

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT LOWERY,

Defendant.

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MEMORANDUM AND ORDER

06-CR-131-S-01

The government's motion pursuant to Title 18, United States Code, Section 3145(a)(1), for an order revoking the order of release previously entered by the United States Magistrate Judge for the United States District Court for the Western District of Wisconsin, came on to be heard before the Court in the above-entitled matter on October 16, 2006, the government having appeared by Erik C. Peterson, United States Attorney for the Western District of Wisconsin, by David Reinhard, Assistant United States Attorney; defendant by Charles W. Giesen. Honorable John C. Shabaz, District Judge, presided.

On June 21, 2006 a three-count indictment was returned against the defendant and two others for conspiracy to possess with intent to distribute over 100 kilograms of marijuana, possession with intent to distribute more than 500 grams of cocaine and being a felon in possession of weapons.

After a hearing on October 10, 2006 the Magistrate Judge ordered defendant released from which the United States has appealed.

The Court has reviewed the nature of the offense. At the initial detention hearing on August 22, 2006 pursuant to a federal search warrant agents found 700 grams of cocaine in defendant's garage, 1800 grams of marijuana were found in his residence and five firearms, many of them loaded, were found in defendant's home. Further, law enforcement officers seized \$40,000 and several boxes of ammunition.

The Court has also reviewed the weight of the evidence against defendant which is very strong. In addition to the above evidence found at defendant's residence, the charged conspiracy to distribute marijuana is based on statements by co-defendants Heather Lane and Jason Carr that they made several trips to the United States/Mexican border to pick up marijuana for defendant. These trips involved a total drug quantity of over 100 kilograms of marijuana. Further, police surveillance revealed the co-defendants returning to defendant's residence after picking up the marijuana. Finally, telephone records connect defendant to his co-defendants.

The Court has also reviewed the history and characteristics of defendant which are set out in the June 15, 2006 pretrial services report together with the July 21, 2006 supplement. Defendant's criminal history includes two prior drug felonies and carrying a concealed weapon.

All of the above have been set forth in the government's appeal from the Magistrate's release order and are not in dispute.

The Controlled Substances Act, Section 3142(e) imposes a rebuttable presumption that no combination of release conditions will assure defendant's appearance and the safety of the community. As stated above, the government has strong evidence of the charged conspiracy which occurred during February 2006 and June 2006. Defendant is a danger to the community based upon his two prior drug convictions, a conviction for carrying a concealed weapon and a felony conviction for animal fighting. Additional risk factors concern his alleged possession of a large amount of cocaine, four or five pounds of marijuana and five firearms. He may also be a career offender facing a minimum mandatory sentence of 15 years to a maximum of 40 years.

Although defendant is dependant on medical care any debilitating effect of the cancer may be minimized with appropriate treatment which apparently is no longer being provided. The Magistrate Judge suggests defendant is suffering from "what by all accounts is probably a terminal cancer with a very small chance of defeating" which is not a certainty particularly where appropriate medical care may very well alleviate those concerns. The Magistrate Judge apparently based his release order on the fact that defendant's present condition no longer suggests him to be a flight risk nor a danger to the community which this Court finds to the contrary. Nor is there any evidence to suggest that the defendant will not flee in view of the length of prison term which may be

imposed and his ability to obtain the medical care which he believes necessary once he may be released.

As well-intentioned as are his primary custodians, Ken and Mary Schara, they are unable to devote anywhere near full time to defendant's monitoring, supervision and care. Should other family members offer assistance it would be difficult to monitor their actions. Admittedly, defendant's presence in South Carolina is a hardship and additional expense for any Wisconsin family member who is required to be with defendant for the lengthy monitoring and vigilance which is necessary to control this flight risk.

The factual findings that attempt to rebut the presumption are clearly erroneous. Danger to the community continues to exist as does the probability of flight to avoid prosecution, particularly where there has been no reasonable alternative to confinement other than that proposed in the plan which at this time is of no avail while defendant's location is in South Carolina. Nor can it be said that defendant will not return to his former criminal conduct once the release is provided.

As aforesaid, defendant is dependant on medical care and the Court agrees with the Magistrate Judge that all necessary medical treatment should be provided. Regardless of the Magistrate Judge's decision to the contrary, this Court is of the opinion that there is no requirement that defendant be released in order to receive the medical treatment which is available to him at the University of Wisconsin Hospitals.

Accordingly,

ORDER

IT IS ORDERED that the government's motion for revocation of release order is GRANTED and defendant is committed to the custody of the United States Marshals Service for confinement separate from persons awaiting or serving sentences or being held in custody pending appeal. Defendant shall be afforded a reasonable opportunity for private consultations with his attorney. On order of this Court or on request of an attorney for the Government, the facility shall deliver defendant to the Marshals Service for the purpose of appearances in this case.

Based on defendant's further need for medical care and treatment which appears to be indicated and trial, IT IS RECOMMENDED that defendant be re-designated to a penal facility within the closest proximity to the residence of defendant's family members which the Bureau of Prisons criteria will allow. IT IS FURTHER ORDERED that he receive his medical care and treatment from the University of Wisconsin Hospitals, Madison, Wisconsin.

Entered this 17<sup>th</sup> day of October, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ  
District Judge