IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MOSHE RUBASHKIN	:	No. 02-333-01

MEMORANDUM AND ORDER

HUTTON, J. March 19, 2003

Presently before the Court are Defendant's Motion for Release Pending Appeal (Docket No. 18), Motion to Renew Motion for Release Pending Appeal (Docket No. 22), and Motion for Ruling on Motion for Release Pending Appeal (Docket No. 26). The Government opposes Defendant's Motion for Release Pending Appeal. For the following reasons, Plaintiff's Motion is denied.

I. BACKGROUND

On July 31, 2002, the defendant, Moshe Rubashkin, pleaded guilty to one count of bank fraud in violation of 18 U.S.C. § 1344. On November, 6, 2002, this Court sentenced Rubashkin to: (1) a 15 month term of imprisonment, which was within the applicable guideline range of 10 to 16 months; (2) five years supervised release; (3) restitution in the amount of $232,936.99; and (5) a special assessment of $100. Rubashkin filed a Notice of Appeal on November 14, 2002.

II. DISCUSSION

Rubashkin moves, pursuant to 18 U.S.C. § 3143(b),[1] for an order granting him release from detention pending the appeal of his conviction. To obtain bail pending appeal, the defendant must demonstrate: (1) that the defendant is not likely to flee or pose a danger to the safety of others if released; (2) that the appeal is not for the purposes of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if that substantial question is decided in the defendant's favor, that decision would likely result in a reversal or an order for a new trial on all counts. United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985).

In the instant case, the Government does not challenge the defendant's assertions that he is unlikely to flee or pose a danger to others and that his appeal is not for purposes of delay. Instead, the Government disputes whether Rubashkin's appeal raises

---

[1] 18 U.S.C. § 3143(b) provides in pertinent part:

> (1) [T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . .
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
>
> (I) reversal,
>
> (ii) an order for a new trial
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process . . ..

a substantial issue of law that is likely to result in a reversal or a new trial. Accordingly, the Court addresses this issue below.

Regarding third prong of Miller, a "substantial question of law or fact" is (1) a significant question (2) that is either: novel, not decided by controlling precedent, or fairly doubtful. United States v. Smith, 793 F3d. 85, 88 (3d Cir. 1986). A legal or factual question is deemed significant if it is "debatable among jurists" or "adequate to deserve encouragement to proceed further." Id. at 90.

Defendant argues that his appeal raises the following substantial question of law: whether a district court, while sentencing a defendant within the applicable guideline range, may consider prior criminal conduct that resulted in a diversionary disposition. Def.'s Mot. at 1-4. In his motion, Rubashkin clams that this Court improperly considered earlier criminal conduct that resulted in an Accelerated Rehabilitative Disposition ("ARD") in a Pennsylvania trial court. Id. Under Pennsylvania criminal procedure, the ARD is a special pre-trial intervention program designed to promote rehabilitation of the offender and reduce the judicial burden from adjudicating certain non-violent offenses. Pa. R.Crim. P. 300 (committee introduction), codified at 42 Pa. Cons. Stat. Ann. R. 300 (West 2001).

Rubashkin bases his argument on U.S.S.G. § 4A1.2(f).[2] This provision prohibits a sentencing court, when calculating a defendant's criminal history computation, from including diversionary dispositions that did not result in a judicial finding of guilt. Rubashkin concedes that the Court did not violate section 4A1.2(f) by including his ARD in his criminal history computation. Def.'s Mot. at 3. Instead, he argues that the Court effectively included the ARD because the Court sentenced him to 15 months, one month short of the top of the offense level. Rubashkin points to the fact that, because sentencing ranges overlap under the Guidelines, this sentence would fall in the middle of the range for the next highest offense level, which extends from 12 to 18 months. Id. It follows, he argues, that because his sentence is within the range of the next highest offense level, the Court effectively included his ARD in calculating his offense level. Id.

This argument does not raise a substantial issue of law under Miller because a court's discretion in this area is not debatable among jurists. Under 18 U.S.C. § 3742, a defendant may only a appeal a sentence that: (1) was imposed in violation of law; (2) was the result of an incorrect application of the sentencing guidelines; (3) was greater than the sentence specified in the guideline range; or, (4) in the absence of any guideline, was

[2] U.S.S.G. § 4A1.2 provides, inter alia, that: "Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted."

plainly unreasonable. In this case, Defendant does not claim that this Court exceeded the applicable guideline range or misapplied any sentencing adjustments. Moreover, because Defendant's sentence was not imposed in violation of the law, there is no substantial issue of law for Defendant to raise on appeal.

Both the United States Code and the United States Sentencing Guidelines give district courts broad discretion to consider information regarding a defendant's background and criminal history. For example, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive for the purpose of imposing an appropriate sentence." The Guidelines reinforce this broad discretion. Section 1B1.4 of the Guidelines provides: "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law."

Moreover, the commentary to that section specifically states that a court, when sentencing a defendant within the applicable Guideline range, may consider information not taken into account in the Guidelines. U.S.S.G. § 1B1.4 (commentary). The Commission cites as an example the situation where a defendant is indicted on

two counts but, as part of plea agreement, pleads guilty to only one. Id. In such situations, the remaining count may provide a reason to sentence at the top of the range or above the range. Id.

Finally, the relevant case law also supports broad judicial discretion in this area. See United States v. Watts, 519 U.S. 148, 156, 117 S.Ct. 663, 136 L.Ed. 2d 554 (1997); United States v. Baird, 109 F.3d 856, 864 (3d Cir. 1997). In Watts, the Court held that a sentencing court can consider conduct underlying charges upon which a defendant had been acquitted by a jury, provided that the conduct in question was proved by a preponderance of the evidence. 519 U.S. at 156. In Baird, the Third Circuit, applying Watts, held that sentencing court could consider conduct underlying related charges that were dismissed prior to trial. 109 F.3d at 864. If a sentencing court may consider this conduct, which was either never subjected to the adversarial process, or under Watts, believed unproven beyond a reasonable doubt before a jury, then a court must be able to consider an ADR, which, by its very nature, involves an acceptance of responsibility by the accused. Accordingly, the question raised by Rubashkin is not a substantial question of law or fact.

In his motion, Rubashkin also argues in passing that fairness requires this Court to more clearly articulate its reasons for sentencing him to this point within the applicable Guideline range. Def.'s Mot. at 3. As the Government properly notes, the relevant

statutes and case law do not require such an explanation. 18 U.S.C. § 3553(c); See United States v. Georgiadis, 933 F.2d 1219, 1222-23 (3d Cir. 1991). In Georgiadis, the defendant claimed that his sentence was illegal because the district court did not specifically comment upon and reject his request for a downward departure from the applicable Guideline range. 933 F.2d at 1222. The court rejected this claim. In doing so, the court clearly spelled out a district court's duties in this area as follows:

> Section 3553(c) defines the only statements a district court must make during sentencing. The section requires that at the time of sentencing a judge shall 'state in open court the reasons for its imposition of a particular sentence.' This general requirement is satisfied when a district court indicates the applicable Guidelines range, and how it was chosen. Section 3553(c) requires more specific statements of judicial reasoning in only two circumstances. First, if a sentence imposed falls within the applicable guidelines range and that range exceeds 24 months, the court must give reasons for imposing a sentence within the range. Second, if a sentence falls outside the applicable guideline range, the court must state the specific reason for imposing a sentence that differs from the Guidelines.

Id. at 1222-23 (emphasis added) (citations omitted). At the sentencing hearing, this Court and Mr. Rubashkin's counsel discussed, in some detail, exactly how the particular Guideline range was calculated. Transcript of Sentencing, United States v. Rubashkin, Nov. 6, 2002 p. 3-6. Moreover, Rubashkin's sentence was within the applicable range and did not exceed 24 months. Accordingly, the requirements of 18 U.S.C. § 3553(c) were

satisfied. As a result, this argument also fails to raise a substantial question of law or fact.

III. CONCLUSION

In order to obtain bail pending appeal, a criminal defendant who has already been sentenced must prove, inter alia, that his appeal raises a substantial question of law or fact that is likely to result in reversal or an order for a new trial. 18 U.S.C. § 3143(b); Miller, 753 F.2d at 24. In the instant motion, Defendant raises two potential arguments for appeal of his sentence, neither of which raises a substantial question of law or fact. Accordingly, Defendant’s motion is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MOSHE RUBASHKIN	:	NO. 02-333-01

O R D E R

AND NOW, this 19TH day of March, 2003, upon consideration of Defendant Moshe Rubashkin's Motion for Release Pending Appeal (Docket No. 18), Motion to Renew Motion for Release Pending Appeal (Docket No. 22), and Motion for Ruling on Motion for Release Pending Appeal (Docket No. 26), IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

____

HERBERT J. HUTTON, J.