

IP 05-0314-M 1 KPF USA v Marbley
Magistrate Kennard P. Foster

Signed on 01/30/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
) PLAINTIFF,)
)
) v.) NO. IP 05-0314M-01
)
) RAYMOND EARL MARBLEY)
)
) Defendant.)

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

Raymond Earl Marbley is charged in a Criminal Complaint issued on August 10, 2005, with being a felon in possession of a firearm in violation of 18 U.S.C. §922(g). On January 13, 2006, at the initial appearance, the government made an oral motion for detention, which was followed by a written motion, filed January 17, 2006, pursuant to 18 U.S.C. §§3142(f)(1)(A), (f)(1)(D), and (f)(2)(A) and (B) on the grounds that this case involves a crime of violence, that the defendant had previously been convicted of at least three violent crimes, there is a serious risk that Mr. Marbley will flee if release, and a serious risk that Mr. Marbley will obstruct justice or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness. A preliminary examination and a detention hearing were held on January 18, 2006. The United States appeared by Assistant United States Attorney Gayle Helart, and the defendant appeared in person and by his appointed counsel, James McKinley, Office of Indiana Federal Community Defender. The United States Probation Office was represented by Mark McCleese.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendant, Raymond Earl Marbley, is charged in this cause by criminal complaint with being a felon in receipt and possession of a firearm in violation of 18 U.S.C. 922(g).

2. The maximum penalty under 18 U.S.C. §922(g) is ten years' imprisonment. However, since the defendant has three prior convictions for qualifying crimes of violence on occasions different from one another, he is subject to the enhanced penalty provisions of 18 U.S.C. §924(e). Under that statute, Mr. Marbley would face, upon conviction, a minimum period of imprisonment of 15 years, and a maximum term of life.¹

3. The Court takes judicial notice of the Complaint and the Affidavit In Support of the Complaint. The Court further incorporates the evidence admitted during the preliminary examination and detention hearing, as if set forth herein.

4. The government submitted the matter on preliminary examination on the Complaint, the Affidavit, and made affiant Todd Burris, police officer, City of Lawrence, Marion County, Indiana, available for cross-examination. Counsel for Mr. Marbley cross-examined Officer Burris. Mr. Marbley presented no evidence on the issue of probable cause and proceeded by proffer on the issue of detention.

5. The Court admitted the Pretrial Services' report, Exhibit 1, regarding the issue of release or detention.

6. The evidence regarding the commission of the charged offense is strong.

¹ Pursuant to Title 18, United States Code, Section 924(e)(1), if a defendant has three previous convictions for qualifying violent felonies, or serious drug offenses, or both, committed on occasions different from one another, then upon conviction for an offense under Title 18, United States Code, Section 922(g), the minimum term of imprisonment is 15 years, and the maximum term is life. The sentence imposed is not subject to either suspension or probation. *See*, Title 18, United States Code, Section 924(e); *Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (*en banc*), cert. den., 115 S.Ct. 2252, 132 L.ed.2d 260 (1995); *United States v. Howell*, 37 F.3d 1197 (7th Cir. 1994), cert. den., 115 S.Ct. 1810 (1995).

(A) Officer Burris affected a traffic stop at 2:00 a.m. on July 9, 2005, on a vehicle which Mr. Marbley was driving. Upon approaching the driver's side of the vehicle, Officer Burris noticed the handle/stock of a firearm sticking out from underneath an arm rest near the driver's seat. Officer Burris immediately removed Mr. Marbley from the vehicle, called for a back up unit and watched Mr. Marbley at the back of Mr. Marbley's vehicle while he also watched the passenger. When a second officer, Shane Bolander, arrived, Officer Bolander removed the passenger from the vehicle and was with him during most of the stop.

(B) Officer Burris attempted to identify Marbley by asking him his name, to which Marbley told him a false name of "Raymond Freeman." Officer Burris, through a vehicle registration in the name of Raymond Marbley and database checks, confirmed Marbley's true identity and also confirmed that he had a parole warrant pending.

(C) Officer Burris gave Marbley his Miranda warnings and asked him about the gun. Marbley said the gun did not belong to him, but rather, it belonged to his sister but that he did not recall his sister's name. The passenger stated that the gun was not his (the passenger's), and that the gun belonged to Marbley.

(D) Marbley has been convicted of numerous crimes since 1979, including three Child Molest offenses. Marbley's convictions at least include: (1) 1979, Theft; (2) 1981, Possession of Marijuana; (3) 1983, Battery; (4) 1985, Child Molest with a victim who was age 8; (5) 1988, Public Intoxication; (6) 1989, Battery; (7) 1992, Driving while intoxicated; (8) 1994, Child Molest, 6 counts, with a victim who was age 11 or 12; (9) 1994, Child Molest, 1 count, with a victim who was between the ages of 12-16; (10) 2003, Interfering with Reporting a crime.

7. The Court finds there is probable cause to believe that Mr. Marbley has committed the offense charged in the Complaint; therefore, Mr. Marbley is held to answer in the District Court.

8. Mr. Marbley qualifies for a detention hearing upon the government's motion that he is

charged with a crime of violence. 18 U.S.C. §3142(f)(1)(A).

9. Mr. Marbley qualifies for a detention hearing upon the government's motion that he has suffered two or more qualifying convictions for qualifying crimes of violence, pursuant to 18 U.S.C. §3142(f)(1)(D).

10. Mr. Marbley qualifies for a detention hearing upon the government's motion that he is a serious risk of flight. 18 U.S.C. §3142(f)(2)(A).

11. The evidence relevant to the factors set forth in 18 U.S.C. §3142(g) requires that Mr. Marbley be detained as there is no condition or combination of conditions that will reasonably assure that he will appear as required for further proceedings, and will not engage in dangerous criminal activity pending trial, or obstruct, or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or a juror. Therefore, Mr. Marbley is ORDERED DETAINED.

12. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United*

States v. Sloan, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. See 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See also *United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§3142(f)(1)(A), (f)(1)(D), (f)(2)(A), and (f)(2)(B). The Court has found that the government satisfied its burden of establishing that all of these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant detained before trial if 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. See 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. See *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. See *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), cert. denied, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and

convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

13. The Court finds that possession of a handgun by a person who has previously been convicted of serious crimes of violence in the factual setting of this case, driving a stolen vehicle, is a crime of violence pursuant to 18 U.S.C. §3142(f)(1)(A). The Court also finds that Mr. Marbley has three prior convictions for violent, qualifying felonies, as described in 18 U.S.C. §3142(f)(1)(D). The Court further finds there is clear and convincing evidence (even though the Court need find only by a preponderance of the evidence) that the defendant is a serious risk of flight if released. That evidence, coupled with the defendant’s propensity for violence and possession of firearms, by clear and convincing evidence also makes him a danger to the community.

14. The evidence presented in this case demonstrates there is no condition or combination of conditions of release that would reasonably assure the defendant’s appearance in Court as ordered or the safety of the community.

WHEREFORE, Raymond Earl Marbley is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. Mr. Marbley shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver Mr. Marbley to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

DATED this 30th day of January, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court

Distribution:

Timothy M. Morrison,
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

James McKinley,
Office of Indiana Federal Community Defenders
111 Monument Circle, Suite 752
Indianapolis, IN 46204

U. S. Marshal

U. S. Probation Office, Pre-Trial Services Division