

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8633  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERMAN RODRIGUEZ VALLEJO,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Western District of Texas  
(A-92-CR-174)

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(January 14, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Herman Vallejo appeals from the district court's order denying his motion for release pending trial on marijuana possession and conspiracy charges.<sup>2</sup> We **AFFIRM**.

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<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

<sup>2</sup> Appeals from detention orders are to be determined promptly, without the necessity of briefs. See 18 U.S.C. § 3145(c), Fed. R. App. P. 9(a).

I.

Vallejo was arrested in September 1992, and charged with conspiracy to possess and possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The magistrate judge, after conducting a hearing on the government's motion for pretrial detention, ordered Vallejo detained without bond. After a second hearing on Vallejo's motion for review of the detention order, the magistrate judge reaffirmed his original order.

Vallejo appealed the detention order to the district court. Vallejo and the government stipulated that the evidence produced at the two hearings before the magistrate judge would be proffered at the hearing before the district judge. The district court approved and adopted the magistrate judge's determination that Vallejo be detained pending trial.

II.

Vallejo contends that the detention order is not supported by the proceedings in the district court, because the government did not meet its burden of proving that he is either a flight risk or danger to the community.

"Absent an error of law, we must uphold a district court's pretrial detention order if it is supported by the proceedings below, a deferential standard of review that we equate to the abuse-of-discretion standard". **United States v. Hare**, 873 F.2d 796, 798 (5th Cir. 1989) (internal quotations and citations omitted). "On appeal, the question becomes whether the evidence as

a whole supports the conclusions of the proceedings below". **United States v. Rueben**, 974 F.2d 580, 586 (5th Cir. 1992).

The pretrial detention statute provides that if, after a hearing, "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", the judicial officer "shall order the detention of the person prior to trial". 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). "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. But, for certain offenses, there is a presumption that the conditions for pretrial detention are met.

Subject 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. **United States v. Trosper**, 809 F.2d 1107, 1110 (5th Cir. 1987). Vallejo's indictment charged offenses that

carry penalties of more than ten years of imprisonment. See 21 U.S.C. §§ 841, 846. Accordingly, the 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.... [W]e 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.

**Hare**, 873 F.2d at 798-99 (internal quotations, citations, and footnotes omitted).

Section 3142(g) lists the factors to consider in determining whether there are conditions of release that would reasonably assure the appearance of the person and the safety of any other person and the community.

These include the nature and circumstances of the offense charged, including whether the offense involves a narcotic drug; the weight of the evidence against the person; the history and characteristics of the person, including the person's character, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

**Rueben**, 974 F.2d at 586; see 18 U.S.C. § 3142(g).

Transcripts of the hearings before the magistrate judge are not in the record before us. The magistrate judge summarized the evidence at the initial detention hearing as follows. As part of an undercover investigation by the Drug Enforcement Administration and the Austin Police Department, Pedro Duran delivered a quarter of a pound of marijuana to an Austin police department undercover officer, as a sample of a negotiated sale of 300 pounds of marijuana. On September 15, 1992, an undercover agent met with Duran in a motel room. After negotiations between them, surveillance revealed that Duran left in a rental car provided by the DEA and went to Vallejo's residence. Duran returned to the hotel and was arrested; 100 pounds of marijuana was discovered in the trunk of the rental car.

Contemporaneously, officers executed federal search warrants at Duran's business and at Vallejo's residence and business. They discovered four to five pounds of marijuana at Duran's business. When police attempted to enter Vallejo's locked garage, they heard voices inside, but the door was not opened in response to police identification. After forcing the door open, officers discovered co-defendants Agis and Hernandez (Mexican nationals) in the garage, along with tools and a 1992 Dodge Ram Charger, which was on ramps. Officers found fifteen pounds of marijuana in a locked cabinet in the garage. They searched the Charger at the Austin Police Department and found 100 pounds of marijuana in the gas tank. The marijuana in the rental car's trunk delivered to the undercover

agent at the hotel, the marijuana at Duran's business, and the marijuana in the Charger's gas tank were wrapped and shaped in a similar fashion.

Agis was carrying on his person a Mexican passport and a visa, along with insurance purchased in Mexico for the Charger. United States Customs records showed that the Charger had crossed the border from Mexico at 10:45 a.m. on September 15, 1992. The search of Vallejo's residence occurred at 5:00 p.m. that same day.

Officers also found \$58,000 cash inside a small metal box in Vallejo's attic. Vallejo made an unsolicited statement that the money was obtained for work outside the country. In Vallejo's garage, officers also found what they believed to be tally sheets of prior marijuana transactions and a large floor scale. In addition, they recorded telephone conversations between Duran and Vallejo.

Vallejo offered evidence that he has a large family that resides in the Austin area and that he has been in the concrete finishing business in that area for a number of years. Vallejo testified that he had lived at the residence where the search warrant was executed for approximately two years; prior to that, he lived next door. Vallejo has two teen-aged sons who attend school in the Austin area. Vallejo's family members, including his 78-year-old mother, were present and offered to be third-party custodians to assure his appearance. The magistrate judge concluded that, despite Vallejo's strong ties to the community, he should be detained because he also has close ties to the Republic

of Mexico, as evidenced by the two Mexican nationals working on the Charger in his locked garage.

At the second hearing, Vallejo's extended family testified that he is a model citizen, a loving and caring father, and a loving, caring, son. Vallejo's financial statements indicated that his concrete finishing business was successful. Vallejo's family was shocked to learn that charges were pending against him for the drug transactions and that officers had found \$58,000 in cash in the attic. The magistrate judge concluded that, while his family's testimony might otherwise rebut the presumption that Vallejo was a flight risk and a danger to the community, the evidence instead indicated that Vallejo had the ability to lead "two lives", and, therefore, reaffirmed his previous order.

At the hearing on the appeal from the magistrate judge's detention order, Vallejo pointed out that, at the prior hearings, he testified that he would comply with special restrictive conditions, that he would maintain employment, and that he would avoid contact with any potential witnesses in the case. Vallejo also emphasized his family's testimony that he has lived in the Austin area for fifteen years and that his mother lives next door to him so that he can care for her. In addition, his relatives who offered to be custodians also agreed to post a \$5,000 cash bond.

Although Vallejo presented considerable evidence of long-standing ties to the locality in which he faces trial, *Rueben*, 974 F.2d at 586, the evidence against Vallejo appears to be strong; and there is evidence that he has at least some ties to a nearby

foreign country. Moreover, the fact that he concealed his conduct regarding the hidden \$58,000 from family members lends additional support to the district court's determination. Therefore, we conclude that the district court's finding that no condition or combination of conditions will reasonably assure Vallejo's appearance or the safety of the community is supported by the proceedings below.

III.

The district court's order that Vallejo be detained pending trial is

**AFFIRMED.**