

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
: :  
v. : :  
: :  
KENNETH EUGENE CHERRY, JR. : :  
a/k/a "Kenny" : NO. 19-122

MEMORANDUM

Bartle, J.

August 14, 2019

Before the court is the motion of defendant Kenneth Eugene Cherry, Jr. for release pending trial pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3142(b).<sup>1</sup>

On February 26, 2019, a federal grand jury returned a twenty-seven count indictment against Cherry.<sup>2</sup> Count One charges Cherry with dealing in firearms without being licensed to do so in violation of 18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D) and 2. Counts Two through Sixteen cite Cherry as being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Count Seventeen charges Cherry with knowing possession and transfer of a machine gun under 18 U.S.C. § 922(o). Counts Eighteen and Nineteen charge him with possession of an

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1. While Cherry states in his motion that he seeks release pursuant to 18 U.S.C. § 3142(b), it is 18 U.S.C. § 3145(b) that provides for review and appeal of a detention order.

2. On August 13, 2019, the Government filed a superseding indictment with the same charges but amending the language of the indictment in order to comply with the recent Supreme Court decision in Rehaif v. U.S., 139 S. Ct. 2191 (2019).

unregistered firearm in violation of 26 U.S.C. §§ 5845(a), 5861(d), and 5871. Finally in Counts Twenty through Twenty-Seven, the indictment states that Cherry was in possession of a firearm with the serial number removed, obliterated, or altered in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(b).

On March 28, 2019, Magistrate Judge Rice granted the Government's motion for pretrial detention after an evidentiary hearing. He concluded that the Government had proved by a preponderance of the evidence that no condition or combination of conditions would reasonably assure Cherry's appearance, and that that the Government had proved by clear and convincing evidence that no condition or combination of conditions would reasonably assure the safety of the community. Magistrate Judge Rice made several findings of fact in support of his conclusion, including that there was probable cause to believe that Cherry committed the offenses charged in the indictment, that the evidence against Cherry is strong as it included audio and video recordings, and that Cherry is likely to face a significant period of incarceration. The court also observed that Cherry and his co-defendant represented a significant potential danger to the cooperating source and his family.

On July 30, 2019, Cherry filed the pending motion seeking to be released to his grandmother's home with electronic

supervision pending trial. The court held a hearing on the motion. Trial is scheduled to commence with on jury selection on August 16, 2019.

Section 3145(b) of the Bail Reform Act provides that a defendant may file "a motion for revocation or amendment of the order" with the court that has jurisdiction over the offense if he is "ordered detained by a magistrate judge." Id. Our review of the issue is de novo. United States v. Delker, 757 F.2d 1390, 1395 (3d Cir. 1985).

Section 3142 of the Bail Reform Act provides that the court is to release a defendant on personal recognizance or subject to conditions unless it determines after a hearing that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." Id.

The factors that the court should consider include:

(1) the nature and circumstances of the offense charged, including whether the offense . . . involves a . . . firearm . . . ;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including-

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse,

criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. . . .

18 U.S.C. § 3142(g).

We begin by addressing the nature and circumstances of the offenses charged. See 18 U.S.C. § 3142(g)(1). Cherry, a convicted felon, has been indicted for possessing and selling over 20 firearms without a license. Some of these firearms had obliterated serial numbers. Some were machine guns. Cherry sold these dangerous weapons over the course of several months and would have continued to do so had he not learned that his buyer was a government informant.

The evidence against Cherry supporting these charges is significant. Alcohol, Tobacco, and Firearms agents recorded Cherry's firearm sale activities with both audio and videotape, including incriminating conversations between Cherry and the informant.

If convicted, Cherry faces a considerable amount of time in prison. The guideline range for these offenses is over

ten years' incarceration. This provides a substantial incentive for Cherry to flee.

Cherry argues that he is not a risk for flight because of his strong family ties and limited means. He has resided in Philadelphia his entire life and does not have a passport or the financial means to leave the country. He has two children and his fiancé is pregnant with his third child. Cherry further asserts that he has never absconded or failed to appear for court.

Cherry also offers that his close family members need his support. Before his arrest, Cherry lived near the home of his grandmother, uncle who has a severe brain injury, and two younger cousins, one of whom has autism. Cherry proposes that if released, he would live with his grandmother and resume care of his uncle.

Despite his close family ties, this risk of flight became reality when Cherry attempted to avoid arrest. The government has proffered that once Cherry realized that his buyer of firearms was a government informant, Cherry discarded his cell phone and checked into a motel in Delaware that a friend had booked for Cherry under the friend's name. When law enforcement officials located and attempted to arrest Cherry, he fled on foot. Cherry was finally arrested in a private home

that he had entered without permission and lied to the occupants that someone was trying to kill him.

In addition to the evidence of risk of flight, there is evidence that Cherry poses a danger to the community, particularly the informant. Cherry proposes to live at his grandmother's house, which is near the apartment that Cherry lived in at the time of his arrest. The court is not convinced that home monitoring would suffice to keep the community and the cooperating witness safe if Cherry were to return to the neighborhood where he committed his crimes. There is evidence that Cherry and his co-defendant Charles Wilson took steps to learn the name and home address of the informant after Cherry became aware that the informant was working with the Government. Wilson trailed the informant and provided a piece of his mail to Cherry.

In further support of his motion, Cherry points to the recommendation of Pretrial Services that he be released pending trial. We agree with Magistrate Judge Rice that the recommendation is not persuasive under all of the circumstances.

The Government has met its burden of demonstrating that no condition or combination of conditions will reasonably assure the safety of the community and the presence of Cherry before the court for his trial. Accordingly, Cherry's motion will be denied.

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ORDER

AND NOW, this 14th day of August, 2019, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion of defendant Kenneth Eugene Cherry, Jr. for release on bail pending trial (Doc. # 50) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.