IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
vs.	)	Case No. 11-2057
	)	
CHRISTOPHER ELDER,	)	
	)	
Appellant.	)	

MOTION FOR RELEASE ON BAIL PENDING APPEAL

Appellant Christopher Elder hereby moves the Court, pursuant to 18 U.S.C. § 3143(b)(1)(A) and Rule 9(b), Federal Rules of Appellate Procedure, to release him on bail pending appeal of his conviction. The Government conceded in its sentencing memorandum that Dr. Elder does not pose a flight risk or pose a danger to the safety of any other person or the community.

On June 30, 2010, a jury found Dr. Elder guilty of one count of conspiracy to possess and distribute controlled substances and eight counts of aiding and abetting distribution of controlled substances (Exhibits A and B). Prescriptions written by Dr. Elder, a physician in Texas, were sent by a pharmacist in Texas to a pharmacy in Belton, Missouri, which the Missouri pharmacy filled and sent back to the pharmacist in Texas. The Government alleged that the pharmacist in Texas had used Dr. Elder's prescriptions in furtherance of a "pill mill" racket, and that Dr. Elder had conspired with and aided and abetted the pharmacist. Although there was evidence that the pharmacist had accrued considerable financial benefit from these activities, there was no evidence whatsoever that Dr. Elder had done so. On May 3, 2011, the District Court sentenced Dr. Elder to 15 months imprisonment, to begin on July 25, 2011 (Exhibit A). At the same time,

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the District Court denied Dr. Elder's motion for release on bail pending appeal (Exhibit B). On July 13, 2011, it denied his motion to reconsider this decision (Exhibit C).

Rule 9(b) provides that this Court may review by motion a denial of bail pending appeal after a judgment of conviction, in accordance with the statutory provisions governing a District Court's decision over such a matter. 18 U.S.C. § 3143(b)(1)(A)(b)(B) provides that if the appellant's "appeal is not for the purpose of delay and raises a substantial question of law or fact," release on bail pending appeal is appropriate. Under this standard, "the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal;" rather, the primary question is whether "the question presented by the appeal is substantial." *United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985).

Dr. Elder's case meets this standard. Although the Government introduced evidence to show that his co-defendants profited substantially from their prescription-delivering enterprise, it never showed that Dr. Elder had done so. The Government's only evidence was that prescriptions Dr. Elder had written – many of which later were changed to grant refills where he had ordered there be none – were used by the co-defendants to order pills fraudulently. Tellingly, Dr. Elder was charged with conspiracy to distribute controlled substances, but only the co-defendants were charged with laundering money from the alleged criminal enterprise.

Before trial, Dr. Elder moved the District Court to sever the counts against him from the co-defendants and try him separately. The court declined. As a result, Dr. Elder, who never was shown to have profited from any criminal enterprise, was shown to the jury as being conflated with individuals of a much higher and different degree of culpability. More than half of the charges before the jury involved a conspiracy to which Dr. Elder was not even alleged to be a party.

Under Rule 8(b), Federal Rules of Criminal Procedure, the District Court had "no discretion to deny severance of misjoined defendants; … misjoinder of defendants is inherently prejudicial." *United States v. Bledsoe*, 674 F.2d 647, 654 (8th Cir. 1982). "Under Rule 8(b), defendants are properly joined 'if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.' … Generally, the 'same series of acts or transactions' means acts or transactions that are pursuant to a common plan or a common scheme." *United States v. Wadena*, 152 F.3d 831, 848 (8th Cir. 1998).

In this case, for the vast majority of counts, Dr. Elder was not even charged with participating in the conspiracy. It severely prejudiced Dr. Elder, who was not even accused of illicit financial gain, to be tried alongside criminals who profited greatly off their enterprise. Dr. Elder's defense was wholly different from the co-defendants. By being tried with them, however, he was made to be seen as "one of the gang" by the jury. This Court abused its discretion in denying Dr. Elder's motion to sever.

At the very least, this issue is "substantial" within the meaning of 18 U.S.C. § 3143(b)(1)(A)(b)(B). If this Court agrees that the District Court erred in denying Dr. Elder's motion to sever, it will result in a new trial. *Bledsoe*, 674 F.2d at 671. Release on bail is warranted.

Similarly, Dr. Elder (and the other defendants) repeatedly moved for transfer of venue to the Southern District of Texas, where all the defendants lived and where all the acts constituting the conspiracy and aiding he was alleged to have committed occurred. Both the Sixth Amendment and Article III, § 2, of the Constitution require the trial to be held in the state where the alleged crime occurred. In cases involving more than one state, the prosecution has a choice of venue, but "the convenience of the parties and the interests of justice" still apply as considerations under Rule 21(b), Federal Rules of Criminal Procedure. *United States v. McManus*, 535 F.2d 460, 463 (8th Cir. 1976).

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In this case, though Dr. Elder's co-defendants were accused of sending the prescriptions to Missouri, the acts of which Dr. Elder was accused (and convicted) occurred entirely in the Southern District of Texas. Obviously, this is closely related to the severance issue. Again, this issue is "substantial" within the meaning of 18 U.S.C. § 3143(b)(1)(A)(b)(B). If the Court agrees that the District Court erred in denying Dr. Elder's motion to transfer venue to the Southern District of Texas, again it, too, will result in a new trial. Release on bail is warranted.

Finally, one of the cardinal issues is whether Dr. Elder's writing of prescriptions which there was no evidence of how the pharmacist obtained and from which there was no evidence of illicit financial gain constituted conspiracy to distribute controlled substances or aiding and abetting the distribution of controlled substances. There was no evidence that Dr. Elder knowingly did anything other than write prescriptions. As he explained in his Motion for Judgment of Acquittal, the Government's evidence was insufficient as a matter of law to prove the charges against him because it failed to prove that the drugs he prescribed were dispensed other than for a legitimate medical purpose and not in the usual course of professional practice (Exhibit D, pp. 1-11). There was no evidence that any prescriptions Dr. Elder wrote were in violation of the national standards. As a result, his conviction cannot stand. *United States v. Hurwitz*, 469 F.3d 463 (4th Cir. 2006).

Again, under 18 U.S.C. § 3143(b)(1)(A)(b)(B), to be released on bail pending appeal, "the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal;" rather, the primary question is whether "the question presented by the appeal is substantial." *Powell*, 761 F.2d at 1233-34. Plainly, these issues meet this standard. Dr. Elder was released on bail pending and after trial without incident. This will not change if this Court authorizes release on bail pending appeal. Under Rule 9(b), it should do so.

Wherefore, Appellant Christopher Elder prays the Court to release him on bail pending appeal.

Respectfully submitted,

s/Dennis Owens

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Certificate of Service

I hereby certify that on July 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Dennis Owens
Attorney

INDEX OF EXHIBITS

Exhibit A .... Judgment in a Criminal Case (May 3, 2011)

Exhibit B .... Sentencing Minute Sheet (May 3, 2011)

Exhibit C ...Order Denying Reconsideration of Denial of Release Pending Appeal (July 13, 2011)

Exhibit D .... Motion for Judgment of Acquittal (August 17, 2010)