FILED
United States Court of Appeals
Tenth Circuit

September 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERNESTO CASADO-HERNANDEZ,

Defendant - Appellant.

No. 21-2091
(D.C. No. 2:21-MJ-00805-SMV-1)
(D. N.M.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GABINO CAMACHO-ERIVES,

Defendant - Appellant.

No. 21-2092
(D.C. No. 2:21-MJ-00699-GBW-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Ernesto Casado-Hernandez and Gabino Camacho-Erives appeal the district court's denial of pre-trial release in their respective criminal cases. In each case, the court found a risk the defendant would fail to appear in part because immigration officials might deport him after he served any term of incarceration resulting from his criminal case. The defendants argue that by doing so, the court improperly imported analysis of immigration law into its detention review under the Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3151. We procedurally consolidated their appeals to consider this argument, which we reject. We likewise reject Camacho-Erives's remaining arguments and therefore affirm the district court's detention order in No. 21-2092. But because the district court failed to make a finding required to support Casado-Hernandez's detention, we remand No. 21-2091 for further consideration.

I. Background

A. *United States v. Casado-Hernandez*, No. 21-2091

Casado-Hernandez is a Mexican citizen. He spent his childhood in Texas, where two of his siblings still live. As a teenager he committed aggravated robbery and failed to stop and render aid to an injured or deceased person. A Texas court sentenced him to eight years in jail in the United States for those crimes. Upon his release, the government deported him to Mexico in 2001, where he lived for 20 years.

While in Mexico, he fathered three children who are all still minors living in Mexico. One of them lives with Casado-Hernandez's mother and two of them live

with their mother. Casado-Hernandez also maintained steady employment in Mexico with the same company for 14 years at the time of his arrest in this case.

In 2007, a federal court in Texas issued a warrant for Casado-Hernandez's arrest on charges related to an alien smuggling conspiracy in violation of 8 U.S.C. § 1324. The warrant remains active.

At some point he re-connected with a U.S.-citizen he had married in 1995, but later divorced. The two share an adult U.S. citizen daughter. They re-married on June 5, 2021.

Three days later Border Patrol agents arrested Casado-Hernandez about one mile west of the Santa Teresa Port of Entry. The government contends Casado-Hernandez's entry into the United States violated 8 U.S.C. § 1326(a)(1), which prohibits certain previously deported aliens from re-entering the United States. If convicted, Casado-Hernandez faces up to 20 years' imprisonment for this offense. *See* 8 U.S.C. § 1326(b)(2).

A magistrate judge ordered Casado-Hernandez detained pending trial. The district court held a hearing to review his detention. At the hearing, Casado-Hernandez offered new evidence that had not been presented to the magistrate judge. He proffered testimony from his wife, who would have testified that she has known Casado-Hernandez for 25 years, that he lived in the United States legally for over two decades, that she would be willing to post her house deed as collateral for a bond, and that Casado-Hernandez is a father figure to her children.

The district court found:

> [T]he Defendant shall be detained pending trial for the following reasons: the weight of the evidence against the Defendant is significant, the Defendant has significant family and other ties to Mexico, a lack of community and family ties to this district, lacks legal status in the United States, has a pending outstanding arrest warrant, issued in 2007, from the United States District Court for the Western District of Texas, El Paso Division, [and] is subject to removal or deportation after serving any period of incarceration[.] . . . [F]or these reasons, and those further elaborated on the record, . . . the Defendant is a flight risk.

No. 21-2091, Aplt. App. at 55.

B. *United States v. Camacho-Erives*, No. 21-2092

Camacho-Erives is a Mexican citizen. Before the events leading to this case, he was a long-term permanent resident of the United States. He lived in Wichita, Kansas, with seven of his minor children and their mother. He maintained steady employment and earned about $8,000 per month.

During his stay in the United States, Camacho-Erives also committed several crimes. These included felony drug possession, misdemeanor drug possession, and disorderly conduct. The government deported him to Mexico in March 2020, while he was on probation for the felony drug-possession conviction. On May 20, 2020, a warrant was issued for his arrest based on an unspecified probation violation.

Camacho-Erives lived with his mother in Mexico for a while before returning to the United States, where officials apprehended him in December 2020. Immigration officials deported him back to Mexico in January 2021. Then on May 21, 2021, Border Patrol agents arrested Camacho-Erives in Hidalgo County, New Mexico. The government contends Camacho-Erives's entry into the United States

violated 8 U.S.C. § 1326(a)(1). If convicted, Camacho-Erives faces up to 10 years' imprisonment for this offense. *See* 8 U.S.C. § 1326(b)(1).

A magistrate judge ordered Camacho-Erives detained pending trial. The district court held a hearing to review his detention. At the hearing, Camacho-Erives offered new evidence that had not been presented to the magistrate judge. He proffered testimony from his former employer, who would have testified that Camacho-Erives would have a job if released and would have commented on Camacho-Erives's character. And Camacho-Erives proffered testimony from his wife, who would have testified about Camacho-Erives's employment history and family and community ties in the United States.

The district court ordered Camacho-Erives's detention pending trial, finding:

> [T]he weight of the evidence . . . against Defendant is strong. Border Patrol agents encountered Defendant in Hidalgo County, New Mexico. Upon questioning Defendant regarding his citizenship, Defendant freely admitted that he was a citizen of Mexico who was illegally present in the United States. Subsequent records checks confirmed this information and established that Defendant was last deported from the United States on January 15, 2021. Database queries further confirmed that Defendant did not cross into the United States through a lawful Port of Entry.
>
> Defendant's history and characteristics also weigh in favor of detention. Defendant's criminal history includes two convictions for possession of controlled substances and one conviction for disorderly conduct. Defendant allegedly committed the instant offense while on probation for his 2018 conviction for felony possession of a controlled substance and has an outstanding warrant for a probation violation associated with that case.
>
> Furthermore, Defendant has strong ties to Mexico, including family members currently residing in Guerrero, Mexico, two prior deportations, and is subject to deportation if convicted in this case.

> For the foregoing reasons . . . Defendant is a flight risk and . . . no conditions or combination of conditions will reasonably assure Defendant's appearance in court.

No. 21-2092, Aplt. App. at 33–34.

II. Discussion

The Bail Reform Act "establishes a two-step process for detaining an individual before trial." *United States v. Ailon-Ailon*, 875 F.3d 1334, 1336 (10th Cir. 2017) (per curiam). At step one, the court must decide the "threshold" question whether § 3142(f) authorizes detention, *id.* at 1337, such as where the "case . . . involves . . . a serious risk that [the defendant] will flee," 18 U.S.C. § 3142(f)(2)(A).

"If the court determines that there is such a risk, the government must prove at the second step" that no "'condition or combination of conditions' . . . 'will reasonably assure the [defendant's] appearance . . . as required [as well as] the safety of any other person and the community.'" *Ailon-Ailon*, 875 F.3d at 1336 (quoting § 3142(f)). Section 3142(g) sets forth the factors a court must consider in making this step-two determination:

> (1) the nature and circumstances of the offense charged . . .;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including—
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

The government did not contend either Casado-Hernandez or Camacho-Erives represented a danger to the community; instead, it relied solely on the risk they would fail to appear under any conditions. The government bears the burden of proving that no set of conditions can reasonably assure a defendant's appearance by a preponderance of the evidence. *See United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003). If the court so finds, it "shall order the detention of the [defendant] before trial." 18 U.S.C. § 3142(e)(1).

"We apply de novo review to mixed questions of law and fact concerning the detention or release decision, but we accept the district court's findings of historical fact which support that decision unless they are clearly erroneous." *Ailon-Ailon*, 875 F.3d at 1337 (internal quotation marks omitted).

A. The District Court's Consideration of the Defendants' Immigration Status

Both defendants argue the district court erred by considering his immigration status as a factor supporting its detention order. They rely on 18 U.S.C. § 3142(d). That section empowers the district court to order a temporary detention of up to 10 business days to give officials from other agencies time to take the defendant into custody for reasons unrelated to the criminal case, such as deportation. And it states that if other officials do not take the defendant into custody, the defendant "shall be

treated in accordance with the other provisions of this section, *notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings*." *Id.* (emphasis added). The defendants argue the "notwithstanding" clause prohibits courts from considering the possibility of deportation in its detention analysis under the Bail Reform Act. We disagree.

"The clause instructs the court to apply the [Bail Reform Act] as it would to any other criminal defendant, notwithstanding the existence of parallel [immigration] proceedings." *United States v. Barrera-Landa*, 964 F.3d 912, 922 (10th Cir. 2020) (internal quotation marks omitted). And "[t]he Bail Reform Act directs courts to consider a number of factors and make pre-trial detention decisions as to removable aliens on a case-by-case basis." *Ailon-Ailon*, 875 F.3d at 1338 (internal quotation marks omitted). Those factors include "the history and characteristics of the person." 18 U.S.C. § 3142(g)(3).

In No. 21-2091, the district court applied these factors and found "multiple reasons" beyond Casado-Hernandez's immigration status that supported its finding, "including the strength of the [current criminal] case [against Casado-Hernandez] and the prior felony; not making himself available; the outstanding warrant; lack of family ties[;] and significant ties in Mexico just across the border." No. 21-2091, Aplt. App. at 75. In No. 21-2092, the district court noted Camacho-Erives "has history that overshadows his [immigration] status." No. 21-2092, Aplt. App. at 47. And it ordered pre-trial detention based in part on "the weight of the evidence [against Camacho-Erives in his criminal case] being very strong," his "prior criminal

history" and "participation in criminal activity while on probation, parole, or supervision," his "history of alcohol or substance abuse," and his "significant family or other ties outside the United States." *Id.* at 46.

While the district court found reasons for detaining each defendant beyond his immigration status, in each case the court relied in part on the fact that the defendant "is subject to deportation if convicted." *Id.* at 34; *see also* No. 21-2091, Aplt. App. at 55 (noting Casado-Hernandez "is subject to removal or deportation after serving any period of incarceration"). We see no error in the court's approach.

The district court was taking into account a relevant "characteristic[] of" the defendants § 3142(g)(3)(A) commands the court to consider. It was not applying immigration law or relying on the existence of immigration proceedings to conclude they must be detained. Because the defendants face a likelihood of deportation after serving whatever sentence may be imposed in their criminal cases, they have an enhanced incentive to return voluntarily to Mexico now and evade prosecution. The magistrate judge in Camacho-Erives's case explained the point: "If convicted, he would be subject to deportation, which . . . frankly creates a situation where it would not seem particularly reasonable for him to abide by conditions and appear in court. Because if he gets convicted, he simply goes back to Mexico, which he could do right now." No. 21-2092, Aplt. App. at 56. Section 3142(d)'s "notwithstanding" clause does not compel district courts to turn a blind eye to such realities.

The defendants do not cite any cases to the contrary. They do cite *Ailon-Ailon*, a case where this court held "that, in the context of § 3142(f)(2), the risk that a

defendant will 'flee' does not include the risk that ICE will involuntarily remove the defendant" before trial. 875 F.3d at 1339. But *Ailon-Ailon* did not hold that a district court may not consider, in the context of § 3142(e), the risk an alien will voluntarily flee to their country of origin to evade a prosecution that would likely be followed by deportation. We hold the district court did not err by taking this risk into account.

B. The District Court's Findings Regarding Conditions that Might Mitigate the Risk of Nonappearance

Camacho-Erives argues the district court erred in his case because it "made no effort to explore whether there were conditions that might mitigate the risk of nonappearance." No. 21-2092, Aplt. Mem. Br. at 17. "'In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community,' the judicial officer must consider" the factors described in § 3142(g). *Cisneros*, 328 F.3d at 617 (brackets omitted) (quoting § 3142(g)). The district court considered evidence bearing on each relevant factor[1] to support its finding that "no conditions or combination of conditions will reasonably assure [Camacho-Erives's] appearance in court." No. 21-2092, Aplt. App. at 33–34. And Camacho-Erives does not point to any evidence undermining the district court's finding or any condition of release the

[1] Section 3142(g)(4) relates to "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." The district court recited this factor but did not evaluate any evidence regarding it. Because the district court based its decision solely on the absence of conditions of release that could reasonably assure Camacho-Erives's appearance and not on his danger to the community, the district court did not err by omitting such an evaluation.

court could have imposed to reasonably assure his appearance. We therefore affirm the district court's finding on this score with respect to Camacho-Erives.

The situation is different for Casado-Hernandez, who makes a similar argument. The district court made the step-one determination that Casado-Hernandez "is a flight risk," No. 21-2091, Aplt. App. at 55, thereby satisfying the § 3142(f)(2)(A) predicate for detention. But the district court stopped there and did not engage the step-two question of whether there were any conditions of release that could nonetheless reasonably assure his appearance as required.

Casado-Hernandez presented evidence his wife would post the deed to her house as collateral for an appearance bond. Other than to acknowledge that he proffered this evidence, the district court did not discuss it. And the district court did not make any finding whatsoever about whether this proposed condition of release or any other condition or combination of conditions might reasonably assure Casado-Hernandez's appearance in court. "Under the Bail Reform Act, a defendant may be detained pending trial *only if* a judicial officer finds 'that no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required . . . .'" *Cisneros*, 328 F.3d at 616 (quoting 18 U.S.C. § 3142(e) (emphasis added)). The district court erred by failing to consider or decide the step-two conditions-of-release question.

C. The District Court's Partial Reliance on Camacho-Erives's Outstanding Warrant

Camacho-Erives further argues the district court erred by considering the outstanding warrant for his arrest as a factor supporting its detention order. He asserts the warrant resulted from a probation violation for non-appearance. And he argues that because his involuntary deportation caused this probation violation, the resulting arrest warrant should not be held against him in the detention analysis under *Ailon-Ailon*'s holding that "the risk that a defendant will 'flee' does not include the risk that ICE will involuntarily remove the defendant." 875 F.3d at 1339.

We need not consider whether *Ailon-Ailon* applies as Camacho-Erives suggests for two reasons. First, the record does not establish that authorities issued the arrest warrant due to Camacho-Erives's non-appearance. While evidence in the record confirms the "warrant was issued after the defendant was deported to Mexico," No. 21-2092, Aplt. App. at 17, it does not prove authorities issued the warrant for non-appearance. It instead only establishes that they issued the warrant for an unspecified "Probation Violation." *Id.* But more fundamentally, Camacho-Erives did not argue to the district court that it could not consider the outstanding warrant under *Ailon-Ailon*. And he did not seek plain error review of the issue in this court. We therefore deem this argument waived. *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem

the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise.").

III. Conclusion

We remand No. 21-2091 for further consideration in light of this order and judgment.

We affirm the district court's detention order in No. 21-2092.

We grant the government's motion to file an oversized consolidated answer brief.

Entered for the Court
Per Curiam