

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 JOSEPH MERLINO : NO. 99-363-01

MEMORANDUM AND ORDER

HUTTON, J.

DECEMBER 15, 1999

I. BACKGROUND

Defendant Joseph Merlino ("Defendant") was arrested on drug charges by Federal Bureau of Investigation agents on June 28, 1999. He was ordered temporarily detained for a pretrial detention hearing. On June 30, 1999, Defendant was charged in a two count indictment with conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846, and with unlawful use of a communication facility in relation to a drug trafficking offense, in violation of 21 U.S.C. § 843(b).

During the course of the June 1999 arrest, Defendant allegedly made certain statements to Detective Mark Pintero "(Pintero)". These statements led to Defendant being charged under 18 U.S.C. § 115(a)(1)(B) and 18 U.S.C. § 115(a)(1)(B) for threatening Pintero and his family.

On July 1, 1999, Chief United States Magistrate Judge James R. Melinson held a pretrial detention hearing. Magistrate Judge Melinson found there was probable cause to believe that Defendant

had committed the offenses with which he was charged and ordered that Defendant be detained pending trial pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3142. See Pretrial Detention Order, filed July 2, 1999, by Honorable Magistrate Judge James R. Melinson, United States v. Merlino, Cr.No.99-363.

On July 12, 1999, Defendant filed with this Court a Motion to Reconsider the Pretrial Detention Order and to Permit Bail. On July 27, 1999, the Government filed a Response to the Defendant's Motion as well as its own Motion and Memorandum for Hearing on Defendant's Pretrial Detention. On July 28, 1999, this Court held a hearing on the two motions regarding the defendant's pretrial detention. On July 30, 1999, the Court denied Defendant's Motion to Reconsider the Pretrial Detention Order and to Permit Bail. The Court's decision relied in part on the fact that Defendant's second indictment indicated that he posed a significant threat of death or serious physical injury to Pinero and his family.

A seven day jury trial on the second indictment commenced on October 12, 1999, before the Honorable Jerome B. Simandle, United States District Judge for the District of New Jersey. The jury returned a verdict of "not guilty" on both counts. See Judgment of Acquittal, filed October 21, 1999, by Judge Jerome B. Simandle, United States v. Merlino, Cr.No.99-430 (JBS).

On November 15, 1999, Defendant filed the instant Motion for Release Pending Trial Pursuant to 18 U.S.C. § 3242(c). Defendant

therein requests that the Court reopen the matter, authorize bail, and release him from custody pending trial on the first indictment. In support of this request, Defendant offers as collateral sixteen properties, aggregately valued at approximately \$1,000,000.00. Additionally, Defendant argues that in accordance with the provisions of 18 U.S.C. §§ 3142(c)(A) and (B), he is eligible for pretrial release because he not been found guilty of committing any crime since being charged with the indictment and is willing to abide by any conditions imposed by the Court in connection with his release from detention.

On November 16, 1999, the United States filed its response to the instant Motion, arguing that the evidence of Defendant's drug trafficking is sufficient to warrant Defendant's detention prior to trial, that Defendant poses a danger to the community, and that application of § 3142(c) is inappropriate in this circumstance as any condition imposed pursuant to this section will only inform the Court that Defendant fled or resumed his criminal career when it might be too late to prevent injustice. (See Government's Resp. to Def.'s Mot. for Release Pending Trial Pursuant to 18 U.S.C. § 3142(c)),

On December 9, 1999, the Court held a hearing on the instant Motion.

The Defendant has seven arrests and two prior criminal convictions. In July, 1984, the Defendant was convicted in

Atlantic County Superior Court, New Jersey, of assault, complicity to assault, and complicity to possess a weapon. In January, 1990, the Defendant was convicted in the United States District Court for the Eastern District of Pennsylvania of conspiring to steal \$350,000 from a Federal Armored Express car. The Honorable Norma L. Shapiro sentenced the Defendant to four years in prison, followed by five years of probation. In September, 1992, while on probation for the armed robbery conviction, the Defendant was induced into the Philadelphia La Cosa Nostra ("LCN").

In November, 1993, Judge Shapiro found that the Defendant had violated the terms of his probation by associating with known felons and members of the Philadelphia LCN, in addition to providing false information regarding his employment. Judge Shapiro ordered that the Defendant be returned to jail for a period of approximately one year.

Since his release from prison in November, 1994, the Defendant has risen through the ranks of the Philadelphia LCN to become the acting "Boss." As the acting Boss of the Philadelphia LCN, the Defendant allegedly approves all criminal activities conducted by LCN members and their associates, and also allegedly receives a portion of the monies generated through the criminal activities conducted by LCN members and their associates.

In this regard, the evidence in this case shows that \$10,180 [in] cash was seized from the Defendant during the execution of the arrest warrant on June 28, 1999.

II. STANDARD OF REVIEW

A judicial officer has inherent power to reconsider his or her own order. See Fed. R. Civ. P. 60(b), which applies by analogy to Federal Criminal proceedings. Thus, upon proper motion, a court may reconsider its original order of, inter alia, pretrial detention.

Courts must strive to impose the least restrictive bail conditions such that the public's safety and the defendant's appearance at trial are assured. See 18 U.S.C. § 3142(c)(1)(B). The Bail Reform Act's structured system regarding the release or detention of a defendant before trial seeks to ensure that the interests of the defendant and the public are carefully considered and contemplated before such release or detention is ordered. See United States v. Lemos, 876 F. Supp. 58, 59 (D.N.J. 1995).

Upon a hearing pursuant to 18 U.S.C. § 3142(f), the Court is charged with determining whether there exists "any condition or combination of conditions set forth in [18 U.S.C. § 3142(c)] will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community. . . ." 18 U.S.C. § 3142(f). See also Lemos, 876 F. Supp. at 59 (stating that "[a] condition precedent to detention without bail under subsection (e)

is that a hearing be held as provided in subsection (f)."). Section 3142(c)(1)(B) sets forth a nonexclusive list of conditions that a court may impose upon granting a defendant's motion for pretrial release. If no sufficient condition or combination of conditions exists, however, the Court may order that the defendant be detained without bail pending trial.

Section 3142(e) of the Bail Reform Act provides, in pertinent part:

If, after a hearing pursuant to the provisions of subsection (f), 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, he shall order the detention of the person prior of trial ... Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the persons required and the safety of the community if the judicial officer finds there is probable cause to believe that the person committed 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.)....

18 U.S.C. § 3142(e). The Bail Reform Act sets forth four factors which the court must consider in determining whether pretrial detention is warranted. These factors are:

- (1) the nature and seriousness of the offense charged;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person including, inter alia, character, employment, family ties, community ties, length of residence in the community and criminal history; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. See United States v. Traitz, 807 F.2d 322, 324 (3d Cir. 1986); see also 18 U.S.C. § 3142(g). The facts employed to support a detention must "be supported by clear and convincing evidence." 18 U.S.C. § 3142(f).

III. DISCUSSION

At the hearing of December 9, 1999, the Court heard counsel's arguments regarding Defendant's fitness under the Bail Reform Act for bail and pretrial release.

Defense counsel argued that Defendant does not pose a serious flight risk as he self-surrendered to the penal and judicial systems when previously indicted and/or convicted and offers \$1,000,000 in real property of family and friends as surety. Counsel stressed the implications of Defendant's self-surrender in light of the fact that he previously faced sentences of three years and four years. While the Court acknowledges that prison sentences of three and four years are not insignificant, the Court also notes that while the Federal Sentencing Guidelines impose a sentence in excess of twenty years, Defendant now faces a statutory mandatory minimum of ten years. As Defendant never faced a potential prison sentence of such a lengthy duration, the Court finds that Defendant's previous behavior (i.e., self-surrender) does not reasonably ensure that he will appear for trial. Moreover, the

defendant has been charged and the Government will present evidence that the has the ability to control drug distribution in Boston, Massachusetts, to control the activities of four people there, to arrange for the distribution of three kilograms of cocaine and the promise of four other kilograms of cocaine which were delivered.

The evidence of the Government will suggest that he was able to control a distribution in Boston, Massachusetts and receive money from Mr. Previte as a result of that transaction. That power tied into him being indicted, the indictment stating that he was the acting boss of the La Cosa Nostra.

The fact that the Defendant has no visible means of support, his lifestyle, and having over \$10,000 in cash when he was arrested shows that he is a risk. He obviously has access to large sums of money.

The Court has no evidence of the equity value of the real estate offered and one of the deeds that was brought the first time was a twice convicted drug dealer who is now arrested again for racketeering and gambling conspiracy.

The Defendant's prior record has violence with a stabbing and a theft involving over \$350,000. He has not complied with the court orders in the past.

He did not comply with Judge Norma Shapiro's order to show employment and not associate. He has never paid one cent of the restitution.

He makes a mockery of Judge Shapiro's orders. He was ordered to pay \$40,000.00 in restitution over 13 years ago and has paid nothing. He is a person who doesn't work and has assets and a continuous source of money.

There is no reason to think that he would not flee if deeds of other people were put up because he has some other way to generate money.

The nature of the drug trafficking offense for which Defendant is currently under indictment is one which suggests a risk of flight and danger to the community. See S. Rep. No. 225, 98th Cong., 2d Sess. 12-12, reprinted in U.S. Code. Cong. & Ad. News 3182, 3195-96, 3203. Therefore, the seriousness of the drug trafficking charge strongly weighs against bail and pretrial release. See 18 U.S.C. § 3142(g)(1).

Furthermore, the Court also finds that contrary to defense counsel's suggestion, house arrest provides no guarantee that Defendant will refrain from engaging in criminal activity. As stated by Government counsel, while under house arrest, defendant could engage in criminal conduct in a variety of ways, including communicating with visitors to his home and conducting criminal activity over cell phones which cannot be effectively monitored by the Government. Moreover, house arrest, even if ordered in conjunction with Defendant's use of an ankle bracelet which monitors his movement, does not prevent flight--it only informs the

Government that the bracelet's wearer is no longer in the area in which he or she was mandated to remain. Continued detention provides the Government its best assurance that Defendant will appear at trial.

Third, Defendant's lengthy criminal history, including two convictions for violent crimes, weigh against bail and pretrial release. See 18 U.S.C. § 3142(g)(3)(A). Finally, the weight of the evidence against Defendant is substantial. See 18 U.S.C. § 3142(g)(2). The Government possesses over 150 audio and video tapes of Defendant and his associates which purportedly expose his criminal activities and prove that he engaged in the unlawful conduct that is the subject of the instant drug trafficking indictment.

The Court therefore finds that no condition or combination of conditions listed in 18 U.S.C. § 3142(c) sufficiently assures the safety of the community while simultaneously reducing the risk of flight so as to render appropriate Defendant's release on bail. Pursuant to 18 U.S.C. § 3142(e), Defendant shall remain in pretrial detention.

As there is probable cause to believe that the Defendant committed an offense punishable by 10 or more years in jail under the Controlled Substances Act, there exists a rebuttal presumption that no condition of release, or combination of conditions, will reasonably assure the safety of any person and the community or

reasonably assure the appearance of the Defendant as required. The Defendant has not rebutted this presumption.

An appropriate Order follows.

THE UNITED STATES DISTRICT COURT
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O R D E R

AND NOW, this 15th day of December, 1999, upon consideration of Defendant's Motion for Release Pending Trial Pursuant to 18 U.S.C. § 3142(c) (Docket No. 37) and the Government's response thereto (Docket No. 38), IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.