NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 19, 2023
Decided May 25, 2023

Before

DIANE P. WOOD, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-1169

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN O. JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 3:16-CR-50060(1)

Iain D. Johnston,
Judge.

O R D E R

Kevin Johnson appeals from his conviction on seven counts of bankruptcy fraud and related crimes, *see* 18 U.S.C. §§ 157(2)–(3); 152(1), (8)–(9), for which he received seven concurrent terms of two years in prison followed by two years of supervised release. His appointed counsel (three attorneys) move to withdraw under *Anders v. California*, 386 U.S. 738 (1967). This *Anders* case is unusual: Counsel identifies one nonfrivolous argument on appeal, but Johnson insists that counsel raise it alongside other issues that they believe are frivolous. Because representing Johnson on the terms he demands would conflict with their ethical obligation to refrain from raising frivolous

issues, counsel assert that they must withdraw. *See id.* at 744. In response, *see* CIR. R. 51(b), Johnson argues that counsel's motion ignores supposedly nonfrivolous issues that he lists in an email he sent to his trial counsel. He asks us to grant counsel's motion to withdraw and either appoint new counsel or permit him to represent himself. Because neither current counsel nor newly appointed counsel can ethically present the frivolous issues that Johnson insists upon, we grant the motion to withdraw and do not appoint new counsel. But we allow Johnson to pursue this appeal—on the express understanding that he must follow the applicable rules that bar frivolous appeals. *See* FED. R. APP. P. 38.

We begin by describing the one nonfrivolous issue that counsel has identified. Counsel explains that Johnson could plausibly argue that the district court wrongly denied his motion to dismiss the indictment under the Speedy Trial Act, 18 U.S.C. § 3161. Johnson's trial was continued twice under the Northern District of Illinois's general orders suspending criminal trials during the COVID-19 pandemic. Shortly before trial, Johnson argued that the delay violated the Speedy Trial Act, which requires that trials be held within a certain timeframe. The district court denied his motion, reasoning in part that the general orders justified the delay. That rationale may be debatable: As counsel points out, some circuits have ruled that pandemic-related general orders delaying trials did not violate the Speedy Trial Act, *see, e.g.*, *United States v. Leveke*, 38 F.4th 662, 670 (8th Cir. 2022), but we have not decided the question. Because the question is open here, we agree with counsel that a challenge to the ruling on the motion to dismiss would not be frivolous. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014) (describing frivolous claims as those "so clearly blocked by statute, regulation, binding or unquestioned precedent, or some other authoritative source of law that they can be rejected summarily").

But counsel are right that Johnson has put them in an ethical bind. On the one hand, lawyers should abide by the objectives that their clients advance. *See* N.D. Ill. L.R. 83.50 (referencing MODEL RULES OF PRO. CONDUCT r. 1.2) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued."). On the other hand, lawyers may not raise frivolous arguments. *See Anders*, 386 U.S. at 744. If counsel is correct that the arguments Johnson insists they make are frivolous, we may grant their motion to withdraw to eliminate the ethical conflict. We therefore examine whether any of the issues that Johnson insists his counsel raise are frivolous, and we conclude that they are.

To begin, some of the issues that Johnson insists his counsel raise would frivolously contest the sufficiency of the evidence upon which the jury relied to convict him. He states in his email for example: "Shifting the burden of proof to me in closing. I'm not obligated to prove my current work. They bore burden to prove what my current accounts were. They didn't." In reviewing a challenge to the sufficiency of the evidence, we would view the evidence in the light most favorable to the verdict and would not reverse a conviction unless the trial record contained "no evidence" to support it. *United States v. Kohli*, 847 F.3d 483, 489 (7th Cir. 2017). The government introduced abundant evidence in the nine-day trial that Johnson falsified and withheld records, *see* 18 U.S.C. § 152(8)–(9), concealed assets, *see id*. § 152(1), and defrauded the bankruptcy court, *see id.* § 157(2)–(3). This evidence included Johnson's sworn admissions in proceedings before the Illinois Attorney Registration and Disciplinary Committee that he hid assets and asked his clients to send payments to him instead of, as was required, to the trustee. Johnson thus could not plausibly argue that "no evidence" supported his convictions. Moreover, he does not explain why evidence of his "current work" was necessary to prove these crimes.

Other issues that Johnson demands that his counsel raise would also frivolously challenge the district court's evidentiary rulings. For example, he asks: "Bill Hotopp as expert. Why not?" At trial, Johnson sought to introduce expert testimony from Hotopp, an attorney who represented him during his bankruptcy proceeding, about the necessity of preserving objections during the bankruptcy proceedings, the workings of the federal courts, and the collectability of legal fees. Johnson argued that the testimony was relevant to his intent to defraud. Seeing no connection between the proposed expert testimony and Johnson's intentions, the district court sustained the government's objection that the testimony was irrelevant. *See* FED. R. EVID. 401. We would review a ruling to exclude expert testimony for abuse of discretion. *United States v. Protho*, 41 F.4th 812, 820 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 465 (2022). But the court's decision was reasonable because, as it observed, an expert cannot testify to a defendant's state of mind. *See* FED. R. EVID. 704. And Johnson has identified no reason, nor can we think of one, why the district court abused its discretion with other evidentiary rulings that he alludes to in his response to counsel's motion.

Because Johnson insists that his counsel raise frivolous arguments, like the ones we have discussed, even though they ethically cannot, we grant their motion to withdraw. But we allow the case to continue. Typically, when we grant a motion to withdraw under *Anders*, we have determined that the defendant could make no nonfrivolous argument and thus we also dismiss the appeal. *See, e.g.*, *United States v.*

Vizcarra, 668 F.3d 516, 529 (7th Cir. 2012). But if, as here, a nonfrivolous appellate challenge is present, then dismissal is not appropriate. *See United States v. Maday*, 799 F.3d 776, 780 (7th Cir. 2015) ("Ordinarily, having concluded that an issue presented by a criminal appeal is not frivolous, we would deny counsel's motion to withdraw *and* order the case briefed."). Johnson's appeal may therefore proceed to briefing. *See United States v. Shaaban*, 523 F.3d 680, 681 (7th Cir. 2008) (Ripple, J., in chambers). We will not, however, appoint replacement counsel for him because we have no reason to believe that another attorney could avoid the same ethical bind that we confront today. Thus, Johnson may either represent himself or hire counsel at his own expense. Of course, any new counsel must mind a lawyer's obligation not to advance frivolous arguments. *See Polk County v. Dodson*, 454 U.S. 312, 323 (1981). We will set a briefing schedule by separate order.

We GRANT counsel's motion to withdraw.