IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30288

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEREMY HATLEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISANA

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BAIL PENDING APPEAL AND STAY OF SURRENDER DATE

Pursuant to Federal Rule of Appellate Procedure 9 and Fifth Circuit Local Rule 9.5, the United States submits this opposition to defendant-appellant Jeremy Hatley's motion for bail pending appeal and for a stay of his surrender date.[1] Hatley pleaded guilty to one count of violating 18 U.S.C. 242 (deprivation of rights under color of law) and one count of violating 18 U.S.C. 1001 (making a false

[1] The United States files this expedited response in accord with the Court's request. The United States has endeavored to draft a full and complete response in the limited time available. Any arguments not raised in this response are reserved for the United States' merits briefing.

statement). See ROA.109.[2] On March 28, 2017, the district court sentenced Hatley to a 36-month term of incarceration, which was below the Sentencing Guidelines range. ROA.36. The district court denied Hatley's post-judgment motion for bail pending appeal and for a stay of his surrender date on April 12, 2017, and Hatley filed the instant motion on April 17, 2017. ROA.47-53; ROA.59. As discussed below, Hatley cannot rebut the presumption against bail pending appeal because he cannot demonstrate that there is a substantial question of law or fact that is likely to result in a reduced sentence to a term of imprisonment that will be shorter than the time period it will take to resolve this appeal. See 18 U.S.C. 3143(b).

BACKGROUND

This case is one of several that resulted from a federal investigation into Iberia Parish Sheriff Louis Ackal and other Iberia Parish Sheriff's Office (IPSO) officials. Federal investigators initially learned that on April 29, 2011, members of IPSO's narcotics unit took five inmates to the chapel of the Iberia Parish Jail (IPJ)—an area not covered by the jail's video surveillance system—and beat them with a baton in retaliation for prior misconduct. Further investigation revealed a

[2] References to "Mot. __" are to page numbers in Hatley's motion for bail pending appeal and for a stay of his surrender date, filed in this Court on April 17, 2017. References to "ROA.___" are to the page numbers in the electronic record on appeal.

number of other abuses by IPSO officials. Ultimately, Sheriff Ackal and a number of other supervisors and officers were charged with federal offenses related to these abuses.[3]

Among the officers charged was Jeremy Hatley, who had been a sergeant in IPSO's K-9 Unit. On March 26, 2016, Hatley pleaded guilty to one misdemeanor count of 18 U.S.C. 242, which prohibits willful deprivation of constitutional rights under color of law, and one count of 18 U.S.C. 1001, which prohibits making false statements. ROA.109.

With regard to the Section 242 charge, Hatley admitted in his guilty plea that he went to the IPJ's chapel on April 29, 2011, and met agents from the IPSO's narcotics unit, a jail supervisor, and a pre-trial detainee, S.S. ROA.120. There, Hatley "understood that the Narcotics Agent intended to use unlawful force against inmate S.S. to punish him." ROA.120. Hatley admitted to watching as a narcotics agent placed "flashlight between his own legs and forced S.S. to mimic performing fellatio on the flashlight, shoving the flashlight into S.S.'s mouth until S.S. began to choke." ROA.120. Hatley acknowledged that "[t]he assault occurred while S.S. was compliant, kneeling on the chapel floor, and presenting no threat to anyone." ROA.120. Hatley admitted that he "watched and did nothing to stop the Narcotics

[3] Three officers were indicted. Ackal was acquitted following a five-day jury trial. One officer pleaded guilty after an indictment, and the third is awaiting trial. Nine other officers, including Hatley, pleaded guilty to informations.

Agent's assault on S.S., even though he knew he had a duty to intervene and he had the opportunity to do so." ROA.120.

Hatley further admitted that he lied to an FBI agent who had been investigating the assaults of detainees that occurred in the jail on April 29, 2011. ROA.120. Specifically, Hatley told the agent that "he had never seen any detainees abused in the chapel of the IPJ" notwithstanding his presence during the assault on April 29, 2011. ROA.120. Hatley admitted that at the time he made the statement to the FBI agent he knew that "he was present in the chapel on April 29, 2011, when officers abused S.S., a pre-trial detainee, and a Narcotics Agent forced a flashlight into the detainee's mouth and forced him to simulate performing oral sex." ROA.120.

At sentencing on March 28, 2017, the district court adopted the Probation Office's Presentence Investigation Report (PSR). ROA.107. The court overruled Hatley's objections to the report, relying on the Probation Office's written responses to those objections. ROA.94-95. The PSR concluded that Hatley had a total offense level of 26 and a criminal history category of I, resulting in a Sentencing Guidelines range of 63 to 72 months.[4] ROA.153. After hearing from Hatley, the court sentenced him to a below-Guidelines, 36-month term of

[4] The district court acknowledged that the United States had filed a 5K1.1 motion recommending a seven-level reduction, which would have resulted in a total offense level of 19, with a guideline range of 30 to 37 months. ROA.94.

imprisonment. ROA.107. The court allocated six months to the Section 242 count and 30 months to the Section 1001 count. ROA.107.[5]

The district court entered judgment on April 6, 2017. ROA.35. On April 10, 2017, Hatley filed a motion for reconsideration, a motion for bail pending appeal, and a notice of appeal. ROA.40-56. The district court summarily denied both motions without a response from the United States on April 12, 2017. ROA.58-59. Hatley filed the instant motion on April 17, 2017.

DISCUSSION

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, creates a presumption that a convicted defendant sentenced to a term of imprisonment "shall * * * be detained" while an appeal is pending. 18 U.S.C. 3143(b)(1). It allows for the release of a defendant pending appeal only if the defendant shows, among other things, that (1) he does not pose a flight risk or a danger to public safety, (2) the appeal is not for the purpose of delay, and (3) the appeal "raises a substantial question of law or fact" likely to result in reversal, a new trial, a non-custodial sentence, or a reduced prison sentence less than the total of the time already served

[5] On the same day Hatley was sentenced, the district court sentenced six of his co-defendants to below-Guidelines sentences. Three of the co-defendants sentenced have appealed, and one—Bret Broussard—has filed a motion or bail pending appeal. Three more co-defendants are scheduled to be sentenced on May 2, 2017.

plus the expected duration of the appeal process. 18 U.S.C. 3143(b)(1)(B). A defendant must establish these elements by clear and convincing evidence. See *United States* v. *Williams*, 822 F.2d 512, 517 (5th Cir. 1987).

For purposes of this motion, the United States concedes that Hatley is not a flight risk or a danger to public safety and that he has not filed this appeal for the purpose of delay. Furthermore, Hatley pleaded guilty and did not preserve any challenge to his conviction; thus, reversal of the conviction or a new trial are not likely. Accordingly, the sole issue before this Court is whether the appeal raises "a substantial question of law or fact" likely to result in a non-custodial sentence or "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." 18 U.S.C. 3143(b)(1)(B)(iv).

A "substantial question," this Court has explained is "one that is 'close' or 'that could very well be decided the other way' by the appellate court." *United States* v. *Clark*, 917 F.2d 177, 180 (5th Cir. 1990) (quoting *United States* v. *Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)). Such a question must raise "substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Valera-Elizondo*, 761 F.2d at 1024. In his motion, Hatley contends that there are four issues that merit bail pending appeal. None of these satisfies the 18 U.S.C. 3143 standard.

A. Individualized Sentence

Hatley's first argument is that the district court failed to provide an individualized sentence to him because the court stated that it was "going to overrule" his objections to the PSR "for two reasons: I remember your testimony in the *Ackal* trial and the reasons stated by the probation office." ROA.94. Hatley's contention is that the reference to "your testimony in the *Ackal* trial" demonstrates that the district judge perceived Hatley to be one of the other defendants in this case because Hatley did not testify at that trial. Mot. 9-10. Hatley argues that this supposed mistaken identity is likely to substantially reduce his sentence. Mot. 9-10.

This issue is not substantial, and any error likely is harmless. The district court's reference to "*your* testimony" as opposed to "*the* testimony" could have been a slip of the tongue or a transcription error. Indeed, despite a lengthy colloquy with the court, see ROA.97-107, neither Hatley nor his counsel objected or otherwise flagged the district court's supposed misstatement. Moreover, it was entirely proper for the district court to consider the testimony it heard about Hatley's role in the offense during the five-day trial of one of Hatley's co-defendants, Sheriff Ackal, in sentencing Hatley. And there is no evidence that the district court ignored Hatley's individualized circumstances, which Hatley outlined in an extensive statement to the court. Hatley detailed his own guilt about the

offense, apologized to his family, detailed his career trajectory for the district court, and "accepted responsibility for not taking a stand to protect [the victim]." ROA.100-107. The district court specifically responded to Hatley's statement and recognized Hatley's "service to [his] country." ROA.107. Accordingly, any argument that the district court was confused about Hatley's identity is groundless.

In any event, any confusion was harmless. As the district court stated, it overruled Hatley's objections for two reasons: the *Ackal* trial testimony *and* the Probation Office's responses to the objections. ROA.94. Even assuming the district court was confused when it referred to the *Ackal* trial testimony, its reliance on the Probation Office's detailed responses to Hatley's legal objections was proper because Hatley does not claim that the Probation Office also confused his identity or otherwise failed to prepare an individualized PSR. Therefore, Hatley's argument that he did not receive an individualized sentence is insubstantial and unlikely to lead to a sentence that is shorter than the duration of this appeal.

B. Guidelines Calculation And Upward Departure

Hatley next contends that the district court's Sentencing Guidelines calculation was erroneous. Mot. 10-11. Specifically, he contends that in calculating the sentence for his 18 U.S.C. 1001 conviction, the district court should have utilized Section 2B1.1 instead of Section 2J1.2 of the Sentencing Guidelines. Mot. 10-11. Hatley further contends that his below-Guidelines sentence actually

constituted an unexplained upward departure because the Guidelines calculation was incorrect. Mot. 11. However, even if the cross-reference methodology that Hatley challenges was incorrect, such an error would have little effect on the ultimate Guidelines range and is thus unlikely to reduce his sentence to a term that will last less than the duration of this appeal. Therefore, Hatley cannot meet his burden of rebutting the presumption against bail. See 18 U.S.C. 3143(b)(1)(iv).

Hatley contends that, applying the proper cross-reference, his offense level for his Section 1001 conviction would be six rather than 23.[6] This, however, ignores the "grouping" provisions of the Sentencing Guidelines. Where, as here, "counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan," the counts are "grouped together" for the purposes of calculating the total offense level. U.S.S.G. 3D1.2(b). And, when offenses are grouped together under this provision, "the offense level applicable to a Group is the offense level * * * for the most serious of the counts comprising the Group." U.S.S.G. 3D1.3(a).

The PSR calculated the adjusted offense level for the 18 U.S.C. 242 count as 29 and the adjusted offense level for the 18 U.S.C. 1001 count—which Hatley challenges—as 23. See ROA.146. The PSR properly grouped these counts

[6] Specifically, Hatley contends that Section 2B1.1 should be used to calculate the offense level. Mot. 10. Under Section 2B1.1(a)(2), the offense level would be six.

together (and Hatley does not object to the grouping). See ROA.145. Accordingly, the starting point for calculating the total offense level—which set the Guidelines range—was based on the Section 242 offense level of 29 (because it was higher than the offense level for Section 1001 and is thus the "most serious"). Therefore, even if Hatley is correct and the appropriate offense level for the Section 1001 count is six, that would be immaterial. The offense level for the Section 242 count would still be 29, which would be higher; this would again result in the 63 to 72 month Guidelines range that the district court utilized (and varied significantly downward from). See ROA.153.

Moreover, even assuming that Hatley's argument is correct, his proposed calculation of the Guidelines range for his Section 1001 conviction would not alter his six-month sentence for his Section 242 conviction. Because the United States would not object to expedited briefing of Hatley's sentencing appeal, Hatley cannot satisfy his burden of showing that his legal challenge likely would result in a term of imprisonment that is shorter than the time it would take for his appeal to be resolved. 18 U.S.C. 3143(b)(1)(B)(iv).

C. Accountability For Assault

Hatley next contends that his sentence was improper because he was sentenced for assaulting S.S., the victim. Mot. 11-13. Hatley contends that he should not be held responsible for the assault because his role was watching the

assault and failing to intervene, rather than engaging in the assault itself. Mot. 11-13.

Hatley's argument is contrary to the Sentencing Guidelines and applicable law. As a threshold matter, by failing to intervene, Hatley violated Section 242, and he should be held accountable for the results of that violation; his lack of active participation in the actual assault is not relevant. The statute prohibits willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" under color of law. 18 U.S.C. 242. Inmates and pretrial detainees have a constitutional right to be free of lawless violence while in the government's custody, and officers have a duty to protect against such violence. See *United States* v. *Reese*, 2 F.3d 870, 887-888 (9th Cir. 1993). Courts have long recognized that this duty includes a legal obligation to act to prevent assaults that an officer witnesses. See *United States* v. *Serrata*, 425 F.3d 886, 896 (10th Cir. 2005) ("There is no question that [the defendant] had a legal obligation to act to prevent the assault on [an inmate], and we flatly reject any suggestion otherwise."); *United States* v. *McKenzie*, 768 F.2d 602, 605 (5th Cir. 1985) (upholding Section 242 conviction against an officer who witnessed an assault by his fellow officers during an interrogation because he "was aware of what was transpiring and did not stop it"). Willfully disregarding this duty—as

Hatley did—is no less a violation of 18 U.S.C. 242 than assaulting an inmate. Hately is responsible for this violation and the consequences thereof.

The Sentencing Guidelines confirm this. Under the Guidelines, a defendant is responsible for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G 1B1.3(a)(1)(A). He is also responsible for "all harm that resulted from [such] acts and omissions." U.S.S.G 1B1.3(a)(3). In light of these provisions, it was entirely permissible for the Guidelines calculation to be premised on, and for the district court to rely on, the entire course of conduct and ultimate consequences that resulted from Hatley's failure to intervene. Here, Hatley acknowledged that he violated Section 242 and that he "did nothing to stop the Narcotics Agent's assault on S.S., even though he knew he had a duty to intervene and he had the opportunity to do so." ROA.120. Moreover, Hatley admitted that he "understood that the Narcotics Agent intended to use unlawful force against inmate S.S." ROA.120. Hatley also accepted responsibility "for not taking a stand to protect [the victim]." ROA.103. In short, Hatley has acknowledged that the assault resulted in part from his failure to intercede and halt it.

In light of Hatley's guilty plea and his acknowledgement of the result of his course of conduct (*i.e.*, the assault), the district court correctly sentenced him for the resulting assault. Hatley has cited no authority—and he cannot—suggesting

that he is not responsible for the assault because he did not himself directly perpetrate it. Accordingly, Hatley has not met his burden of establishing a substantial question of law on this issue, nor has he established any likelihood that this Court's ruling on the issue will result in a sentence that is shorter than the duration of this appeal.

D. Vagueness And Overbreadth

Hatley finally argues that 18 U.S.C. 242 is overbroad and unconstitutionally vague as applied to him. Mot. 13-14. He argues that the statute did not put him on notice that his failure to intervene when he knew his fellow officers were assaulting an inmate was illegal. Mot. 13-14. This question is insubstantial.

As noted above, by prohibiting willful deprivation of constitutional rights under color of law, Section 242 necessarily prohibits an officer's willful failure to intervene when he witnesses an assault of an inmate by a fellow officer. In light of that case law, there can be no doubt that Section 242 applies when an officer does not intervene when he knows an inmate is being wrongfully assaulted, as was the case here.

In any event, Hatley did not make an as-applied vagueness or overbreadth challenge in the district court. Hatley pleaded guilty to violating Section 242 as a result of his failure to intervene in his fellow officer's assault of an inmate. He did not at any point in the district court assert that the statute did not apply to him or

that the statute was vague or overbroad if it did apply to him. To the contrary, he repeatedly accepted responsibility for his wrongdoing with regard to his failure to intervene in the assault. ROA.120 (acknowledging his duty to intervene). Accordingly, this challenge is waived, subject to only plain error review, and is unlikely to constitute error that would reduce or eliminate his sentence. See *United States* v. *McRae*, 702 F.3d 806, 832 (5th Cir. 2012) (arguments raised for first time on appeal are subject to plain error review).

Because the statute plainly prohibits the conduct in which Hatley engaged and because he did not raise a vagueness or overbreadth challenge before the district court, Hatley has not met his burden of establishing that this question is substantial or likely to result in a sentence shorter than the duration of this appeal.

CONCLUSION

For the foregoing reasons, this Court should deny Jeremy Hatley's Motion For Bail Pending Appeal And Stay Of Surrender Date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BAIL PENDING APPEAL AND STAY OF SURRENDER DATE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and service will be accomplished by the appellate CM/ECF system.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BAIL PENDING APPEAL AND STAY OF SURRENDER DATE:

(1) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 3191 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Vikram Swaruup
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Date: April 20, 2017