

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 11, 2020

Christopher M. Wolpert  
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MERRILL ROSS MOON,

Defendant - Appellant.

No. 20-1150  
(D.C. No. 1:20-CR-00061-RBJ-1)  
(D. Colo.)

ORDER

Before **MATHESON, PHILLIPS**, and **MORITZ**, Circuit Judges.

Merrill Ross Moon appeals from the district court's order continuing his pretrial detention. Exercising jurisdiction under 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291, we affirm.

**Background**

Moon was indicted for being a felon in possession of firearms and ammunition. The charges stem from his having threatened to kill his adult son and daughter, with whom he lived at the time, and any law enforcement officer who tried to intervene. According to the government, Moon had repeatedly told his son and daughter he would kill them, the police, and himself before going back to prison.

Law enforcement searched Moon's home pursuant to a warrant and found twelve firearms—multiple shotguns and rifles, a loaded handgun under his pillow, a

revolver, and two self-made fully automatic machine guns. They also found two self-made silencers, a ballistics vest, and thousands of rounds of ammunition. The machine guns and silencers did not have serial numbers so were untraceable. Moon's children reported that he assembled guns from parts he bought online.

Moon had an extensive criminal history before this incident. Six years earlier, he was convicted of witness intimidation for tying his son up, beating him and a friend, holding a gun to his son's head, and threatening to kill him. His other convictions included willful poisoning, witness-victim bribing, third-degree assault, harassment, multiple drug convictions, and possession of a weapon by a previous offender.

The government requested that Moon be detained pending trial. Based on Moon's possession of multiple guns, his criminal history, and the nature of his conduct, including his having sent people to look for his son and daughter after they were placed in protective custody, the government argued that he presented a serious threat to his children and the community. It further argued that no combination of conditions could reasonably assure the safety of the community. The probation department agreed with the government's arguments and recommended detention.

In opposing detention, Moon maintained that he was a limited flight risk because he had been diagnosed with cancer five months before this incident and needed to continue with his five-day-a-week radiation treatments. He also maintained that he was not dangerous because the victims no longer lived with him and law enforcement had taken his guns. Moon's proposed solution to the magistrate

judge's concern that he had a demonstrated ability to obtain guns was GPS monitoring.

After a hearing, the magistrate judge ordered that Moon be detained, finding by clear and convincing evidence that no conditions or combination of conditions could be imposed to assure the safety of the community. In applying the 18 U.S.C. § 3142(g) factors, the magistrate judge was particularly concerned about Moon's cache of weapons, his prior witness-victim intimidation and bribing convictions, and the "disturbing" facts of the case, *Aplt. App.*, Vol. 1 at 28, including that he sent people to look for the victim-witnesses after they were taken into protective custody. The magistrate judge also expressed concerns about Moon being a flight risk but ultimately did not reach that issue.

Shortly after entry of the detention order, Moon filed a series of motions challenging his detention based on concerns stemming from the COVID-19 virus pandemic. First, he filed two motions asking the magistrate judge to reopen the detention hearing and reconsider the detention order, arguing that his medical condition increased his vulnerability to the COVID-19 virus. Those motions also asked the magistrate judge to grant Moon temporary release pursuant to 18 U.S.C. § 3142(i), arguing that his risk of exposure to COVID-19 rendered the "hardships of prison unusually harsh" for him and was "a compelling and exceptional reason" for his release. *Aplt. App.*, Vol. 1 at 41 (internal quotation marks omitted); *see also id.* at 61. The magistrate judge denied the motions, concluding that Moon "fail[ed] to identify any changed circumstances that would undermine the Court's earlier

conclusion that there were no conditions or combination of conditions that the Court could impose that would insure the safety of the community.” *Id* at 47; *see also id.* at 65. The magistrate judge did not expressly deny the request for temporary release under § 3142(i), but he implicitly did so in concluding that Moon could not safely be released into the community.

Moon then filed the motion at issue here, asking the district court to revoke the magistrate judge’s detention order under 18 U.S.C. § 3145(b). Like the motions to reconsider, the motion to revoke raised concerns about the risks associated with COVID-19. Moon maintained that the pandemic changed the detention analysis and that the § 3142(g) factors now supported setting conditions of release. He also alleged that he was not receiving appropriate medical treatment in custody and maintained that his particular health issues combined with his susceptibility to COVID-19 and the increased risk for viral spread in detention facilities created a “compelling reason” for temporary release under § 3142(i). *Aplt. App.*, Vol. 1 at 67 (internal quotation marks omitted). Moon outlined a release plan that he claimed could assure his appearance and the safety of the community: (1) his landlord would serve as a third-party custodian; (2) Moon would wear a GPS monitor and leave home only for medical appointments; and (3) probation officers could visit his residence and search it for weapons. Moon requested a hearing so that he could present evidence about his cancer diagnosis, pre-detention treatment, inadequacy of current treatment, recommended future treatment, the landlord’s ability to serve as a third-party custodian, and Moon’s housing plan. *See id.* at 84.

In opposition, the government emphasized that Moon remained both a flight risk and a danger to the community and that nothing in his motion to revoke undermined the magistrate judge's determination that no combination of conditions of release could reasonably assure the safety of the community. It argued that his proposed conditions of release would not adequately mitigate the danger he posed because Moon's proposed custodian—the landlord—did not live at Moon's residence, a GPS monitor would not prevent Moon from acquiring and assembling weapons, and the probation department would be unable to search his house because of the risk of COVID-19 exposure. With respect to Moon's health-related concerns, the government indicated that the facility where he was housed had no COVID-19 cases<sup>1</sup> and had taken comprehensive measures to minimize the risk of a COVID-19 outbreak. And it presented evidence that Moon was continuing to receive all necessary medical treatment while in custody.

The district court denied the motion. It rejected Moon's allegation that he was not receiving appropriate medical treatment in custody, and it determined that the community-safety reasons supporting the detention order had not materially changed and that the threat of COVID-19 was not a sufficient reason to revoke his detention. The court denied Moon's request for a hearing, concluding that a hearing was both

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<sup>1</sup> When Moon filed the appeal, he represented that the Bureau of Prisons had confirmed that one staff member at the facility where Moon is housed tested positive for COVID-19, and in supplemental authority, he indicated that as of June 10, 2020, the BOP confirmed that four inmates at that facility have tested positive.

unnecessary and would unnecessarily risk exposing those involved, including Moon, to the COVID-19 virus.

Moon sought reconsideration of that order, raising the same COVID-19-related concerns he had raised in his previous motions and arguing that the government had failed to satisfy its burden of showing, by clear and convincing evidence, that no release conditions would reasonably assure the community's safety. He challenged the court's denial of his motion to revoke without a hearing, suggesting that the court could hold a hearing by video teleconference to eliminate the risk of COVID-19 exposure, and arguing that a hearing was necessary to address the adequacy of his release plan and his concerns about his cancer treatments and increased susceptibility to COVID-19.

The district court denied the motion to reconsider. It noted that, in ruling on the motion to revoke, it had already considered the nature of the charges, Moon's criminal history, the risk of exposure to COVID-19 in prison, Moon's increased susceptibility to the virus, and, "by analogy" the factors for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which include the defendant's medical condition. *Aplt. App.*, Vol. 1 at 197; *see* U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A) (U.S. Sentencing Comm'n 2018). And it explained that it had to balance Moon's health-related concerns with "other factors including the specific reasons that the magistrate judge found that detention was appropriate." *Aplt. App.* Vol. 1 at 197. Because it concluded that those risks had not materially changed and were not

outweighed by Moon's risk of exposure to COVID-19, the court denied the motion for reconsideration.

### **Discussion**

#### **A. Legal Standards**

Under the Bail Reform Act (the Act), a defendant may be detained pending trial if the court finds that “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). The court may make such a finding only after holding a hearing under § 3142(f). *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003). In making its decision, the court must consider the following four factors: the nature and circumstances of the charges, the weight of the evidence, the defendant's history and characteristics, and “the nature and seriousness of the danger to any person or the community that would be posed by the person's release.” § 3142(g). When, as here, the government seeks detention based on the defendant's dangerousness, it must prove by clear and convincing evidence that the defendant presents a danger to the community. *Cisneros*, 328 F.3d at 616.

After the initial detention decision is made, the same judicial officer who entered the order may reopen the hearing if he or she finds that new information has a material bearing on whether there are conditions of release that will reasonably assure a defendant's appearance at trial and the safety of the community.

§ 3142(f)(2); *see also Cisneros*, 328 F.3d at 614. That same judicial officer may also, by subsequent order, permit the temporary release of the detained person based

on a determination that doing so is “necessary for preparation of the person’s defense or for another compelling reason.” § 3142(i). In addition, if the order was entered by a magistrate judge, the defendant may file a motion asking the district court judge to revoke the magistrate judge’s detention order. § 3145(b); *see also Cisneros*, 328 F.3d at 614. A district court reviews a magistrate judge’s detention order de novo “and must make an independent determination of the proper pretrial detention or conditions for release.” *Cisneros*, 328 F.3d at 616 n.1 (internal quotation marks omitted).

We review de novo mixed questions of law and fact concerning the detention decision, but we review any findings of historical fact for clear error. *Id.* at 613. “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on review of the entire record, is left with the definite and firm conviction that a mistake has been committed.” *United States v. Gilgert*, 314 F.3d 506, 515 (10th Cir. 2002) (brackets and internal quotation marks omitted). “On clear error review, our role is not to re-weigh the evidence; rather, our review of the district court’s finding is significantly deferential.” *Id.* at 515-16 (internal quotation marks omitted).

## **B. Arguments on Appeal**

Moon contends that the district court erred by denying his motion to revoke the detention order and for temporary release. He also challenges several procedural aspects of the district court’s ruling on the motion to revoke. We reject his procedural challenges and find no error in the district court’s conclusion that Moon’s



risk of exposure to the COVID-19 virus did not warrant revocation of the detention order given that Moon continued to present a significant risk of danger to others. We also reject Moon's arguments regarding the denial of temporary release.

### **1. Denial of Motion to Revoke Detention Order**

Contrary to Moon's contention, the district court considered the risk of exposure to COVID-19 in prison and his particular susceptibility to the virus because of his cancer diagnosis. It expressly acknowledged both the general risk of exposure and Moon's particularized concerns in both the order denying the motion to revoke and the motion for reconsideration. *See* Aplt. App., Vol. 1 at 161 (finding that "the threat of COVID-19 in detention and out of detention is present"); *id.* at 197 (indicating that the court considered Moon's "medical situation as [he and the] government counsel described it," and recognizing that "persons in custody potentially have greater exposure to the virus than others, and that persons like Mr. Moon might experience more severe consequences than others if they do contract COVID-19"). But it explained that it had to balance those concerns against the other § 3142(g) factors and that, while relevant, Moon's COVID-19 risk was outweighed by the evidence of his continued dangerousness, including his criminal history, history of threats of violence, and demonstrable ability to obtain guns.<sup>2</sup> Moon's disagreement with the outcome of the court's weighing of the parties' evidence and

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<sup>2</sup> Given that the district court expressly considered the COVID-19 virus pandemic and acknowledged its relevance to the detention analysis, we need not address Moon's argument that "if the court implicitly concluded that COVID-19 does not change the pretrial release calculus, it erred." Aplt. Bail Mem. Br. at 15.

arguments and its balancing of the relevant factors—including the risk of COVID-19—is not a basis for reversal of its order. *See Gilgert*, 314 F.3d at 515-16.

The record also does not support Moon’s assertion that the district court failed to consider his proposed release plan. In its order denying the motion to revoke, the district court indicated that it had “reviewed the entire file,” including not only the record of the proceedings before the magistrate judge, but also Moon’s motion for revocation, which explained the details of his release plan. *Aplt. App.*, Vol. 1 at 161. Based on that review, the district court found that the “the community safety reasons for the magistrate judge’s order of detention have not materially changed.” *Id.* We can fairly infer from that finding that the court concluded Moon’s proposed release plan could not reasonably assure the safety of the community.

Based on our independent review of the record and considering the evidence as a whole, we find no error in the district court’s ruling. Moon’s citation to cases in which courts have released non-violent defendants based on concerns about COVID-19 exposure does not require a different result. Those cases are inapposite, because unlike the defendants in those cases, Moon has a significant history of violence. Moreover, detention decisions are inherently individualized, and the balance of the COVID-19 risks against the § 3142(g) factors is no different. Thus, whether concerns about the virus are sufficient to overcome concerns about a particular defendant’s dangerousness if released into the community is a fact-specific inquiry. That COVID-19 might support pretrial release in a different case on different facts does not mean that revocation of Moon’s detention order was required here.

We reject Moon's procedural challenges to the district court's ruling. First, Moon complains that the district court did "not necessarily" apply the de novo standard in ruling on the motion to revoke. Aplt. Bail Mem. Br. at 14. As noted above, however, the court conducted an independent review of the record of the proceedings before the magistrate judge, and it made an independent determination about the propriety of Moon's detention. That is exactly what the de novo standard of review required. Contrary to Moon's assertion, the court's characterization of the magistrate judge's detention order as "a well-founded detention decision," Aplt. App., Vol. 1 at 161, does not mean it applied an inappropriately deferential standard of review and was "looking for reasons not to overrule" the magistrate judge's decision, Aplt. Bail Mem. Br. at 14 (internal quotation marks omitted).

Moon also takes issue with the court's refusal to hold a hearing on the motion to revoke. But the Act does not require a district court to hold a hearing on a motion to revoke. *See* § 3145(b) (providing only that a district court must decide a motion to review promptly). Thus, although a court has authority to conduct another hearing, it may decide a motion to revoke based on a de novo review of the evidence presented to the magistrate judge. *Cf. Cisneros*, 328 F.3d at 617 ("[The district court] also held [its] own hearing to consider new evidence from the parties, as was [its] prerogative."). We find no error in the district court's discretionary determination that a hearing was unnecessary here given that neither the motion to revoke nor the motion for reconsideration suggested that Moon had any new evidence to present at a

hearing that would change the court's analysis of his dangerousness, which was the court's overarching concern.<sup>3</sup>

Finally, we reject Moon's assertion that the court erred by not specifically addressing each of the § 3142(g) factors in its order denying his motion to revoke detention. In support of that contention, Moon cites cases addressing the requirements for initial detention orders and the adequacy of findings to support such an order. But none of those cases addresses what findings, if any, are required to support an order on a motion to revoke. Here, the magistrate judge made detailed findings about each factor in the initial detention order. Although the district court did not make specific findings about each factor, it mentioned all of the factors and agreed with the magistrate judge's determination that the balance of those factors, particularly Moon's criminal history and the conduct giving rise to the current charge, required that he be detained. There was no reason, much less a requirement, for the court to repeat the full analysis of each factor.

## **2. Request for Temporary Release under § 3142(i)**

Moon's motion to revoke was filed pursuant to § 3145(b), but it also perfunctorily sought temporary release under § 3142(i). On appeal, he complains that the district court's finding that the threat of COVID-19 in detention "is not

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<sup>3</sup> We note Moon's disagreement with the district court's conclusion that his assertion that he "is not receiving appropriate medical treatment for his cancer condition" in prison "is not accurate," Aplt. App., Vol. 1 at 161, and his request for a hearing on that issue. But the court's finding does not amount to clear error, and the court did not abuse its discretion by not holding a hearing to address that issue.

a *sufficient reason* . . . to overrule a well-founded detention decision,” Aplt. App., Vol. 1 at 161 (emphasis added), did not resolve the question whether Moon’s particularized COVID-related concerns provided a “*compelling reason*” for his temporary release under § 3142(i). *See* § 3142(i) (emphasis added).<sup>4</sup>

We reject this argument for three reasons. First, it is illogical. If a reason is not *sufficient* to warrant a defendant’s release, it necessarily is not *compelling* enough to warrant a temporary release. Second, the argument is based on the flawed premise that the district court did not take the particularized threat of COVID-19 to Moon into account. *See* Aplt. Bail Mem. Br. at 17 (arguing that “[t]he district court failed to consider whether the public health crisis, *combined with the particularized threat of COVID-19 to Mr. Moon*, is a ‘compelling reason’ for temporary release under section 3142(i)” (emphasis added)). As established above, the district court did consider

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<sup>4</sup> We note that it is an open question whether a district court has authority to consider a motion for temporary release under § 3142(i) when a magistrate judge made the initial determination that temporary release is not warranted. *Compare United States v. Alderete*, No. CR 19-1989 JB, 2020 WL 2572716, at \*23-24 (D.N.M. May 21, 2020) (noting that the Tenth Circuit has not analyzed whether “[t]he judicial officer’ who considers whether to order temporary release must be the same person as ‘the judicial officer’ who issued the original detention order pursuant to § 3142(i)’s requirements,” and extending the reasoning in *United States v. Cisneros*, 328 F.3d 610, 614 (10th Cir. 2003), to answer that question affirmatively), *with United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (concluding that a district court may consider a motion for temporary release when a magistrate judge entered the initial detention order, but doing so based on a misreading of the statute as allowing “a judicial officer,” not “the judicial officer,” to consider requests for temporary release (emphasis added)). The parties did not raise or brief this issue, and we decline to resolve it here because doing so is not necessary to the resolution of this appeal.

Moon's particular susceptibility to the virus because of his cancer diagnosis. Finally, we agree with the government that Moon's motion for revocation contained only a perfunctory reference to § 3142(i) and did not make sufficient legal arguments regarding that subsection.

**Conclusion**

The district court's decision is affirmed. Moon's unopposed motion to seal volume two of the appendix, which contains his medical records and which was filed under seal in the district court, is granted.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk