

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES : CRIMINAL ACTION
 :
 v. : NO. 09-155-11
 :
 STEVE CALDERON :
 :

OPINION

Slomsky, J.

October 26, 2010

I. INTRODUCTION

Defendant Steve Calderon has filed a Motion for Pretrial Release. (Doc. No. 143.) Defendant had appeared before United States Magistrate Judge David R. Strawbridge for a Detention Hearing on July 26, 2010 and stipulated to Pretrial Detention at that time. On September 29, 2010, the Government filed a response in opposition to Defendant's Motion for Pretrial Release. (Doc. No. 151.) This Court held a hearing on Defendant's Motion on October 6, 2010. Counsel for Defendant and the Government presented arguments in support of their respective positions and Defendant testified on his own behalf. Defendant's girlfriend and his sister also testified on his behalf. Taking into consideration the arguments and briefs of Counsel and the record in this case, the Court will deny Defendant's Motion for Pretrial Release.

II. BACKGROUND

On April 28, 2010, a grand jury returned a Superseding Indictment (Doc. No. 9) charging Defendant in four (4) counts with the following offenses:¹

¹ The grand jury returned the initial indictment in this case on March 11, 2009, but did not name Steve Calderon as a defendant. (Doc. No. 1.) The April 28, 2010 Superseding

- (1) Conspiracy to participate in a racketeering (RICO) enterprise in violation of 18 U.S.C. § 1962(d) (one count);
- (2) Conspiracy to commit murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5) (one count);
- (3) Distribution of 50 grams or more of cocaine base (“crack”) in violation of 21 U.S.C. § 841(a) (one count); and
- (4) Distribution of controlled substances on public housing authority property in violation of 21 U.S.C. § 860(a) (one count).

The maximum sentence for these offenses is life imprisonment with a mandatory minimum of ten (10) years imprisonment. (Doc. No. 151 at 1; Doc. No. 39 at 4.)

On July 21, 2010, Defendant was arrested and United States Magistrate Judge Henry S. Perkin granted the Government’s Motion for Temporary Detention. (See Doc. No. 35.) On July 23, 2010, the Government filed a Motion and Memorandum for Hearing and Defendant’s Pretrial Detention. (Doc. No. 39.) As noted above, on July 26, 2010, United States Magistrate Judge David R. Strawbridge presided over Defendant’s arraignment and signed an Order confirming that Defendant had stipulated to pretrial detention and entered a plea of not guilty. (Doc. No. 53.) Thereafter, on September 2, 2010, Defendant filed the Motion for Pretrial Release presently before this Court. (Doc. No. 143.) The Government filed its response in opposition on September 29, 2010. (Doc. No. 151.)

On October 6, 2010, the Court held a hearing on Defendant’s Motion for Pretrial Release (the “Hearing”). Defendant testified on his own behalf that he had been living with his

Indictment (Doc. No. 9) replaced the initial indictment, adding counts and defendants, including Steve Calderon.

girlfriend, Felicia Donato,² for approximately one year prior to his arrest. (Transcript of October 6, 2010 Hearing (“Hr’g Tr.”) at 6:10-13; 7:1-2). Defendant and Donato, who is four months pregnant with Defendant’s child, resided in the household with four children. One child they had together; one child is Defendant’s from a prior relationship; and two children are Donato’s from a prior relationship. (Id. at 7:9-24.) Defendant testified that prior to his arrest he was employed full-time at a warehouse in Bethlehem, Pennsylvania. (Id. at 8:6–9:3.) Defendant was employed at the warehouse for approximately seven months and he believes, based on information provided to him by Donato, that he would be able to return to that job if he were released on bail. (Id. at 9:4–10:4.) Defendant also testified regarding his criminal history and indicated that he had probation violations for “dirty urine” resulting from marijuana use (id. at 13:15–14:20); a state court misdemeanor conviction for escape which arose during an incident where Defendant fled from a police officer on a motorcycle (Id. at 17:6–18:9); and an open burglary charge pending in Bethlehem, Pennsylvania. (Id. at 19:6–20:11.) Defendant expects that this charge will be dismissed. (Id.) Defendant also stated that he has no passport, has never left the country, was born in New York and raised in Pennsylvania, and has only resided in those states. (Id. 16:15–17:5.)

Felicia Donato also testified at the Hearing. Donato said that her landlord has given her approval for Defendant to move back into the home with Donato if he is released on bail. (Hr’g Tr. at 23:6-8; 24:5-10.) She spoke with Defendant’s former employer at the warehouse and he assured her that Defendant could return to work. (Id. at 23:9-13.) Donato recently lost her job.

² During the hearing, Donato was referred to as either Defendant’s girlfriend or his fiancée.

She is having trouble paying her bills and caring for the children without Defendant's assistance. (Id. at 23:17–24:18.)

Defendant's sister, Lissette Cruz, also testified. Cruz said that, although she owns her home, she was not in a position to say whether she could post her home as collateral on behalf of Defendant without discussing the issue with her husband. (Hr'g Tr. at 27:25–28:3; 32:16–33:4.) Cruz explained the living arrangements of Defendant's other siblings. All reside in either Pennsylvania or New York. She could not confirm whether any of Defendant's siblings were in a position to post property as collateral to assure Defendant's appearance in court if he were released on bail. (Id. at 29:6–32:15.)

Defendant's Motion for Pretrial Release asserts that "with the imposition and enforcement of certain conditions to ensure Defendant's presence at trial," Defendant should be released on bail. (Doc. No. 143 at 3.) At the Hearing on Defendant's Motion, counsel for Defendant elaborated upon this request and offered house arrest, mandatory urine tests and proof of Defendant's full-time employment as conditions that might satisfy the Court that Defendant would not flee or pose a danger to the community. (Hr'g Tr. at 35:1-14.)

At the Hearing, the Government argued that the charges against Defendant create a presumption that Defendant is a danger to the community and a flight risk and he should be detained. (Id. at 36:4-15.) Moreover, the Government noted that Defendant sold a stolen firearm loaded with live ammunition just two weeks before being arrested on the charges contained in the Superseding Indictment (Doc. No. 9) and that Defendant has three prior adjudications for drug-related offenses—two as an adult and one as a juvenile. (Hr'g Tr. at 47:9-16.)

III. JURISDICTION

Defendant moves for pretrial release, which is in essence a request for a review of Magistrate Judge Strawbridge's July 26, 2010 Detention Order. This Court has jurisdiction to review the Magistrate Judge's Detention Order under 18 U.S.C. § 3145(b). Section 3145(b) "requires this Court to make a *de novo* determination of the findings of fact underlying the detention Order." United States v. Cole, 715 F. Supp. 677, 677 (E.D. Pa. 1998) (citing United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985)).

IV. LEGAL STANDARD

Detention of federal defendants prior to trial is controlled by the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.* Pursuant to 18 U.S.C. § 3142(e)(1), a defendant may be detained pending trial:

If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person in the community.

Furthermore:

Subject to rebuttal by [a defendant], it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of [a defendant] as required and the safety of the community if the judicial officer finds that there is probable cause to believe that [a defendant] committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 *et seq.*).

Id. at § 3142(e)(3)(A); see also United States v. Strong, 775 F.2d 504, 507 (3d Cir. 1985) (noting that, in enacting 18 U.S.C. § 3142(e), Congress explicitly equated these drug offenses under the Controlled Substances Act with danger to the safety of the community for purposes of detaining

a defendant pending trial).

V. DISCUSSION

Defendant is charged in the Superseding Indictment with two counts of violating the Controlled Substances Act, 21 U.S.C. §§ 841 and 860, and these offenses carry a mandatory minimum of ten years imprisonment. The statutory presumption that no conditions will reasonably assure the appearance of a defendant at trial or will reasonably assure safety of the community is therefore triggered. See 18 U.S.C. 3142(e)(3)(A).

Moreover, the requisite probable cause is established by the grand jury finding sufficient evidence to support the charges contained in the Superseding Indictment. An indictment “is sufficient to support a finding of probable cause triggering the rebuttable presumption of dangerousness under § 3142(e).” United States v. Suppa, 799 F.2d 115, 119 (3d Cir. 1986) (noting that although the Government always carries the burden of persuasion, the probable cause determination predicated on an indictment merely shifts the burden of producing lack of evidence of dangerousness onto the defendant); United States v. Levy, No. 08-393, 2008 WL 4978298, at *1 (E.D. Pa. Nov. 20, 2008) (noting that based on an indictment defendant is subject to the statutory presumption against bail set forth in 18 U.S.C. § 3142(e)).

To further bolster the presence of probable cause to believe that Defendant committed the offenses listed in 18 U.S.C. § 3142(e)(3)(A), the Government proffered that it possesses evidence against Defendant consisting, in part, of audio and video recordings, surveillance observations by law enforcement, seized controlled substances and weapons, and testimony of a member of the Federal Bureau of Investigation and various police officers who were involved in the investigation and arrest of Defendant. (Doc. No. 39 at 2.)

Based on the foregoing, the statutory presumption that no condition or combination of conditions will reasonably assure Defendant's appearance and the safety of the community is applicable in this case. See Suppa, 799 F.2d at 119; 18 U.S.C. § 3142(e)(3).

Having found the presumption applicable, the burden shifts to Defendant to rebut this presumption. Rebuttal evidence Defendant may put forward includes “testimony by co-workers, neighbors, family physician, friends, or other associates concerning the arrestee's character, health, or family situation,’ or evidence of steady employment.” Levy, 2008 WL 4978298, at *1 (quoting United States v. Perry, 788 F. 2d 100, 115 (3d Cir. 1986)); see also Suppa, 799 F.2d at 120. Defendant may also proceed by proffer. See Suppa, 799 F.2d at 118 (citing Delker, 757 F.2d at 1390; 18 U.S.C. § 3142(f)). No single factor or combination of factors is dispositive. Levy, 2008 WL 4978298, at *1. The ultimate determination on this issue is for the Court, “based on all evidence and arguments adduced.” Id. The Court should consider Defendant's rebuttal evidence in light of certain factors, including: (1) the nature and circumstances of the offenses charged, including whether the offenses involve drugs or firearms; (2) the weight of the evidence against Defendant; (3) the history and characteristics of Defendant; and (4) the nature and seriousness of the danger to the community that would be posed by Defendant's release. See Levy, 2008 WL 4978298, at *1; 18 U.S.C. § 3142(g).

At the Hearing, Defendant offered two witnesses and provided his own proffers. The testimony addressed Defendant's character, family situation and the nature of his employment. Specifically, Defendant proffered that he does not possess a passport, he has never traveled outside of the United States and he desires to stay in Lehigh Valley with his family, including his children and his girlfriend, Felicia Donato. (Hr'g Tr. at 16:15–17:5; 21:6-11.)

Felicia Donato testified that Defendant is a good father and partner and that he volunteers as a coach for a Tee-ball team in the community. (Id. at 25:5-20.) She told the Court that, having spoken to her landlord and to Defendant's former employer, Defendant would have a place to live and a job if released on bail. She opined that Defendant wanted to return to live with her and the children and he would not flee. (Id. at 25:25-26:3.) Lissette Cruz also testified that, in her opinion, Defendant would not flee. (Id. at 33:17-24.)

The proffers made by Defendant and his witnesses do not overcome the statutory presumption applicable here. The nature and circumstances of the offenses charged involving quantities of controlled substances are specifically listed in 18 U.S.C. § 3142(e)(3)(A). The weight of the evidence proffered by the Government is substantial. The Government has put forth, both in its Memorandum in Opposition to Defendant's Motion for Pretrial Release (Doc. No. 151) and at the Hearing, that it possesses audio and video recordings, surveillance observations by law enforcement, seized controlled substances and weapons and testimony of a member of the Federal Bureau of Investigation and various police officers who were involved in the investigation and arrest of Defendant. (Doc. No. 39 at 2; Hr'g Tr. at 40:4-41:14.) Moreover, the Government has proffered that it possesses audio and video recordings proving that on or about July 7, 2010, after the sealed indictment was handed down in this case, Defendant was in possession of and sold a stolen revolver loaded with live ammunition. (Doc. No. 151 at 5; Hr'g Tr. at 48:18-49:12.) In addition, the Government asserts that on July 21, 2010, at the time of Defendant's arrest, agents searching Defendant's home recovered a digital scale, which is used in the distribution of controlled substances. (Doc. No. 151 at 6; Hr'g Tr. at 49:15-18.)

With respect to the history and characteristics of Defendant, the Government proffered

that Defendant has three prior drug convictions, a prior conviction for escape, a conviction for providing false identification to law enforcement and multiple violations of court ordered supervision.³ Based on Defendant's history of interaction with the criminal justice system, the evidence proffered by the Government, the probable cause supporting the charges in the Superseding Indictment, and the evidence proffered by Defendant at the hearing on October 6, 2010, Defendant has not met his burden to rebut the statutory presumption.

VI. CONCLUSION

Based on the nature of the charges contained in the Superseding Indictment, the weight of the Government's proffered evidence against Defendant, Defendants' prior criminal record including drug convictions, and the statutory presumption applicable here, at this stage in the proceeding no condition or combination of conditions will reasonably assure the appearance of Defendant at trial and the safety of the community. Accordingly, Defendant's Motion for Pretrial Release will be denied. An appropriate order follows.

³ At the Hearing, the parties agreed that the drug offenses were misdemeanors in violation of Pennsylvania law. (Hr'g Tr. at 56:2-14.) The parties were uncertain whether the drug offenses involved merely simple possession or other elements. (*Id.* at 53:19-55:14.) Moreover, Defendant claimed that the conviction for escape overstates what actually occurred. As noted above, Defendant explained that he was riding a motorcycle and a police officer approached him. Defendant fled, was arrested, was held in jail, and was told that he could be released that day if he would plead guilty to escape. (*Id.* at 17:19-18:9.) The violations of court supervision involved instances of "dirty urine" discovered during testing at the state probation office, and Defendant's failing to appear for a meeting with his probation officer because he knew his urine would test "dirty." (*Id.* at 13:15-14:4; 13-20; 45:19-46:1.) Despite Defendant's apparent claim that these charges and violations lack seriousness, the fact is that they did occur and they can be considered by the Court in deciding whether the statutory presumption has been overcome by Defendant. *See* 18. U.S.C. § 3142(g)(3)(A) ("The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account . . . the person's character . . . past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.").

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ORDER

AND NOW, this 26th day of October 2010, upon consideration of Defendant's Motion for Pretrial Release (Doc. No. 143), the Government's response in opposition (Doc. No. 151), and the arguments and evidence presented at the October 6, 2010 hearing, it is ORDERED that Defendant's Motion is DENIED.

BY THE COURT:

/s/ Joel H. Slomsky, J.

JOEL H. SLOMSKY, J.