

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1957
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

VERSUS

FELICIANO MUNOZ,
a/k/a Felix,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-462-H-02)

(January 7, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:¹

The government appeals the district court order releasing Feliciano Munoz on bail. We conclude from our review of the record that the decision of the district court is not supported by the proceedings below. Reversed.

¹Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Through the use of a wiretap, confidential informants, PEN registers, and physical surveillance, a federal drug task force determined that Jose Caballero (Caballero) was running a cocaine-distribution ring out of the Jaguar Bar and the Taco Riendo restaurant in Dallas, Texas. Feliciano Munoz (Munoz), Caballero's brother-in-law, owned the Jaguar Bar and the Taco Riendo restaurant.

The agents witnessed several cocaine transactions in which Munoz participated. In one instance, the agents intercepted a telephone conversation between Munoz and an individual in Mexico about the price and availability of cocaine in Mexico. In another instance, the agents determined that Munoz used his Taco Riendo restaurant to arrange and participate in the purchase of approximately 40 kilograms of cocaine for \$629,568.

Soon after that transaction, agents searched the seller's car and found \$629,568. They then searched Taco Riendo. That same evening, Munoz phoned the Jaguar Bar and said, "I'm not coming back." Munoz was in Mexico for the next several days. The Caballero family has family members and a ranch in Mexico. Munoz and Caballero spoke on the phone while Munoz was in Mexico. They discussed the price of cocaine, co-conspirators, and drug transactions. Munoz returned to Dallas and Taco Riendo after about a week.

The Government moved for Munoz's pretrial detention. A magistrate judge held a hearing on the motion. Federal Bureau of

Investigation Agent Don Borelli (Borelli) testified about the Government's investigation of Munoz. Rafael Duarte (Duarte), a Dallas produce merchant, testified about his long-standing business and social relationship with Munoz.

The magistrate judge found probable cause to believe that Munoz had conspired to distribute cocaine. She found strong evidence that Munoz was an "upper level member" of the conspiracy. She found that the Government failed to show by clear and convincing evidence that Munoz was a danger to the community because Munoz was not the leader of the conspiracy and had no prior record of drug trafficking. She also found that the Government failed to show that Munoz was a flight risk because Munoz had been in Dallas since 1981; had a wife and children in Dallas; and owned Taco Riendo. The magistrate judge set bail at \$200,000.

The Government appealed the magistrate judge's order to the district court. The court held a hearing on the Government's motion. Borelli again testified about the Government's investigation. Marisa Caballero (Marisa), Munoz's sister-in-law, testified in detail about Munoz's ties to this country: that Munoz's wife had been in the United States for 23 years; several other members of the Caballero family also had been in the United States for a long time; Munoz had lived in the United States for 18 years and held resident-alien status; Munoz had been married to Marisa's sister for eight and one-half years; Munoz had a 16-year-old stepson and a six-year-old daughter. The family owned three houses and Munoz's businesses. Munoz managed his restaurant, which

was successful. According to Marisa, Munoz would not return to Mexico because he had built a life in the United States. Nor would Munoz's family be willing to move to Mexico. Marisa added that the Caballero "hacienda" in Mexico was a two-bedroom house on a small plot of land.

After the hearing, and before the court made a decision, a grand jury indicted Munoz of conspiring to distribute cocaine, using a telephone to facilitate a drug offense, money-laundering, and engaging in a continuing criminal enterprise.

Several days later the district court affirmed the magistrate judge's order to release Munoz on bail. The court found that the Government had failed to prove that Munoz was a flight risk. The court relied on Munoz's family and financial ties to Dallas and the fact that Munoz returned from Mexico to Dallas even though he knew he was the target of an investigation.

The court also found that the Government had failed to prove that Munoz was a threat to the community if he were released on bail. The court ordered Munoz released on \$75,000 bail; required him to wear an electronic monitoring device; and restricted Munoz to his home, his place of employment, his lawyer's office, and the federal courthouse. Specifically, the court found:

The evidence shows that the government is fully aware of the defendant's places of business and residence. The government is also fully aware of the persons with whom the defendant associates. The court finds that based on the defendant's substantial ties to the community, his business interest in the community, the fact that arrests of many of the defendant's associates has occurred and the government's knowledge of the defendant's

activities, the evidence fails to show that the defendant will continue to commit illegal acts while on bail. Additionally the court finds that any possibility of the defendant committing illegal activities while on bail is greatly diminished by the court's order of the defendant to submit to electronic monitoring of his location and the court's order that he be limited to his home or place of business, his lawyers' office or court appearances.

We granted the government's application for a stay of the district court's order pending resolution of this appeal.

II.

The Government contends that the district court's order releasing Munoz on bail was not supported by the proceedings below and thus constituted an abuse of discretion. Our task is to determine whether the evidence as a whole supports the district court's order. **United States v. Rueben**, 974 F.2d 580, 586 (5th Cir. 1992) (citations omitted). This standard of review equates to the abuse of discretion standard. **Rueben**, 974 F.2d at 586.

The pretrial detention statute provides that the judicial officer "shall order the detention of the person before trial" if he "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." 18 U.S.C. § 3142(e). The Government must prove risk of flight by a preponderance of the evidence and risk of danger to the community by clear and convincing evidence. **United States v. Fortna**, 769 F.2d 243, 250 (5th Cir. 1985); 18 U.S.C. § 3142(f). "For pretrial detention to be imposed on a defendant, the lack of reasonable assurance of either the defendant's appearance, or the safety of

others or the community is sufficient; both are not required."

Rueben, 974 F.2d at 586.

Further,

[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that 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). An indictment provides probable cause that a defendant committed an offense. **U.S. v. Trosper**, 809 F.2d 1107, 1110 (5th Cir. 1987). Munoz's indictment alleged offenses under the Controlled Substances Act that carry penalties of more than ten years' imprisonment. 21 U.S.C. §§ 841(b)(1)(B), 846, 848(a). So his indictment is sufficient to trigger the statutory presumption that no condition or combination of conditions will reasonably assure his appearance or the safety of the community.

The presumption shifts to the defendant only the burden of producing rebutting evidence, not the burden of persuasion. However, that presumption is not a mere "bursting bubble" that totally disappears from the judge's consideration after the defendant comes forward with evidence. . . . We have held that Congress intended that the presumption "remain [] in the case [as] a factor to be considered by the judicial officer." Thus the mere production of evidence does not completely rebut the presumption, and in making its ultimate determination, the court may still consider the finding by Congress that drug offenders pose a special risk of flight and dangerousness to society.

United States v. Hare, 873 F.2d 796, 798 (5th Cir. 1989)(citations omitted).

Munoz failed to rebut the statutory presumption that he posed a risk of future danger to the community; more specifically, the danger that he would continue to traffic in drugs. **Rueben**, 974 F.2d at 580. Duarte and Marisa testified only about Munoz's family and financial ties to Dallas and the unlikelihood of Munoz's flight. Their testimony shed no light on the risk that Munoz would continue to deal in drugs.

Nor does the evidence on which the district court relied rebut the presumption of a risk of danger. Again, Munoz's family and financial ties to the community relate to his risk of flight; they are irrelevant to the risk of danger to the community through drug trafficking. Significantly, Munoz was on three years non-adjudicated state probation for a drug offense when he was arrested for this offense. Nor does the fact that many of his drug-trafficking associates have been arrested indicate that Munoz will not traffic in drugs in the future. In fact, the opposite is true; several of Munoz's co-defendants are currently fugitives in Mexico. Additionally, we see no indication that the special limitations the district court placed on Munoz's movements lessen the possibility that Munoz will traffic in drugs; the Government's investigation indicates that Munoz's business establishments were a center of the Caballero drug-trafficking operation.

Our review of the record leads us to conclude that the district court's release order is not supported by the proceedings

below. REVERSED.