IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9072
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR PRIETO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:93-CR-332-G-2)

(March 16, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Oscar Prieto was arrested for conspiracy to possess cocaine with intent to distribute in violation of 18 U.S.C. § 846. The government moved for detention because the case was a drug offense involving a potential sentence of ten or more years incarceration, and because Prieto was presumed to be a serious flight risk. See 28 U.S.C. § 3142(e). A detention hearing was conducted. The

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

magistrate judge set conditions of release pending trial, which included a $150,000 cash/surety bond.

The government appealed the magistrate judge's order. The district court granted the government's appeal and ordered Prieto detained. The district judge failed to state, in writing, the reasons for the action taken, as required by Fed. R. App. P. 9(a). Prieto appealed, untimely, the district court's order revoking the magistrate judge's order. The district court determined the late notice of appeal was due to excusable neglect.

Prieto argued in this court that he presented sufficient evidence at the detention hearing "to overcome the rebuttable presumption created by 18 U.S.C. Section 3142 that he presents a substantial risk of flight or a danger to the community." However, Prieto did not state why the district court's order was not supported by the proceedings. See 5th Cir. R. 9.1. Prieto referred to the detention hearing, but did not shoulder his burden of including in the record a transcript thereof to support his position, as required by Fed. R. App. P. 10(b)(2).

Judge DeMoss directed the district court to enter written reasons for the actions taken. U.S. v. Prieto, No. 93-9072 (5th Cir. Jan. 21, 1994). Prieto was advised that if he intended to "urge on appeal that the district's court's reasons [were] unsupported by the proceeding therein . . . he should include in the record a transcript of the September 28, 1993, detention hearing." The district court complied and entered written reasons.

Prieto has not provided this court with a transcript of the detention hearing.

Under the Bail Reform Act, an individual shall be released pending trial unless a 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." 18 U.S.C. § 3142(e); see U.S. v. Hare, 873 F.2d 796, 798 (5th Cir. 1989). "If a judicial officer finds probable cause to believe the defendant committed a violation of the Controlled Substances Act carrying a maximum sentence of ten years or more, the presumption arises that the defendant will present a flight risk and a danger to the community." U.S. v. Barker, 876 F.2d 475, 476 (5th Cir. 1989); 18 U.S.C. § 3142(e). "The presumption shifts to the defendant only the burden of producing rebutting evidence, not the burden of persuasion." Hare, 873 F.2d at 798. The presumption remains in the case to be considered by the district court even after the defendant produces rebuttal evidence. Barker, 876 F.2d at 476.

"Once the district court has determined that pretrial detention is necessary, this Court's review is limited. The order of the district court is to be sustained `if it is supported by the proceedings below.'" U.S. v. Westbrook, 780 F.2d 1185, 1189 (5th Cir. 1986) (quoting U.S. v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985)). This is a deferential standard equal to the abuse-of-discretion standard. Hare 873 F.2d at 798 (also holding that the

same standard applies on appeal from refusal to revoke detention order).

The government should receive the benefit of the statutory presumption that Prieto is a flight risk and a danger to the community. The only evidence offered by Prieto was testimony that he had a relative in Odessa, Texas, with whom he could reside prior to trial, and that his family would provide financial assistance for securing a bond.[1] See Fed. R. App. P. 9(a) and 10(b)(2). Prieto is a Mexican, not United States, citizen. He has not shown any ties to the United States, save one relative in Odessa, Texas, and has not offered evidence of any job prospects. As Prieto was involved in the distribution of at least 60 kilos of cocaine, which he apparently "fronted" and on which he has collected $3,000 only, he is facing a potentially lengthy prison sentence if convicted.

Prieto has not rebutted the statutory presumption of being a flight risk. See Fortna, 756 F.2d at 251-52; § 3142(e). Furthermore, he has not shown that the district court's order is not supported by the proceedings below and, thus, has shown no abuse of discretion. See Westbrook, 780 F.2d at 1189; see Hare, 873 F.2d at 798. Therefore, we AFFIRM.

A F F I R M E D.

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[1]Inasmuch as Prieto has not provided this court with a transcript of the detention hearing, the testimony and evidence offered therein is gleaned from the district court's memorandum order.