

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT B. MAHAN, JR.

Defendant.

Case No. 1:19-cr-00233-DCN

**ORDER GRANTING MOTION
FOR RELEASE**

Before the Court is Defendant's Motion to Revoke Detention Order and for Release from Pretrial Detention (Dkt. 60). The Court has reviewed the motion, its supporting memorandum, the Government's opposition (Dkt. 62), and Defendant's supplemental memorandum (Dkt. 64). In addition, the Court has reviewed again the original presentence report (dated July 30, 2019) and the addendum report (dated April 3, 2020). The Court heard oral argument, by teleconference call, on April 9, 2020.

Since July 30, 2019, Defendant has been detained pending trial (Dkt. 25). At present, he is in custody at the Bureau of Prisons federal detention facility located in Washington state, commonly referred to as the "Sea-Tac" facility. Due to circumstances surrounding the national public health emergency of the COVID-19 pandemic, including Defendant's representations regarding his own personal

health situation and because of concerns over his ability to connect with his attorney for purposes of preparing for trial, he moves to be released from pretrial detention.

Defendant, through his counsel, relies upon four arguments for his release. Three relate to the COVID-19 pandemic: first, that the pandemic is widespread across the United States and represents a serious, immediate threat to the safety and even the lives of people who are incarcerated; second, that although there are no known cases of the COVID-19 virus in any detainee or staff member of the Sea-Tac facility, the virus has found its way into other federal prison facilities in the country and is multiplying rapidly, such that it is only a matter of time before it reaches Sea-Tac; and third, that Defendant is especially vulnerable to the health risks of the virus because he suffers from asthma. Apart from the arguments regarding the COVID-19 virus, Defendant also contends that he has been unable to communicate with his attorney about his case because of the operational changes at the Sea-Tac facility implemented in response to the pandemic.

Defendant does not specify the basis for his request for release, at least so far as the particular provision of federal law. He does refer generally to the Bail Reform Act¹ in his motion, but does so to emphasize what appears to be an

¹ 18 U.S.C. 3142, *et seq.*

argument that changed circumstances justify his release. He argues through his counsel that “federal courts rely on pretrial detention at an alarmingly high rate,” such that “federal district courts historically err on the side of caution...and *over-detain* relative to the requirement that all ‘doubts regarding the propriety of release should be resolved in the defendant’s favor.’”² Moreover, he contends that his “continued detention poses a grave risk to the community” for the reason that the more people who remain incarcerated during the pandemic, the greater risk that the virus will spread through such facilities, then to prison employees, and then to the community. Further, he states that if he were to become infected, he would “consume precious resources that are needed to contain this pandemic” and therefore, if he remains in detention he “will pose a risk not only to himself, but also to the community.” He describes a release plan to live with his mother in Phoenix, Arizona, and his counsel proffers that he would have a job in the grocery industry waiting for him, although no specifics of the same were available.

The Government acknowledges that the COVID-19 pandemic is a matter of urgent concern and worry for everyone. However, the Government disagrees that Defendant should be released under any application of the Bail Reform Act, relying upon the information previously provided to the Court about the details of

² Citing *U.S. v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).

the alleged crimes in this case and Defendant's background and criminal record. Some of those details deserve mention here, particularly where the Court is being asked to consider Defendant's release because of danger of the COVID-19 virus to him, and because of the risk to others – which Defendant's counsel contends would include not just other detainees, but also guards, staff and their families and friends and therefore the larger community.

Defendant is charged with two very serious controlled substance crimes. The first – Conspiracy to Distribute Methamphetamine – carries (because of the large amounts of methamphetamine alleged to be involved) a mandatory minimum prison sentence of 10 years, and up to life. The second charge is Possession with Intent to Distribute Methamphetamine and Heroin, which carries a potential sentence of up to 20 years in prison. He has no contacts with the District of Idaho, other than the Government's proffer that he came to Pocatello from Arizona with a co-defendant to engage in a large volume drug transaction involving pounds of methamphetamine. After that transaction was made, the Government proffered further that Defendant was arrested after a traffic stop led to a search of the vehicle in which he was traveling, which resulted in the seizure of, among other things, a large quantity of heroin, a large quantity of methamphetamine, four cell phones, an electronic currency counting machine, and \$37,775 in cash.

Defendant is 36 years old. He has spent much of his adult life in prison, having been convicted of felony Aggravated Assault and felony Possession of Narcotic Drugs in Arizona at age 20. In that case, he was released pending trial, but a petition was filed soon thereafter for non-compliance. He was sentenced to probation in October 2005, but the probation was revoked six months later and he was sent to prison. His sentence and revocation of probation appears to have been done concurrently with a sentence imposed on charges brought against him while he was on probation on the earlier felony convictions. Those charges included another felony aggravated assault and felony possession of narcotic drugs.

On separate charges, brought in the same time frame, Defendant faced six separate felony charges, five of which were dismissed (likely in a plea bargain) which led to a conviction on a felony Possession of Weapon by Prohibited Person charge. He received a six-year prison sentence on May 15, 2006, was paroled on January 24, 2011, and discharged from parole on February 23, 2012.

His discharge on parole came despite the fact that he had been charged on January 12, 2012, also in Arizona, with four new felonies involving drug trafficking. Three were dismissed and he was sentenced on September 25, 2012 to a three-and-a-half-year prison sentence for felony Attempt to Commit Marijuana Violation. He was paroled on November 24, 2014 and released from parole on August 22, 2015.

In November 2018, he was convicted of misdemeanor possession of drug paraphernalia charge, and then in July 2019 was charged first in state court, then indicted in federal court, on the charges he faces in this case.

In sum, then, Defendant has been charged with, and convicted of, multiple serious crimes of violence and drug trafficking in a repeating pattern over the last sixteen years. He has been given the benefit of probation but violated probation and served a prison sentence. He has been sentenced to prison in four separate cases, which meant that he has been in and out of prison from 2006 to 2014. He has been on supervision and violated supervision multiple times, including committing new crimes.

When considering that information, other information and argument from the initial detention hearing and the lack of contacts with the District of Idaho, the Court ruled that the presumption of detention contained at 18 U.S.C.

§ 3142(e)(3)(A) was not rebutted and detention was required. On that template, even with the updated information about a place for Defendant to live and the prospect of employment, the Court is not persuaded under an application of the Bail Reform Act's § 3142(g) factors that release is appropriate, in that there are no conditions that could be imposed that would reasonably assure the appearance of Defendant at future proceedings and reasonably assure the safety of any person and the community.

Although not specifically relied upon by Defendant, there is a side route to release under the Bail Reform Act that allows for release when something out of the ordinary would call for the Court to consider such release. Section 3142(h), which deals with the contents of a release or detention order, contains a penultimate paragraph which reads:

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

As mentioned at the outset, Defendant raises an alternative argument that his release is required because of difficulties his counsel has had in communicating with him, and trying to work with him, in a confidential setting, on the defense of the charges. The Court concludes that the difficulties Defendant and his counsel have encountered are the product of the difficulties that the COVID-19 pandemic has created for every person and institution in the country. The solutions to such problems are not found in a manual; rather, they are being worked on and worked out on a daily basis and there are imperfections in every setting, but people are also doing their best to solve such problems and arrange for the best possible solution, given the constraints created by the pandemic. Significantly, some of those constraints will continue to exist regardless of whether Defendant is detained, or whether he would be released to Arizona. Hence, the Court is not persuaded, on

the present record, that the problems encountered are sufficient to justify release, particularly because they may already be solved, or in the process of being solved.³

That leaves the question of whether the present circumstances – which is to say, the health risk created by the COVID-19 virus and its possible spread through the Sea-Tac detention facility – rise to the level of a compelling reason for Defendant’s release under the Bail Reform Act.

It is important to pose that question, as the Court has done, against the backdrop of all the reasons why Defendant is presently detained. Succinctly put, he has been a danger to the community for years as demonstrated by his criminal record, and the Government’s proffer as to the details of the crimes with which he is charged in this case illustrate that the Government and the grand jury which indicted him believe he continues to present such a danger. There is a palpable irony in Defendant’s request for release based in part upon the argument that if he remains in custody there is a likelihood that he and others will become infected with the COVID-19 virus and therefore also the likelihood that the larger community will be infected by transmission through guards, staff, and others, and that people will die. If one changed that scenario to reference a person trafficking in controlled substances and committing crimes of aggravated assault and illegal

³ The Court’s conclusions in that regard are based upon the current record. If such problems persist or are further exacerbated, the Court’s view might change.

possession of weapons, the script would be the same. In other words, the Government no doubt would argue that Defendant's release from detention may instead risk the health or even the life of someone on the end of a chain of illegal distribution of controlled substances.

Hence, these decisions sometimes raise stark possibilities which do not always neatly fall on one side of a dividing line in circumstances such as beset our country today. It is easy in the abstract to emphasize the risk which inmates face in a jail or other correctional facility as a basis for release, but each such decision rests ultimately on the particular facts of that person's circumstances.

In Defendant's case, he contends that he is at particular risk of severe health consequences should he contract the virus because he suffers from asthma. In the briefing submitted in support of his motion, his asthma was referenced generically. The initial bail report from Pretrial Services made mention of the asthma, but also without specificity (indeed, any such specificity was unnecessary at that time, as the report was prepared months before the prospect of a pandemic was even known). But in this setting, the details of Defendant's asthma are important, as there are many different types and levels of seriousness when it comes to asthma. If Defendant seeks release because he has asthma, then the Court is unable to assess whether his condition puts him at greater risk unless further details are known.

During the April 9, 2020 hearing, Defendant's counsel referenced CDC guidelines regarding asthma and COVID-19, which the Court has also reviewed. Those guidelines, current as of April 2, 2020, state among other things that "people with moderate to severe asthma may be at higher risk of getting very sick from COVID-19. COVID-19 can affect your respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease." The CDC advice goes on to say "there is currently no specific treatment for or vaccine to prevent COVID-19. *The best way to prevent illness is to avoid being exposed to this virus.*" <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html> (retrieved April 9, 2020) (emphasis supplied).

The Court asked Defendant's counsel to proffer additional details about the nature and extent of Defendant's asthma condition. That led to Defendant being questioned by his counsel about his asthma condition. Defendant testified that he was first diagnosed with asthma "as a kid," that he began using an inhaler and nebulizer in grade school, and that he continues to deal with has asthma daily. Defendant said that his asthma is triggered by various things, including most seriously air pollution and common allergens. He said that he uses an inhaler while in custody.

There are obvious reasons why Defendant might choose to exaggerate or otherwise misconstrue the nature of his asthma in this setting. Nonetheless, the

Court is persuaded that his testimony was credible, given the various references he made to the onset of such difficulties and the environmental conditions that can bring the difficulties such a condition can cause to the fore. Therefore, for these purposes, the Court is persuaded that Defendant has a chronic, moderate asthma condition and such a condition places him at higher risk of getting very sick from COVID-19. Further, such a condition is particularly worrisome given the impact of COVID-19 upon the respiratory system, and the now-general knowledge that many of the deaths caused by the virus stem from pneumonia caused by the effect of the virus upon the lungs.

The Court is also persuaded, as stated on the record in the hearing, that the COVID-19 virus will reach the Sea-Tac facility, if it is not already present. The Court is also persuaded that the nature of a detention facility creates a greater likelihood of the spread of the illness, even with appropriate measures taken to prevent the presence of the virus in the facility and to control its spread if it does appear in the facility. The reasons for that are obvious and need not be repeated at length here. All of that does not mean, however, that Defendant is certain to be infected with the virus if he were to remain detained at the Sea-Tac facility, nor that even if infected he would become seriously ill. But, with the virus present in all States, and particularly in areas where the COVID-19 virus has run rampant such as in King County and Pierce County of western Washington, the risk is real,

serious, and compelling. Further, there is no universal testing for the virus in our communities, nor is there universal testing in the Sea-Tac facility. Therefore, tracking the presence of the virus and whether it has spread in the facility will always be a catch-up exercise. Unfortunately, the virus does not wait for its presence to be discovered before it begins taking its terrible toll. Therefore, as the CDC and other health professionals across the country continue to emphasize, the most important protection one can take is to avoid being exposed.

In the Sea-Tac facility, Defendant cannot control his risk of exposure to the virus. Even if released, Defendant may be exposed to the virus. However, if released, Defendant can take steps to protect himself against exposure to the virus. If his condition is as he describes and his counsel argues to the Court, then his decision about whether to take such steps is just as much a life-saving decision as he would characterize a decision to release him from custody, given his asthma.

Accordingly, the Court orders that Defendant released temporarily, with conditions. His release is justified pursuant to 18 U.S.C. Section 3142(h) because of the compelling reasons created by his chronic, moderate asthma condition in a detention facility during the COVID-19 pandemic. The Court's decision in this regard is limited solely to present circumstances, for this Defendant alone.

Defendant's release shall continue until further order of the Court. His release is subject to the conditions contained in the separate order setting conditions of release issued this same date.

The Court will issue a minute entry order setting a hearing for a future date to consider whether Defendant's temporary release should be continued.

SO ORDERED.



DATED: April 10, 2020

A handwritten signature in black ink, appearing to read "Ronald E. Bush", is written over a horizontal line.

Honorable Ronald E. Bush
Chief U.S. Magistrate Judge