

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CRIMINAL NO. 18-20315

v.

HON. Judith E. Levy

Keith Kennedy,

Defendant.

**MOTION FOR RECONSIDERATION OF BOND TO KEITH
KENNEDY**

For the reasons stated below, the government requests that the Court reconsider its order granting bond to Keith Kennedy. Pursuant to Local Rule 7.1, the government sought but did not receive defense counsel's consent prior to filing this motion.

Respectfully submitted,
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Dated: March 30, 2020

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I. Introduction

After absconding from pre-trial supervision for nine months and continually testing positive for fentanyl and heroin, Keith Kennedy should not be released pending sentencing. At a time when law enforcement and Pretrial Services are strapped for resources, Kennedy's release places more of a burden on law enforcement and the court system. And Kennedy's inability to refrain from using drugs and his history of distributing drugs threatens the safety of himself and members of the community. In granting Kennedy's oral motion for bond,

this Court erred in failing to consider the Bail Reform Act and failed to allow the government to respond to Kennedy's motion in writing. For the reasons stated herein, the government respectfully requests that the Court reconsider its decision granting defendant's motion for bond.

II. Background

Kennedy made his initial appearance in October 2018, on a superseding indictment. Two days after his initial appearance, he was released on bond, with conditions that he report as directed to Pretrial Services, submit to drug testing/drug treatment, and refrain from tampering with drug testing, among the other standard conditions. While on bond, Kennedy tested positive for opiates, fentanyl, heroin, or cocaine 10 times on: December 18, 2019, January 8, 15, 25, 2019, February 28, 2019, March 8, 18, and 28, 2019 April 8 and 16, 2019.

On May 22, 2019, Kennedy entered a guilty plea to count one of the superseding indictment, which charged him with conspiracy to possess with intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C § 846, 841.

Because of his continued drug use, failure to report to drug treatment, and failure to maintain contact with Pretrial Services, the Court set a bond review hearing for June 6, 2019. Kennedy failed to appear. He was a fugitive until March 10, 2020, when he was arrested and detained by the U.S. Marshals.

On March 26, 2020, the Court held a telephonic bond review hearing. During the hearing, after an oral motion by counsel for Kennedy, the Court ordered the immediate release of Kennedy pending sentencing, due to the current COVID-19 pandemic and his inability to prepare for sentencing with his counsel. (R. 77: Order).

III. Argument

A. Standard of review

Under this district's local rules, a court should grant a motion for reconsideration if the movant demonstrates a "palpable defect" and "correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(h)(3). While granting a motion to reconsider is the "exception to the norm," it should be done if there is "a significant error that changes the outcome of a ruling on a motion." *United States v. West*, No. 06-20185, 2018 WL 1609961, at *2 (E.D. Mich. Apr. 3, 2018)

(Roberts, J.).

B. The Court erred by granting bond with consideration of the Bail Reform Act.

Under the Bail Reform Act, a court shall order a defendant detained pending trial if “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)(1).

During the pretrial phase, the burden of proof lies with the government to establish by clear and convincing evidence that there are no conditions of release that would reasonably assure the safety of any other person or the community, or by a preponderance of the evidence that there are no conditions that would reasonably assure the appearance of the defendant as required. 18 U.S.C. § 3142(f); *see United States v. Hinton*, 113 Fed. App’x 76, 77 (6th Cir. 2004). After a defendant has been found guilty of an offense and is awaiting imposition of sentence, the burden shifts to the defendant seeking release to establish by clear and convincing evidence that the defendant “is not likely to flee or pose a danger to the safety of any other person or the community if released.” 18 U.S.C. § 3143(a)(1).

Here, defendant entered a guilty plea on May 22, 2019 and the Court took the plea agreement under advisement. Because defendant has entered a guilty plea, he should remain detained, unless he meets his burden of rebutting the risk of nonappearance and dangerousness. Kennedy has not met his burden and the Court failed to consider the factors under 18 U.S.C § 3142(g) in deciding whether Kennedy should be released pending sentencing.

1. Nature and circumstances of the offense charged

Kennedy has been convicted of conspiracy to possess with the intent to distribute more than 100 grams of heroin. He and his co-defendants ran a drug house, operated at all hours of the day and night for months that supplied heroin, crack cocaine, and cocaine to some of the most vulnerable citizens of Detroit. Because of the quantity of drugs distributed by the defendants, Kennedy is facing a mandatory minimum of 60 months imprisonment unless he qualifies for the Safety Valve. This penalty reflects the dangerousness of Kennedy's conduct.

2. Weight of the evidence

The weight of the evidence factor assesses the weight of the evidence of dangerousness or nonappearance. *See United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985). Here, Kennedy poses a serious risk of nonappearance. This is evident from the fact that he has been an absconder since June 2019. Kennedy made no attempt to contact his attorney, Pretrial Services, law enforcement, the Court, or any other party to turn himself in, despite knowing that he had an active warrant for his arrest. This factor weighs in favor of detention.

3. History and characteristics of Kennedy

Kennedy has a history of non-compliance with the terms of court supervision which again, weighs in favor of detention. He tested positive 10 times while on pretrial supervision for opiates, fentanyl, heroin, or cocaine. He failed to turn himself into in-patient substance abuse treatment. He failed to remain in contact with pre-trial services and he absconded for nine months. He has given the Court no indication—other than his word—that he will comply with bond conditions going forward.

Kennedy also does not have a suitable place to live at if he is released. According to Pretrial Services, his only option is to live with his 64 year-old aunt and 55 year-old-cousin (individuals whose age makes them more susceptible to the COVID-19 virus). Pretrial Services learned that Kennedy lived at this home while he was a fugitive, which is a concern for the government.

4. Nature and seriousness of the danger posed

Kennedy's prior poor performance while under court-ordered supervision is highly instructive. As described above, Kennedy previously absconded from supervision and continually tested positive for illegal controlled substances while on bond. There are ample facts demonstrating that defendant poses a risk of nonappearance and an inability to be supervised, and that no condition or combination of conditions would reasonably assure the safety of the community.

In addition, Pretrial Services has no ability to effectively monitor Kennedy due to the ongoing nature of the global pandemic. On March 23, 2020, Governor Whitmer announced a "Stay Home, Stay Safe," requiring people to shelter in place, effective at midnight for the next three weeks, after 1,232 confirmed cases of COVID-19 in Michigan. *See*

www.michigan.gov/coronavirus; Executive Order 2020-21. Releasing Kennedy now would heighten the risk to others in the community, including Pretrial Services officers. These officers would be given the difficult task of closely supervising defendant's to ensure that he is complying with bond conditions and not threatening the safety of the community during the COVID-19 outbreak, while themselves operating under the strain of limited resources. Given Kennedy's history, release under any conditions would likely result in violations, putting Pretrial Services, other court employees, and local law enforcement at greater risk due to the need to respond to these violations. For example, Pretrial will not have the ability to drug test Kennedy to ensure that he is not using controlled substances; they will not be able to apply GPS monitoring equipment; they will not be able to conduct home visits; and Kennedy will not be able to attend in-person substance abuse or mental health treatment. Supervision of someone like Kennedy—who has already absconded, failed to comply with conditions, and continues drug use—is nearly impossible given the current global pandemic and creates a dangerous situation.

Finally, individuals who have poor compliance with conditions may raise the risk of spread of COVID-19 in the community for another reason. If Kennedy is unable to comply with court orders regarding his own supervision, he is likely even less willing to comply with general health recommendations to stay at home and avoid close contact with others. This is particularly concerning given Kennedy's drug addiction and his need to self-medicate. If Kennedy returns to using drugs, he will have to interact with other members of society to obtain the drugs. Thus, if Kennedy were to become infected while released, he could be at greater risk of becoming a vector of transmission for the virus to court officers and others in the community.

In short, Kennedy's release would pose serious risks of danger to the community, particularly during a health pandemic, and his motion for relief from detention should therefore be denied.

C. The Court erred by failing to allow the government to respond to the motion in writing

Pursuant to Local Rule 7.1(e)(2)(B), a response to a non-dispositive motion must be filed within 14 days after service of the motion. The government was deprived of the time allowed under the court rules to

respond to Kennedy's request in writing. Administrative Order 20-AO-024, entered on March 26, 2020, allows the government 72 hours to respond to a motion to review a detention order raising arguments concerning COVID-19. This Court entered its order on March 27, 2020, without giving the government an opportunity to respond in writing.

D. COVID-19 conditions outside of the Saginaw County Jail do not constitute grounds for Kennedy's release

Although COVID-19 is undoubtedly a serious public health concern, there are currently no known cases of COVID-19 at the Saginaw County Jail where Kennedy was housed, or at any other facility where the U.S. Marshals house prisoners in this district.¹ Moreover, officials at the Saginaw County Jail have also instituted a

¹ According to the Saginaw County Jail, one state inmate at that facility developed a fever on or about March 19, 2020, amidst other common drug withdrawal symptoms. He was taken to a hospital, and, pending a COVID-19 test, all other inmates in his dorm were quarantined. That inmate will be released from the hospital and will not be returning to the facility, and the isolation cell was sanitized by an outside company. This state inmate had no contact with any federal inmate.

number of precautionary measures to reduce the risk of infection.

These include the following:²

- *Detainees Entering the Facility.* The jail has altered its incoming medical screening procedures. All incoming detainees are screened in the sally-port garage, including by taking temperatures. If a detainee displays any symptoms of COVID-19, or states he was exposed to a person who displayed symptoms, that detainee is not admitted to the jail. Once medically cleared at a hospital, the detainee will be admitted to the jail but quarantined in a single cell for 14 days. (*This has not yet happened at the facility.*)
- *Visitation.* The jail has canceled all in-person visits, for both social/family visits and attorney visits. For at least two weeks, no visitors or attorneys have entered the jail.
- *Sanitation.* Extra cleaning is being done at the jail.

Cleaning supplies, including disinfectant, are provided to

² Information regarding the current precautionary measures at Saginaw County Jail was provided on March 27, 2020, by Lieutenant David Kerns of the Saginaw County Sheriff's Office.

prisoners inside their cells. In addition, jail medical staff has distributed literature regarding hand-washing and other sanitation measures to detainees.

- *Correctional Officers and Staff.* All staff is currently screened daily at the facility by having their temperature taken. In addition, staff has been advised they must self-report any symptoms of infection.
- *New Facility.* In the near future, Saginaw County will be opening a new jail and transferring all prisoners from the existing Saginaw County Jail to the new facility. This will be the newest jail facility in the Eastern District of Michigan.

While there may ultimately be no measures that can absolutely guarantee that any person – whether inside or outside of jail – will not contract COVID-19, the Saginaw County Jail has implemented heightened, reasonable precautions to mitigate the risk of COVID-19 spread, in the common interests of both prisoners and staff. U.S.

A court may consider defendant's own physical and mental health in its detention decisions, and Kennedy alleged that he had a fever and cough, however, this information was not verified by any physician within the Saginaw County Jail. Kennedy also does not appear to fall within an established category of individuals at high risk of developing severe illness from a COVID-1. And if the Court is concerned with spreading the COVID-19 virus to more vulnerable members of society, permitting Kennedy—who claims to be symptomatic—to live in a home with individuals who are considered at-risk and more susceptible to the virus seems risky.

Kennedy's situation with respect to COVID-19 is no different than that of many other detainees who are currently in custody because of a judicial finding of danger to the community and lack of suitable conditions for release. Releasing large numbers of such defendants would endanger communities and place serious additional strain on the courts, Pretrial Services, and local law enforcement, while also exposing Pretrial Services officers to greater health risks while attempting to supervise these individuals in the community. *See*

<https://www.fox2detroit.com/news/duggan-25-detroit-officers-test-positive-healthy-officers-working-double-shifts>.

E. Any release should have been conditioned on a health screening

Finally, Kennedy should not have been released into the community if he truly was exhibiting any signs of COVID-19, as he suggested during the hearing on March 26, 2020. Accordingly, the Court should have ordered that the defendant submit to screening for COVID-19 by the Bureau of Prisons and/or the United States Marshals Service. If the defendant was found to be exhibiting symptoms consistent with COVID-19 or is confirmed to have COVID-19, the defendant should not have been released into the public because of the danger the defendant poses to the community.

IV. Conclusion

For the reasons stated above, Kennedy's motion should have been denied, and the Court should reconsider its decision.

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Dated: March 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, the foregoing document was electronically filed by an employee of the United States Attorney's Office with the Clerk of the Court using the ECF system, which will electronically serve all ECF participants.

s/Jihan Williams
United States Attorney's Office