

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE HON. ANN L. AIKEN, JUDGE PRESIDING

UNITED STATES OF AMERICA,)	
)	
Government,)	
)	
v.)	No. 06-60070
)	
KEVIN TUBBS,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

WEDNESDAY, JANUARY 17, 2007

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PROCEEDINGS

WEDNESDAY, JANUARY 17, 2007

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3 THE CLERK: This is the time set for Criminal
4 06-60070, United States of America versus Kevin Tubbs,
5 hearing on defendant's motion for release from custody.

6 THE COURT: Good afternoon. Sorry to be a little
7 slow, but as you can see, none of us are immune to the ice.

8 So I would be happy to hear anything you wish to
9 add to the paperwork that you filed, Mr. Friedman, and I
10 don't have a response in writing from the government, so I'm
11 assuming you are going to give it orally in court this
12 afternoon.

13 MR. ENGDALL: Correct, Your Honor.

14 THE COURT: All right? Thank you.

15 Go ahead.

16 MR. FRIEDMAN: Thank you, Your Honor. I will make
17 my initial remarks brief. I think the motion pretty well
18 provides the basis in law for us to proceed at this time.
19 We are asking the court to consider Mr. Tubbs' release at
20 this time prior to his sentencing.

21 We would submit, Your Honor, that Mr. Tubbs is
22 neither a danger to this community nor a flight risk and is
23 in fact prepared to, through his family and friends, to post
24 substantial bond.

25 I have here today with us in court his fiance,

13:51:44

1 Michelle Page, who has been visiting him at Sheridan just
2 about every week, sometimes twice a week, since he's been in
3 custody, which is now since December. Also here coming down
4 from Portland are his close friends, Matt Rossell and Leslie
5 Hemstreet, right here.

6 Your Honor, Mr. Tubbs has been cooperating with
7 the government pretty much from the get-go in this case.
8 There is no doubt that his cooperation with the government
9 probably in substantial part led to some of the other
10 charges as well as pleas that have been brought forth in
11 this case, in these various cases. And we would submit that
12 that is a substantial reason why the court should consider
13 his release. I think ultimately the question before this
14 court is whether releasing Mr. Tubbs would constitute a risk
15 to this community or that there's a chance that he would
16 flee.

17 Your Honor, what we presented in the package to
18 the court, and we have no doubt that if the court were to --
19 if the court considers this and directs pretrial services to
20 consider this, you will be able to find that essentially his
21 family and his friends have put everything they have in
22 front of the court in terms of financial resources to enable
23 him to be placed on bond, and we are talking about a very
24 short period of time between now and April 17th, which is
25 the sentencing date. If he were to flee, they would lose

13:53:32

1 everything. And Your Honor, Mr. Tubbs is not a man who is
2 going to cause that kind of harm to his family or his
3 friends.

4 The fact of the matter is, Your Honor, Mr. Tubbs
5 has never had a desire to flee. He's been prepared to face
6 the consequences of these charges.

7 I think the court has some idea, a little bit
8 about his history, and I don't know that I'm going to go
9 into a whole lot of detail at this point unless the court
10 has questions. But the fact is that the incidents that he
11 has pled guilty to all occurred over five years ago and some
12 as long as ten years ago. He has stayed out of the activist
13 community.

14 And I know full well that counsel is going to
15 present some information that would suggest that he still
16 plays a role, and perhaps I will have an opportunity to
17 respond to that when counsel is done.

18 But the fact is that Mr. Tubbs had distanced
19 himself from all these matters. Obviously it's impossible
20 to completely put these matters behind him. He wouldn't be
21 where he is today if he could have. But at least in terms
22 of his mind-set, in terms of his desire to be involved to
23 any extent with the activist community, that was something
24 that was part of his past. It is part of his past and,
25 again, long before the government arrested him back on

13:54:56

1 December 5th, 2005.

2 Your Honor, the fact is that Mr. Tubbs is a very,
3 very decent individual, and he's prepared, and he knows --
4 he knows that he's facing a substantial amount of time in
5 this case, and that's something that this court is going to
6 have to determine later on. He also knows full well that if
7 the court were to grant his release and he were to flee,
8 that any deal he has with the government, any deal
9 whatsoever is gone. And that's very different than where we
10 were when we had a release hearing almost a year ago, Your
11 Honor. The fact of the matter is at that point there were
12 no deals. Everything was sort of open. Mr. Tubbs was
13 cooperating at that time, but he didn't know what the stakes
14 were.

15 And he's cooperated. He's made a deal with the
16 government. He doesn't want to blow that. He doesn't want
17 to do anything that's going to cause this court to have any
18 second thoughts about him.

19 So Your Honor, we are asking this court to place
20 him on release subject to any restrictions. And, again,
21 he's perhaps the only individual -- there are a number of
22 others that this court has had before it and has granted
23 release to who are not even in the state and at this point
24 not even on any form of electronic monitoring.

25 Mr. Tubbs will be in this community. If he's

13:56:20

1 released, he'll go and live with his fiancée in her home in
2 Springfield. He will abide by any terms with regard to
3 electronic surveillance or any reporting terms. He is not a
4 risk of flight, and he certainly is not a danger to this
5 community. I will leave it at that at this moment and then
6 ask to be able to respond to Mr. Engdall.

7 THE COURT: Mr. Engdall.

8 MR. ENGDALL: Thank you, Your Honor.
9 Counsel.

10 I should begin my argument or my position
11 statement to the court by saying that the arguments
12 presented in the defendant's memorandum to this court are
13 identical to the arguments submitted to Judge Coffin in
14 February. The single difference between now and in February
15 between what the defendant's proposing is that he has
16 pleaded guilty to the charges, some ten arsons and
17 conspiracy to commit arson which involved approximately more
18 than \$11 million of damage. He's pleaded guilty to that.
19 The burden for release now is greater on the defendant than
20 it was at the time we were before Judge Coffin.

21 The test for release for this defendant pursuant
22 to 18 United States Code § 3145(c) is that a defendant who
23 has been found guilty of a crime of violence for which the
24 maximum term of imprisonment is ten years or more, which is
25 what, of course, the defendant is involved with, there is a

13:57:51

1 presumption of detention unless the court finds that there
2 is, and it's clearly shown, that there are exceptional
3 reasons why such a person's detention would not be
4 appropriate. The burden is on the defendant now, not on the
5 government, for detention.

6 The case of United States v. Jose Ramon Garcia
7 cited in the defendant's memorandum, it's a Ninth Circuit
8 opinion, talks about exceptional reasons, gives some
9 examples of exceptional reasons, and I emphasize exceptional
10 reasons why a person that has already been found guilty
11 guilty of a crime should be released pending sentencing.

12 And the government understands from the holding in
13 Garcia that there are no limits placed upon the
14 considerations of this court when it examines a totality of
15 the factors, factors that may apply with regard to
16 determining what an exceptional reason may be.

17 But the court in Garcia does talk about truly
18 unusual factors or combination of factors that would render
19 it unreasonable to incarcerate the defendant or keep him
20 incarcerated. Unreasonable detention. There is no such
21 situation or circumstance in this particular case.

22 And the court goes on in Garcia to advise that
23 when considering these factors, you must bear in mind the
24 congressional policy that offenders who have committed
25 crimes of violence should not, except in exceptional cases,

13:59:35 1 be released pending appeal.

2 The examples of exceptional circumstances provided
3 to us by the Garcia case are not numerous. But the examples
4 given are -- one example would be if the conduct of the
5 defendant was an aberration. It was a reaction to an
6 unusually provocative circumstance. And I'm assuming they
7 are suggesting crimes of passion, such as manslaughter,
8 homicide, a person coming upon a spouse and a lover,
9 committing a crime sort of out of the blue.

10 As far as Mr. Tubbs is concerned, his crimes
11 involve no aberration. His first arson began at the Dutch
12 Girl or Echo Dairy here in Eugene on Christmas Day in 1995.
13 He operated alone in that particular arson. He manufactured
14 the destructive devices, three in number. One failed to
15 ignite. And in the government's exhibit list there is a
16 photo of -- Exhibit No. 10 is a photo of a failed device.
17 Exhibit 9 is simply a photo of the dairy truck involved in
18 that arson in 1995.

19 So he began his arson career in 1995. Continued
20 that career one year later by being associated with the
21 Oakridge Ranger Station arson. And by the end of a six-year
22 aberration, if you will, he had been involved in 16 arsons
23 and attempted arsons, as well as a number of animal releases
24 and destruction of research facilities in Oregon,
25 Washington, California, Colorado, Wyoming, and has caused

14:01:15

1 over, as I said before, over \$11 million in damage. This is
2 not a blip on the radar screen. This is part of the
3 defendant's character and was part of the defendant's
4 character.

5 Another consideration for exceptional
6 circumstances as directed to us by the Garcia case is to
7 consider the nature of the violent act itself.

8 Was it violent but did it not involve specific
9 intent. All the crimes that involved Mr. Tubbs and all the
10 crimes that he completed involved specific intent. They
11 involved extraordinarily sophisticated means of planning,
12 preparation, execution, and intricate destructive devices.

13 Another exceptional circumstance as suggested by
14 the Garcia court is the length of sentence imposed and the
15 maximum length of the sentence. And they go on to explain
16 that if the sentence imposed upon the defendant -- this is
17 primarily for people that are appealing their sentence -- if
18 it's a short sentence, that might be a proxy for the
19 seriousness of that particular crime. In this case, the
20 defendant is looking at a maximum sentence of over hundreds
21 of years of incarceration, and if he continues and abides by
22 the agreement of the government, a minimum of 14 years
23 incarceration.

24 So that particular exceptional circumstance
25 certainly does not apply to Mr. Tubbs.

14:02:42

1 Another circumstance the Garcia court talks about
2 are circumstances which would render prison unduly harsh for
3 this defendant or any defendant, where the defendant has
4 become seriously ill or possesses certain physical or
5 psychological or other characteristics such as old age or
6 special medical needs. We find none with regard to
7 Mr. Tubbs.

8 The nature of the defendant's arguments on appeal.
9 He's not appealing anything, so that's irrelevant in this
10 particular analysis.

11 Another one is an exceptional unlikelihood that
12 the defendant will flee or constitute a danger to the
13 community. Whether the defendant is wholly incapacitated or
14 might be entirely unable to either -- to act violent or to
15 abscond. This is the exceptional circumstances not only
16 that he will simply be a risk of flight. The exceptional
17 circumstances is he is unable to take flight. Was he
18 injured. The example given was a drug dealer who was shot,
19 critically wounded, and is paralyzed. Those are the
20 exceptional circumstances that the Garcia court is directing
21 us to look at.

22 The last one is was there a presence of an unusual
23 degree of cooperation with the government. And in this
24 case, the government fully agrees that there was cooperation
25 by this defendant with the government. However, was it an

14:04:01

1 unusual degree? What he did was he gave statements to the
2 investigation. That is not unusual. It happens routinely
3 in our work. And he is not required to be an undercover
4 informant, as one of the cooperating witnesses was in this
5 particular case. He simply makes a statement. So I submit
6 to the court those are not unusual. It's not an unusual
7 degree of cooperation when it comes to Mr. Tubbs.

8 Defendant's arguments for extraordinary
9 circumstances and truly unusual factors I submit fail to
10 meet the test. Defendant argues that for the past five
11 years he has not -- he has rejected the philosophy of direct
12 action and has realized that his conduct was both wrong and
13 counterproductive.

14 In preparation for this hearing, I went back
15 through some of the consensual recordings that were made by
16 a cooperating witness and this defendant, and I also went
17 back through some of the 302s from the other cooperating
18 witnesses in the case, and it doesn't bear fruit in support
19 of the defendant's argument for his assertion that he's
20 rejected the philosophy of direct action for the past five
21 years. In fact, it is within the last year before his
22 arrest -- he was arrested, I remind the court, December 7th,
23 2005. And he -- within a year of his arrest, he had had
24 contact with at least eight coconspirators in the case.
25 Ms. Gerlach; Mr. Thurston; Mr. Meyerhoff; Mr. McGowan;

14:05:44

1 Mr. Rodgers, since deceased; Ms. Rubin, who is a fugitive
2 from justice; and Mr. Dibee, who is also a fugitive from
3 justice; and of course, as well as the cooperating informant
4 in this particular case, Mr. Ferguson.

5 Mr. Tubbs has maintained contact with persons in
6 Canada who are willing to assist fugitive Josephine Sunshine
7 Overaker, and I submit this goes to the defendant's ability
8 to flee. He does not need money because he has a support
9 group in Canada.

10 On October 26th, 2004, about a year before his
11 arrest, he advised on a consensual recording that he had
12 gotten word from people in Canada who were willing to assist
13 Josephine Sunshine Overaker with money and a place to stay.
14 Mr. Tubbs made it clear to our cooperating witness that he
15 would serve as the go-between between the people in Canada
16 and anyone that had heard from the fugitive Overaker.

17 He also insisted if anyone heard from Overaker,
18 they should tell her that she can't come back to the United
19 States, but that we have a community in Canada which will
20 provide her a place to live and money.

21 Tubbs -- Mr. Tubbs also wants the court to believe
22 that he has removed himself from the ideology of the
23 movement. On December 10th, 2004, Mr. Tubbs stated in a
24 consensual recording that he feels closer to the members of
25 the movement than his own family, and that he feels that --

14:07:24

1 he feels powerful when he's with his coconspirators.

2 With his ability to flee, Mr. Tubbs advised on
3 November 13th, 2004, that he knew four or five people who
4 have hiked back and forth dozens of times on different
5 trails from the United States to Canada without being
6 contacted by law enforcement officials.

7 He was also provided maps showing the trails into
8 Canada and back into the United States by a friend of
9 coconspirator and fugitive Rebecca Rubin. That was 12
10 months prior to his arrest.

11 Today I went online to see if he still had his
12 support Web site on the Internet. He indeed does. And on
13 that Web site, he maintains that he's nonviolent and that
14 charges are unjust and to send money to his account.

15 And that's Exhibit 8. The court has those
16 exhibits. That shows that -- and we don't know what's in
17 the account, but it certainly shows that he has at least
18 monetary -- he's soliciting monetary support.

19 He has no regrets for what he's done. On
20 December 18th, 2004, within a year of his arrest, he stated
21 that as he gets older, his activities as an arsonist are
22 things that he does not regret; in fact, contrary to what
23 counsel has stated, the arsons make his life all worthwhile.

24 On December -- excuse me -- on December 10th,
25 2004, he talks to the cooperating witness and is excited

14:09:06

1 about 25 arsons that occurred in the State of Maryland and
2 the destruction of an animal release research lab at the
3 University of Iowa. He stated that he had heard of the 25
4 arsons or barbecues, as he called them in those days, in
5 Maryland and believed that it was, expletive deleted, cool.

6 He was also excited and supportive of the
7 destruction that had just occurred at the University of Iowa
8 research lab. He believed that the action was militaristic
9 and, expletive deleted, sharp.

10 So there's a pattern that's developing here, Your
11 Honor, or continuing, I should say, within the year of his
12 ultimate arrest, and that is, contrary to what he is putting
13 forth today, he was fully supportive of the ALF and ELF
14 direct action movement up until the date of his arrest.

15 In his memorandum to the court, he talks about his
16 best friends, Leslie Hemstreet and Matt Rossell, and they
17 live in Portland, and they have put their house up on the
18 block in support of Mr. Tubbs and his release. I should
19 give you some background information on these individuals.

20 In August, on August 28th, 1999, Mr. Tubbs and
21 nine other individuals were involved in an animal release
22 and the destruction of a medical research laboratory in
23 Orange City, California. That laboratory was -- had 46 dogs
24 which had implanted in them pacemakers. They were doing
25 heart -- pacemaker research at that time.

