

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GUSTAVO ALONSO
RAMOS-CABALLERO,

Defendant - Appellant.

No. 21-2098
(D.C. No. 2:21-MJ-00856-SMV-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HARTZ, KELLY, and CARSON**, Circuit Judges.

Gustavo Alonso Ramos-Caballero is charged with reentry after a removal from this country based on a conviction for the commission of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). He appeals from the district court’s order affirming the magistrate judge’s pretrial detention order. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3145(c), we affirm.

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

I. Background

In July 2011, Mr. Ramos-Caballero pled guilty to felony second-degree assault in state court. He was sentenced to 13 months' imprisonment and 18 months of probation. He was removed from the United States to Mexico in November 2014.

In June 2021, United States Border Patrol Agents encountered Mr. Ramos-Caballero in Grant County, New Mexico. He had not crossed the border from Mexico through a lawful port of entry, and there is no evidence that he had applied for or received permission from the proper authorities to be or remain in this country. When the agents asked him about his citizenship, he admitted he was a Mexican citizen illegally present in the United States.

Mr. Ramos-Caballero was arrested and charged with illegal reentry of a removed alien. Because the prior removal was based on a conviction for the commission of an aggravated felony, he faces a maximum of 20 years' imprisonment. *See* 8 U.S.C. § 1326(b)(2). The government moved for his pretrial detention on the basis that he posed a serious flight risk. *See* 18 U.S.C. § 3142(f)(2)(A). Probation and Pretrial Services prepared a Pretrial Services Report recommending that he be detained.

A magistrate judge conducted a detention hearing. After he heard argument from the parties and considered the information presented at the hearing, he agreed with the government that, by a preponderance of the evidence, Mr. Ramos-Caballero should be detained as a flight risk. The magistrate judge's order, which takes the form of a checklist, concludes that the government proved "[b]y a preponderance of

the evidence that no condition or combinations of conditions of release will reasonably assure [Mr. Ramos-Caballero's] appearance as required." Aplt. App. at 41. The magistrate judge specified his reasons for detention by checking boxes indicating that the "[w]eight of evidence against the defendant is strong," he would be "[s]ubject to [a] lengthy period of incarceration if convicted," he had a "[l]ack of significant community or family ties to this district," and had "[p]rior violations of probation, parole, or supervised release." *Id.* at 41-42.

Mr. Ramos-Caballero appealed to the district court, which held a hearing and heard argument from the parties. No additional evidence or testimony was presented. After considering the statutory factors in 18 U.S.C. § 3142(g), the district court concluded that given "the weight of evidence, ties to Mexico, and [Mr. Ramos-Caballero's] history of willfully violating orders of the court and the authority of the United States, . . . a preponderance of the evidence shows that [he] is a flight risk and no condition or combination of conditions will reasonably assure his appearance as required." Aplt. App. at 97-98. The district court therefore ordered that he would remain under pretrial detention.

II. Analysis

The Bail Reform Act sets out the framework for evaluating whether pretrial detention is appropriate. *See* 18 U.S.C. § 3142. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). But a defendant must be detained pending trial if a judicial officer finds that "no condition or combination of

conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(e)(1). A judicial officer may make such a finding only after holding a hearing under § 3142(f). *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003). The government bears the burden of proving risk of flight by a preponderance of the evidence. *Id.*

Under § 3142(g), the judicial officer must consider four factors as part of the evaluation: “(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”; and (4) “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” 18 U.S.C. § 3142(g).

A district court conducts a de novo review of the magistrate judge’s order. *Cisneros*, 328 F.3d at 616 n.1.

Mr. Ramos-Caballero opposes the pretrial detention order on two grounds: (1) in assessing the prescribed factors under 18 U.S.C. § 3142(g), the district court applied improper weight to the weight of the evidence; and (2) the district court improperly required him to demonstrate a reasonable fear and sincere intention to seek relief under the Convention Against Torture.

We review the district court’s determinations concerning the construction and applicability of the Act de novo. *See Cisneros*, 328 F.3d at 613. We also review its ultimate pretrial detention decision de novo because it presents mixed questions of law and fact. *See id.* However, we review the underlying findings of fact for clear error. *See id.*

The district court concluded, in assessing the weight-of-the-evidence factor, that the facts weighed heavily against Mr. Ramos-Caballero. He challenges the district court's evaluation of this factor on two grounds. First, he contends that by failing to consider the weight of the evidence as the *least* important factor the district court in effect created a categorical denial of bail for illegal entry defendants. Def.'s Mem. Br. at 16-18.¹ We agree that Mr. Ramos-Caballero cannot be detained solely because he is a removable alien charged with illegal reentry. *See United States v. Ailon-Ailon*, 875 F.3d 1334, 1338 (10th Cir. 2017) (“[A]lthough Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list.”). But he fails to show that is what happened here. The district court did not simply make a categorical determination that

¹ Mr. Ramos-Caballero finds support for his argument in comments the magistrate judge made at an initial hearing in this case. The magistrate judge stated that he had “released one reentry defendant in 10 years on the bench.” Aplt. App. at 58. That person, the magistrate judge explained, was removed as an infant, returned when he was four years old, eventually married a United States citizen with whom he had several children, had “started a business” that “employed over 150 people” and “had a net worth of several million dollars.” *Id.* at 58-59. The magistrate judge stated that he had “certainly considered releasing a reentry defendant under circumstances kind of like that but it would have to be real close to something like that.” *Id.* at 59. These comments do not provide a basis for reversal. The district court reviewed the magistrate judge's order de novo and made an individualized determination subject to our review. *See Cisneros*, 328 F.3d at 613, 616 & n.1. Mr. Ramos-Caballero further states that the magistrate judge's “pattern of denying bail to illegal reentry defendants . . . is affirmed by [his counsel's] internal office statistics, which show that since 2018 [that] office has taken 1,000 illegal reentry cases, and *zero* have been released pretrial.” Def.'s Mem. Br. at 14. But he provides no evidentiary support for this contention, and of course “attorneys' arguments [are] not evidence,” *United States v. Rios-Morales*, 878 F.3d 978, 989 (10th Cir. 2017). Accordingly, we do not consider this argument.

Mr. Ramos-Caballero was ineligible for release because of the evidence against him on the illegal reentry charge. Instead, it considered the relevant factors and made an individualized determination that he was a flight risk. In assessing his history and characteristics the district court found that his family and community ties to the United States were a neutral factor at best; his reluctance to disclose the whereabouts of his partner/wife and child suggested that they resided in Mexico, significantly increasing the risk that he would flee to join them; his prior conviction was for a violent offense; and he had previously been removed and reentered the United States on several occasions.

In addition, Mr. Ramos-Caballero fails to persuade us that the district court was required as a categorical matter to assign the least weight in its analysis to the strength of the evidence against him. The plain language of § 3146(g) does not suggest that one factor matters more or less than another. And even where, as here, the district court assigns great weight to the evidence against an illegal reentry defendant, it must also consider the other relevant factors in reaching its decision—factors that require an individualized determination that may favor one defendant more than another. Nor is the evidence concerning illegal reentry necessarily of the same strength in every reentry case, as Mr. Ramos-Caballero’s argument seems to suggest. We therefore reject the argument that the district court erred in assigning great weight to, and by failing to assign the least weight to, the strength of the evidence against Mr. Ramos-Caballero.

Second, Mr. Ramos-Caballero contends the district court should only have considered the weight of the evidence to determine how it bore on the issue of flight risk. *See* Def.’s Mem. Br. at 17. But the district court tied this factor to flight risk. Notably, it viewed the evidence of Mr. Ramos-Caballero’s history of removals and reentries, including the facts underlying his current reentry offense, to reach its conclusion that he was “incapable of complying with the orders of the Court or the authority of the United States.” *Aplt. App.* at 97.

Turning to his other issue, Mr. Ramos-Caballero argued to the district court that he had returned to the United States with the intention of seeking relief under the Convention Against Torture (CAT). The district court rejected this argument because he failed to proffer evidence to establish a reasonable fear that he would be tortured in Mexico; he failed to show a sincere intention to seek relief under the CAT because he “did not enter the United States through a lawful port of entry where he could claim such [relief]”; and he failed to show that if released he would not flee to another location besides the place of the alleged threat in Mexico. *Aplt. App.* at 97.

Mr. Ramos-Caballero argues this analysis was erroneous because he had no statutory burden to demonstrate his entitlement to immigration relief, or even a viable immigration claim, to obtain pretrial release.² But the district court did not impose

² He also argues the district court erred in concluding his CAT claim was not viable because he did not enter this country through a lawful port of entry. *See* Def.’s Mem. Br. at 19-20 (citing 8 U.S.C. § 1158(a)(1) as permitting an application for asylum “whether or not” a noncitizen entered “at a designated port of arrival”). Even if this provision of the asylum statute applies to a CAT claim, the fact that he

such a requirement. Instead, it considered whether Mr. Ramos-Caballero's argument—that he was less likely to flee due to his sincere intention of invoking CAT protection due to his fear of being tortured in Mexico—was a viable argument in favor of pretrial release, and concluded it was not.

III. Conclusion

We affirm the district court's detention order.

Entered for the Court
Per Curiam

failed to enter this country through a lawful port of entry was relevant to his professed intention to avail himself of the protections afforded by a CAT claim.