURT: That's my recollection what it was. Mr. Harris?

MR. HARRIS: Frankly, I remember that I agreed that I would join in with the request he remain free pending appeal. I forget whether or not the court was also a party to the agreement or not. But if the two of you recall it that way, then I willS0

THE COURT: I think there was some discussion about that, and that's where I was unclear ofS0about whether it was in writing or not.

And my memory of the agreement was that if there was a conviction, and Mr. Mitchell was going to waive the jury, if there was a conviction, he was going to appeal it and that he would remain on bond to do that.

That was my recollection, and I can't remember whether ISQI thought that was you all's recollection and you all's agreement, and I can't remember if there was anything else attached to it at all.

MR. HARRIS: No. I think that was it."

Any agreement used by the government to entice a defendant into waiving his constitutional right to a jury trial in exchange for release on bond would be plainly invalid and could not be tolerated by this Court. Such an agreement, at the least, is contrary to public policy. We cannot dismiss it on the theory that

the defendant and his counsel were freely able to bargain with the prosecutor and were in no way "coerced" into accepting the arrangement. "For the evil in the [government's activity] is not that it necessarily coerces . . . jury waivers but simply that it needlessly encourages them." *United States v. Jackson*, 88 S.Ct. 1209, 1217 (1968) (emphasis in original). The government's conduct "need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right" such as the right to a trial by jury. *Id.* In *Jackson*, the Supreme Court held the Federal Kidnapping Statute unconstitutional because it exposed the defendant to the death penalty only upon conviction by a jury. *Id.* at 1216-17. In other words, a defendant could escape the threat of execution merely by abandoning his right to contest his guilt before a jury. While a rational defendant facing a possible death sentence might view his rights under the Sixth Amendment as constitutional luxuries he would willingly forgo, the Court deemed the choice impermissible because such a tempting offer "needlessly penalizes the assertion of a constitutional right." *Id.* at 1217. As *Jackson* ruled that a defendant cannot trade his right to a jury trial to safeguard his life, neither can he barter away his rights to protect his liberty. We conclude that a jury waiver based on an impermissible agreement to remain free on bond must be held invalid.

The government now steadfastly denies making any such agreement with Mitchell. Rather, it contends that: Mitchell, through his counsel, approached the government to inquire what its position would be regarding release after sentencing; the

government informed him it would take no position on the matter; when the issue was raised before the court, the magistrate judge informed Mitchell that it would be up to the district court to determine whether he would be released on bail, but that he would very likely be allowed to do so given the history of his case and his past actions; and at no time did the magistrate judge suggest that a jury waiver would be necessary.

While the government admits it had its own "strategic" reasons for not wanting to present its case before a jury, it maintains that Mitchell separately expressed his intent to waive a jury trial. Clearly, there can be no legitimate relation between a defendant's decision to waive his right to a trial by jury and the court's decision to allow him to remain free on bond pending appeal. The court should not even reach the bond question until after there has been a conviction. And in that vein, the government now contends that these issues were not linked in any manner and that the magistrate judge fully explained the bond issue and then separately explained that the defendant had a right to a jury trial and that a jury panel was awaiting trial.

In any event, certain statements Mitchell made at trial indicate that he *believed* there was a necessary connection between jury waiver and release on bond. Thus, whether the government extracted some form of *quid pro quo* from the defendant or merely stepped aside and knowingly allowed him to proceed on an erroneous belief that these issues were interconnected, our result would not necessarily change. The magistrate judge informed Mitchell that "we have a jury available, and that if you, after consulting with

Mr. Morris and Mr. Smith, desire to waive that jury, you can waive that jury. And then the case would proceed to me on the trial . . . . Do you understand?" Mitchell responded:

"Yes, Your Honor, I do. And I just want to make it clear to the Court that the reason for opting to this is with the understanding that I can obtain the stay during the appeal, because I think the appealS0if it comes to an appeal in this case, is going to be very significant. And that's my main interest."

Rather than dispelling Mitchell's misconception, the magistrate judge simply responded, "I understand that." The magistrate judge should have clarified that jury waiver was irrelevant to the bond issue, and the court's failure to do so itself creates considerable ambiguity as to the voluntariness of the defendant's waiver.

Taken as a whole, the crucial aspects of the government's present position on this issue are simply not supported by the record, which, to the contrary, strongly supports Mitchell.<sup>5</sup>

In these circumstances, a substantial and essentially un rebutted showing having been made that Mitchell's oral jury waiver was not voluntary, we should not sustain the bench trial

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<sup>5</sup> The government says that the magistrate judge's order and his, and the Assistant United States Attorney's, remarks at sentencing, are simply a confused error resulting from forgetfulness as to what had happened at trial, which was about thirteen months previous.

Under certain circumstances, we might consider a remand to determine what "really" happened. But there is no reason to think the prosecutor's (and defense counsel's) and magistrate judge's recollections would be any better now than at sentencing, when certainly none of them realized anything was wrong with the recited agreement (nor was this merely a slip of the tongue, as the magistrate judge's written order reflects). Nor does the government suggest any extra-record documentary proof or third party evidence which would even tend to clarify (let alone clearly establish) the matter in its favor. Under the circumstances, we consider the only practical alternative to be vacation of the conviction.

conviction.

### **Conclusion**

Because of the circumstances surrounding and un rebutted record recitations respecting Mitchell's oral waiver of his right to a trial by jury, which strongly indicate that the waiver was involuntary, we vacate his conviction and remand for a new trial. Of course, Mitchell remains free to decide whether his interests will best be served by a trial before a judge or a jury, as long as he is allowed to make a fully informed and voluntary decision. We need not address Mitchell's remaining points of error as they are rendered immaterial by our disposition of the jury waiver issue.

VACATED and REMANDED