

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 ERASMO JAVIER DOMINGUEZ : NO. 97-175-03

**MEMORANDUM AND ORDER**

HUTTON, J.

February 8, 1999

The Court held a detention hearing on Defendant's Application for Bail Pending Sentencing ("Bail Application") on February 3, 1999. Neither the Government nor the Defendant submitted written legal authority in support of their position.

**I. BACKGROUND**

On April 24, 1997, the federal grand jury for the Eastern District of Pennsylvania, returned a one count indictment charging defendants Carlos Dyett-Cutodio, Pablo Lerebours-Marte, and Erasmo Javier Dominguez with one count of conspiracy to possess with intent to distribute more than five kilograms of cocaine. On February 1, 1999, Erasmo Javier Dominguez ("Defendant" or "Dominguez") pleaded guilty to one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §

846.<sup>1</sup> Dominguez then moved this Court for an order of release pending sentencing (the "Bail Application"). This Court scheduled a hearing for February 3, 1999, where the Defendant would be given an opportunity to be heard concerning bail. The Court remanded the Defendant to the custody of the marshals pending the outcome of the hearing. On February 3, 1999, a hearing was held regarding the Defendant's Bail Application.

## II. DISCUSSION

### A. Standard for Bail Pending Sentencing

The Bail Reform Act of 1984 (the "1984 Act") provides, in relevant part:

(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence ... be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under [S]ection 3142(b) or (c)....

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of [S]ection 3142<sup>2</sup> and is awaiting imposition or execution of sentence be detained unless--

(A)(I) the judicial officer finds there is a

---

<sup>1</sup>Both Carlos Dyett-Cutodio and Pablo Lerebours-Martel, Dominguez's co-conspirators, also pleaded guilty.

<sup>2</sup>Subsection (f)(1) of Section 3142 provides, in relevant part:  
(A) a crime of violence;  
(B) an offense for which the maximum sentence is life imprisonment or death;  
(C) 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.), [or] the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.)....  
18 U.S.C. § 3142(f)(1)(A)-(C).

substantial likelihood that a motion for acquittal or new trial will be granted; or (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

18 U.S.C. § 3143(a).

Section 3143(a) creates a presumption in favor of detention pending sentencing. Government of Virgin Islands v. Clark, 763 F. Supp. 1321, 1323 (D.V.I. 1991), aff'd, 989 F.2d 487 (3d Cir.), cert. denied, 509 U.S. 910 (1993); see also United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985) ("The [1984 Act] was enacted because Congress wished to reverse the presumption in favor of bail that had been established under the prior statute, the Bail Reform Act of 1966."); United States v. Bertoli, 854 F. Supp. 975, 1157 (D.N.J. 1994).

"[I]t is the defendant's burden to prove by clear and convincing evidence that he [or she] is not likely to flee or pose a danger to the community." Clark, 763 F. Supp. at 1323; United States v. Strong, 775 F.2d 504, 508 (3d Cir. 1985). The Circuit has explained:

Unlike a defendant who has not yet been convicted and for whom the [1984 Act] gives a presumption for bail except in certain circumstances, see 18 U.S.C. § 3142(b), once a defendant has been convicted, albeit not yet sentenced, the burden shifts to defendant. The court "shall order" detention unless the defendant shows by "clear and convincing evidence" that (1) s/he is not likely to flee or (2) pose a danger to the safety of the community or any person therein if released.

Strong, 775 F.2d at 505.

The Third Circuit has defined "clear and convincing" evidence as follows: "[The witnesses'] testimony [must be] so clear, direct, weighty, and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue...." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985). For purpose of rebutting detention presumption, "clear and convincing evidence" is defined as more than preponderance of evidence, but less than beyond reasonable doubt. See Strong, 775 F.2d at 508; see also United States v. Mustakeem, 759 F.Supp. 1172, 1177-78 n. 7 (W.D. Pa.1991) ("Clear and convincing evidence means something more than a preponderance of the evidence and something less than beyond a reasonable doubt." (internal quotations omitted)).

In making a determination concerning whether there are conditions of release, which will assure the future appearance of a convicted defendant and the safety of the community, the Clark court explained that the factors enumerated in Section 3142(g), regarding bail pending trial, must be considered. Clark, 763 F. Supp. at 1323. Section 3142(g) provides that the court must consider available information regarding:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
- (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).

### **1. The Risk of Flight**

The factors to be considered in assessing the risk of flight include: (1) the nature and circumstances of the offense, (2) the defendant's family ties, (3) the defendant's employment status, (4) the defendant's financial resources, (5) the defendant's character and mental condition, (6) the length of defendant's residence in the community, (7) any prior criminal record and (8) any flight or failures to appear in court proceedings prior to or during the time of trial. Bertoli, 854 F. Supp. at 1158; United States v. Lamp, 606 F. Supp. 193, 200 (W.D. Tex. 1985), aff'd, 868 F.2d 1270 (5th Cir. 1989); see also 18 U.S.C. § 3142(g) (setting forth similar considerations with respect to bail pending trial).

### **B. Analysis**

As noted above, neither the Government nor the Defendant submitted written briefs in support of their position. During the

hearing, defense counsel never offered any evidence, by way of affidavit or testimony, to establish by clear and convincing evidence that no risk of flight nor danger to the community would result from granting the Bail Application. The Government stated its position that it believed the Defendant to be a flight risk and expressed doubt that the Defendant had met his burden.<sup>3</sup>

The Defendant claims that he should be released pending sentencing because he fully complied with the terms of his bail while he was awaiting trial, and because his wife is currently pregnant. He also maintains that he is not a flight risk because his travel documents have been seized, and his family resides in New York. Finally, the Defendant claims that the terms of his bail could be made more strict in order to ensure his compliance.

Under the United States Sentencing Guidelines (U.S.S.G.), Dominguez faces a minimum sentence of ten years and a maximum sentence of life. Because defendant was convicted of conspiracy to possess with intent to distribute cocaine, in order to be released on bail pending sentencing he must comply with the provisions set

---

<sup>3</sup>Assistant United States Attorney, Linwood C. Wright, Jr., stated to the Court the Government's position:

Your Honor, strictly under the terms of the law it is difficult for the Government to see how the defendant has carried his burden in this case. In light of the fact that he does face a severe prison sentence, that is a mandatory minimum sentence, although he may well be eligible for the safety valve, he has real incentive to flee, and that's addressing the law. And based on his incentive to flee, then he may well not be the best candidate for release at this time, taking into account that he's been convicted and he is going to go to jail if he stays in this country. That is the law.  
(Tr. of Detention Hr'g, Feb. 3, 1999 at 11-12.)

forth in 18 U.S.C. § 3143(a). Pursuant to § 3143(a), a person found guilty of an offense such as the present one must be detained pending sentencing "unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person of the community ...", 18 U.S.C. § 3143(a), emphasis added. As stated by the Third Circuit in Strong, 775 F. Supp. at 508, in overcoming the presumption of detention, the burden of proof rests with the Defendant once he or she is convicted.

The Defendant has failed to meet his burden. His arguments that he is not a flight risk are unpersuasive. First and foremost, Dominguez admitted to the Court that he has the capacity to leave the United States at any time, even though he does not have a passport.<sup>4</sup> Also, his reliance on the fact that his wife is currently pregnant is misplaced, insofar as it does nothing to help him meet his burden of proof under the statute. See Levandier, 14 F. Supp.2d at 173 (finding the fact that the defendant was pregnant did nothing to overcome presumption of flight risk).

The Court also finds no merit in Defendant's argument that his faithful compliance with the pre-trial bail conditions will necessarily carry over after his conviction. As noted above, the Defendant faces a minimum sentence of ten years and a maximum sentence of life. As has been found by other district courts

---

<sup>4</sup>The Defendant told the Court that "if I had wanted to leave the country I would have. I had ample opportunities, but I'm not interested." (Tr. of Detention Hr'g, Feb. 3, 1999 at 17.)

dealing with this issue, this Court similarly believes "the prospect of a substantial period of incarceration serves as a significant incentive to flight even in the presence of strong family ties." United States v. Scott, 1995 WL 723752 (E.D. Texas 1995) (citing United States v. Garcia, 727 F.Supp. 318 (N.D. Texas 1989)); Aquirre-Parra, 763 F. Supp. at 1226. Hence, there is a strong motive for Defendant to flee. Based on the substantial risk of flight that the Defendant poses, as well as Defendant's failure to present clear and convincing evidence indicating otherwise, the Defendant's Bail Application is denied.

An appropriate Order follows.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 ERASMO JAVIER DOMINGUEZ : NO. 97-175-03

O R D E R

The Court held a detention hearing on Defendant's Application for Bail Pending Sentencing ("Bail Application") on February 3, 1999. Neither the Government nor the Defendant submitted written legal authority in support of their position.

AND NOW, this 8th day of February, 1999, for the reasons stated in the attached memorandum, the Defendant's Motion is **DENIED.**

BY THE COURT:

---

HERBERT J. HUTTON, J.