

FILED

UNITED STATES COURT OF APPEALS

SEP 13 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE EUGENE LILLARD,

Defendant-Appellant.

No. 18-30106

D.C. No.

2:16-cr-00007-RSM-1

Western District of Washington,
Seattle

ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE EUGENE LILLARD,

Defendant-Appellant.

No. 18-30114

D.C. No.

2:15-cr-00270-RSM-1

Western District of Washington,
Seattle

Before: HAWKINS, CLIFTON, and N.R. SMITH, Circuit Judges.

In appeal number 18-30106, the court has received and reviewed Lonnie Eugene Lillard's pro se objections to the Appellate Commissioner's report and recommendation. Lillard's pro se objections are overruled. The court adopts in full the Appellate Commissioner's report and recommendation. Lillard's request

MH/Appellate Commissioner

to represent himself (Docket Entry No. 6) is denied. Suzanne Lee Elliot, Esq., will be appointed by separate order to represent Lillard in appeal number 18-30106.

In appeal number 18-30114, Lillard's motion to consolidate appeal numbers 18-30106 and 18-30114 (Docket Entry No. 12) is granted. The Clerk shall change this court's docket to so reflect. For each district court case, the parties shall prepare, cite to, and file separate excerpts of record.

In the consolidated appeals, Lillard shall designate the reporter's transcripts by October 5, 2018. The reporter shall file the transcripts by November 5, 2018. Lillard's opening brief and excerpts of record are due December 17, 2018. The government's answering brief is due January 17, 2019. Lillard's optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve this order on all counsel of record and appellant individually: Lonnie Eugene Lillard, Reg No. 27612-086, FCI Sheridan, Federal Correctional Institution, P.O. Box 5000, Sheridan, OR 97378.

Appendix B

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UNITED STATES COURT OF APPEALS

JUL 09 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE EUGENE LILLARD,

Defendant-Appellant.

No. 18-30106

D.C. No.

2:16-cr-00007-RSM-1

Western District of Washington,
SeattleREPORT AND
RECOMMENDATION

Before: Peter L. Shaw, Appellate Commissioner.

I

Background

Lonnie Eugene Lillard pleaded guilty to conspiracy to commit bank fraud. *See* 18 U.S.C. §§ 1334, 1349. Over an 18-month period, Lillard co-led a group that stole and reprogrammed point-of-sale terminals, posed as merchants and used the terminals to process unauthorized transactions, and generated more than \$7.5 million in proceeds that were spent before the frauds were detected. Lillard has a history of fraud convictions in state and federal court, and the evidence showed that he had planned the fraud in this case before completing his last prison sentence and embarked on it within weeks of his release. The district court sentenced

Lillard to 196 months in prison and 60 months of supervised release, and ordered Lillard to pay \$5,816,938.82 in restitution and a \$100 special assessment. Lillard is in custody at the Federal Detention Center in Seattle, Washington, and his projected release date is March 30, 2030.

In the district court, Lillard alternatively requested the assistance of counsel and leave to represent himself, and he changed his mind about that several times. Initially, Lillard was represented by appointed counsel Robert Harris Gombiner. Lillard pleaded guilty, the district court granted Lillard's motion to withdraw the guilty plea, and Lillard pleaded guilty again. After a hearing, a magistrate judge denied Lillard's motion to represent himself. The district court granted Lillard's motion for reconsideration and allowed Lillard to represent himself with Gombiner serving as standby counsel. During restitution hearings, the district court granted Lillard's motion to revoke his pro se status and to reappoint counsel Gombiner. The district court then granted another motion by Lillard to represent himself, and denied Lillard's pro se motion to withdraw the guilty plea. Lillard represented himself at sentencing and filed a pro se notice of appeal from the district court judgment and sentence.

In related proceedings, the same district court judge revoked Lillard's supervised release. Lillard was represented by counsel Gombiner in those

proceedings. Gombiner moved to be relieved, and appellate counsel Suzanne Lee Elliott was appointed to represent Lillard in appeal number 18-30114 from the revocation of supervised release.

Meanwhile, in the direct appeal from the bank fraud conviction, the court of appeals ordered Lillard to retain counsel, request appointment of counsel, or request permission to represent himself on appeal. In response, Lillard filed a pro se request to represent himself. In the motion, Lillard states that during a recent visit with counsel Elliott, his appointed counsel in the related supervised release revocation appeal, he agreed to have Elliott represent him in this direct criminal appeal. The next day, however, Lillard informed Elliott that he wished to represent himself.

The court referred Lillard's request to represent himself to the Appellate Commissioner, pursuant to Ninth Circuit General Order 6.3(e), which authorizes the Appellate Commissioner to confirm that a request for self-representation and waiver of the right to counsel is knowing, intelligent, and unequivocal. *See Hendricks v. Zenon*, 993 F.2d 664, 669 (9th Cir. 1993).

II Analysis

The United States Supreme Court held in *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000), that there is no constitutional right to self-representation on appeal, but that the court has the discretion to allow self-representation in appropriate cases. *Id.* This court's discretion to allow self-representation on appeal in appropriate cases is exercised with attention to the court's strong interests in ensuring the integrity of the judicial process and in avoiding the undue burden that may be imposed by a pro se litigant. *See Martinez*, 528 U.S. at 162-63. Accordingly, the court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request for self-representation and waiver of the right to counsel are knowing, intelligent, and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. *See* 9th Cir. R. 4-1(d).

A review of the district court and court of appeals dockets shows that this is not an appropriate case in which to exercise the court's discretion to permit self-representation. *See Martinez*, 528 U.S. at 163. Allowing Lillard to represent himself could unduly burden the court and the government, endanger the integrity

of the judicial process, and undermine the just and orderly resolution of the appeal. *Id.*; *Martinez*, 528 U.S. at 162.

In the district court, Lillard filed a number of pro se motions that did not advance his cause, and that the district court denied or struck from the record. *See* Docket Entry Nos. 202, 237, 245, 247, 253. Lillard also filed a motion to recuse the district court judge that was denied by the district court judge and the senior active district court judge. *See* Docket Entry Nos. 199, 200. In addition, Lillard filed two pro se interlocutory appeals that were dismissed by the court of appeals for lack of jurisdiction. *See* Appeal Nos. 18-30075, 18-30078.

Lillard also has filed a number of unsuccessful pro se appeals in the past, and in some of those appeals he also filed unsuccessful motions for reconsideration and was prohibited from further filings. *See* Appeal Nos. 99-35996 (affirming district court denial of habeas corpus petition), 05-56922 (denying certificate of appealability), 07-55587 (same), 10-16844 (same), 12-16326 (same), 12-16640 (same), 13-35067 (same), 17-71031 (denying application for authorization to file second or successive habeas corpus petition). Lillard also has submitted pro se pleadings while represented by counsel in direct criminal appeals. *See* Appeal Nos. 02-50264, 03-30431, 08-10481.

Lillard filed pro se opening and reply briefs in his pro se appeal number 16-30194 from a district court order granting the government's motion to apply \$6,671.81 in his inmate trust account to the restitution owed on his 1998 conviction for conspiracy and possession of counterfeited securities. The court recently appointed the federal public defender as amicus counsel in that appeal to file a supplemental opening brief addressing two specific issues that Lillard failed to address sufficiently in his pro se briefing. Thus, Lillard's pro se briefing in that appeal was insufficient.

The Appellate Commissioner also has reviewed Lillard's proposed pro se supplemental opening brief in direct criminal appeal number 08-10481, which the court declined to file because Lillard was represented by counsel. Lillard's proposed pro se brief, like many of his other pro se pleadings, is handwritten, overlong, does not adequately discuss legal analysis in the context of the facts relevant to his case, and is generally not helpful to his cause. For example, Lillard wished to present an ineffective-assistance-of-trial-counsel claim, which appointed counsel appropriately did not raise on direct appeal because it must be presented instead in a habeas corpus petition.

Given the complexity of the fraud in this case, the potential issues presented by Lillard's guilty plea, and the significant sentence and restitution imposed, the

court would benefit from appointing counsel Elliott to represent Lillard. Elliott is familiar with Lillard's related supervised release revocation appeal, and she is willing to represent him in this direct criminal appeal.

Counsel Elliott is an experienced appellate panel attorney who has represented many criminal defendants in this court under the Criminal Justice Act. Elliott can research the relevant issues, advise Lillard regarding the merits of his appeal, and prepare briefing and other pleadings that marshal the most promising arguments on Lillard's behalf. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (recognizing "the superior ability of trained counsel in the examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," and stating that "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.").

In sum, this is not an appropriate case in which to exercise the court's discretion to permit self-representation. *See Martinez*, 528 U.S. at 162-63. Here, the court's interest in the fair and efficient administration of justice outweighs Lillard's interest in self-representation. *Id.*

III Recommendation

The court should deny Lonnie Eugene Lillard's request to represent himself (Docket Entry No. 6). The court should appoint counsel Suzanne Lee Elliott to represent Lillard, and set a new schedule for filing the briefs.

**Additional material
from this filing is
available in the
Clerk's Office.**