

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA
Plaintiff

:
:

vs.

: **CRIMINAL CASE NO. BEL-08-0239**

YANCEY COOPER
Defendant

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: : : :

AMENDED MEMORANDUM OPINION

On May 20, 2008, the defendant was charged by indictment with possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g). On May 21, 2008, the defendant made his initial appearance and the government requested that he be detained, pursuant to 18 U.S.C. § 3141, *et. seq.* (the "Bail Reform Act"). The matter was set in for a detention hearing on May 23, during which the Assistant U.S. Attorney (AUSA) on duty asked to proceed by proffer rather than with live evidence. This Court routinely permits the government to proceed by proffer in such hearings, even though the Bail Reform Act does not expressly authorize the practice.

For almost a decade it has been routine procedure in this District for the government to present proffers at detention hearings and, in the rare circumstance where the Court has found a proffer inadequate to support the government's position, the Court has so advised the government, granted a brief postponement to allow the government to locate its witnesses, and then heard live testimony on problematic questions. *See, United States v. Hammond*, 44 F. Supp. 2d 743 (D. Md. 1999). This practice is efficient in that it conserves scarce public resources by not requiring the presence of busy law enforcement officers at every detention hearing while at the same time leaving the Court the option of requiring their testimony when confronted with questions incapable of resolution without the direct and cross examination of a live witness. Ultimately, "it is the Court

and not the government that determines whether proceeding by proffer is acceptable in a given detention hearing.” *Hammond, id.* at 744.

After hearing the government’s proffer in the instant matter, the Court was troubled by the suggestion that the defendant, after being confronted with an empty handgun box found in the car he was driving, had essentially blurted a detailed confession implicating himself in the constructive possession of a firearm and illegal drugs at a home in which he no longer resided, the home being approximately a mile and a half away from where he had just been stopped for a traffic violation and found in possession of 6 or 7 grams of suspected cocaine powder. After hearing the proffer, the Court did not reject out of hand the possibility that the defendant had confessed as suggested in the proffer, but the Court concluded under *Hammond* that this was a circumstance where, before crediting the unusual confession, the Court needed to hear the live testimony of the officers who claimed to have overheard it. The Court noted that the strength of the government’s case relied mostly on the credibility that the Court would accord the assertion that the confession had been made, and before finding that it had in fact been made, the Court required a witness come forward, describe the confession and its circumstances under oath and subject to the penalty of perjury, and then withstand cross-examination, the engine that makes our adversarial process the superb, truth-finding mechanism that it is. When the Court presented the government with the opportunity of a continuance for the sole purpose of presenting live witness testimony, testimony that might successfully address the credibility issue, the duty AUSA immediately accepted. The matter was then put over until May 27, 2008.

When the detention hearing reconvened on May 27 for the purpose of hearing the government’s live testimony, a different Assistant U.S. Attorney appeared and advised the Court

that, contrary to the first AUSA's projection on May 23, the government would not present live testimony in support of its motion to detain but instead wished to present a further proffer. The Court denied this request, ruling that the detention hearing was to have concluded on May 23 and that it was continued only for the sole and specific purpose of allowing the government time to round up the witnesses who could supply the live testimony the Court found necessary. This Court did not grant a continuance to simply allow the government to improve their proffer; the defendant was held in custody pursuant to an Order of Temporary Detention over the long Memorial Day weekend solely to permit the government to bring in a live witness. Had the AUSA advised the Court on May 23 that the government's presentation after the long weekend would simply consist of an additional proffer, then the Court would not have granted the continuance that the government requested and instead would have ruled on the motion to detain then and there. The Court is troubled by the manner in which the government has proceeded here.¹

On May 27, with the record continuing to lack live testimony on the critical issue before the Court, and with the Court therefore unable to determine the credibility of the assertion that the defendant had confessed to the possession of a firearm and a significant quantity of drugs, the Court found that the case against the defendant lacked weight. In determining whether to release a defendant, the Bail Reform Act commands the Court to "take into account the available information concerning . . . the weight of the evidence against the person." 18 U.S.C. § 3142(g)(2). In this case, the Court concluded on the record then before it that detention was not warranted. Stringent supervision conditions were established, and the defendant was ordered released. The government

¹ In this matter, the Court does not fault the duty AUSA who appeared on May 23. The government's decision not to present live testimony on May 27 appears to have been made elsewhere in the hierarchy of the U.S. Attorney's Office.

immediately announced its intention to appeal and asked the Court to stay its release order until review could occur, and the Court granted the stay.

On appeal, the government urged Chief Judge Legg to reverse the undersigned, but he declined to do so and instead, in a written opinion, remanded the matter for a further detention hearing at which the government was to present live testimony. *See* Paper No. 17. After an apparent misunderstanding by the government at what had transpired in the appellate proceeding, Chief Judge Legg in an additional order highlighted a significant inaccuracy in a government post-proceeding pleading and, after correcting the government, he reiterated that he had “remanded the matter to provide the government with the opportunity to complete the record by producing witnesses as directed by Judge Bredar.” Paper No. 20.

On May 30, 2008, the matter came on before the undersigned for the further proceeding the Chief Judge ordered. This time the government complied with the letter of Chief Judge Legg’s directive and did present the testimony of a live witness, Detective Delford Jimmerson of the Baltimore City Police Department. The additional hearing could not be completed on May 30, however, because the government was unable to comply with its obligations to produce the witness’s previous statements at the conclusion of his direct testimony, pursuant to Rule 46(j), Federal Rules of Criminal Procedure.² This difficulty necessitated a further postponement until June 3, 2008, when the *Jencks* material was provided. Cross-examination then occurred and the hearing was concluded.

Incredibly, after this series of events during which the deficiency in the government’s case was highlighted on numerous occasions, the government nevertheless failed to call a witness who

² After the proceedings on May 30, the defendant was released on the conditions previously set, the Court declining to further stay the release order.

was present when the defendant allegedly confessed. In calling only Detective Jimmerson to testify, the government had complied with the letter but not the spirit of Chief Judge Legg's order. After these many hours of proceedings, the Court at the end of the final hearing was still left without a means of assessing the credibility of the assertion that the defendant had blurted a detailed confession shortly after the traffic stop. The government's sole live witness, Detective Jimmerson, was not present when the confession allegedly occurred and, apparently, had no involvement in the investigation of the case until approximately three months after the relevant street confrontation. His testimony was of no more value to the Court than the inadequate proffer of the prosecutor on May 23. Further, during the earlier proffer and during Detective Jimmerson's testimony, it emerged that other detectives (including Evans, Johnson, Clark and possibly Moore) were supposedly all present to hear the alleged confession, and the only reason offered by the government for failing to call one of these eyewitnesses ("ear witnesses"?) to testify was an apparent "office policy" against presenting the testimony of direct, non-hearsay evidence at detention hearings, even when the witness is a police officer.

The Court is left in the same position that it was in at the conclusion of the proffer presented by the Assistant U.S. Attorney on May 23. It is unable to assess the credibility of the police officers who claim that they heard the defendant make a surprising, detailed confession that he was in constructive possession of a firearm at a residence some distance away. The government has proffered and Detective Jimmerson has testified to other evidence, such as the fact that the weapon that the defendant is alleged to have possessed was found in a residence at an address that appears on his driver's license, that inside this residence there was a piece of mail of unknown date addressed to the defendant, and that in the defendant's pocket was found a key to this residence.

However, it is undisputed that at least two other persons were actually living in the residence when the police found the gun there, and that after the weapon was seized the State of Maryland charged these other two residents with its possession, along with the defendant, suggesting that the authorities themselves are uncertain as to whom the gun belonged. The defendant acknowledges that he once lived at the residence but claims that he moved out some time ago. Further, in the alleged confession, the defendant supposedly said that the weapon and drugs would be found in a closet in the rear bedroom; in fact, they were not found in the rear bedroom but instead in a closet in the master bedroom apparently occupied by Ms. Hunter, one of the current residents who was also charged with possessing the gun.

There may well be a government witness or witnesses whose testimony would credibly establish that the defendant blurted this unusual confession, and such credible evidence that the defendant constructively possessed a firearm might lead the Court to a different ruling on the motion to detain. But no such witness has appeared, and no such witness has given testimony under oath and withstood cross-examination. There is a simple failure of proof. Further, considering the multiple opportunities the government has been given to rectify this situation by presenting an appropriate witness, and their failure to do so, the Court is left to wonder whether there is some defect in the observations and potential testimony of the eyewitness police officers causing the government to be reluctant to call them. This circumstance now further undercuts the government's position.

At least until the credibility of the assertion that the defendant confessed can be assessed, the government has failed to present weighty evidence in support of a motion to detain. For this reason, and because the defendant although released is subject to stringent conditions including electronic

home monitoring and a twenty-four-hour-per-day, seven-day-per-week curfew, the Court is satisfied that under the Bail Reform Act its earlier release order³ remains appropriate. The government's renewed motion to detain the defendant is DENIED.

Dated this 16th day of June, 2008.

BY THE COURT:

/s/

James K. Bredar
United States Magistrate Judge

³ At the conclusion of the hearing on June 3, 2008, and upon reflection that the defendant's employment involved traveling through the city as a sanitation worker, the Court concluded that its earlier condition granting the defendant release from home detention to work each day should be modified, and the defendant is now locked down on home detention twenty-four hours per day, seven days per week, with tightly limited exceptions.