IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Criminal Case No. 14-cr-00163-RM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. SHANNON MAUREEN CONLEY,

Defendant.

ORDER

THIS MATTER is before the Court on defendant's "Motion for Release on Bond" (ECF No. 39). By her motion (the "Motion"), Ms. Conley seeks to have post-conviction bond and release conditions set for her so that she may be released from official detention pending sentencing. In addition to the Motion, the Court has reviewed the non-public responsive pleading (the "Response") of the government (ECF No. 43) entitled "United States' Response to Defendant's Motion for Release on Bond (Doc 39)." For the reasons set forth below, the Motion is DENIED.

To the extent that the Motion makes reference to 18 U.S.C. § 3142 or to district court review of a detention order issued under such provision, the Motion misses the mark. Having now been convicted, release or detention of Ms. Conley is governed solely by 18 U.S.C. § 3143 and § 3145(c).

Title 18, United States Code, section 3143 contains two separate provisions governing release. The more restrictive provision is § 3143(a)(2). That subsection provides - at least insofar as applicable to Ms. Conley - that she shall be detained pending sentencing unless:

> [(A)](ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
>
> (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

Under § 3143(a)(2), the Motion would seemingly have to be denied for the simple reason that the government has not recommended that no sentence of imprisonment be imposed.

Seeking to avoid this consequence, Ms. Conley asserts, without meaningful explanation, that the foregoing provision is inapplicable to her. According to defendant, the substantial requirements of § 3143(a)(2) are, by its express terms, only triggered in the case of a "person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of Section 3142...." Of these referenced subparagraphs, only subparagraph (A) has any arguable relevance to Ms. Conley. In pertinent part, that subparagraph lists:

> (A) a crime of violence...or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

Section 2332b(g)(5)(B) contains a lengthy list of offenses covering a wide variety of conduct. As it pertains to Ms. Conley, the list includes a violation of "2339B (relating to providing material support to terrorist organizations)," but does not include any reference to the general conspiracy statute (18 U.S.C. § 371). Although not set forth in any detail in her Motion, Ms. Conley's argument appears both to focus only on section 2332b(g)(5)(B) listed offenses and to be essentially as follows: The substantial requirements or, as Ms. Conley puts it, significant

roadblocks to release contained within § 3143(a)(2) would have applied to her had the government directly charged her with conspiracy under 18 U.S.C. § 2339B as § 2339B is both listed in § 2332b(g)(5)(B) and carries a maximum sentence in excess of ten (10) years. However, because the government elected to exercise its charging discretion by instead proceeding on a violation of the general conspiracy statute, 18 U.S.C. § 371 (albeit referencing §2339B) which carries a maximum sentence of only five (5) years, and in that Ms. Conley pled guilty only to that latter charge, she now stands convicted neither of an offense listed in §2332b(g)(5)(B) nor of an offense which carries a maximum sentence of ten (10) years or more. Thus, the restrictive provisions of 18 U.S.C. § 3143(a)(2) are, by definition, inapplicable to her.

In this regard, defendant is correct – at least insofar as the latter portion of subparagraph (A) of subsection (f)(1) of section 3142 is concerned. And the government does not appear to take issue with this conclusion. However, while the parties' analysis ends here, the question remains as to whether Ms. Conley has been convicted of a crime of violence which would also trigger the more restrictive release provisions of 18 U.S.C. § 3143(a)(2). The term "crime of violence" for purposes of the Bail Reform Act is defined at 18 U.S.C. § 3156(a)(4)(B) as including:

> any ... offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; …

Other district courts have concluded that a violation of 18 U.S.C. §2339B is categorically a crime of violence for purposes of the Bail Reform Act. *United States v. Goba*, 220 F. Supp. 2d 182, 188 (W.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 579 (E.D. Va. 2002).

And in the Tenth Circuit, a § 371 conspiracy to commit a crime of violence is itself a crime of violence. *See United States v. Morgan*, 748 F.3d 1024, 1034-35 (10th Cir. 2014); *United States v. Brown*, 200 F.3d 700, 706 (10th Cir. 1999). Thus, were I to conclude that 18 U.S.C. § 2339B is a crime of violence, the charged § 371 conspiracy would also be a crime of violence as a matter of law in this Circuit.

Even if I were disinclined to view a violation of 18 U.S.C. § 2339B as categorically a crime of violence triggering the automatic consequence that conspiracy to commit such an offense is itself a crime of violence, I would still have to consider whether the § 371 conspiracy charged in this case nonetheless constitutes a crime of violence on its own merit. In making this determination, the Court would note that one significant ramafication of the government's shifting of the charge in this case from a conspiracy under 18 U.S.C. § 2339B (the complaint) to one under 18 U.S.C. § 371 (the information) is that the government altered the nature of the charged conspiracy from one which required merely an agreement to one which required an agreement plus an overt act in furtherance of the conspiracy. And that overt act would have to be one in furtherance of a conspiracy to provide material support and resources to a foreign terrorist organization. The critical question thus becomes whether the potential for such an act creates a "substantial risk" that physical force "may be used" in the commission of the offense. In considering this issue, it must be noted both that the provision of material support in violation of federal law includes the potential for the provision of such things as "weapons, lethal substances, explosives [or] personnel" (18 U.S.C. §§ 2339B(g)(4) and 2339A(b)(1)) and that the organization supported is one which itself engages in "terrorist activity" which includes, but is

not limited to, such matters as assassination, violent attacks on internationally protected persons, and the use of explosives and firearms with intent to endanger the safety of individuals (18 U.S.C. §2339B(g)(6), 8 U.S.C. §1189(a)(1), and 8 U.S.C. §1182(a)(3)(B)).

To be clear, the Court is not suggesting that such acts were ones undertaken in this case by Ms. Conley, but that is not the proper scope of inquiry. The correct inquiry focuses on the offense of conviction and whether it, by its nature, creates a "substantial risk" that physical force "may be used." The Motion stands silent both on this issue and on the issue of categorical classification of 18 U.S.C. § 2339B. And the Response stands silent on these fronts as well.

With no meaningful input from the parties, the Court concludes that it need not decide the crime of violence issue due to the fact that doing so would only postpone, not obviate, the need for analysis of the detention issue under 18 U.S.C. § 3143(a)(1). This is because 18 U.S.C. § 3145(c) provides a form of relief from the substantial impediments to release contained within the four corners of § 3143(a)(2). Section 3145(c) provides in pertinent part that:

> … A person subject to detention pursuant to section 3143(a) (2) … who meets the conditions of release set forth in section 3143(a)(1) …, may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons such person's detention would not be appropriate.

Despite the fact that this statutory provision is entitled "Appeal from a release or detention order," it is applicable at the district court level. *United States v. Kinslow*, 105 F.3d 555, 557 (10th Cir. 1997).

Thus, regardless of whether the offense of conviction is a crime of violence, the analysis ultimately turns on Ms. Conley's ability to satisfy the standard for release set forth in 18 U.S.C.

§ 3143(a)(1). If Ms. Conley's offense of conviction is a crime of violence, then 18 U.S.C. § 3145(c) redirects the analysis from § 3143(a)(2) back to § 3143(a)(1) as an alternative basis for release, provided that exceptional reasons for release can also be shown. If Ms. Conley's offense of conviction is not a crime of violence, her ability to obtain release is wholly governed by § 3143(a)(1) and the lack of any government recommendation of a sentence of no imprisonment, which serves as an impediment to release under § 3143(a)(2), is of no importance.

Under § 3143(a)(1) of the Bail Reform Act, Ms. Conley "shall...be detained" unless the Court finds by clear and convincing evidence that she is "not likely to flee or pose a danger to the safety of any other person or the community if released...." And the burden is on the defendant – not the government. If Ms. Conley cannot meet her burden, then she may not be released, regardless of whether she stands convicted of a crime of violence or whether any exceptional reasons for release are required by law.

Here, reduced to the essentials, what I have before me are defense representations (which the Court will accept as proffers) that Ms. Conley recognizes the errors of her prior decisions and that her parents are willing and able to assume the role of custodian for Ms. Conley while she lives in their home awaiting sentencing. Without belaboring the point, defendant has hardly met her burden by clear and convincing evidence. And this is true even putting aside the various matters which the government wishes to have the Court consider in the Response. If a mere post-conviction statement of contrition and promise of change would suffice under a clear and convincing standard, the presumption in favor of detention would be largely neutered. To the extent the Motion points to the complaint as evidencing a cooperative attitude by Ms. Conley in

her dealings with law enforcement, the Court draws another inference. Ms. Conley was cooperative in meeting with law enforcement, but was insistent on going forward with her plans, even after being advised of their illegality. And the complaint also reports Ms. Conley's then stated beliefs that military personnel, government personnel, public officials and law enforcement are legitimate targets for attack under her interpretation of jihad. As for Ms. Conley's parents acting as custodians, it must be noted that the instant offense was committed while Ms. Conley was living with her parents. The Court finds and concludes therefore that, notwithstanding her lack of prior record and even without consideration of the various matters tendered by the government, Ms. Conley has failed to demonstrate by clear and convincing evidence that she is "not likely to flee or pose a danger to the safety of any other person or the community if released" as required under 18 U.S.C. § 3143(a)(1).

Accordingly, it is hereby ORDERED that the Motion for Release on Bond (ECF No. 39) is DENIED. Ms. Conley shall remain in custody pending sentencing.

DATED this 17th day of September, 2014.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge