

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. JAMES MOONEY, Defendant.</p>	<p>ORDER DENYING UNITED STATES' APPEAL OF MAGISTRATE'S ORDER SETTING CONDITIONS OF RELEASE</p> <p>Case No. 2:05-CR-410 TS</p>
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This matter came before the Court on July 7, 2005, for hearing on the United States' Appeal of Order of Magistrate Judge Releasing Defendant Pending Trial. The Court, having reviewed the pleadings and the file, having heard argument of counsel at the hearing, and being otherwise fully informed, will DENY the United States' appeal and AFFIRM the magistrate judge's order of release, as is set forth below.

BACKGROUND

Defendant is charged with various counts of Conspiracy to Possess Peyote with Intent to Distribute, Conspiracy to Distribute, Distribution of Peyote, and Attempted Possession of Peyote with Intent to Distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 844. Defendant appeared

before Chief Magistrate Judge Alba for a detention hearing on June 28, 2005, and was ordered detained. A second detention hearing was held on July 5, 2005, and Judge Alba ordered Defendant released from custody pending trial. The government filed its objection to Defendant's release on July 6, 2005, and Defendant responded on July 7, 2005.

DISCUSSION

DUCrimR 57-16(a)(1) provides that “[a]ny party is entitled to appeal a magistrate judge’s order releasing or detaining a defendant under 18 U.S.C. §§ 3142 et. seq. The appeal will be a timely scheduled de novo review by the assigned district judge.”

The Court notes that, as a general rule, the presumption lies in favor of release of a defendant, unless certain other factors are present that make release of the defendant unsafe or impractical. However, in certain cases, the presumption shifts. Section 3142(e) dictates that, “[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act . . .” The Court finds that, as the indicted counts against Defendant carry 20-year possible terms of imprisonment under the Controlled Substances Act, there is a presumption in favor of detention of Defendant, subject to his rebuttal.

Further, subsection (g) to § 3142 sets forth factors the Court is to consider “in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community . . .” Those factors include the nature

and circumstances of the charged offense, the weight of the evidence, the history and characteristics of the person, and the nature and seriousness of the danger posed by the person to the community upon release.

Based upon the testimony and evidence received at the hearing, and having reviewed the magistrate judge's detention order *de novo*, the Court finds that Defendant has successfully rebutted the presumption in favor of detention against him. The Court finds specifically that Defendant is not a danger to a person or the community and is not a risk of flight or nonappearance.

Regarding the nature and circumstances of the offense, although this offense deals with the use of an illegal drug, it is a drug which is legally permitted in certain cases. The evidence is clear that Defendant encouraged and used peyote for religious, spiritual and therapeutic purposes, and that he did so based upon a sincere belief. Whether that belief provides legitimate relief from prosecution has yet to be determined. Further, the Court notes that the indicted offenses allegedly occurred in or prior to 2000 – five years ago. There are no indicted offenses since then.

Regarding the weight of the evidence against Defendant, there is substantial evidence of Defendant's criminal conduct in the past, including some conduct post-2000. However, the evidence of more recent criminal offenses is clearly disputed. The Court notes that, based upon the Utah Supreme Court decision regarding Defendant, there is at least a legitimate question as to whether or not the offenses in question are, in fact, illegal. Most certainly, Defendant had reason to believe – based upon his acquittal in state court – that his actions were not illegal.

Turning to the history and characteristics of Defendant, the government provided evidence that Defendant feels very strongly about his beliefs as to the legal use of peyote both by him and

others. Again referring to the Utah Supreme Court decision wherein he was acquitted of the state charges, his belief in that regard may not be totally unreasonable. Defendant clearly has ties to the State of Utah, where he is a resident. He has family here. The Court is cognizant of the petitions received from Defendant's neighbors indicating that Defendant and his family pose no danger in their minds. Significant is the fact that, during the course of the four-year state prosecution, Defendant posed no problems, either in his appearances or in any other manner. He has no criminal history. Perhaps of most significance to the Court is that, although Defendant was warned by a letter from the U.S. Attorney's Office that he may yet be prosecuted at the federal level, he made no effort to flee. When agents showed up at Defendant's house and he was not there, he returned telephone calls to establish contact.

As to the question of whether Defendant poses a danger to a person or the community, the Court finds little credible evidence of danger or threats. While evidence was presented to the Court that there have been disputes or disagreements with past associates, the Court cannot find that this rises to the level of a threat – particularly a threat of any type of physical harm. Further, the incidents referred to are of ancient vintage.

Finally, the Court is mindful of the fact that pretrial services has contended that Defendant is a manageable risk of danger.

Based upon the above, the Court will not further detain Defendant, but will add or supplement the conditions imposed by Judge Alba, as is set forth below.

CONCLUSION

Therefore, it is hereby

ORDERED that the government's Appeal of Magistrate's Detention Order is DENIED, and the Order of Release Pending Trial entered by the magistrate is AFFIRMED. It is further

ORDERED that Defendant shall remain released pending trial, subject to the following additional or supplementary conditions of release: 1) Defendant shall seek employment; 2) Defendant shall undergo regular drug tests for peyote, in addition to the current drug-testing regimen – the costs of said drug testing shall be shared by the probation office and the federal defender's office; 3) Defendant shall have no dealings with the Oklevueha Earth Walks Native American Church during the course of his release; and 4) Defendant shall undergo a mental evaluation.

SO ORDERED.

DATED this 2nd day of August, 2005.

BY THE COURT:



TED STEWART
United States District Judge