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United States District Court, District of Columbia.

UNITED STATES of America
v.
Devon DABNEY, et al., Defendants.

Criminal No. 20-cr-27 (KBJ)
|
Signed 04/13/2020

Attorneys and Law Firms

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Michelle M. Peterson, Federal Public Defender for the District of Columbia, Washington, DC, for Defendant Tyree Marshall.

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ORDER

KETANJI BROWN JACKSON, United States District Judge

***1** On February 3, 2020, at a detention hearing in front of Magistrate Judge G. Michael Harvey, Defendant Devon Dabney conceded detention pending trial on one charge of unlawful distribution of fentanyl, in violation of 18 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). (*See* Minute Entry of Feb. 3, 2020.)[1] This Court held a status conference on February 27, 2020, during which both Dabney and his co-defendant, Tyree Marshall, appeared. (*See* Status Conference of Feb. 27, 2020.) Dabney's counsel made clear that he intended to seek pretrial release, and the Court invited counsel to file a motion on the docket requesting reconsideration of the previously conceded issue of pretrial detention. (*Id.*)[2] One month later, on March 27, 2020, defense counsel filed a "Motion for Reconsideration of Pretrial Detention." (*See* Def.'s Mot. for Reconsideration ("Def.'s Mot."), ECF No. 20.) In that motion, which the government opposes (*see* Gov't Opp'n to Def's Mot. ("Gov't Opp'n"), ECF No. 22), defense counsel argues that "the dismissal of Mr. Dabney's D.C. Superior Court case and the impact of the Coronavirus on the jail and judicial system constitute changed circumstances sufficient to justify a modification of Mr. Dabney's pretrial detention order." (Def.'s Mot. at 5; *see also* Def.'s Reply to Gov't Opp'n ("Def.'s Reply"), ECF No. 23 at 12.) Based on the legal standards that this Court detailed in *United States v. Lee*, No. 19-cr-298, 2020 WL 1541049 (D.D.C. Mar. 30, 2020), and for the reasons summarized below, Dabney's motion for pretrial release will be **GRANTED**.

1 The government had requested that Dabney be held in pretrial detention either pursuant to 18 U.S.C. § 3142(f)(1)(C), which creates a rebuttable presumption in favor of detention in cases involving certain drug trafficking offenses that carry a maximum term of imprisonment of ten years or more, or pursuant to 18 U.S.C. § 3142(d)(1)(A)(i), which allows for temporary detention in federal court to permit the revocation of pretrial release with respect to a state felony charge. (*See* Gov't Mem. in Supp. of Pretrial Detention, ECF No. 8 at 1.)

2 In the motion that is presently before this Court, defense counsel suggests that it is his "recollection" that, during the status conference, he "renewed orally the request for Mr. Dabney's pretrial release, which the Court denied." (*See* Def.'s Mot. for Reconsideration, ECF No. 20 at 2 & n.1.) To the contrary, defense counsel merely noted his intention to make a motion for reconsideration, and this Court explained that it does not entertain oral motions concerning detention matters. (*See* Status Conference of Feb. 27, 2020.) Thus this Court did not previously rule on the issue of Dabney's pretrial detention. (*Id.*)

I.

This Court has carefully considered the parties' briefs and supporting materials—including defense counsel's provision of health-related records and filing of various notices concerning Dabney's asthma-related difficulties while he has been incarcerated (*see, e.g.*, Supplement, ECF No. 24 at 1–2 (asserting that prison authorities prescribed Dabney an inhaler to manage his condition in prison, but it "apparently ran out" and has not been replaced because "the infirmary is closed to non-COVID related inquiries"))—and the Court agrees with Dabney that a reopening of the detention determination is warranted in this case under 18 U.S.C. § 3142(f). The Court further finds that the detention factors set forth in 18 U.S.C. § 3142(g) weigh in favor of Dabney's release on high-intensity supervision.

***2** *First*, there is new and material information that was previously unavailable at the time of Dabney's pretrial detention hearing and that warrants reopening of the detention determination. *See* 18 U.S.C. § 3142(f) (authorizing the "reopening" of a detention hearing in light of "information ... [that] was not known to the movant at the time of the hearing and that has a material bearing" on the propriety of pretrial detention). At the time of Dabney's detention hearing, Dabney had a pending case in the Superior Court of the District of Columbia for carrying a pistol without a license, possession of a large capacity ammunition feeding device, and other related charges. (*See* Gov't Mem. in Supp. of Pretrial Detention ("Gov't Detention Mem."), ECF No. 8 at 8.) Those charges have been dropped (*see* Def.'s Mot. at 5*; see also* Gov't Opp'n at 2), and just as *having* such charges pending against Dabney would have been material to this Court's determination of whether or not Dabney should be detained under the Bail Reform Act (had Dabney not conceded the issue), so, too, is their *dismissal* material to a determination of whether Dabney should remain detained. Additionally, this Court considers the emergence of COVID-19 in the D.C. Jail to be new information that is material to the detention determination in this particular case, insofar as the Court has received health-related records from Dabney's counsel (*see* Notice of Documents Provided, ECF No. 27), as well as Dabney's medical records from D.C. Department of Corrections (*see* Minute Order of Apr. 10, 2020), and the prison records show that not only did Dabney report that he has asthma during his intake medical evaluation in January, but prison authorities also prescribed him an inhaler to manage this condition. In this Court's view, having an underlying medical condition that could heighten a defendant's risk of harm during the period of pretrial detention has a "material bearing" on the required detention determination. *See Lee*, 2020 WL 1541049, at *4 (noting that "those [defendants] who have underlying medical conditions" may be able to "reasonably maintain that COVID-19 casts new light on the individual 'characteristics' that the court previously considered when deciding whether detention was required." (quoting 18 U.S.C. § 3142(g)(3))). Consequently, Dabney's request for a reconsideration of his detention determination, which this Court construes as a motion for reopening his hearing under section 3142(f), is well founded.

Second, although the Bail Reform Act's rebuttable presumption in favor of detention applies to Dabney's charged offense (*see* Gov't Detention Mem. at 1 (citing 18 U.S.C. § 3142(f)(1)(C))), Dabney has satisfied his burden of production to rebut that presumption. *See United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (explaining that the rebuttable presumption "operate[s] at a minimum to impose a burden of production on the defendant to offer some credible evidence contrary to the statutory presumption" (emphasis omitted)).[3] Dabney explains that he has no adult criminal history, and that the state charges that were pending against him in D.C. Superior Court were dismissed on February 28, 2020, as noted above. (*See* Def.'s Mot. at 5.) Moreover, Dabney stresses that he is a life-long resident of Washington, D.C., has one child, and has family support in the area, including that of his mother. (*See* Def.'s Mot. at 5; Def.'s Reply at 10.) A defendant's "burden of production" to rebut the Bail Reform Act's presumption of detention is not "heavy," *United States v. Lee*, 195 F. Supp. 3d 120, 125 (D.D.C. 2016), and in this Court's view, Dabney has pointed to enough credible evidence that he should not be presumed a danger to the community or a flight risk (including the fact that he was successfully supervised by pretrial services in connection with the dropped Superior Court case), and as such, this Court finds that he has rebutted the statutory presumption of detention pending trial.

3 Dabney has been charged by indictment with unlawful distribution of fentanyl, which is an offense that carries a maximum term of imprisonment of twenty years or more under the Controlled Substances Act. *See* 18 U.S.C. § 841(b)(1)(C). This charge thus triggers a rebuttable presumption under section 3142(e)(3)(A) that no conditions can effectively ensure Dabney's appearance at further proceedings in this case or could otherwise protect the community if Dabney is released.

Third, because "the burden of persuasion remains with the government throughout the proceeding," *United States v. Taylor*, 289 F. Supp. 3d 55, 63 (D.D.C. 2018), and because the government here emphasizes almost exclusively that Dabney is a danger to the community (*see* Gov't Opp'n at 6–7), the question now becomes whether the government has satisfied its own burden of showing, by "clear and convincing evidence[,]" *United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996), that no pretrial conditions of release can assure the safety of the community.[4] As explained below, this Court's *de novo* review of the section 3142(g) factors as they apply to Dabney's individual circumstances leads inexorably to the conclusion that the government has not met its burden of proof.

4 It is clear beyond cavil that, before a guilty plea or conviction, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception."

> *United States v. Salerno*, 481 U.S. 739, 755 (1987). However, in evaluating whether a defendant is a danger to the community, the Court must consider Congress's presumption "that defendants charged with [certain] offenses are likely to pose a danger to the community[.]" *United States v. Gamble*, No. 19-cr-348, 2020 WL 588323, at *4 (D.D.C. Feb. 6, 2020) (internal quotation marks and citations omitted). And the Court must also examine available information that relates to the following four factors: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community. *See* 18 U.S.C. § 3142(g).

***3** The "nature and circumstances" of the charged offense, 18 U.S.C. § 3142(g)(1), and the "weight of the evidence" against Dabney, *id.* § 3142(g)(2), do not favor release (*see* Gov't Opp'n at 5), but neither do they clearly weigh in favor of detention. Indeed, the government's recitation of the events that led to the arrest of Dabney and Marshall (*see* Gov't Detention Mem. at 5–6) makes clear that undercover agents *were investigating Marshall* and had set up a controlled buy *with Marshall*, and that Dabney's involvement in the charged criminal activity—*i.e.*, merely carrying the package out of the residence and to the waiting officer once Marshall realized that he needed more of the product and went back into the building—was simply incidental and, accordingly, minimal. Moreover, when law enforcement officers later arrested both Dabney and Marshall during a traffic stop, Dabney was sitting *in the backseat* of the vehicle in which a gun was found on the floorboard; there is no evidence that actually ties the gun to Dabney, and Dabney was not indicted for possessing any firearm. (*Id.* at 6.) Indeed, the strongest evidence that the government has offered to establish Dabney's dangerousness is the fact that he can be seen holding a firearm in a rap video on YouTube, but it was Marshall who posted the video, and two other (apparently unindicted) individuals also appear in the frame. (*Id.* at 9.) In other words, the extent of Dabney's charged offense conduct is the one-time hand-off of fentanyl to an undercover officer on behalf of his co-defendant, Marshall, to complete a sale that Marshall had arranged and partially executed, which, alone, does not support the conclusion that Dabney is dangerous and needs to be detained pretrial for the protection of the community. (*See* Indictment, ECF No. 7 (noting three charges against Marshall—i.e., distribution of fentanyl; possession with intent to distribute fentanyl; and possession of a firearm during a drug trafficking offense—and one charge against Dabney).)

Dabney's "history and characteristics" weigh decisively in favor of his release. 18 U.S.C. § 3142(g)(3). First of all, although Dabney was on supervised release on D.C. Superior Court charges at the time of his arrest (*see* Gov't Opp'n at 6), those charges were later dropped, and Dabney comes before this Court with no criminal history (*see* Def.'s Mot. at 5). Additionally, Dabney appears to have followed the conditions of release that were imposed upon him while he was previously on location monitoring, and he has strong community ties: he is a life-long resident of Washington, D.C., where he completed the 11th grade; he enjoys the support of his mother and various relatives in the area; and he is the father of one child. (*Id.*) Importantly, Dabney also suffers from asthma that was diagnosed years before his arrest. (*See* Notice of Documents Provided, ECF No. 27.) Perhaps, in a COVID-19-free world, Dabney's mild intermittent asthma would be irrelevant to this Court's assessment of his individual characteristics for the purpose of determining whether his detention pending trial would be proper; but, unfortunately, we do not live in such a world, and "just how much asthma can exacerbate the risks of COVID-19 is currently unknown." *United States v. Irizzary*, No. 17-cr-283, 2020 WL 1705424 (S.D.N.Y. Apr. 8, 2020). Thus, Dabney's history and characteristics, including his underlying medical needs and issues, weigh in favor of his release pending trial.

Finally, when it comes to "the nature and seriousness of the danger to any person or the community that would be posed by [Dabney's] release," 18 U.S.C. § 3142(g)(4), there is little record evidence that Dabney would pose a threat to the community if he was released. To be sure, the charged offense, which involves the distribution of fentanyl, is a serious one. (*See* Gov't Detention Mem. at 10.) But, with respect to Dabney, there is no evidence that his involvement with Marshall's drug distribution operation was more than a one-off incident. And there is similarly no evidence of violence in Dabney's record: again, the gun that was retrieved from the floorboard of the car on which Dabney was riding at the time of his arrest has not been tied to him in any way. (*Id.* at 9.) The Court also reiterates that Dabney previously performed successfully while on location monitoring for the D.C. Superior Court charges that were subsequently dismissed, and this is not only evidence of Dabney's ability to follow conditions of supervised release, but also suggests that, if Dabney is placed on high-intensity supervision now, "the probation officers who would be tasked with monitoring his behavior while he is out of jail" would not necessarily have to go to great lengths and/or put themselves at risk to respond to

his non-compliance. *Lee*, 2020 WL 1541049, at *5. Thus, the last Bail Reform Act factor too weighs in favor of Dabney's release.

II.

***4** In conclusion, this Court finds that the reopening of Dabney's detention hearing is appropriate in light of new, material information, and that the government has failed to meet its burden of proof to support Dabney's detention pending trial.

Accordingly, it is hereby

ORDERED that the Defendant's motion for reconsideration of pretrial detention (*see* ECF No. 20) is **GRANTED**. It is

FURTHER ORDERED that Dabney is to be released pending trial into the Pretrial Services Agency's High Intensity Supervision Program ("Program") with electronic monitoring, and with the condition of permanent home confinement, with the exception of attending medical appointments or other activities approved by D.C. Pretrial Services; and it is

FURTHER ORDERED that Dabney shall report to 633 Indiana Avenue, NW, 9th Floor, in Washington, D.C., on the day he is released—or on the next business day after his release if he is released after 2:00 p.m.—for the installation of an ankle bracelet, and he must follow the instructions he receives there concerning orientation. Thereafter, he must immediately contact the Pretrial Services Agency ("PSA") for the United States District Court at (202) 442-1002 to participate in a telephone orientation. It is

FURTHER ORDERED that Dabney shall follow all of the rules, regulations, and requirements of the Program that are listed in the orientation contract, which is incorporated herein by reference. He must maintain reporting requirements as directed by PSA, abide by an electronically-monitored curfew, and abide by all other conditions imposed by the Court and as directed by PSA. Dabney must report to D.C. Pretrial Services by phone twice a week. Dabney must not be in possession of any illegal substances or any firearm, destructive device, or other weapons. Any other violation of the Program requirements will subject him, at a minimum, to administrative sanctions. Dabney will be supervised by a type of electronic monitoring device to be determined by PSA. He is required to maintain properly and charge the monitoring device each day. Any attempt to tamper with or mask the device's monitoring capability may result in his removal from the Program and/or additional criminal charges; and it is

FURTHER ORDERED that, as a condition of his release, Dabney must maintain a 24-hour curfew at his mother's address, which will be provided to PSA. Dabney may not leave that address without pre-approval from PSA. Dabney must maintain residence at his mother's address and may not change his residence without prior notification to, and approval of, the Court or PSA. In the event that, for any reason, Dabney is unable to reside at this address, he must immediately contact PSA at (202) 442-1002; and it is

FURTHER ORDERED that, when notified of the next status conference date in this matter through his defense counsel, Dabney shall report to this Court as directed.

The Court is to be notified of any violations of this Order.

All Citations

Not Reported in Fed. Supp., 2020 WL 1867750

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