

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: Vanroy Benjamin,)	
)	
United States of America and)	Crim. No. 2002-125
Government of the Virgin Islands,)	
)	
Plaintiffs,)	ORDER TO SHOW CAUSE
)	
v.)	
)	
George Osborne and)	
Jay Watson,)	
)	
Defendants.)	
_____)	
_____)	
United States of America,)	
)	
Plaintiff,)	Mag. No. 2003-023
)	
v.)	
)	
Vanroy Wendall Benjamin, Jr.,)	
)	
Defendant.)	
_____)	

TO: AUSA St. Clair Theodore
Jeffrey B.C. Moorhead, Esq.
U.S. Marshals Service
U.S. Probation and Pretrial Services

ORDER GRANTING UNITED STATES'S MOTION FOR DETENTION

Section 3142(f)(1) authorizes the Court on motion of the United States to hold a hearing to determine whether any condition or combination of conditions will reasonably assure the

defendant's appearance and the safety of any other person and the community in a case that involves a crime of violence. Further, 18 U.S.C. 3142(f)(2) allows such hearing in a case that involves:

- A. A serious risk that such person will flee; or
- B. A serious risk that such person will obstruct justice, or threaten, injure, or intimidate or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The United States moved for defendant's detention under both (f)(1) and (f)(2) above. The defendant is charged

1. in Mag. No. 2003-023 with corruptly threatening, obstruction and impeding the due administration of justice in *United States of America and Government of the Virgin Islands v. George Osborne and Jay Watson*, Crim. No. 2002-125, in violation of 18 U.S.C. § 1503; and
2. with criminal contempt of court in violation of 18 U.S.C. § 401.

At a hearing on September 4, 2003, AUSA St. Clair Theodore represented the United States and Amelia B. Joseph, Esquire (Attorney Jeffrey B.C. Moorhead has since been substituted), represented the defendant. The United States called FBI Special Agent Dennis M. Kinney, Jr., who testified that on August 28, 2003, the defendant, Vanroy Benjamin, while seated in the public gallery of the courtroom made a slashing motion across his throat directed at one of the jurors empaneled to hear the case of *United States of America v. George Osborne and Jay Watson* (Crim

No. 2002-125). In his affidavit supporting the motion for an order to show cause why the defendant should not be held in contempt of court for his actions, Agent Kinney recited that George Osborne, one of the persons on trial, reported through his counsel that he saw a spectator make a threatening gesture to the witness or the jury. The agent further recounted that defendant Benjamin admitted that he made the gesture to juror No. 6 with whom he claimed he had a personal relationship, and that the defendant had been in the courthouse conducting a security survey for ADT Security Systems. Juror No. 6 recognized the defendant as an employee of ADT who had installed an alarm at her business but did not see the gesture. Agent Kinney stated that juror No. 10 did see the defendant make the throat-cutting gesture and was very frightened by it. The agent related that a mistrial was declared because of the effect the gesture had on the juror. The trial of Osborne and Watson has since been moved from the St. Croix to the St. Thomas vicinage and the jury for the re-trial is scheduled to be selected on Wednesday, September 17, 2003.

Agent Kinney also testified that he found a handwritten note in the defendant's pocket stating "where is the other two guys?" and "look how he keep." He stated that Mr. Benjamin was convicted of a drug offense in 1993 in the state of Pennsylvania.

He arrested the defendant on the evening of August 28 at 8:40 p.m. The defendant was advised of his rights the next day and the United States moved for detention and to continue the detention hearing for three days.¹

At the end of the FBI agent's evidence, the defendant presented his aunt, Keturah Richards, as a proposed third party custodian. Ms. Richards indicated her willingness to make sure defendant complied with all release restrictions and to report any violations. Clearly, full and adequate supervision would be difficult, because both she and her husband have full-time jobs. The Court notes the odd coincidence that Ms. Richards had appeared for jury selection as one of the jury venire persons for the same trial of Osborne and Watson (Crim No. 2002-125) during which the defendant made his throat-slashing gesture.

Defense counsel also called Benjamin's supervisor at ADT Security Systems ["ADT"], Curtis A. Lynch, as a witness. On cross examination, Mr. Lynch acknowledged that ADT has a contract for security at the District Court and the United States

¹ Contrary to the assertion of Attorney Moorhead in his petition to the Court of Appeals, I held the detention hearing on the third day after the United States moved for detention and defendant was advised of his rights on Friday, August 29, 2003. The weekend days and the Labor Day holiday were excluded and Thursday, September 4, 2003 is thus the third consecutive business day following August 29. See 18 U.S.C. § 3142(f)(2)("[A] continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday).").

Attorney's office and also does home alarm systems for federal agents and federal prosecutors in this district, some of which his employee, Mr. Benjamin, more than likely installed. Other than attempting to control the defendant's work schedule, Mr. Lynch could not assure the Court that Mr. Benjamin would not have access to the federal facilities or agent's homes or prosecutor's homes or anything that could potentially be a threat to anyone in the criminal justice system. In answer to my questions, Mr. Lynch testified that the local ADT is separately owned but affiliated with ADT in the United States and participates in the national contract that ADT has to provide security for the federal courts. Mr. Lynch has been with ADT here since it first started and he took the defendant's application for work some four years ago. He acknowledged that the application required Mr. Benjamin to state whether he had ever been arrested or convicted of a crime and Mr. Lynch testified that the defendant more than likely put "no" as an answer.

The Pretrial Services Report, which both counsel relied on, assessed the defendant as a risk for non-appearance because of his family ties to the British Virgin Islands and his travel to Tortola, BVI, in April 2002 and the island of Antigua sometime in 1999. Pretrial Services further found that the defendant's

criminal conviction as well as the nature of the charges in this case "speaks to his danger to the community."

Section 3142(e) authorizes the court to detain a defendant unless the court finds that there exists a "condition or combination of conditions [that] will reasonably assure the appearance of the persons as required and the safety of any other person and the community." Section 3142(g) enumerates the factors I am to consider, and I discuss each factor individually below. The Third Circuit Court of Appeals has emphasized that the factors are to be viewed together to provide an overall analysis of whether or not the defendant should be detained. See *United States v. Delker*, 757 F.2d 1390, 1399 (3d Cir 1985).² Accordingly, I review the following factors to determine whether, when viewed as a whole, there is "clear and convincing evidence" that no condition or combination of conditions will reasonably assure the safety of others and the community, as well as the integrity of the administration of justice.

² The Court of Appeals noted that "[t]he legislative history [of the Bail Reform Act of 1984] posits that the characteristics that will support pretrial detention may vary considerably in each case, and thus Congress 'has chosen to leave the resolution of this question [what kinds of information are a sufficient basis for denial of release] to the sound discretion of the courts acting on a case-by-case basis.'" *Delker*, 757 F.2d at 1399 (quoting S.Rep. No. 225, 98th Cong., 1st Sess. at 18-19 (1983)). I make such a case-by-case analysis by considering the factors outlined in § 3142(g).

1. Whether the Offense Is a Crime of Violence³

I find that Mag. No. 2003-023 clearly involves a crime of violence within the meaning of section 3142(f)(1)(A). The defendant is charged with threatening a juror by making a gesture to that juror as if he were cutting her throat. See 18 U.S.C. § 1503 (a) ("Whoever . . . by threats . . . endeavors to influence, intimidate, or impede any . . . petit juror, . . . or endeavors to influence, obstruct, or impede, the due administration of justice" A "crime of violence" is defined by 18 U.S.C. § 3156(a)(4)(A) for purpose of section 3141-3150 to mean "an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another. . . ." The defendant is thus clearly charged with a crime of violence.

2. The Weight of the Evidence

The defendant has admitted to making the threatening throat-cutting gesture directed at a juror during a trial in open court in full view of the rest of the jurors and the defendants. Moreover, a juror did in fact feel threatened and justice was in fact obstructed as evidenced by the resulting mistrial. Because

³ The United States makes no claim that it is entitled to the rebuttal presumption in favor of detention under 18 U.S.C. § 3142(e) & (f).

this is not merely a case of improper contact with a juror, but instead a case of successful juror intimidation through the threat of bodily harm, such conduct warrants pretrial detention.⁴

3. Defendant's History and Characteristics, Including the Person's Character, Physical and Mental Condition, Family Ties, Length of Residence in the Community, Employment, Community Ties, Criminal History

Although the defendant was gainfully employed at the time of the offense and has ties to the community, he also has an earlier felony drug conviction. Additional information bearing on his character and trustworthiness to appear and comply with court orders comes from the records of Crim. No. 125, of which I take judicial notice.⁵ On the present state of the evidence, I cannot accept the defendant's explanation that he was merely making what is universally considered a threatening gesture to a female juror with whom he was having a relationship. The female juror's

⁴ *Cf. United States v. Simon*, 760 F. Supp. 495, 497 (D.V.I. 1990). In *Simon*, this Court found that pretrial detention was not warranted under 18 U.S.C. § 3142 in part because the defendant "made no threats or threatening gestures" and because the government offered no evidence that the defendant was attempting to intimidate a juror that he contacted. *Id.* at 497. In contrast, defendant Benjamin has admitted to making the threatening gesture and the clear and convincing weight of the evidence persuades me that the defendant was attempting to influence the jury by threatening bodily harm.

⁵ Attorney Moorhead has also moved that I must recuse myself from handling this case because I presided over the trial in which the defendant made his threatening gesture and that he intends to call me as a witness. I did not see the gesture and all of the information I have is in the record in Crim. No. 2002-125 that is equally available to all parties. Accordingly, there is no basis for me to recuse myself and the motion is denied. Depending on the schedule of Chief Judge Finch, however, this case may well be transferred to his docket.

denial that there is any such relationship between her and the defendant only reinforces the inherent implausibility of Benjamin's story. The Pretrial Services Report provides little if any information about the defendant's ties to the community or length of time he has resided here. The defendant claimed that he has been residing at a home owned by his father for eighteen years and that he has siblings in Tortola, BVI, St. Thomas, and St. Croix. Pretrial Services was unable to verify this information, however, because his counsel asked that his family members not be contacted.

4. The Nature and Seriousness of the Danger to Any Person or the Community That Would Be Posed by the Defendant's Release

Also in the record of which I take judicial notice is the initial information relayed to the Court by Mr. Osborne's trial counsel that the defendant not only directed the threatening gesture toward the jury, but also that Benjamin immediately followed up the throat-cutting motion by pointing toward the defense table. This, together with the handwritten note in the defendant's pocket stating "where is the other two guys?" and "look how he keep" gives me great concern that the threatening gesture could well have been intended to affect the outcome of the trial itself. It could have been a direction to the jurors

that they should convict the defendants. Alternatively, the throat-cutting motion could just as well have been intended to threaten the jurors themselves with bodily harm if they convicted the defendants. While moving the trial of George Osborne and Jay Watson from St. Croix to St. Thomas may alleviate somewhat the danger to any of the jury pool on St. Croix, it cannot remove the very real concern for the safety of the jurors on St. Thomas or that the defendant's threatening actions were indeed directed at those defendants. Furthermore, the defendant's employment at ADT Security Systems potentially gives him access to the homes of FBI agents and prosecutors, and his supervisor could not assure the Court that the defendant could be prevented from using his knowledge to access those facilities and homes.

CONCLUSION

I may order detention if a crime of violence as enumerated in 18 U.S.C. § 3142(f)(1) is involved, if there is a serious risk that the defendant will attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror as provided in section 3142(f)(2)(B), or if there is a serious risk that the defendant will not appear when required by the court as enumerated in section 3142(f)(2)(A). Inasmuch as the case clearly

involves a crime of violence and, after full consideration of all the facts, I find the evidence to be clear and convincing that the defendant poses a danger to the safety of other persons, the community, and the administration of justice, I need not assess how serious the risk is that he will flee. I further find the evidence to be clear and convincing that there are no conditions or combination of conditions which would ensure the safety and integrity of the judicial process as it relates to Crim. No. 2002-125 until the trial of Messrs. Watson and Osborne has been completed. Once the trial of these two gentlemen has concluded, there may well be conditions or a combination of conditions that would ensure both the safety of the community and the integrity administration of justice. The risk of defendant appearing for court proceedings and his own trial can also be assessed at that time.

Accordingly, it is hereby;

ORDERED as follows:

1. That the United States's motion to detain the defendant pursuant to 18 U.S.C. §3142(f) be and the same is hereby **GRANTED**;
2. That the defendant be committed to the custody of the Attorney General for confinement in a corrections

facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal or having any connection with the witnesses in *United States of America v. George Osborne and Jay Watson*, Crim. No. 2002-125;

3. That the Defendant be afforded reasonable opportunity for private consultation with counsel;
4. That on order of a court of the United States or on request of an attorney for the United States, the person in charge of the corrections facility in which the defendant is confined shall deliver defendant to the United States Marshal for the purpose of appearance in connection with a court proceeding;
5. That this matter may be reopened by the defendant at a later date pursuant to 18 U.S.C. § 3142(f) after the trial of *United States of America v. George Osborne and Jay Watson* (Crim. No. 2002-125) has been concluded or if new evidence develops.

Dated: September 12, 2003

ENTER:

_____/s/_____
THOMAS K. MOORE
DISTRICT JUDGE

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ATTEST:
Wilfredo Morales
Clerk of Court

By: _____
Deputy Clerk

CC: The Hon. Raymond L. Finch, Chief Judge
The Hon. Jeffrey L. Resnick, Magistrate Judge
The Hon. Geoffrey W. Barnard, Magistrate Judge
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