

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,)	
)	
Plaintiff,)	CR-17-00585-PHX-GMS(DKD)
)	
vs.)	Phoenix, Arizona
)	April 27, 2017
Thomas Mario Costanzo,)	10:34 a.m.
)	
Defendant.)	
)	

BEFORE: THE HONORABLE MICHELLE H. BURNS, MAGISTRATE JUDGE

TRANSCRIPT OF PROCEEDINGS

DETENTION HEARING/ARRAIGNMENT

A P P E A R A N C E S

For the Government:

MATTHEW A. BINFORD, ESQ.
CAROLINA ESCALANTE, ESQ.
 U.S. Attorney's Office (Phoenix)
 40 N. Central, Ste. 1800
 Phoenix, AZ 85004-4408
 602.514.7500/(fax) 602.514.7650

For the Defendant:

MARIA WEIDNER, ESQ.
 Federal Public Defender (Phoenix)
 805 W. Adams St., Ste. 201
 Phoenix, AZ 85007
 602.382.2700/(fax) 602.382.2800

Transcriptionist:

Elaine Cropper
 Sandra Day O'Connor U.S. Courthouse
 401 West Washington Street, SPC 35
 Phoenix, Arizona 85003-2150
 602.322.7245/(fax) 602.322.7253
 Proceedings Recorded by Electronic Sound Recording
 Transcript Produced by Transcriptionist

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P R O C E E D I N G S

(Court was called to order by the courtroom deputy.)

(Defendant present and in custody.)

(Proceeding begin at 10:34 a.m.)

THE COURT: Good morning. You may be seated.

01:09:44

COURTROOM DEPUTY: On the record in CR17-585, *USA v. Thomas Mario Costanzo*, before the Court for a detention hearing and arraignment.

MR. BINFORD: Good morning, Your Honor. Matthew Binford and Carolina Escalante on behalf of the United States.

01:10:04

THE COURT: Good morning.

MS. WEIDNER: Good morning, Your Honor. Maria Weidner for Mr. Costanzo. He is present and in custody.

Your Honor, would you like to us approach the lectern to proceed with the arraignment first or . . .

01:10:20

THE COURT: We'll do that in just a moment. Before we get started, good morning, Ms. Weidner.

Good morning, Mr. Costanzo.

THE DEFENDANT: Hello.

THE COURT: It has been brought to my attention that at the last hearing that some members in the audience attempted to take photographs. That's not permitted. It wouldn't be allowed in this courtroom and if anyone is observed doing that, and I don't know if anyone is -- here is among the perpetrators but I will just warn those that are present that the deputy

01:10:32

01:10:49

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1 marshals here will confiscate that device and that includes 01:10:54
2 recording of anything that is said here as well. It's not
3 permitted.

4 So with that, Ms. Weidner, why don't we go ahead and
5 proceed with the arraignment? And you can remain seated since 01:11:09
6 we're going to go into the hearing after that. So this is the
7 time set for Mr. Acosta's arraignment.

8 Ms. Weidner, have you received a copy of the
9 indictment?

10 MS. WEIDNER: Yes, Your Honor, I did and I reviewed 01:11:22
11 it with Mr. Costanzo before this hearing. His name is spelled
12 correctly in the caption and he waives a formal reading and
13 asking the Court to enter a plea of not guilty to the single
14 charge of possession of ammunition by a convicted felon and a
15 denial of the forfeiture allegation. 01:11:42

16 THE COURT: And I believe I've heard you pronounce
17 his name Constanza. It looks like it's spelled Costanzo. I
18 would like to say it correctly. How is it pronounced?

19 MS. WEIDNER: Costanzo? If I said Constanza, it was
20 an accident. It's Costanzo. 01:11:59

21 THE COURT: Okay. Thank you for that clarification.

22 So Mr. Costanzo, we will enter a plea of not guilty
23 on your behalf as well as a denial of the forfeiture
24 allegation. Your trial is set for Tuesday, June 6, 2017. That
25 will be at 9 a.m. before Judge Humetewa. 01:12:12

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1 If you are released, you are ordered to appear there
2 in courtroom 605 of this building or a warrant will issue for
3 your arrest. It's also ordered that a 21-day deadline be set
4 for the filing of pretrial motions.

01:12:16

5 Now, as to the issue of detention, the Court has
6 reviewed the Pretrial Services report as well as the addendum.
7 Are the parties ready to proceed?

01:12:30

8 MR. BINFORD: Yes, Your Honor.

9 MS. WEIDNER: Yes, Your Honor.

10 THE COURT: All right. For the Government?

01:12:42

11 MR. BINFORD: Thank you, Your Honor. We agree with
12 the recommendation of Pretrial Services. We believe that
13 there's no condition or combination of conditions that will
14 reasonably assure the appearance of Mr. Costanzo at trial. We
15 also believe that he's a danger to the community. He has a
16 lengthy criminal history that goes back 35 years and he has
17 convictions as recent as 2015.

01:12:54

18 His prior arrests and convictions include disorderly
19 conduct, auto theft, felony fleeing, another disorderly
20 conduct, resisting an officer, resisting arrest, failure to
21 appear, failure to appear for disorderly conduct, fleeing an
22 officer, fleeing police, driving on a suspended license,
23 speeding, aggravated assault of police, felony flight, failure
24 to stop, suspended license, speeding, resisting arrest,
25 contempt of Court, battery, possession or use of marijuana,

01:13:10

01:13:29

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1 possession or use of drug paraphernalia, failure to obey a 01:13:33
2 police officer, failure to show a driver's license or
3 identification, carrying a concealed weapon without a permit,
4 possessing a weapon by a prohibited person -- which is
5 essentially the same offense here -- theft, driving while 01:13:54
6 license was suspended, possession of a false or canceled
7 driver's license, failure to show a driver's license, failure
8 to appear in the second degree, driving on a license suspended,
9 disorderly conduct, resisting arrest, aggravated DUI,
10 possession or use of marijuana, possession or use of drug 01:14:11
11 paraphernalia, another resisting arrest, driving with a
12 suspended license, failing to show license or identification,
13 obstructing a criminal investigation or prosecution,
14 obstruction, failure to stop or obey police, failure to obey a
15 police officer, excessive speeding, possession or use of 01:14:28
16 marijuana, possession or use of drug paraphernalia, failure to
17 appear, failure to show license or identification, driving
18 while license suspended, possession or use of marijuana,
19 possession or use prescription drugs, possession or use of a
20 dangerous drug, possession or use of drug paraphernalia, and 01:14:53
21 obstruction refusing true name.

22 That history over 35 years shows an attempt to hide
23 his identity, the use of an alias, the failure to provide
24 identification to law enforcement or governmental authorities
25 on multiple occasions. 01:15:10

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1 He has failures to appear when ordered to do so. The 01:15:12
2 first one was in 1983. The most recent one was in 2014. He
3 has flight from law enforcement and violence against law
4 enforcement. I believe that his 35-year history with the law
5 enforcement system shows that he is a danger to the community 01:15:25
6 based on his violent encounters with law enforcement and
7 others, his possession of weapons when he is not supposed to
8 have them. And I believe that his history of failing to appear
9 and failing to follow court orders shows that he is a risk of
10 nonappearance and will not show up at trial. 01:15:41

11 So the Government's position is that there is no
12 condition or combination of conditions that would assure his
13 appearance or protect the community.

14 THE COURT: Thank you, Mr. Binford.

15 Ms. Weidner? 01:15:54

16 MS. WEIDNER: Your Honor, the Government basically
17 read the Pretrial Services report and recounted every charge
18 that Mr. Costanzo has ever been faced with. However, for
19 example, with the weapons charge that they raise, which was in
20 2006, no complaint was filed. With the ag DUI, that was 01:16:11
21 dismissed. The --

22 THE COURT: And just to make it clear, Ms. Weidner,
23 the Court will not consider any allegations that are set forth
24 there in the Pretrial Services report that have not resulted in
25 a conviction. 01:16:30

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1 MS. WEIDNER: And Your Honor, I would just submit to 01:16:32
2 the Court that many of the offenses stated by the Government
3 were, in fact, dismissed or no complaint was filed or a
4 resolution was not even recorded.

5 Mr. Costanzo's recent history, with his most recent 01:16:49
6 arrest being three years ago in 2014, had to do with marijuana
7 possession and use and -- actually in both occasions. In those
8 situations, Your Honor, had he had a medical marijuana card,
9 this probably would have not been a state offense at all and in
10 that regard, I think that -- 01:17:16

11 THE COURT: Are you saying he had a medical marijuana
12 card?

13 MS. WEIDNER: No. If he had had. And as a result,
14 I'm saying that the seriousness of that offense, then, is
15 different than if it had been possession of a more serious drug 01:17:30
16 that is illegal under any circumstances like cocaine or
17 methamphetamine or heroin.

18 Also, Your Honor, Mr. Costanzo has ties to Arizona
19 that go back more than 30 years. He first moved here in 1978.
20 His mother lives here in Arizona, his community is here in 01:17:47
21 Arizona, and he has lived here in the Valley for at least the
22 last decade. He's self-employed. If that is that
23 insufficient, he is happy to seek employment that is otherwise
24 verifiable. And the danger that is alleged by the Government
25 must relate to the federal case. And possession by a felon of 01:18:14

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1 ammunition is not a crime of violence and it is not, in and of
2 itself, a dangerous offense. There is not a witness to this
3 offense who the Government has stated they are concerned that
4 Mr. Costanzo would harm or otherwise provided how precisely he
5 is a danger to the community. And I don't think that the
6 Government has met the standard of clear and convincing
7 evidence to show danger.

8 As to flight, again, Mr. Acosta's significant ties to
9 the Valley, not just the fact that his mother is here but he
10 has an adult child here with whom he has weekly contact. All
11 of those things weigh in his favor. And I think it's also
12 relevant given his recent cases, that just in an abundance of
13 caution, I asked for him to be prescreened for Crossroads.

14 When Crossroads spoke to him, they said this is not a
15 man who is in need of treatment for alcohol or drug abuse. And
16 so that factor, which is sometimes a concern in determining
17 whether or not someone is a flight risk, I think is greatly
18 minimized by the --

19 THE COURT: I found that fairly curious given his
20 several convictions here for drug -- well, marijuana but drug
21 convictions.

22 MS. WEIDNER: He provided a negative test and that
23 was -- you know, I'm not a substance abuse professional but
24 that was the conclusion of the professionals who did his
25 prescreening and we rely on them to determine what individuals

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1 are either amenable to treatment or in need of treatment and -- 01:19:54
2 well, actually both. And they determined that he was not in
3 need of treatment.

4 So based on all of that, Your Honor, I think that
5 there are conditions that this court could craft and I spoke 01:20:11
6 with Mr. Costanzo about this before this hearing. He is happy
7 to abide by whatever conditions the Court would impose. He is
8 happy not to obtain new travel documents, turn over travel
9 documents, or, like I said, obtain employment outside of his
10 current self-employment. 01:20:33

11 Based on all of this, Your Honor, I think that the
12 Government hasn't met its burden to show that he is a flight
13 risk and a danger to the community.

14 With respect to the failures to appear, in his past,
15 some of them are indeed quite remote from the 20th century 01:20:52
16 instead of the 21st century and he had a failure to appear that
17 was cited by the Government where no complaint was filed and
18 one that was dismissed.

19 So, again, given the -- given all of this, Your
20 Honor, I think that there are conditions this Court could craft 01:21:20
21 that Mr. Costanzo would abide by and that his release is proper
22 under the Bail Reform Act.

23 THE COURT: Thank you, Ms. Weidner.

24 Mr. Binford, what evidence do you have of danger here
25 really? 01:21:35

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1 MR. BINFORD: Well, there's a prior conviction for 01:21:36
2 battery. There are the -- I know the Court said that it's not
3 going to consider anything that did not result in a conviction.
4 I would like to make sure that -- I would like to point out to
5 the Court to *Santos-Flores* where the Ninth Circuit specifically 01:21:51
6 said that a prior charge of failure to appear not resulting in
7 an actual conviction supports detention and also in
8 *Santos-Flores* the Court said that a number of prior arrests
9 beyond failure to appear was past conduct that was proper to
10 consider. 01:22:10

11 So I think there is Ninth Circuit law supporting
12 detention based on the number of prior arrests, failure to
13 appear charges that did not result in a conviction, and also
14 the use or possession of fraudulent identity documents, some of
15 which he did receive convictions for. There was the battery 01:22:23
16 conviction which was in 2004.

17 THE COURT: You said a fraudulent identification
18 conviction. I don't recall seeing that.

19 MR. BINFORD: It's on page five of the original
20 Pretrial Services report. It's from April 30 of 2008. It was 01:22:43
21 Count 2. It says possess, canceled or false driver's license.
22 And disposition is guilty.

23 MS. WEIDNER: Your Honor?

24 THE COURT: I'm not --

25 MR. BINFORD: It's the second entry or the third 01:22:58

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1 entry on page five of document two, the original Pretrial
2 Services report.

3 THE COURT: Oh, I'm sorry. I'm looking at the
4 addendum. Give me one moment.

5 All right. Thank you.

6 MS. WEIDNER: Your Honor, I would point out that it
7 says possess, canceled or false driver's license. And I
8 believe that there is a very strong possibility, if not almost
9 a certainty on my part, that this was a canceled driver's
10 license that we're talking about, not a false one.

11 THE COURT: How do you know that?

12 MS. WEIDNER: Because I asked my client.

13 THE COURT: All right.

14 MR. BINFORD: And if we're looking at the actual
15 convictions and not considering any arrests, there is a
16 conviction for aggravated assault of police, battery, failure
17 to obey a police officer, the failure to show driver's license,
18 which is what the possession of false or canceled driver's
19 license. The resisting arrest from 2014 resulted in a
20 conviction.

21 The marijuana possession or use, two of those
22 separately in 2014. Failure to show driver's license again in
23 2014. So there are convictions that this Court can look to
24 show that there is a substantial risk that he does not show up
25 at trial.

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1 In addition, it appears that he was not honest with
2 Pretrial Services during the interview process. He says that
3 he is not a citizen of the United States. However, his
4 immigration, his ICE status shows that he is a citizen of the
5 United States. In addition to that, he reported his monthly
6 expenses as \$845 yet he reports his monthly income as \$400. So
7 there are inconsistencies with his statements to Pretrial
8 Services which is representing the Court and investigating this
9 information.

01:24:23

01:24:38

10 So we would ask the Court to find that there is no
11 condition or combination of conditions that would reasonably
12 assure his appearance at trial and to find that he is a danger
13 based on his prior violent criminal convictions along with the
14 fact that he is charged with being a convicted felon in
15 possession of ammunition which is a dangerous offense.

01:25:02

01:25:17

16 THE COURT: All right. Thank you.

17 Ms. Weidner, you've already had an opportunity to
18 speak on your client's behalf but you did -- it did appear that
19 there was something else that you wanted to say. I'll
20 certainly give you that opportunity.

01:25:34

21 MS. WEIDNER: Yes, Your Honor. I do not believe the
22 fact -- if it bears out that Mr. Costanzo did not have a
23 driver's license and was stopped and cited for not possessing a
24 driver's license and not -- and, therefore, not presenting one
25 is an indication that he is a flight risk. I also would submit

01:25:48

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1 again to Your Honor that --

01:25:53

2 THE COURT: Well, let me just say that this matter
3 has been set for detention hearing I think for a few days and
4 certainly if there was any disagreement with respect to what
5 was reported there, there should have been opportunity to
6 obtain whatever documents would be necessary to clarify what is
7 in this report.

01:26:07

8 But go ahead.

9 MS. WEIDNER: Yes, Your Honor. I understand. And I
10 guess what I'm taking issue with is the Government's reliance
11 on dismissed charges, unfiled charges, and charges for which no
12 resolution is provided. And I think that's very prejudicial to
13 Mr. Costanzo in this hearing. And it also flies in the face of
14 everything that we believe as far as the idea that someone,
15 just because they are charged with something, is not
16 automatically guilty of that thing.

01:26:18

01:26:51

17 And I think his -- the Government's repeated laundry
18 list of infractions regardless of whether they resulted in
19 conviction, has -- to some degree, I have concern possibly
20 tainted this hearing. And based on all of that, Your Honor, I
21 would again ask for the Court to look only at what we know
22 about this case, what we know about Mr. Costanzo's ties, what
23 we know about this offense that he is charged with and to
24 release him back into the community on whatever conditions this
25 Court finds appropriate.

01:27:18

01:27:38

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1 THE COURT: Mr. Binford? 01:27:41

2 MR. BINFORD: I just want to respond to the
3 allegation that I did anything to taint this hearing.
4 Everything I've told this Court today is from the Pretrial
5 Services report that was prepared by the Pretrial Services 01:27:49
6 officer that was provided to the Court, to defense counsel. I
7 said nothing outside of that record, and I take offense to any
8 statement that I have tainted these proceedings.

9 THE COURT: Well, and I understand what you're
10 saying, Mr. Binford. I didn't think that that was what 01:28:01
11 Ms. Weidner was suggesting. And to the extent that there's
12 something that has been tainted by this criminal history report
13 that indicates a lot of arrests that don't result in
14 convictions, that happens all the time. That information is
15 always provided to the Court. I don't find that it taints the 01:28:20
16 Court's ruling in these matters in any way.

17 As I stated, I won't in my ruling consider any
18 arrests that did not result in convictions. I do find the
19 Government has established, by a preponderance of the evidence,
20 that Mr. Costanzo, you do pose a flight risk. There's enough 01:28:38
21 here for the Court I think quite easily to make that finding.

22 The second part of the analysis, though, is to
23 determine whether or not there are any conditions or
24 combination of conditions that would assure your appearance.

25 And even discounting all of the -- it's quite a 01:28:54

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1 multitude of arrests here that didn't result in a conviction. 01:29:00
2 Even discounting all of that, the convictions themselves I
3 think reflect a pattern over a long period of time of
4 Mr. Costanzo not complying or not following the rules, not
5 complying with the law. And so I don't find that there are any 01:29:18
6 conditions or combination of conditions under those
7 circumstances that would assure his appearance.

8 And if the Government is correct that *Santos-Flores*
9 does permit consideration of arrests that don't result in
10 convictions, for instance, the several arrests for failure to 01:29:36
11 appear and other offenses, certainly the multitude of those
12 would support the Court's ruling. But the ruling that the
13 Court has made with respect to detention is based solely upon
14 quite a number of convictions and the nature of those
15 convictions that the Court has taken into consideration that 01:29:59
16 are noted in the Pretrial Services report, and for other
17 reasons identified in the Pretrial Services report the Court
18 will order the defendant detained pending trial.

19 Anything else, counsel?

20 MR. BINFORD: No, Your Honor, thank you. 01:30:23

21 THE COURT: All right. Thank you.

22 (Proceedings concluded at 10:55 a.m.)
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C E R T I F I C A T E

I, ELAINE M. CROPPER, court-approved transcriber, certify that the foregoing is a correct transcript, to the best of my skill and ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

DATED at Phoenix, Arizona, this 23rd day of January, 2018.

s/Elaine M. Cropper

Elaine M. Cropper