Maria Albano

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U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 6/10/2009 at 7:32 AM EDT and filed on 6/9/2009
Case Name: USA v. Corbin
Case Number: 2:09-mj-444
Filer:
Document Number: 27

Docket Text:
ORDER Re: [26] Letter moving the Court to grant a certificate of appealability - For the foregoing reasons, Corbins motion for a certificate of appealability ofthe Courts May 29, 2009 decision and subsequent June 1, 2009 Order is denied. (See Order for further details). (Ordered by Senior Judge Arthur D. Spatt on 6/9/09). (Coleman, Laurie)

2:09-mj-444-1 Notice has been electronically mailed to:

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2:09-mj-444-1 Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

Plaintiff,

ORDER
09-MJ-0444 (ARL)

-against-

ROGER CORBIN,

Defendant.
---X

APPEARANCES:

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Jeff Grossman, Esq., Of Counsel

SPATT, District Judge:

On May 29, 2009, the Court ruled from the bench, denying defendant Roger Corbin's motion for the following relief:

> (A) to permanently enjoin, restrain, and stop Newsday, News 12 and the United States Government from issuing press releases, mug shots or "perp walk" photos, videos or images of the defendant in handcuffs; and
>
> (B) to permanently enjoin the United States Government from conducting "perp walks" or issuing other information of the defendant aside from pedigree information and except as directed by the Court; and
>
> (C) to immediately conduct a hearing to determine whether Rule 6 of the Federal Rules of Criminal Procedure was violated and whether the New York Rules of Professional Conduct § 3.6 was violated; and
>
> (D) to hold the United States Government in contempt pursuant to Federal Rules of Criminal Procedure Rule 6(e)(7); and
>
> (E) to dismiss the charges against the defendant and seal the record.

Upon announcement of the decision, counsel for Corbin moved the Court to grant a certificate of appealability. On June 1, 2009, the Court issued a written Memorandum of Decision and Order, in which the Court reserved decision as to the issuance of a certificate of appealability.

28 U.S.C. Section 129 provides that the United States Courts of Appeal have jurisdiction from all final decisions of the district courts. "The Supreme Court has

noted that adherence to the rule of finality is particularly important in criminal cases, because the delays and disruptions attendant upon intermediate appeal, which the rule is designed to avoid, are especially inimical to the effective administration of the criminal law." *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1042 (2d Cir. 1988) (internal quotations and citations omitted); *United States v. Magassouba*, 544 F.3d 387, 399–400 (2d Cir. 2008) ("The final-decision rule applies with particular force in criminal cases, which we generally review only after sentence has been imposed and a judgment of conviction entered.").

However, under the collateral order doctrine, courts recognize a small class of rulings as final when they "(1) conclusively resolve a disputed question that (2) is an important issue completely separate from the merits of the action, and that (3) would be effectively unreviewable on appeal from a final judgment." *Id.* at 400; *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Although media intervenors have been permitted to appeal from interlocutory orders restraining public disclosure of criminal proceedings, *see ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004), *see also United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), the right of a defendant to appeal from an order denying such restraint presents a different issue. In *Wecht*, the court explained that the United States Supreme Court has found the requirements of the collateral order doctrine satisfied in very limited

circumstances: (1) an order denying a motion to reduce bail; (2) an order denying a motion to dismiss an indictment on double jeopardy grounds; (3) an order denying a motion to dismiss an indictment on speech or debate grounds; and (4) an order to forcibly medicate a defendant during trial. *Id.* at 228 (citing *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) and *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)).

Here, the Court reviewed the defendant's motion to determine the risks presented by the complained of activities with regard to a fair trial by an impartial jury. On each issue, the Court determined that the exposure to the public was unlikely to jeopardize a fair trial in this expansive, densely populated district.

Appeals resting solely on "fair trial" grounds are particularly suited for direct review following final judgment in criminal cases. *See U.S. v. Gerena*, 869 F.2d 82, 84 (2d Cir. 1989) (entertaining appeal raising "fair trial" grounds of order allowing use of surveillance materials in briefs and memoranda only because of overlap with the appealable of issue defendants' privacy interests); *see also United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir. 1982) ("The question of appealability might be answered differently if this appeal were based solely on the appellants' argument that public disclosure of the wiretap evidence will prevent their getting a fair trial. Not only could such an appeal delay the trial, but the appellants, though not the media, could look forward to having an effective remedy if it turned out that the motion had

been granted improperly-an order for a new trial.").

However, in *United States v. Graham*, 257 F.3d 143 (2d Cir. 2001), the Second Circuit, without explaining its reasons for departing from the general rule, found a district court order allowing the media to copy tapes played at defendants' detention hearing appealable by the defendants on an interlocutory basis. *Graham*, 257 F.3d at 147–48 (finding that "the order of the district court falls within the collateral order exception."). The *Graham* court did not explicitly renounce previous jurisprudence concerning "fair trial" appeals and the Court finds this singular case insufficient to grant a certificate of appealability in this case.

In addition, in its May 29th decision and subsequent order, the Court found that the defendant failed to provide factual support for his allegation that Fed. R. Crim. Pro. 6 had been violated and the requirements of grand jury secrecy breached. It is well-settled, in this Circuit, that an interlocutory order denying a motion to dismiss a criminal indictment for violation of Rule 6(e) is not subject to immediate appeal. *Midland Asphalt*, 840 F.2d at 1046 (finding that decisions concerning Rule 6(e) violations are subject to post-conviction review and, therefore, not reviewable on an interlocutory basis). Therefore, the denial of Corbin's request for "an immediate hearing" on the issue is likewise unreviewable.

For the foregoing reasons, Corbin's motion for a certificate of appealability of the Court's May 29, 2009 decision and subsequent June 1, 2009 Order is denied.

SO ORDERED.

Dated: Central Islip, New York
June 9, 2009

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge