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

UNITED STATES OF AMERICA,

OPINION & ORDER

Plaintiff,

v. 14-cr-121-jdp

JOHN C. MORRISON and
ANNA F. NOVAK,

Defendants.

Defendants Anna Novak and John Morrison have filed motions and supplemental motions to stay execution of their sentences pending appeal, pursuant to 18 U.S.C. § 3143. Dkt. 85; Dkt. 89; Dkt. 94; Dkt. 97. The government agrees that neither defendant is a flight risk or a danger to the community, but it nevertheless opposes the motions. Dkt. 99.

Before I can stay execution of defendants' sentences under § 3143, they must demonstrate that their appeal will raise a substantial question, which essentially means a close question that could go either way. *United States v. Hatterman*, 853 F.2d 555, 557 n.6 (7th Cir. 1988). If defendants make that showing, then they must also show that a favorable ruling would result in either a sentence that does not include imprisonment, or in a reduced sentence that would be less than the expected duration of the appeal. Defendants have not made either showing, and so I will deny their motions.

Defendants identify two issues that they intend to raise on appeal. First, defendants contend that I erred in calculating the drug quantity to be 25,000 grams of controlled substance analog in determining the guideline sentence range. But as the government points out, Dkt. 99, at 4-5, I made a conservative estimate of the drug quantity based on the evidence presented at the sentencing hearing, including Novak's recorded statements and

defendants' business records. I did not include all sales of synthetics made during the charged conspiracy, although there was credible evidence that could have supported such a calculation, which would have resulted in a quantity of 125,000 grams. I included only the quantity sold during the period when undercover officers were making controlled buys, and each of those buys included one of the four analogs charged in this case: UR-144, XLR11, PB22, and 5F-PB-22. Sentencing courts must determine drug quantities by a preponderance of the evidence, and appellate courts review these determinations for clear error. *United States v. Medina*, 728 F.3d 701, 705 (7th Cir. 2013). Defendants have not shown that their challenge to my determination of the drug quantity in this case will be a close question on appeal.

The second issue that defendants will raise on appeal is whether their pleas were invalid because I did not understand that the drug analog offense required a showing that defendants knew that the substances they were selling had a chemical structure similar to that of a controlled substance. Dkt. 94. But this issue was thoroughly discussed during the plea colloquy. I explained to defendants that if they did not know the facts that made the substance they were selling a controlled substance or a controlled substance analog, then they would have a defense to the charges. *See, e.g.*, Dkt. 104 (Plea Hearing Tr. 28:3-16). Defendants elected to plead guilty anyway, knowing the elements of the controlled substance analog charge. They have not shown that they will be able to withdraw their pleas.

Defendants have not shown that their appeal will raise a substantial question, which would be reason enough to deny their motions. But they have also failed to show that if they prevail on appeal, then they will receive sentences without imprisonment, or with terms of imprisonment that are shorter than the expected time for the appeal process. Besides the

controlled substance charges, defendants both pled guilty to tax fraud charges, for which I sentenced them to three years' imprisonment. Although defendants do not come straight out and say it, they imply that without the controlled substances charges, they would have received considerably shorter sentences of imprisonment on the tax fraud charges. *See* Dkt. 100, at 3. This is a fair point: under Guideline § 2T1.1(b)(1), defendants both received increases in the base offense levels for these charges because the income that they failed to report was from criminal activity. A completely successful appeal of the controlled substance conviction would make this increase inappropriate, and then the resulting guideline range for the tax fraud charges would be 12 to 18 months. But even assuming that defendants received sentences at the bottom of this range, their incarceration would likely still last longer than the duration of their appeal. The Seventh Circuit's 2014 operating statistics show that, on average, the court of appeals resolves criminal cases in just over 10 months after the filing of a notice of appeal in the district court. *See The Judicial Business of the United States Courts of the Seventh Circuit 2014*, Table 9, https://www.ca7.uscourts.gov/rpt/2014_report.pdf. Defendants filed their notices of appeal in mid-November 2015, and they will not begin their terms of incarceration until January 2016. Thus, even if they secured complete reversal of the controlled substance charges, they would still face sentences on the tax fraud charges that would likely exceed the duration of their appeal.

Defendants have not met their burden under 18 U.S.C. § 3143 and their motions for stay of execution of their sentences are denied.

Entered December 18, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge