FILED
United States Court of Appeals
Tenth Circuit

September 24, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. BANKS,

Defendant-Appellant.

No. 11-1487
(D.C. No. 1:09-CR-00266-CMA-1)
(D. Colo.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENDRICK BARNES,

Defendant-Appellant.

No. 11-1488
(D.C. No. 1:09-CR-00266-CMA-6)
(D. Colo.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEMETRIUS K. HARPER,
a/k/a Ken Harper,

Defendant-Appellant.

No. 11-1489
(D.C. No. 1:09-CR-00266-CMA-2)
(D. Colo.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. CLINTON A. STEWART, a/k/a C. Alfred Stewart, Defendant-Appellant.	No. 11-1490 (D.C. No. 1:09-CR-00266-CMA-4) (D. Colo.)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY L. WALKER, Defendant-Appellant.	No. 11-1491 (D.C. No. 1:09-CR-00266-CMA-3) (D. Colo.)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID A. ZIRPOLO, Defendant-Appellant.	No. 11-1492 (D.C. No. 1:09-CR-00266-CMA-5) (D. Colo.)

ORDER

Before **BRISCOE**, Chief Judge, and **KELLY**, Circuit Judge.

After a jury trial, defendants were convicted of one or more counts of mail fraud, wire fraud, and/or conspiracy to commit mail and wire fraud and sentenced to terms of imprisonment ranging from 87 to 135 months. The total loss resulting from

the fraud scheme exceeded $5 million. The district court denied defendants' motions for release pending appeal. In this court, defendants Harper, Barnes, Stewart, Walker, and Zirpolo (the Harper defendants) have filed a joint motion for release pending appeal, and defendant Banks has filed a separate such motion.

A motion for release pending appeal is governed by 18 U.S.C. § 3143(b)(1), which has a presumption that "a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . be detained." A defendant may overcome this presumption if he meets his burden of satisfying the limited statutory conditions identified in § 3143(b)(1). *See United States v. Meyers*, 95 F.3d 1475, 1489 (10th Cir. 1996). First, the court must find "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." 18 U.S.C. § 3143(b)(1)(A). Second, the court must find

> that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
>
> (i) reversal,
> (ii) an order for a new trial,
> (iii) a sentence that does not include a term of imprisonment, or
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Id. § 3143(b)(1)(B).

In denying defendants' motions for release pending appeal, the district court found that they had not established by clear and convincing evidence that they were not a flight risk under § 3143(b)(1)(A). The court rejected defendants' argument that

they were not now a flight risk because, despite anticipating lengthy sentences, they had complied with all of their bond conditions while on release before sentencing. The court reasoned that defendants now presented a heightened risk of flight because of the substantial terms of imprisonment they received and because there remained substantial sums of money unaccounted for (according to the court, "several million dollars," Joint App'x, Vol. II at 436). At defendant Banks's sentencing hearing, the court noted it was also influenced by the sophisticated nature of the fraud scheme. In support of its findings regarding defendants' flight risk, the court relied on *United States v. Bailey*, 759 F. Supp. 685, 687 (D. Colo. 1991), for the proposition that "the imposition of a sentence heightens the risk of flight and . . . presentence compliance with bond conditions does not, by itself, meet a defendant's burden under § 3143(b)(1)." Joint App'x, Vol. II at 274. The district court also relied on *United States v. Madoff*, 316 F. App'x 58, 59-60 (2d Cir. 2009), for the proposition that a "defendant's exposure to [a] lengthy imprisonment term and access to assets not accounted for create[s] a risk of flight." Joint App'x, Vol. II at 274. The court further found that defendants would be unable to raise a substantial question of law or fact on appeal likely to lead to any of the results listed in § 3143(b)(1)(B) because the court had denied post-judgment relief on the issues defendants indicated they planned to raise on appeal.

In their motions and supporting briefs, the Harper defendants argue that they are not flight risks now because they did not flee before. They point out that they

first learned the government was investigating them in 2004 yet made their initial appearances in these cases voluntarily in 2009. From that time until the guilty verdict in October 2011, they remained free on personal recognizance bonds, and between conviction and sentencing, they were released on bond and complied with all terms and conditions of their release. They appeared at each other's sentencing hearings yet none fled despite witnessing their co-defendants receive the substantial sentences recommended by the government in its presentence reports. They posit that their compliance with their conditions of release should weigh heavily in their favor under § 3143(b)(1)(A). Regarding the money not accounted for, they argue (without any record citation) that the government's claim that it cannot account for all of the money at issue is "contrary to its forensic accountant's position." Joint Reply at 3. They also point to "Harper's explanation at his sentencing hearing of the reason such is not possible (Joint Appendix, Vol. II, p. 473-74)." Joint Reply at 3.[1]

[1] The explanation to which the Harper defendants apparently point reads as follows:

> One of the things, as well, [government counsel] says, is he doesn't know where the money is. What you are failing to see, again, is the mark-up is included in that 5 million. So there might be 30 to 40 percent as a typical standard in a staffing and payrolling system to do a mark-up. So that $5 million, everyone saying we don't know where it went. A lot of that was profit that they are not accounting for. So, in essence, you take that out, then you start getting to real numbers.

Joint App'x, Vol. II at 472-73.

In addition, they attempt to distinguish the two cases the district court relied on, *Bailey* and *Madoff*, which we will discuss below.

Defendant Banks filed a separate motion for release but also joined in the Harper defendants' motion. His arguments regarding his flight risk are substantially similar to those raised in the Harper defendants' motion, but he adds that his bond was paid for by family and church members, he is at low risk to be a recidivist, he was convicted of non-violent crimes, and he has no prior criminal history except for traffic offenses. He also states that "[b]ased on actual time he will serve," his 135-month sentence is "not . . . substantial." Banks's Reply at 2.

We review de novo "mixed questions of law and fact concerning the detention or release decision, but we accept the district court's findings of historical fact which support that decision unless they are clearly erroneous." *United States v. Cisneros*, 328 F.3d 610, 613 (10th Cir. 2003). It is the defendant's burden to prove that he is not a flight risk, not the government's burden to prove that he is. *See United States v. Affleck*, 765 F.2d 944, 953 (10th Cir. 1985) (holding "that in order to grant bail pending appeal, a court must find that *the defendant has met his burden* of proving by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or to the community" (emphasis added)).

Defendants have a high burden to overcome the presumption of detention in § 3143(b)(1). They have not met that burden. The fact that they remained free until sentencing and complied with their conditions of release is some evidence that they

do not present a post-sentence flight risk, but it is not clear and convincing evidence because their incentive has changed—they have now received substantial sentences of imprisonment. Further, they have not seriously contested the district court's finding that there remains a substantial sum of money unaccounted for.

Defendants' attempts to distinguish *Bailey* and *Madoff* are unavailing. Regarding *Bailey*, 759 F. Supp. 685, they argue that not every defendant who demonstrates exemplary compliance with pre-sentence release becomes a flight risk simply by virtue of receiving a lengthy sentence. However, they have offered nothing to show that this concept should be applied to them; they simply rest on the laurels of their pre-sentence compliance. As we said, that is insufficient, particularly when coupled with the prospect that they have sufficient assets to finance flight. Regarding *Madoff*, 316 F. App'x 58, defendants point out that Mr. Madoff received a much lengthier sentence (1,800 months' imprisonment) and had much greater financial means to flee because he was ordered to pay restitution of over $170 billion. Nonetheless, it remains that defendants received substantial terms of imprisonment, and they have not shown clear error in the district court's finding that a substantial sum of money has not been accounted for.

To conclude, the district court found that defendants had not demonstrated by clear and convincing evidence that they were not flight risks, and defendants have not shown that this finding was clearly erroneous. Because defendants must satisfy both factors in § 3143(b)(1), their failure to meet their burden of proof on the first factor is

dispositive of their motions, and we therefore do not need to reach their arguments on the second factor. Accordingly, the defendants' motions for release pending appeal are DENIED.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk