

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1466  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL FITZGERALD WILSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
3:93 CR 151 H

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June 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Michael Wilson appeals an order of the district court denying release from pretrial detention pursuant to 18 U.S.C. § 3148(b). Finding no error, we affirm.

I.

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\* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Wilson was indicted on May 19, 1992, in connection with a conspiracy involving distribution and possession with intent to distribute cocaine and cocaine base. On June 5, 1992, he was released on a \$20,000 surety bond and under several conditions, including that he not violate any federal, state, or local laws.

A thirty-one-count superseding indictment was returned in September 1992, charging Wilson and his co-defendants with conspiracy, the distribution of cocaine and marihuana, illegal use of a communication facility, distribution of crack cocaine and marihuana within 1,000 feet of a school, and the use of firearms during drug trafficking. Wilson's trial was severed from that of his co-defendants because his attorney was hospitalized prior to the commencement of the trial scheduled for May 1993.

On April 23, 1993, Wilson was charged in a three-count indictment with witness tampering. The government filed a motion for pretrial detention pursuant to 18 U.S.C. § 3142(e) and (f), noting that he was considered to be a danger to several witnesses scheduled to testify at the trial of his co-conspirators. The government also filed a motion to revoke Wilson's bond in the drug case.

The magistrate judge held a hearing and denied both motions, determining that the government had failed to show by clear and convincing evidence that Wilson would be a danger to other persons or the community if he was released from custody. The district court, with the consent of the parties, listened to the tape recording of the hearing held before the magistrate judge rather

than holding another evidentiary hearing.

The court made a de novo determination and vacated the magistrate judge's order, finding that the "clear and convincing standard" relied upon by the magistrate judge is applicable to a detention proceeding under 18 U.S.C. § 3142(f) but not to a revocation proceeding under section 3148. The district court revoked Wilson's bond pursuant to section 3148, finding that the government had demonstrated probable cause to believe that Wilson tampered with witnesses, a federal felony, and is a danger to others and the community. The court granted the government's motion to revoke bond and ordered Wilson detained.

At the hearing before the magistrate judge, Walter Woosley, an Internal Revenue Service special agent, testified that the authorities had learned, through wiretaps and the execution of search warrants conducted in nine locations, that Wilson was the leader of a crack cocaine organization that distributes narcotics throughout Dallas. Numerous weapons had been discovered at the search locations controlled by Wilson.

Woosley testified that he also had been involved in the investigation of the alleged witness tampering that occurred while Wilson was released on bond and that one of the witnesses, who wished to remain anonymous, was approached by Wilson in June 1992, and Wilson attempted to have the witness give false testimony concerning money laundering if contacted by the law enforcement authorities. The witness stated that he was afraid of Wilson because of the manner in which Wilson came across during the

conversation. Wilson had stopped in front of the witness's location about a month prior to the hearing, and the agent testified that the witness was extremely reluctant to provide any information because of Wilson's contact.

Woosley testified that he also had obtained evidence that Wilson had intimidated Linda Lane, a co-defendant in the drug case. Lane indicated to the agent that she was afraid of Wilson because he had warned her against providing incriminating information to the authorities and indicated his belief that Lane was the weak link in their organization. Lane quoted Wilson as saying, "If I have to spend forty years in jail, I'm going to kill the mother fucker over it."

Lane told the agent that she was aware that Wilson was responsible for the beating of another co-defendant, Koda Cook, because Cook had come up short on a drug transaction and that Wilson had beaten up his girlfriend and co-defendant, De Ann Coffman. The Cook beating was corroborated by wiretap information. Lane told the agent that she continued to have contact with the Wilson family because, if she did not maintain contact, they would have realized that she was a government witness.

Woosley testified that a third individual, Kelvin Webb, had informed the police in May 1992 that a certain amount of crack cocaine could be found in a specific area of Coffman's apartment that was occupied by Wilson and also in the apartment of an associate of Wilson's. The cocaine was found in the locations specified by Webb. Woosley testified that a motion was subse-

quently filed in Coffman's case in connection with the search and seizure of the drugs, and attached to it was an affidavit by Webb, stating that the information that Webb had provided to the police was untrue.

Webb advised the agent that he executed the affidavit because Wilson had made numerous telephone calls to his and his parents' homes. Webb agreed to meet with Wilson, who told Webb to sign the affidavit to help him out because "you know how my family is." Wilson told Webb that he would be left alone if he signed the false affidavit. Webb indicated to the agent that he knew the family was dangerous because Webb had been present at the time Cook was beaten up with bricks and boards by a Wilson family associate. Webb told the agent that he knew Wilson always carried a gun, and he was scared to go to the meeting but was also scared not to attend.

Wilson offered the testimony of an employee at his car repair business, Lee Smith, and his cousin, Joseph Scott, to the effect that Lane visited the business on numerous occasions and that Wilson did not threaten Lane and that Lane did not appear to be frightened on those occasions. Wilson's mother testified that Lane often called her and related that the agents were pressuring her to provide them with information against Wilson, although she did not have any such information.

At the commencement of and during the detention hearing, the magistrate judge advised Wilson's counsel that the defendant would be given a continuance if he required it to obtain further evidence. Counsel did not indicate that there was any such further

evidence.

II.

A.

Wilson has filed a motion for an expedited appeal. As an appeal from a detention order should be determined promptly, 18 U.S.C. § 3145(c); Fed. R. App. P. 9(A), we grant the motion.

B.

Wilson argues the district court erred in making a de novo determination without holding an additional evidentiary hearing. He reasons that, in the absence of the hearing, the district court was functioning as an appellate court and, upon finding error, should have remanded the matter to the magistrate judge or ordered an additional hearing. Wilson argues that the magistrate judge should have reweighed the evidence under a different legal standard because the district court could not properly evaluate the credibility of the witnesses.

When the district court reviews a magistrate judge's pre-trial detention or release order pursuant to 18 U.S.C. § 3145(b), the district court acts de novo and makes an independent determination of the propriety of detention or release. United States v. Westbrook, 780 F.2d 1185, 1188 n.4 (5th Cir. 1986). The district court, in considering the evidence, is "unfettered as it would be if the district court were considering whether to amend its own action." United States v. Fortna, 769 F.2d 243, 250 (5th Cir.

1985) (internal quotations and citation omitted). Therefore, Wilson is incorrect in his contention that the district court was acting as an appellate court in reviewing the magistrate judge's order.

Additionally, the argument that the magistrate judge should be given an opportunity to reweigh the evidence under the different legal standard of section 3148 is without merit. The magistrate judge made a determination that the evidence was sufficient to establish probable cause that Wilson had engaged in witness tampering, as required under that section.

Further, Wilson cannot complain that the district court did not hold an additional hearing, because he consented to the district court's relying upon the record made before the magistrate judge in making its determination, and Wilson did not request the opportunity to introduce additional evidence before the magistrate judge or the district court.

C.

Wilson argues that the district court erred in finding that there was no condition or combination of conditions that would assure that he would not pose a danger to a person or the community. Wilson contends that he presented sufficient evidence to rebut the statutory presumption that he was a danger to a person or the community.

"A district court's detention order must be sustained if it is supported by the proceedings below." United States v. Aron, 904

F.2d 221, 223 (5th Cir. 1990) (internal quotation and citation omitted). The factual basis of the decision is reviewed under the "clearly erroneous" standard. Id.

The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer )) (1) finds that there is )) (A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; . . . and (2) finds that )) (A) based on the factors set forth in section 3142(g) . . . there is no condition or combination of conditions of release that will assure that the person will not . . . pose a danger to the safety of any other person or the community.

Section 3148(b).<sup>1</sup>

In order to fulfill the probable cause requirement, "the facts available to the judicial officer must warrant a man of reasonable caution in the belief that the defendant has committed a crime while on bail." Aron, 904 F.2d at 224 (internal quotation and citation omitted). The evidence presented by the government was sufficient to warrant a reasonable belief that Wilson used intimidation or threats to influence the testimony of prospective witnesses in violation of 18 U.S.C. § 1512(b)(1).

If probable cause is found, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of another or the community. Aron, 904 F.2d at 223. "[A] district court's finding that a defendant will not abide by any conditions of release may be established by a preponderance of the evidence." Id. at 224.

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<sup>1</sup> If the government initially seeks detention pursuant to § 3142, based upon the ground that the defendant is a danger to others and the community, the fact that the defendant is dangerous must be supported by clear and convincing evidence. § 3142(f).



The district court found that the rebuttal evidence presented by Wilson's employee and family members, challenging the veracity of Lane's allegations of intimidation, and the evidence that Wilson had family ties, were insufficient to rebut the statutory presumption that Wilson will pose a danger to the safety of others and the community under any conditions. The court's findings are supported by the evidence presented and are not clearly erroneous.

Wilson further argues that he did not present further evidence to rebut the presumption at the magistrate judge's hearing because it was unnecessary and that the district court did not give him the opportunity to present further evidence to rebut the presumption after making the probable-cause finding. Wilson is seeking a remand for the presentation of further evidence.

Wilson and his counsel were aware at the time of the evidentiary hearing that the motion for detention and the motion for revocation were before the court. Counsel was advised that the hearing would be continued to a later date if he wished to present further evidence in response to the motion to revoke. Wilson could not have been aware, prior to the magistrate judge's ruling, that it would be unnecessary to present rebuttal evidence under section 3148(b), yet he did not seek to present additional evidence prior to the conclusion of the hearing. Nor did he request an evidentiary hearing before the district court to present additional evidence. Thus, Wilson has not demonstrated any basis for remanding the case for an additional hearing.

D.

Wilson argues that the district court erred in not identifying a statutory basis for detaining him in the witness-tampering case. The district court was entitled to detain Wilson under the less stringent requirements for revocation of bail under section 3148 and was not required to determine whether there was also clear and convincing evidence to support its determination. See United States v. Cook, No. 89-4107 (5th Cir. May 31, 1989) (unpublished; copy attached as appendix to Aron, 904 F.2d at 225-27) (court upheld magistrate judge's order of revocation under section 3148, although the district court had detained the defendant pursuant to section 3142, finding that the order of detention was supported by the less stringent requirements of section 3148). Therefore, a remand for further findings by the district court under section 3142 is not necessary.

The motion for expedited appeal is GRANTED. The order of the district court is AFFIRMED.