New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 247—NO. 107
TUESDAY, JUNE 5, 2012

WHITE-COLLAR CRIME

Expert Analysis

Denying Bail To the 'Economically Dangerous'

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Although historically the primary purpose of bail was to enable courts to set conditions that reasonably would assure an individual's appearance in court, since its passage in 1984, the Bail Reform Act also has empowered federal courts faced with defendants evidencing a propensity for violence to deny or revoke bail upon a finding that they pose a danger to the community.[1] Recent high-profile prosecutions of serial fraudsters like Bernard Madoff have fanned the flames of a debate regarding whether economic danger can be the basis for imposing detention to protect the financial safety of the community. Two recent district court opinions addressing misbehavior by white-collar defendants while released on bail provide useful guideposts in this debate.

In those cases, Judge Janet Hall in the District of Connecticut and Judge Kiyo Matsumoto in the Eastern District of New York revoked bail based on their determinations that the post-arrest criminal conduct of the defendants before them demonstrated a continuing economic threat to others. Whether such reasoning also might justify an initial decision to deny release—assuming statutory prerequisites have been met—is an unsettled question.

'Danger' Under Bail Statute

Section 3142 of the Bail Reform Act sets forth the process by which a court makes an initial determination whether an accused should be released or detained pending his or her trial. Where a court finds that the case involves either 1) a list of enumerated crimes, including violent felonies, drug crimes, or felonies involving a minor or possession of a firearm, or 2) a serious risk the defendant will flee or obstruct justice, a detention hearing is required.[2] At the detention hearing, a judicial officer must determine whether any conditions of release exist that will "reasonably assure the appearance of the person as required and the safety of any other person and the community."[3] Thus, under the statute, a court does not reach the question of whether a defendant should be detained on the basis of dangerousness until a detention hearing is mandated as a result of either an indictment for one of the enumerated offenses or a showing of a serious risk of flight or obstruction of justice.[4] Where the government seeks detention based on danger, the government's proof must be clear and convincing, while detention based on risk of flight need only be proven by a preponderance of the evidence.[5]

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Statistics from the U.S. Department of Justice show that more than half of all defendants charged with a violent crime and almost three-quarters of those charged with fraud crimes are released on bail pending trial.[6] This is so because "only a limited group of offenders…should be denied bail pending trial."[7] Courts can resort to pretrial detention only in those instances where a defendant's incarceration serves administrative, not punitive, purposes.[8]

Historically, courts have considered the bail statute's focus on safety to the community in the context of whether a defendant poses a danger of harm involving physical violence or injury. Courts considering the issue whether the concept of danger encompasses economic harm "have ultimately made their initial [detention] determination based on consideration of the flight risk and not as a result of finding the accused or convicted individual will perpetrate a pecuniary or economic harm that requires detention."[9] As noted by Southern District of New York Magistrate Judge Ronald Ellis in *United States v. Madoff*, however, "jurisprudence…support[s] the consideration of economic harm in the context of detention to protect the safety of the community."[10] The *Madoff* opinion goes on to state, though, that the scope of an economic harm factor in determining a defendant's dangerousness remains uncertain. The fact remains that courts continue to be more likely to consider future nonviolent harm to the community in cases such as child pornography or drug trafficking rather than white collar fraud cases.[11]

Although a court's consideration of a defendant's potential to inflict economic harm may be circumscribed in the context of the initial pretrial detention hearing, courts have been more willing to focus on the issue of economic danger when considering whether to revoke bond. In both *United States v. Trudeau* and *United States v. Dupree*, the government conceded that the defendants posed no risk of flight. Accordingly, their detention was sought solely on the basis of alleged economic wrongdoing.

'United States v. Trudeau'

In November 2010, William Trudeau Jr. was arraigned on an indictment charging him with conspiracy to commit bank fraud and the substantive crimes of bank, mail, and wire fraud. Among the charges against Trudeau were allegations that he conspired with others to obtain money by submitting fraudulent mortgage loan applications on properties he did not own. Trudeau was released on a $250,000 bond with the conditions that he not violate any federal, state, or local laws while on release and that he refrain from encumbering or conveying "any interest in any property that he owns or manages without notice to or permission of the court" or representing that he has an interest in any property which he does not, in fact, own. In April 2011, the government sought revocation of the bond, alleging that the defendant had violated the conditions of his release and violated state law by representing that he had an interest in property that he did not own.[12]

After a hearing on the government's motion, a magistrate judge placed additional conditions on Trudeau's release, ordering him to provide certain financial documentation to the U.S. Pretrial Services Office. At that time, the magistrate judge did not rule on the government's motion to revoke bond. In August 2011, with the motion still pending, the government filed supplemental papers

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seeking to revoke the bond, claiming that Trudeau had further violated the law and continued to disregard the conditions of his release.[13]

After a second hearing on Aug. 30, 2011, Magistrate Judge Holly Fitzsimmons revoked the bond, ruling that Trudeau had violated the terms and conditions of his pretrial release and that he was unwilling to comply with any conditions necessary to prevent him from further financial misconduct. Trudeau moved in district court to reverse the magistrate judge's order. Earlier this year, in a thoughtful bench ruling on March 22, Judge Janet Hall reviewed the decision de novo.[14]

Hall proceeded under Section 3148 of the Bail Reform Act of 1984 which governs the sanctions for a violation of a release condition. These include the revocation of release, an order of detention, and a prosecution for contempt of court. Where the government seeks a revocation of release, the statute requires a reviewing court to hold a hearing and engage in a two-step analysis. First, the court must find either (A) probable cause to believe the defendant has committed a federal, state, or local crime while on release or (B) clear and convincing evidence that the person has violated any other condition of release.[15] Second, the court also must find that (A) based on the factors set forth in 18 U.S.C. §3142(g), no condition or combination of conditions of release exist that will assure that the defendant will not flee or pose a danger to the safety of the community or (B) the defendant is unlikely to abide by any combination of conditions imposed.[16] If a finding is made under both steps of the analysis, the court is required to issue an order of revocation and detention.

In the first step of the analysis, Hall found probable cause to believe that Trudeau had committed a number of economic felonies while on release. Section 3148 further provides that "[i]f there is probable cause to believe that, while on release, the person committed a [f]ederal, [s]tate, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community." Accordingly, the burden of proof shifted from the government to Trudeau to overcome the presumption against him.[17]

Hall found that based on the record the defendant did not overcome the rebuttable presumption, stating that "the court is concerned that Mr. Trudeau locked down in a house under electronic monitoring with a monitored telephone and computer, would still pose a danger to the community. It is my view that he would use other people to effectuate his fraud." The court rejected the defense's argument that the Bail Reform Act does not contemplate economic misconduct when discussing danger to the community, noting that the procedural posture of the instant case distinguished it from those relied on by the defendant which considered economic danger to the community in the context of an initial determination of pretrial detention or release under section 3142. Hall pointed out that under section 3148, the government was moving for the revocation of previously set bond rather than initial detention: "[Section] 3148 says wait a minute, you tried as hard as you could, Judge, and he's still violating these conditions, and it's a different stage we're on."[18] Accordingly, Hall affirmed the magistrate judge's decision ordering Trudeau's detention.

'United States v. Dupree'

In *Dupree*, defendant Courtney Dupree, charged with bank fraud, making a false statement, and conspiracy to commit bank, mail and wire fraud, was released on an $800,000 bond. His release conditions included the standard requirement that he not commit any federal, state, or local crimes during the period of pretrial release. Subsequently, Dupree was arrested on a new criminal complaint alleging that he orchestrated another fraudulent scheme against the same financial institution that was the victim of the originally charged fraud.

On March 16, 2011, Eastern District of New York Magistrate Judge Cheryl Pollak granted the government's motion to revoke Dupree's bond, finding that the defendant failed to comply with the conditions of release by continuing to commit fraud and steal money from the bank and "present[ed] a financial danger to the bank." The court further found that "no terms or conditions… could mitigate that risk." Accordingly, Dupree was ordered detained pending the resolution of the charges against him.[19]

In 'Dupree,' Judge Kiyo Matsumoto noted that three judges had concluded on three separate occasions that there was probable cause that Dupree had committed another financial crime while released on bail and that Dupree had not rebutted the presumption that no conditions would assure the safety of the community.

Dupree sought review of Pollak's decision on a number of occasions, most recently arguing that a nine-month pretrial detention violated his due process rights. In evaluating whether a pretrial detention has become unconstitutionally excessive, a court is required to weigh the strength of the evidence upon which detention was based, i.e., the evidence of risk of flight and dangerousness, in addition to a number of other factors such as the length of detention, the extent that the government is responsible for a trial delay, and the gravity of the charges.[20] Undertaking a thorough analysis, Judge Kiyo Matsumoto on Nov. 3, 2011, found the government's evidence on the issue of the defendant's dangerousness persuasive, noting that "[h]is continued detention is warranted to protect [the bank] from yet another fraudulent scheme."[21] Matsumoto noted that three judges had concluded on three separate occasions that there was probable cause that Dupree had committed another financial crime while released on bail and that Dupree had not rebutted the presumption that no conditions would assure the safety of the community.

Conclusion

Although the degree to which a defendant's potential to cause economic danger is a factor in pretrial detention is unclear, it has become an area of increasing focus for courts. Pretrial detention of suspects directly impacts the presumption of innocence and implicates due process protections. Accordingly, pretrial release is the presumptive result in most cases and the government's burden in arguing for initial pretrial detention is substantial.

The Bail Reform Act does not permit detention on the basis of dangerousness, economic or otherwise, in the absence of serious risk of flight or obstruction of justice, or charges of offenses enumerated in the statute, and even then the government must prove by clear and convincing evidence that a defendant's pretrial release cannot be conditioned in a manner that would eliminate any economic risks hypothesized by the government. As recent case law demonstrates, however, this is not the case where the government seeks to revoke bond. In those instances, a finding that the defendant poses an economic danger to the community may be sufficient to warrant pretrial detention. At a minimum, these decisions suggest an added theme for defense attorneys when discussing pretrial behavior with their clients.

1. 18 U.S.C. § 3141 et. seq.
2. Id. §3142(f).
3. Id. §3142(g).
4. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).
5. *United States v. Madoff*, 586 F.Supp.2d 240, 247 (internal citations omitted).
6. See, e.g., U.S. Department of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2004—Statistical Tables, Table 9, "Felony Defendants Released Before or Detained Until Case Disposition, by Most Serious Arrest Charge" (2004).
7. *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1985).
8. *United States v. El-Hage*, 213 F.3d 74, 79 (2d Cir. 2000).
9. 586 F.Supp.2d at 254, n. 14.
10. Id. at 253.
11. Id.
12. The government alleged that Trudeau had represented himself as the landlord of property which belonged to his wife and had executed a lease for the apartment despite the fact that the property was subject to a levy of judgment creditors.
13. Specifically, the government alleged that the defendant had: 1) defrauded the Westport Public Schools and Connecticut Department of Motor Vehicles by providing a false address; and 2) improperly leased a vehicle under his mother's name without permission from the Probation Office or court.
14. Transcript of Hearing before Judge Janet Hall, *United States v. Trudeau*, 3:10CR234 (March 22, 2012).
15. 18 U.S.C. §3148(b)(1).
16. Id. §3148(b)(2).
17. In considering the defendant's rebuttal, a court should look to the provisions of section 3142 which govern the release or detention of a defendant pending trial. Specifically, subsection 3142(g) sets forth a number of factors to be considered by the court in determining whether there are appropriate conditions of release to guarantee the defendant's appearance and safety of the community. These factors include the nature of the crime charged, the weight of the evidence against the person, the history and characteristics of the defendant, and the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.
18. Transcript of Hearing, *United States v. Trudeau*, at p. 48.
19. Transcript of Criminal Cause for Arraignment Before the Honorable Cheryl L. Pollak, U.S. Magistrate Judge, *United States v. Dupree*, 10-CR-627 (E.D.N.Y. March 16, 2011).
20. *United States v. Dupree*, __F.Supp.2d__, 2011 WL 5325561, *8 (E.D.N.Y. Nov. 3, 2011) (citing *El-Hage*, 213 F.3d at 79).
21. Id. at *11.