

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

UNITED STATES OF AMERICA)	
)	Criminal Action
)	No. 07-CR-00203
vs.)	USM#60187-066
)	
JOEL MICHAEL TYSON,)	
)	
)	
Defendant)	

* * *

APPEARANCES:

FRANCIS C. BARBIERI, JR, ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

WILLIAM J. HONIG, ESQUIRE
On behalf of Defendant

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M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion and Memorandum for Bail Pending Appeal, which motion and memorandum were filed on behalf of defendant Joel Tyson on October 8, 2007.¹ On October 17, 2007 the Government's Response to Defendant's Motion for Bail Pending Appeal was filed. On November 7, 2007 I conducted a hearing on defendant's motion. For the reasons set forth below, I deny the motion.

¹ On October 12, 2007 defendant filed the same motion and memorandum a second time. Because both filings are exactly the same, I consider them both one motion and memorandum.

FACTS

Based on the evidence proffered² by the parties at the hearing conducted before me on November 7, 2007 and the facts adduced at the pretrial suppression hearing conducted before me on August 23, 2007, I find the pertinent facts to be as follows.

On April 17, 2007 a federal Grand Jury returned an Indictment charging defendant Joel Tyson with one count of convicted felon in possession of a weapon in violation of 18 U.S.C. § 922(g)(1).

This charge stemmed from an incident occurring on February 25, 2007. On that date, at 3:15 a.m., Sergeant Michael Kalin of the City of Reading, Pennsylvania Police Department was in a marked police vehicle parked on the 200 block of North 3rd Street in the City of Reading with his driver's side window open. Sergeant Kalin was surveilling the George Washington Carver Post which is a known "after hours" private club where police are regularly dispatched for problems when the club closes including physical fights, gun shots, shootings, stabbings and noise.

As Sergeant Kalin was preparing to leave his location because most of the patrons had left the bar, he heard between 20

² The Bail Reform Act of 1984 provides that at a bail hearing, defendant "shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." 18 U.S.C. § 3142(f) (emphasis added).

The parties did not call witnesses but, by agreement, both parties presented their cases at the hearing by proffer.

and 30 gunshots in rapid succession coming from a location approximately one block away. It appeared to Sergeant Kalin that the shots came from north of his position around Elm Street. Sergeant Kalin radioed police headquarters that he heard gun shots.

Sergeant Kalin drove North on 3rd street to Elm Street and turned east on Elm Street. Just before he got to Rose Street, Sergeant Kalin observed an elderly man with no shirt on wearing sandals. Because it was cold out, Sergeant Kalin believed the man had just come outside from a nearby house. Sergeant Kalin asked the unidentified man where the shots came from. The man pointed in a Northeast direction toward Rose Street and said, "Down there; down there."

Sergeant Kalin then drove to the 300 Block of Rose Street, which intersects the middle of the 300 Block of Elm Street. When he arrived at the 300 Block of Rose Street, Sergeant Kalin saw two nicely-dressed Hispanic males walking South on the sidewalk of Rose Street. Sergeant Kalin asked these two men about the shots; and one of them pointed backward, further North down the same block of Rose Street.

Sergeant Kalin looked down the block and saw both an Hispanic and an African-American male standing further down the block near a group of parked cars. Sergeant Kalin drove to the area where the cars were parked. When he arrived the Hispanic

male, later identified as Emilio Reguero, was standing next to a parked green Buick with tinted windows. The African-American male, later identified as Justin Buchanon, was standing nearby.

Sergeant Kalin ordered Mr. Reguero to show his hands. Mr. Reguero allegedly ignored Sergeant Kalin and proceeded to light a cigarette "very calmly". Sergeant Kalin exited his vehicle and determined that Mr. Reguero was the biggest possible threat to his safety because Mr. Reguero ignored Sergeant Kalin's command.

Sergeant Kalin drew his service revolver, pointed it at Mr. Reguero and pushed Mr. Reguero face down on the hood of the green Buick. Sergeant Kalin then observed that there were two people in the front seat of the green Buick. Sergeant Kalin handcuffed Mr. Reguero and pointed his service revolver at the two individuals in the green Buick and directed both men to put their hands on the dashboard.

At this point, Officers Christopher Dinger and Hector Santiago arrived on the scene and removed the occupants of the green Buick from the vehicle. Defendant Joel Tyson was in the driver's seat. Mr. Tyson explained that the car belonged to his sister and that he was driving it because she was too drunk to give him a ride. Franklin Caceras was the front seat passenger. Both Mr. Tyson and Mr. Caceras were handcuffed and patted down for weapons only. Officers checked everyone for warrants. When

it was determined that there were no outstanding warrants for defendant Tyson his handcuffs were removed.

Before permitting Mr. Tyson to get back into the Buick and leave, Officer Dinger looked inside in the driver side of the car and shined his flashlight to look for weapons. When conducting this visual search, Officer Dinger observed the hammer and back end of a handgun, later determined to be a Silver Ruger Model P95DC, 9mm handgun, serial number 31225729, underneath Mr. Tyson's driver side seat.

Officer Dinger grabbed the gun and felt that the slide section was hot to the touch, as if it had just been fired. In addition, there was an extended high capacity magazine fitted into the handle of the gun which Officer Dinger estimated can hold 20 to 30 rounds. The magazine was empty. Mr. Tyson was then arrested for convicted felon in possession of a firearm and carrying a firearm without a license.

A short time after defendant's arrest, Officer Keith Merkel returned to the area of Elm and Rose Streets and recovered 28 brass Luger 9mm casings from the street between 318 Elm Street and the Northwest corner of Rose and Elm Streets. The casings were submitted to the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") for comparison to the Ruger recovered from Mr. Tyson's vehicle. Laboratory analysis conducted by ATF revealed that the 28

cartridges recovered between 318 Elm Street and the Northwest corner of Rose and Elm Streets were fired from the 9mm Ruger recovered from under defendant's seat in the green Buick.

On July 20, 2007 Defendant's Motion and Memorandum to Suppress Physical Evidence was filed seeking to suppress the gun recovered by police on February 25, 2007 as the fruit of an illegal search. On August 23, 2007 after hearing, and for the reasons expressed simultaneously on the record at that time, I granted defendant's motion to suppress the gun seized in this case.

On September 21, 2007 the government appealed my Order. The government's appeal of my August 23, 2007 Order is currently is pending before the United States Court of Appeals for the Third Circuit. In his within motion, defendant seeks bail pending the government's appeal.

Defendant is also currently facing state charges in Berks County, Pennsylvania for possession of a weapon. The facts of the state criminal case involve another shooting. In that case, defendant was with a friend on a sidewalk in Reading when a vehicle passed by and one of the occupants of the vehicle fired shots toward Mr. Tyson and his friend. Defendant's friend was shot and killed.

In addition, defendant allegedly possessed a weapon that he used to fire shots back at the vehicle as it was leaving

the scene of the homicide. This shooting incident preceded the stop on February 25, 2007 which resulted in the within charge. Defendant is being held on one million dollars bail in the Berks County case.

Defendant is a lifelong resident of 859 Schuylkill Avenue, Reading, Berks County, Pennsylvania. Mr. Tyson's parents, Jean and Harold Tyson, own and reside at the Schuylkill Avenue residence. Defendant has a limited employment history with the only disclosed employment being an unspecified four-month job with Quaker Maid Meats, Reading, Pennsylvania just prior to being arrested on the current charges.

Defendant has one sibling, Chantal Tyson, who also resides in Reading. Defendant has three children, aged 6, 3 and 11 months. Defendant's two oldest children live with their mother, Tiffany Landis, in Williamsport, Pennsylvania. Defendant's youngest child resides with his ex-girlfriend, Latoya Opante, in Reading.

Defendant attended high school until the eleventh grade and later acquired his G.E.D.

Defendant has five prior criminal convictions. Two of defendant's convictions are for drug-related crimes. Two of defendant's convictions are firearms related. Defendant's fifth conviction is for fleeing from the police.

On May 16, 2007 defendant waived a pretrial detention hearing before United States Magistrate Judge Henry S. Perkin and agreed to pretrial detention. Defendant now seeks bail on the charge in this case.

DISCUSSION

My review of a Magistrate Judge's pretrial detention determination is de novo. United States v. Delker, 757 F.2d 1390, 1395 (3d Cir. 1985). However, because defendant did not originally oppose pretrial detention on May 16, 2007 when Magistrate Judge Henry S. Perkin issued a pretrial detention Order, this is the first formal review of defendant's bail status notwithstanding Magistrate Judge Perkin's Order.

The issue of bail for a defendant pending a government appeal is addressed in 18 U.S.C. § 3143(c). Section 3143(c) provides in pertinent part:

(c) Release or detention pending appeal by the government.-The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731³ of this title,

³ Title 18, section 3731 of the United States Code governs appeals by the government in criminal cases. Section 3731 states in pertinent part:

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence...not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of fact material in the proceeding.

(Footnote 3 continued):

in accordance with section 3142 of this title, unless the defendant is otherwise subject to a release or detention order.

18 U.S.C. § 3143(c). Thus, based upon the express language of § 3143(c) an examination of § 3142 is necessary.

The issue of pretrial detention is governed by the Bail Reform Act, 18 U.S.C. § 3142. The Act provides, in part:

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 and the community, such judicial officer shall order the detention of the person before trial.

18 U.S.C. § 3142(e).

Accordingly, I must review the factors enumerated in 18 U.S.C. § 3142(g) to determine whether defendant is eligible for release on bail pending appeal. These factors include:

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(Continuation of footnote 3):

As noted above, on August 23, 2007 after hearing, I granted defendant's motion to suppress the gun seized in this case. On September 21, 2007 the government appealed the August 23, 2007 Order granting defendant's motion to suppress. In its Notice of Appeal, the government certified that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of fact material in the proceeding. The government's appeal of my August 23, 2007 Order is currently is pending before the United States Court of Appeals for the Third Circuit.

Thus, I treat the government's appeal as one properly taken pursuant to § 3731.

(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 of an offense under Federal, State, or local law; and

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

18 U.S.C. § 3142(g).

In applying the factors outlined above, as more fully discussed below, I find that the statutory factors weigh heavily in favor of detention, particularly the nature and circumstances of the offense charged, the history and characteristics of defendant and the nature and seriousness of the danger to any person or the community that would be posed by defendant's release.

The issue of the weight of the evidence at this time is a neutral factor. However, viewed in conjunction with all the other factors, this factor is insufficient to outweigh the other factors. Defendant's ties to the community appear to be strong.

This factor weighs in favor of pre-trial release. However, I conclude that this factor alone is insufficient to outweigh the other factors.

Regarding the nature and circumstances of the offense charged, the government has charged defendant with the serious crime of possession of a weapon by a previously convicted felon. Specifically, defendant is charged with possessing a Silver Ruger Model P95DC, 9mm handgun, serial number 31225729, which weapon was found underneath Mr. Tyson's driver side seat.

In addition, when found by the police, the slide section of the gun was still hot, as if it had just been fired. Furthermore, there was an extended high capacity magazine fitted into the handle of the gun which could hold as many as 20 to 30 rounds. Finally, 28 brass Luger 9mm casings were recovered from the street near where defendant was stopped by the police and those casings appear to be from the 9mm Ruger found underneath defendant's car seat. Finally, this matter obviously involves a firearm, a factor specifically contemplated by Congress in enacting subsection 3142(g)(1).

Accordingly, I find that the nature and seriousness of the offense weigh in favor of detention.

Next, regarding the weight of the evidence factor, I previously suppressed the weapon in this case because I concluded that the stop and search by the police was Constitutionally

infirm. Thus, at this time the weight of the government's evidence is weak. However, if the government prevails in overturning my suppression decision, the government's case becomes considerably stronger.

Thus, because I cannot predict how the Third Circuit may decide the government's appeal, I conclude that this factor is neutral on the issue of whether to grant defendant bail pending appeal.

Defendant has strong ties to the community. He is a lifelong resident of 859 Schuylkill Avenue, Reading, Pennsylvania. Defendant has lived at the same residence with his parents for his entire life. Moreover, defendant's only sibling and one of his three children also live in the City of Reading. All these ties to the community weigh in favor of granting defendant bail.

However, the United States Court of Appeals for the Third Circuit has found community ties to be "of limited weight" in the context of a case where other factors weigh heavily in favor of pretrial detention. Delker, 757 F.2d at 1396. Thus, although it appears that defendant has considerable ties to the community, this factor does not outweigh the other factors in favor of pre-trial detention.

Defendant has a limited employment history with the only disclosed employment being a four-month job with Quaker Maid

Meats, Reading, Pennsylvania. This limited employment history mitigates against release.

Defendant has five prior criminal convictions. Two of defendant's convictions are for drug-related crimes. Two of defendant's convictions are firearms related. Defendant's fifth conviction is for fleeing from the police. Accordingly, defendant's prior criminal history involving drugs, guns and escape, weigh in favor of detention.

Finally, the strongest factor weighing in favor of pre-trial detention is the danger to both defendant and the community if the defendant were to be released pending appeal.

Defendant is facing state court charges in Berks County, Pennsylvania for possession of a weapon. The facts of the state criminal case involve another shooting where a vehicle passed by and one of the occupants of the vehicle fired shots toward Mr. Tyson and his friend. Defendant's friend was shot and killed. Defendant allegedly fired back at the vehicle.

The facts of the within matter indicate that defendant was allegedly in possession of a weapon with a high capacity magazine that was fired in an urban area of the City of Reading. The within incident took place after the previous shooting. This indicates that defendant may have the ability to acquire additional weapons if released. In addition, there is a chance

that defendant may seek retribution for the shooting death of his friend.

Thus, given the apparent proclivity of defendant to fire weapons in populated urban areas, the fact that defendant has already been the victim of a driveby shooting, where he fired back at the perpetrators, and the fact that he may have access to other weapons, I find these factors to strongly weigh in favor of detention pending appeal.

Conclusion

For all the forgoing reasons, I find that defendant's proffered evidence does not warrant release pending appeal. In particular, the neutral factor of the weight of the evidence and defendant's strong community ties do not outweigh the nature and circumstances of the offense charged, the history and characteristics of defendant and the nature and seriousness of the danger to any person or the community which would be posed by defendant's release.