

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA :
 :
 v. : CR No. 1:09-MJ-082A
 :
 DAVID CHIARADIO :

MEMORANDUM AND ORDER

Pending before the Court for determination (28 U.S.C. § 636(b)(1)(A); LR Cr 57.2(a)) is the Government's Request to Detain Defendant Pending Trial. Pursuant to 18 U.S.C. § 3142(f), a detention hearing was held on April 30, 2009 to determine if any condition or combination of conditions of release would reasonably assure (1) Defendant's appearance at future Court proceedings including trial; and (2) the safety of the community. Both sides have presented legal argument to the Court and, at the hearing, the Court received an exhibit under seal from the Government. (Govt.'s Ex. 1).

Background

Defendant is charged with possession of child pornography (18 U.S.C. § 2252(a)(4)) which carries a ten-year maximum sentence. See 18 U.S.C. § 2252 (b)(2). However, the Government proffered that it will seek more serious charges before the Grand Jury including distribution and/or receipt of child pornography under 18 U.S.C. § 2252(a)(1) and (2). Such charges carry a five-year mandatory minimum sentence. See 18 U.S.C. § 2252(b)(1). Under the Bail Reform Act, these potential charges might trigger the rebuttable presumption against bail. 18 U.S.C. § 3142(e). However, the possession charge presently pending against Defendant does not trigger such statutory presumption.

Discussion

Generally, the Bail Reform Act informs that a defendant should be released on bail on the least restrictive condition or combination of conditions that will reasonably assure the defendant's appearance when required and the safety of the community. See 18 U.S.C. § 3142(c)(1)(B). The Government argues that detention is warranted because Defendant is both a risk of flight and a danger to the community. First, it contends that Defendant is a risk of flight because the weight of the evidence against him is strong, and he faces a substantial prison term if convicted in this case. Second, the Government contends that the nature of the offense charged, i.e., possession of child pornography, and recent and past allegations of molesting young girls makes Defendant a potential danger to the community.

As to the risk of flight, the Government bears the burden of proof by a preponderance of the evidence. United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991). The Government also bears the burden of proving Defendant poses a danger to the community, but must meet a higher "clear and convincing evidence" standard by statute. See 18 U.S.C. § 3142(f). Finally, the Court must assess "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g)(4).

A. Danger to the Community

The Government describes the evidence against Defendant as "overwhelming." According to the Government's Affidavit, the child pornography providing the basis for this prosecution was obtained from two computers seized in 2006 from Defendant's home. Defendant admitted ownership and/or control of the computers. These computers contained over 2,000 still images and

over fifty videos depicting child pornography including images of adults engaging in sexually explicit conduct with prepubescent minors.

Defendant does not have a criminal record. However, he has been the subject of two known accusations of sexual misconduct with very young girls. The Government proffered at Defendant's initial appearance that he is currently under investigation for the crime of second degree child molestation. According to the police reports submitted under seal (Gov't. Ex. 1), the incident involved a five year old girl and allegations that Defendant inappropriately touched the victim and exposed himself to her. This event allegedly occurred on April 12, 2009. These reports also indicate that Defendant was previously accused of exposing himself to a three year old girl in 2002. It does not appear that the 2002 allegation resulted in any criminal charges against Defendant. Although the latest allegation is still under investigation, the Government disclosed that the minor victim was recently interviewed at the Children's Advocacy Center and did not repeat her prior allegations about Defendant.

Defendant's counsel argued that it is unfair for the Court to rely upon what he described as "unfounded" allegations in assessing potential danger to the community. While Defendant's argument might have some appeal if these allegations were considered individually and in a vacuum, I am required by the Bail Reform Act to simultaneously consider a number of factors (18 U.S.C. § 3142(g)) including the nature and circumstances of the offense charged, past conduct and criminal history. Considering all of these factors together, the Government has established that Plaintiff presents a danger to the community. Although neither of the past molestation allegations has resulted in convictions, the nature of both make them difficult cases to prosecute. Both involve very young girls, allegations (touching and exposure) that would not result in much, if any, corroborating

physical evidence, and apparently no independent witnesses. Defendant's counsel argued that knowledge of the 2006 seizure of his computer by the FBI may have made Defendant a target for suspicion of, or false claims of, molestation. That argument does not, however, explain away the 2002 allegation. Although Defendant is entitled to the presumption of innocence, the Court must, in assessing bail, balance that presumption against the safety of the community, in this case young children. It strains credibility to accept that Defendant is the subject of strong evidence of guilt as to possessing pornography depicting young children engaged in sexual acts and coincidentally has been the subject of two separate allegations of molestation (2002 and 2009) which are completely unfounded.

Having found that the Government has established that Defendant is a danger to the community, the Court must determine if there is any condition or combination of conditions of release which could reasonably assure the safety of the community. At the time of his arrest, Defendant resided with his wife in an apartment located in a large, multi-building complex. The complex is located in a busy suburban area near schools, a community playground and a day camp. It is set on a wooded parcel with jogging trails, a swimming pool, clubhouse and other community amenities.

According to the pending charge and Supporting Affidavit, Defendant has shown an interest in collecting a substantial amount of child pornography. Also, based on his history of two prior molestation allegations, he has allegedly acted on that interest on occasion. If Defendant were released, he would obviously be denied access to computers and other devices capable of accessing the Internet. He would also be ordered to refrain from contact with children and be subjected to some level of confinement/restrictions with electronic monitoring. I find that such conditions would

not be a sufficient protection for the community (in this case, young children) based on the particular circumstances presented in this case. While electronic monitoring can be an important and effective tool of supervision, it obviously cannot restrict a person's movements and actions. It is effectively a location monitoring tool. It alerts supervising authorities when a releasee is not where he or she is supposed to be and then relies on a chain of human reaction to determine the releasee's whereabouts.

In a case involving risk of flight, it is a useful, but not foolproof, tool which acts as a deterrent and as prompt notice if a defendant chooses to flee. It does not stop the flight. In a case involving danger to the community, it cannot stop a releasee from engaging in misconduct. It may confirm that the releasee was out of the house when an incident of misconduct occurred but it cannot prevent it. Also, unless the releasee was on strict home incarceration, there would be times when the releasee would be permitted to leave his or her residence and thus pose a risk to the public. In Defendant's case, this risk would be exacerbated by the nature and location of his current apartment. Defendant's counsel argued alternatively that Defendant could be released to live with his parents in their home. However, such location would not allay the Court's concerns for two primary reasons. First, the 2009 molestation incident allegedly occurred in that house. Second, the house is a single-family home located in a thickly settled residential area, near a park and down the street from a public elementary school.

B. Risk of Flight

Although Defendant faces a significant period of incarceration if convicted and the weight of the evidence against him is strong, these facts are not new to Defendant and he has not fled. Defendant's computer was seized by the FBI in 2006, and he retained defense counsel to

communicate with the Government about this case. It is reasonable to assume that Defendant's counsel has fully apprised him of the potential consequences of a conviction including the likelihood of a prison sentence. Defendant is a life-long Rhode Island resident and has family ties to the community. Defendant's wife lives and works in Rhode Island. Defendant credibly reports limited assets which could be used to finance a flight from prosecution. Also, Defendant's parents are willing to post their home (which has significant equity) as security for his release. Accordingly, I find that some combination of conditions of release and surety could be imposed that would reasonably assure Defendant's appearance in Court and thus risk of flight, in and of itself, does not warrant pretrial detention in this particular case.

Conclusion

For the reasons discussed above, the Court finds that the Government has met its burden of establishing that Defendant presents a danger to the community. Additionally, the Court finds that the Government has not met its burden of establishing that Defendant is a risk of flight. The Court further finds that there are no conditions or combination of conditions of release that could be imposed to reasonably assure the safety of the community. Thus, the Court orders that Defendant remain detained pending trial and committed to the custody of the Attorney General or his designee for purposes of such pretrial detention.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States District Court
May 4, 2009