

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-3033

September Term, 2019

1:19-cr-00018-ABJ-1

Filed On: July 10, 2020

United States of America,

Appellee

v.

Roger Jason Stone, Jr.,

Appellant

BEFORE: Tatel, Griffith, and Millett, Circuit Judges

ORDER

Upon consideration of the emergency motion to extend the July 14, 2020 surrender date, and to expedite, or for an administrative stay, the response thereto, and the reply, it is

ORDERED that the motion be denied.

On November 15, 2019, Roger Stone was convicted of one count of obstruction of a proceeding in violation of 18 U.S.C. § 1505, one count of witness tampering in violation of 18 U.S.C. § 1512(b)(1), and five counts of false statements in violation of 18 U.S.C. § 1001(a)(2).

The district court sentenced Stone on February 20, 2020 to 40 months' imprisonment on the obstruction count, with concurrent sentences of 12 and 18 months' imprisonment for the false statement and witness tampering counts. The court released Stone pending execution of his sentence. See 18 U.S.C. § 3143(a). The court ordered him to surrender to the Bureau of Prisons when notified, which would not be sooner than fourteen days after the court ruled on his then-pending motion for a new trial.

The district court denied Stone's motion for a new trial on April 16, 2020. That made him subject to a surrender date as early as April 30, 2020. Citing health concerns in light of the COVID-19 pandemic, Stone asked the Bureau of Prisons to set a surrender date in June. The Bureau of Prisons agreed and directed Stone to surrender on June 30, 2020, which gave him 61 additional days on release beyond the minimum the district court had originally set.

Stone timely filed a notice of appeal of his conviction, and his appeal remains pending.

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On June 23, 2020, just one week before he was scheduled to report to prison, Stone filed a motion in the district court seeking an extension of his surrender date from June 30 to September 3, 2020. His motion cited his continuing health concerns in light of the COVID-19 pandemic. The district court granted the motion in part, giving him another fourteen days, until July 14, 2020, to surrender. That added up to a total of 75 days that Stone's reporting date was extended beyond the earliest date he could have been directed to report.

Stone has now filed an emergency motion seeking reversal of the district court's release order. See 18 U.S.C. § 3145(c); FED. R. APP. P. 9(b). The sole basis on which he seeks relief is the "exceptional reasons" provision of 18 U.S.C. § 3145(c). See Emergency Motion of Roger Stone at 10.

As relevant here, Section 3145(c) states: "A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c).

Because Stone has failed to show, as a matter of law, that he is eligible for release under Section 3145(c), the motion must be denied. To be eligible for release under Section 3145(c), Stone bears the burden of proving three things.

First, Stone must demonstrate that he is "subject to detention pursuant to section 3143(a)(2) or (b)(2)" of Title 18. 18 U.S.C. § 3145(c). Those two provisions, in turn, apply to someone convicted of an offense under 18 U.S.C. § 3142(f)(1)(A), (B), or (C). Those offenses are (A) a crime of violence, sex trafficking of children, or certain terrorism offenses, (B) an offense for which the maximum sentence is life imprisonment or death, and (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed by the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 *et seq.*, or chapter 705 of Title 46, which governs maritime drug offenses.

Stone's conviction plainly was not for offenses involving the sex trafficking of children, terrorism, or controlled substances. Neither was he subject to a sentence of life imprisonment or the death penalty. Nor does Stone contend that his conviction for witness tampering, 18 U.S.C. § 1512(b)(1), constitutes a crime of violence within the meaning of 18 U.S.C. § 3142(f)(1)(A), and we are aware of no relevant case law suggesting that it does. In fact, Stone's motion papers do not address the threshold issue of establishing a qualifying

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conviction at all. As a result, he fails to demonstrate his eligibility for relief under Section 3145(c)'s "exceptional reasons" provision.

Second, Section 3145(c) also required Stone to show that he "meets the conditions of release set forth in section 3143(a)(1) or (b)(1)[.]" 18 U.S.C. § 3145(c). He has not done so.

Because Stone is "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the relevant conditions of release are enumerated in 18 U.S.C. § 3143(b)(1). That provision requires Stone's detention pending appeal unless he demonstrates:

(A) by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Id.

The parties agree that Stone is neither a flight risk nor a threat to public safety. And seeing no reason to conclude otherwise, we will assume that his appeal was not filed for the purpose of delay.

But that gets Stone only halfway there. Neither in his motion to the district court nor here has Stone attempted to show that his appeal raises the type of "substantial question" that would be "likely" to result in the relevant form of relief on appeal. 18 U.S.C. § 3143(b)(1)(B). He has not even identified what issues he might raise on appeal. As a result, he is doubly ineligible for release under Section 3145(c) as a matter of law. *Cf. United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (denying release pending appeal under 18 U.S.C. § 3143(b) where the movants failed to "raise a substantial question likely to result in reversal of all counts for which [they] received prison terms") (internal quotation marks omitted).

Third, Stone bore the burden of "clearly show[ing] that there are exceptional reasons why [his] detention would not be appropriate." 18 U.S.C. § 3145(c). That showing has not been clearly made either. The Bureau of Prisons and Justice Department both support the

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district court's decision extending Stone's reporting date by only fourteen days. See Gov't's Response to Appellant's Emergency Motion Appealing the Partial Denial of His Request to Postpone Self-Surrender Date at 1–2, 5 n.2; *United States v. Stone*, Crim. Action No. 19-0018, 2020 WL 3629985, at *2 (D.D.C. June 26, 2020) (“On or about June 10, 2020, government counsel informed undersigned counsel that he had been in contact with [the Bureau of Prisons] and had been informed that BOP was no longer extending surrender dates based on COVID-19 and that, therefore, BOP would not be changing Stone's June 30, 2020 surrender date.”) (quoting Def.'s Resp. to Court's Order dated June 25, 2020, at 2).

On appeal, Stone proffers for the first time new facts regarding what he describes as positive tests for COVID-19 at the prison facility to which he has been assigned. But Stone never afforded the district court the opportunity to consider that new evidence and make any relevant fact findings in a motion for reconsideration. See generally *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014) (“We are a court of review, not of first view[.]”). Stone's argument that Circuit Rule 27(f) left him without enough time to present his new evidence to the district court first is mistaken. That rule requires either that an emergency motion be filed at least seven days before the date of requested action “or counsel must explain why it was not so filed.” D.C. CIR. R. 27(f) (emphasis added).

In sum, Stone is not legally eligible for further postponement of his reporting date under 18 U.S.C. § 3145(c), which is the only basis on which he seeks relief from this court. We therefore deny his motion. Our decision is without prejudice to his ability to present any new factual evidence that he believes might warrant reconsideration to the district court for it to evaluate in the first instance.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Amy Yacisin

Deputy Clerk