

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN KEITH SMALL,

Defendant.

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OPINION AND ORDER

14-cr-18-bbc

By counsel, defendant Brian Keith Small has filed three motions, one for my recusal, one seeking dismissal of the prosecution on the ground that the federal courts have no jurisdiction to try criminal cases and one for a stay of trial pending resolution of his challenge to the court's jurisdiction. Dkt. #79. All three motions must be denied.

Under 28 U.S.C. § 455, all judges of the United States must disqualify themselves in any proceedings in which their impartiality can reasonably be questioned. Defendant has shown no reason why my impartiality would be subject to question in his case and I know of none. I have no financial interest that might be at stake in the prosecution, I do not know defendant or either of the alleged victims and I know nothing about the case except for what I have read in the court filings. Contrary to defendant's assertion about the ruling on his jurisdictional challenge, a ruling on a legal question is not a demonstration of bias, in and of itself.

Defendant's other two motions can be addressed together. His motion for a stay of trial falls with the determination that he has failed to show that this court lacks jurisdiction to hear it. Although I concluded in the order entered herein on October 17, 2014, dkt. #70, that this court has jurisdiction to hear defendant's case, defendant argues in his recent motion that Congress did not properly enact the statute, 18 U.S.C. § 3231, that gives the courts of the United States original jurisdiction of all offenses against the laws of the United States. Defendant raised the same issue in the Court of Appeals for the Seventh Circuit after he had been found guilty in the District Court for the Northern District of Illinois of tax evasion and failure to file tax returns. The court of appeals considered the same argument defendant is making in this case: that it was improper for the district court to assert jurisdiction over his case because § 3231 was passed without a quorum in the House of Representatives and was therefore invalid. United States v. Small, 487 Fed. Appx. 302 (7th Cir. 2012). The court of appeals rejected the argument, pointing out that it conflicted with the "enrolled-bill-rule," under which any bill certified by the presiding officer of each chamber is considered "complete and unimpeachable." Id. According to the relevant Congressional Record, 90 CONG. REC. 568 (1948), § 3231 had been so certified. Id.

Thus, even if I agreed with defendant that jurisdiction did not exist in his case because of improprieties in the passage of the enacting legislation, I would not be free to reach a decision in his favor. As a district court judge, I am bound by the rulings of the court of appeals for this circuit. Luna v. United States, 454 F.3d 631, 636 (7th Cir. 2006) ("district court should not be making contrary predictions when this court has ruled squarely

on the matter. Ours is a hierarchial system”) (citing Gary v. Wlborn, 994 F.2d 305, 310 (7th Cir. 1993) (“Ours is a hierarchial judiciary, and judges of inferior courts must carry out decisions they believe mistaken.”)). See also Hutto v. Davis, 454 U.S. 370, 375 (1982) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts must think it to be.”).

One final matter. In a letter filed on October 21, 2014, defendant’s counsel wrote that his client wanted an opportunity to appeal any adverse decision on his motion for dismissal of the prosecution for lack of jurisdiction before he has to stand trial. He adds that a stay would allow defendant to make arrangements for transportation to and from court. Dkt. #77. I will not delay the trial to allow defendant to file an appeal of this order; such an appeal would be frivolous, given the lack of factual and legal support for defendant’s contentions. As to defendant’s transportation problems, the government has informed him and the court, dkt. #80, that the United States Marshal will pay for defendant to travel to Madison for trial under 18 U.S.C. § 4285.

Additional matters regarding trial will be addressed at the final pretrial conference scheduled for 12 noon on Friday, October 24, 2014.

#### ORDER

IT IS ORDERED that defendant Brian Keith Small’s motions for my recusal, for dismissal of this case for lack of jurisdiction and for delay of his trial pending a ruling on his

motion for dismissal, dkt. #79, are DENIED. Furthermore, I will not delay the trial to allow him to take an appeal of the ruling denying his motion for dismissal of the case.

Entered this 23d day of October, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge