

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

5. DAVID A. ZIRPOLO,

Defendant.

ORDER

THIS MATTER arises on the **Joint Motion for Bond Hearing** [Doc. # 541, filed 11/4/2011] (the “Motion”). The Motion requests that I reopen the detention hearing held on October 20, 2011, and order the defendant released on a surety bond and other conditions. I have reviewed the Pretrial Services report, received proffers, reviewed the court file, and heard the arguments of counsel. For the reasons stated, I GRANT the Motion and order the defendant released on bond and other conditions, as specified.

The issue of release or detention of a defendant after conviction and pending the imposition of sentence is controlled by 18 U.S.C. § 3143(a). In this case, which does not involve any offense described in 18 U.S.C. § 3142(f)(1)(A), (B), or (C), the issue of release or detention is controlled by § 3143(a)(1), which provides in relevant part:

[T]he judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 944 does not recommend a term of imprisonment, be detained, unless the judicial officer finds 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 under section 3142(b) or (c).

18 U.S.C. § 3143(a)(1).

Thus, pursuant to § 3143(a)(1), a person who has been convicted of an offense must be detained pending sentencing unless the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of the community if released. “Post-conviction, a defendant no longer has a substantive constitutional right to bail pending sentencing.” United States v. Madoff, 2009 WL 728379 *1 (2d Cir. March 20, 2009). Nor is the defendant entitled to the presumption of innocence. Id. The defendant bears the burden of proving by clear and convincing evidence that he is neither a flight risk nor a danger to the community. See United States v. Khanu, 675 F. Supp. 2d 69, 70 (D.D.C. 2009). In addition:

Although Congress did not intend to eliminate bail pending appeal . . . , Congress did intend to substantially limit its availability. The Bail Reform Act therefore creates a presumption against bail pending appeal because the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption.

United States v. Scheur, 626 F. Supp. 2d 611, 615 (E.D. La. 2009)(addressing an analogous section, 18 U.S.C. § 3143(b), which concerns release or detention pending appeal by the defendant).

In this case, a jury returned its verdict on October 20, 2011, finding the defendant guilty of one count of conspiracy to commit wire fraud and mail fraud; ten counts of mail fraud; and two counts of wire fraud.

The defendant, through proffer and argument of counsel, has rebutted the presumption of detention. First, there is no serious argument that the plaintiff poses a danger to the community,

and I find clearly and convincingly that he does not pose any such risk.

The sole issue is whether there is a risk that the defendant will flee. That concern is rebutted by the fact that the defendant is a long-time resident of the State of Colorado with substantial ties to the community; he is the Sunday School Superintendent at the Colorado Springs Fellowship Church, which has provided him with substantial financial and emotional support; his life is deeply rooted in the Colorado Springs community; he did not flee pretrial while on a personal recognizance bond, even though he held a valid passport; and he has no substantial criminal history other than the instant case. In addition, the defendant must post a surety bond in the amount of \$40,000.00, guaranteed and co-signed by the defendant and Torri D. Lopez. Finally, the defendant must submit to home detention, submit to location monitoring in a form designated by his supervising officer, and report daily to the supervising officer.

I previously found that the defendant has an incentive to flee based on the length of the potential sentence he faces and an ability to flee. Order of Detention [Doc. # 507] at p. 3. I am persuaded, however, that the defendant's ties to the community, combined with a substantial financial bond and adequate monitoring, clearly and convincingly rebut that risk.

IT IS ORDERED:

1. The Motion [Doc. # 541] is GRANTED;
2. The defendant is ordered released from custody pending sentencing on the following conditions. The defendant must:
 - (a) Not violate any federal, state, or local law while on release;
 - (b) Advise the court, defense counsel, and the U.S. attorney in writing before changing his address or telephone number;

- (c) Appear in court as required and surrender to serve any sentence imposed;
- (d) Report to the supervising officer on a daily basis, as the supervising officer may direct;
- (e) Obtain, execute, and maintain a surety bond from a solvent surety, in a form acceptable to the court, in the amount of \$40,000.00. The bond must be guaranteed and co-signed by the defendant and Torri D. Lopez;
- (f) Surrender any passport to the Clerk of the Court prior to release and obtain no new passport or other international travel documents;
- (g) Not travel outside of the State of Colorado without the prior permission of the court;
- (h) Refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (i) Submit to home detention. The defendant is restricted to his residence at all times except for religious services, medical treatment, attorney visits, court appearances, court-ordered obligations, or other activities approved in advance by the supervising officer;
- (j) Submit to location monitoring as required by the supervising officer and abide by all of the program requirements and instructions provided by the supervising officer related to the proper operation of the technology; and
- (k) Not act as an informant for any law enforcement agency without the prior permission of the court.

Dated November 22, 2011.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge