

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

Eastern District of Kentucky
FILED

DEC 27 2016

AT COVINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
)
v.) CASE NO. 16-2564
)
UMAIR HAMID)
)
Defendant)

DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF PRETRIAL RELEASE

Now comes the Defendant, Umair Hamid, and respectfully submits the instant memorandum of law in support of his request that he not be detained (as requested by the government) but instead be released from custody subject to reasonable restrictions, in accordance with the provisions of 18 U.S.C. § 3142(c). The instant memorandum is submitted per the invitation of the Court, as extended at the conclusion of the detention hearing in this matter.

I. INTRODUCTION

The Court heard extensive argument from both parties at the detention hearing, and the purpose of the instant memorandum is not to cover the same ground but to supplement the arguments made to the Court at the hearing and, most especially, to clarify certain factual representations and assertions made by the Government to the Court at the hearing. Given the nature of the government’s assertions and “proof” proffered to the Court in support of its request for Mr. Hamid’s detention – most of which would not be admissible under the rules of evidence, cannot be effectively contested by the defense (at least at this stage of the proceedings), and in large measure is totally irrelevant to the narrow issue before the Court (the question of Mr.

Hamid's detention) – it is especially important that certain representations made to the Court at the detention hearing be clarified lest the Court make its determination based on a misleading, if not misrepresented, factual record.

As outlined by the undersigned at the detention hearing, a strict application of law to facts in Mr. Hamid's case leads inescapably to the conclusion that he should not be detained and should instead be released subject to certain reasonable, customary restrictions. Such reasonable conditions might include, inter alia, the surrender of his passport, the posting of a modest cash bond, and/or the condition that Mr. Hamid be subject to electronic monitoring until such time as he reports to his designated pre-trial services contact in the Southern District of New York.

To order detention in this case, even on a “temporary” basis (with the understanding that the detention issue could/should be revisited upon his arrival in New York), would be to effect a grave and unique injustice. Mr. Hamid has no ties to the New York area whatsoever. To be confined in that jurisdiction – away from a) his only family in the United States (his sister and brother-in-law, both U.S. citizens and long-time residents of Independence, Kentucky), and b) his retained counsel in this matter (most especially) – would cause a level of hardship to Mr. Hamid not ordinarily inflicted on the “average” criminal defendant in Mr. Hamid's shoes. Relevant to his defense of the very serious (though as-yet-untested) charges outlined in the Complaint sworn out against him, his detention would directly and tangibly prejudice his most fundamental constitutional rights insofar as it would necessarily preclude him from having access to counsel (in the short-term, at the very least).¹ This consideration is made all the more significant in light of the government's decision to unseal this matter yesterday. By all accounts,

¹ As the Court is likely aware, transfer by the U.S. Marshal's to a different district as far away as the Southern District of New York would not happen overnight, by any means. As a practical matter Mr. Hamid is likely to crisscross the country on a plane over the span of several weeks until he is delivered to his final destination, all the while completely without access to counsel.

there is significant media interest both domestically and overseas and Mr. Hamid's and his employer's reputational, business, and civil legal interests have already come under significant attack. If Mr. Hamid is detained, these interests cannot be defended as a practical matter and irreparable injury across a variety of fronts is an inevitability.

The government's presentation at the detention hearing in support of its request for detention was telling indeed. Completely absent from its argument was any mention of the applicable law. The applicable law is plainly set forth in 18 U.S.C. § 3142, and is perfectly clear. To summarize: detention is the last resort (not the starting point); there are intermediate, less-onerous methods of assuring a criminal defendant's appearance for court proceedings that must first be considered before ordering detention; it is the government's burden to prove in the first instance that a defendant should not be released without conditions, and in the second instance that there is no set of conditions that will reasonably guarantee the defendant's appearance at future court proceedings. 18 U.S.C. § 3142(b) through (f). Given that the government is seeking to have Mr. Hamid detained in this case, it is not surprising that the government would seek to distract the Court from a reasoned analysis of the applicable law by making broad, unsupported, and in some cases downright irresponsible representations to the Court about facts and events (both real and imagined) purportedly to have occurred in a foreign land.

Stripped of its bombast and innuendo, the government's argument for detention can be reduced to the following: this is a "big case" (in that the total alleged fraud loss of the entire alleged conspiracy is a big number and the subject matter has received media interest) with international reach, Mr. Hamid is a foreigner, and therefore Mr. Hamid should be locked up. Implicit in the government's rhetoric is the phrase "out of an abundance of caution." Whatever appeal this logic has at a surface level dissipates very quickly, however, once it is processed

through the statutory framework of § 3142. Applying the legal analysis plainly required thereunder, such surface logic is blown to smithereens and the proper legal result here made abundantly clear: Mr. Hamid should be released subject to the aforementioned reasonable conditions of release.

II. APPLICABLE LAW

As stated above, the relevant statutory provisions could not be more clear. The default is that a defendant should be released on personal recognizance or an unsecured appearance bond. 18 U.S.C. § 3142(b). Only if the judicial officer determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community should the defendant not be released. 18 U.S.C. § 3142(b). If the judicial officer determines that release on personal recognizance or unsecured bond will not reasonably assure the defendant's appearance, then pretrial release under the least restrictive conditions shall be ordered. 18 U.S.C. § 3142(c)(1).

If and only if the judicial officer determines that no set of conditions will reasonably assure the appearance of the defendant as required is the Court to order pretrial detention. 18 U.S.C. § 3142(f). In making such a determination, the judicial officer shall consider: (1) the nature and circumstances of the offense charged (whether it is a crime of violence or some other "special category" crime – which the offenses alleged against Mr. Hamid in the Complaint are not); (2) the weight of the evidence against the person²; (3) the history and characteristics of the person (including, inter alia, the person's character, community ties, and criminal history); and

² This factor refers to the evidence to be considered in determining whether there are conditions which will assure the appearance of the accused or determining his dangerousness, not the weight of evidence of defendant's guilt of the underlying offenses of which he stands accused. See *United States v. Stone*, 608 F.3d 939, 948 (6th Cir. 2010); *United States v. Fuller*, No. 14-20677, 2015 U.S. Dist. LEXIS 21551 (E.D. Mich., Feb. 24, 2015); *United States v. Marcrum*, 953 F.Supp. 2d 877 (W.D. Tenn. 2013). The weight of the evidence of a criminal defendant's guilt as to the underlying charges of which he stands accused is not properly considered in addressing the issue of pre-trial release. *United States v. Stone*, 608 F.3d at 948.

(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).

It is the government's burden, by a preponderance of the evidence, to establish in the first instance that conditions are warranted and in the second instance that there exist no set of conditions that would reasonably assure the appearance of the defendant.³ 18 U.S.C. § 3142(f); *see also United States v. Hinton*, 113 Fed. Appx. 76, 77 (6th Cir. 2004); *United States v. Readus*, No. 3:09-00240-2, 2013 U.S. Dist. LEXIS 23514 (M.D. Tenn., Feb. 21, 2013); *United States v. Ross*, No. 1:05-CR-160, 2007 U.S. Dist. LEXIS 35160 (W.D. Mich., April 6, 2007).

While the Court is not limited to considering evidence properly admissible under the rules of evidence in making its determination regarding the issue of detention, 18 U.S.C. § 3142(f); *see also United States v. Davidson*, No. 3:08-CR-169, 2009 U.S. Dist. LEXIS 59675 (E.D. Tenn., July 10, 2009), the court must nevertheless ensure that the evidence upon which it relies is reliable. *See United States v. Goba*, 240 F. Supp. 2d 242, 247 (W.D.N.Y. 2003); *see also United States v. LaFontaine*, 210 F.3d 125, 131 (2nd Cir. 2000) (explaining that magistrate judges have a duty to ensure basic reliability of government proffers of "proof"). The type of rumor and innuendo offered by the government in support of detention at the detention hearing is precisely the type of proffered "evidence" the Court should not be quick to credit.

III. SUPPLEMENTARY FACTS AND ANALYSIS

The facts supporting Mr. Hamid's release on conditions in this case were presented to the Court at the detention hearing and no purpose is served by presenting them again herein. In short, Mr. Hamid has been accused of a non-violent crime, has no criminal history whatsoever, has ties to the local community (in the form of his sister and brother-in-law, both U.S. citizens

³ The analysis is different, of course, where the law provides for a presumption of pretrial detention (so-called "presumption cases"). This is not such a case, and the government could not and has not asserted to the contrary.

and long-time residents of Independence, Kentucky), and has surrendered his passport (and therefore poses no real threat of a flight risk whatsoever). Without his passport, he cannot fly even domestically – much less jet off to Pakistan, as the government would have this Court believe. Moreover, the subject matter forming the basis for the underlying charges was previously the basis of a prosecution in Pakistan in which a) Mr. Hamid was not charged, and b) all defendants were acquitted. There is simply no basis whatsoever on which to argue that Mr. Hamid should be treated any different than any other defendant who comes before this Court accused of a non-violent crime and without a criminal history. (Such defendants are routinely released on their own recognizance, or at most with minimal conditions.) That Mr. Hamid happens to live in Pakistan and is not a U.S. citizen is not grounds to make him the exception to what might well be considered an unofficial “rule”: persons without criminal histories accused of non-violent offenses simply have no business being detained pending trial.

That said, certain of the government’s representations to the Court at the detention hearing are troubling and merit clarification. At best, the government’s proffered characterization of certain “facts” was misleading. The more significant of these proffered “facts” and representations are addressed below.

A. Mr. Hamid did not confess.

By all accounts, Mr. Hamid fully cooperated with the federal agents who arrested him late in the evening at his sister’s residence in Independence, Kentucky on December 19. But cooperation is hardly a confession. Mr. Hamid openly acknowledged being in communication with certain persons and doing certain things like opening a bank account in the United States. The government apparently draws the conclusion that Mr. Hamid has acknowledged his guilt. But nothing could be further from the truth. It is an essential element of the crimes alleged in the

Complaint against Mr. Hamid that he knowingly participated in a scheme to defraud. At no time did he confess to participating in such a scheme, or to knowing that those with whom he was communicating or transacting were engaged in such a scheme. Mr. Hamid denies the charges outlined in the Complaint and intends to mount a vigorous defense at trial.

If the government had a “confession,” surely it would have produced a statement to that effect from Mr. Hamid at the detention hearing, or at the very least called one of the interviewing agents (who were present in the courtroom) to testify as to what precisely Mr. Hamid told the agents. The government having failed to do so, the Court is left to consider the untested, proffered representation of the government lawyer who himself is relying on second-hand information relayed to him by the New York-based federal agents who actually interviewed Mr. Hamid. It is plain that inferences are being drawn that are unwarranted and that Mr. Hamid did not confess to knowingly participating in a scheme to defraud. (He certainly denies it now.) It would therefore be very unjust indeed to order him detained based in part on the premise that he has given a confession which he very clearly did not give.

Even if he had “confessed,” as the government misleadingly suggests, the law is clear that the guilt of the accused has no place in the pre-trial release/detention analysis. *See United States v. Stone*, 608 F.3d 939, 948 (6th Cir. 2010). Not only is it not dispositive, it should not even be part of the discussion in the first place. *Id.*

B. Mr. Hamid did not “evade law enforcement.”

This proffered representation from the government is just as irresponsible as its suggestion that Mr. Hamid “confessed.” It seems to be premised on the idea that Mr. Hamid has somehow tried to hide his true identity, or has held himself out to be other than who he is. This premise has no basis in fact, however.

In truth, Mr. Hamid does not have an “alias” or an alternative identity and does not use fictitious names. He has a nickname. “Shah” is a nickname (fairly common in Pakistan). There is absolutely nothing nefarious about Mr. Hamid using this nickname and the government does not point to a single instance in which Mr. Hamid attempted to mask the fact that he went by this nickname, or tried to hide his true identity by using it. Indeed, the government’s complaint itself includes averments that themselves show that Mr. Hamid has not tried to hide his true identity. When the government’s cooperating witness asked for Mr. Hamid’s identification documents, for example, Mr. Hamid gladly produced his legitimate identification documents. There is simply no factual basis whatsoever for the suggestion that Mr. Hamid is a shifty figure operating in the shadows and using false identities. The government’s suggestion in this respect is especially irresponsible given that the use of alternative identities is certainly germane to the question of flight risk. Simply stated, it would be most unfair for this Court to consider Mr. Hamid a serious flight risk based on the suggestion of multiple identities when in fact he has never made any effort whatsoever to hide or disguise his identity.

C. The Pakistani Opinion and Order (admitted as Defendant’s Exhibit 2 at the detention hearing) relating generally to the same subject matter as outlined in the Complaint against Mr. Hamid is an original Pakistani court document and not a translation (as suggested by the government at the detention hearing).

As previously stated, the subject matter forming the basis for the charges outlined in the Complaint against Mr. Hamid was previously the basis of a prosecution against certain individuals (but not Mr. Hamid) in Pakistan. As reflected in the Pakistani Opinion and Order, all defendants were acquitted and the court pointed out the significant holes in the prosecution’s case in a very specific manner. The Complaint against Mr. Hamid amounts more or less to essentially the very same case prosecuted by the Pakistani authorities in the Pakistani courts and contains the very same holes. It is significant insofar as it provides important context for the

government's request for detention in the instant case. In other words, not only does the government seek to detain a defendant with no criminal history accused of a non-violent crime but a crime that has more or less been prosecuted once already by a prosecuting authority who apparently saw no reason to accuse Mr. Hamid of any involvement and furthermore acquitted the entire roster of individuals who it did think appropriate to accuse.

In a tacit acknowledgment of the evidentiary value of the Pakistani Opinion and Order, the government at the detention hearing in the instant matter sought to undermine its significance by suggesting that it was not an original Pakistani court document but instead a translation. As it is, the document is an original Pakistani court document and is the official judgment of acquittal in the Pakistani court proceeding. English is one of the two official languages of Pakistan and the Pakistani court proceedings in the Pakistani case in which the Opinion and Order was generated were conducted in English. The force of its reasoning – which cuts hard against the government's request for Mr. Hamid's detention in the instant matter – is therefore not diluted one iota by the fact of any translation.

IV. CONCLUSION

The question is not a close one: detention is entirely inappropriate in this case. Any reasonable application of the law to the facts compels the conclusion that Mr. Hamid should be released subject to reasonable conditions. Given the unique circumstances of Mr. Hamid's situation, detention would prejudice Mr. Hamid to an extraordinary extent and his confinement on even an interim basis would amount to a grave miscarriage of justice.

Respectfully submitted,

/s/ Benjamin Dusing

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2016, I electronically transmitted the foregoing to the following counsel of record:

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