

PRECEDENTIAL VALUE

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Deborah L. Williams, Federal Public Defender
Editors Richard Monahan, Kevin Schad & Jacob Cairns
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This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at www.fpd-ohs.org.

I. Sentencing Issues

B. Guideline issues

2B1.1 – Fraud loss amount

U.S. v. Donadeo, 17-4295 (12/5/18)

One of several conspirators worked for the school district and devised a scheme to defraud by setting up shell corporations and then billing the district for IT services that were not performed. The defendant was one of the conspirators involved who set up two of the shell corporations and received the proceeds. At sentencing, the district court held the defendant responsible for the entire fraud loss, including shell corporations in which he had no part. Answering an open question in circuit, the Sixth Circuit panel held that six factors are relevant to § 1B1.3 and whether conduct is within the “scope of the jointly undertaken criminal activity of the defendant”: (1) the existence of a single scheme; (2) the similarities in modus operandi; (3) coordination among the schemers; (4) pooling of resources; (5) knowledge of the scheme’s scope; and (6) length and degree of participation in the scheme. **The court found that the case involved a single scheme to defraud the school district, the**

shell corporations all operated exactly the same, the coconspirators coordinated together with regard to avoiding detection, funds from one shell corporation were used to start another, the defendant knew of at least one other shell corporation, and the defendant had an average role in the scheme compared with others. Accordingly, the court ruled that the entire fraud loss was properly attributable to the defendant and the sentence was affirmed.

3C1.1 – Obstruction of justice

U.S. v. Donadeo, 17-4295 (12/5/18)

While being investigated in a fraud scheme, the defendant fled the U.S. and went to Germany and then Spain. When he was ultimately convicted in the U.S., the district court applied an enhancement for obstruction of justice. **On appeal, the court held that flight alone is insufficient for the obstruction enhancement, but instead it must be combined with some other obstructive type of conduct.** The court found that the defendant had committed conduct beyond mere flight because he (1) cut off communications with his family in the U.S., (2) intentionally did not obtain employment or use a credit card in order to hide his location, (3)

cancelled his planned travel back to the U.S., and (4) cut off contact with his attorney in the U.S., who was negotiating his return. Accordingly, the obstruction of justice enhancement was affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

U.S. v. Rockymore, 18-5148 (11/20/18)

The defendant was convicted of being a felon in possession of a firearm and at sentencing the government argued that he was an armed career criminal based, in part, on two prior Tennessee convictions for delivery of cocaine. The district court disagreed and found that the prior offenses did not qualify as “serious drug offenses” under the ACCA. The government appealed. The court held that, under the ACCA, a prior conviction only counts as a serious drug offense if it was punishable by more than 10 years in prison. The court found that, although Tennessee law is somewhat ambiguous, the most reasonable interpretation of the criminal statutes was that the defendant’s maximum potential sentence for the prior drug offenses was 6 years. Further, the court held that to the extent ambiguity existed as to the proper interpretation of the Tennessee sentencing scheme, the rule of lenity required interpreting it in the defendant’s favor. Accordingly, the ACCA was inapplicable and the defendant’s sentence was affirmed.

U.S. v. Stitt, 17-765 (12/10/18)

Supreme Court

The Armed Career Criminal Act does not define the term “burglary.” In 1989, the Supreme Court determined that the proper meaning for burglary must derive from the “generic form” of the crime, which was “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” In Stitt, the Supreme Court grappled with the terms “building” and “structure.” Under Tennessee

law, burglaries could include non-dwellings such as mobile homes, trailers, or tents. The state statute did, however, require that these other structures be “designed or adapted” for overnight accommodations. The Court held that such definitions fell within the generic version of the burglary offense, and thus qualified as prior convictions for the ACCA. The Court noted that “an offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation,” and thus the type of “risk of violence” was present. Accordingly, the Court held that the defendant’s prior conviction for Tennessee burglary was a qualifying offense for the ACCA and his sentence was affirmed.

III. Evidence

A. Article IV – Relevancy

404(b) – Intent

U.S. v. Asher, 17-6251 (12/12/18)

The defendant was a jailor who allegedly participated in a severe beating of an inmate and then lied in reports to cover it up. As a result, he was charged with depriving the inmate of his civil rights and falsifying a report to impede a federal investigation. In the district court, the government sought to introduce a 2 1/2 year old incident where the defendant beat up an inmate and lied to cover it up. The government argued that the evidence proved that the defendant acted purposefully in the charged offense. In response, the defendant offered to stipulate intent if the jury first found at trial that he participated in committing the beating. The district court admitted the prior beating under FRE 404(b), the defendant was convicted, and he appealed. The court held that the prior beating was not properly admitted to show intent because of the highly prejudicial nature of the prior act evidence. The court considered the temporal proximity of the

evidence, the availability of other means of proof, and the nature of the offense itself, and determined that the defendant's intent at the time of the offense was not a compelling enough reason to admit the prior act evidence. In this regard, the court found that the real issue in the case was whether the defendant was the one who committed the assault, not his intent. As such, the court ruled that the "entire issue of intent was subsumed by the conduct." Thus, the court found that the prior act evidence was unnecessary and unduly prejudicial, and vacated the defendant's conviction.

IV. Fourth Amendment

E. Search warrants

Good faith

U.S. v. Ardd, 18-5257 (12/18/18)

The defendant attempted to purchase 250 grams of cocaine from an informant, but was arrested by police. At the time, the defendant was in possession of a firearm. As a result, law enforcement obtained a search warrant for the defendant's residence and found more drugs and another gun. The defendant moved to suppress the evidence seized in during the search of his home, the district court denied the motion, and the defendant appealed. The court held that the search warrant was saved by good faith. The court ruled that only a "minimally sufficient nexus" is required between a defendant's residence and drug trafficking activity in order to survive the good faith standard. The court found that the fact that the defendant was attempting to purchase 250 grams of cocaine, which the court characterized as "thousands of retail hits of cocaine," clearly demonstrated that the defendant was an ongoing drug dealer and established the necessary inference that drugs would be found in the defendant's residence. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

D. Double jeopardy

U.S. v. Dyer, 17-6174 (11/13/18)

In Kokesh v. SEC, the Supreme Court held that a disgorgement of assets as part of an SEC enforcement proceeding was a "penalty" under 28 U.S.C. § 2462. The defendants in Dyer therefore argued that the disgorgement of their assets in a civil suit precluded their later prosecution for fraud and tax evasion based on the Double Jeopardy Clause. Deciding an open question in the Sixth Circuit, the court held that disgorgement of assets by the SEC, while it constitutes a civil "penalty," does not count as a criminal punishment for purposes of Double Jeopardy. Accordingly, the defendants' convictions were affirmed.

VI. Sixth Amendment

D. Right to counsel/Self represent

Ineffective assistance of counsel

Logan v. U.S., 17-1996 (12/13/18)

The defendant was charged with participating in a drug conspiracy in Michigan and was appointed an attorney. The attorney negotiated a plea agreement for the defendant that limited his sentencing exposure to 10 years. The attorney advised the defendant that it was a good plea offer and encouraged him to take it. The defendant signed the plea, but prior to the plea hearing consulted with an attorney hired by his family from California who told the defendant not to take the plea and that he could "beat the case." As a result, the defendant chose to withdraw from the plea agreement. The defendant was subsequently represented by the California attorney and pled guilty without a sentencing cap. The district court imposed a sentence of 35 years imprisonment. The defendant filed a habeas

petition claiming ineffective assistance of counsel, which the district court denied. On appeal, the court first held that the hired California attorney had provided deficient representation. Nonetheless, the court ruled that because the defendant received effective representation from his appointed attorney regarding the plea decisions, the defendant did not have a cognizable ineffective assistance of counsel claim: “Because [appointed counsel] adequately assisted Logan at the plea-bargain stage, Logan received his Sixth Amendment right to effective assistance of counsel, regardless of [the California attorney’s] subsequent, contradictory advice.” Accordingly, the sentence was affirmed.

VIII. Defenses

D. Statute of limitations

U.S. v. Dyer, 17-6174 (11/13/18)

The defendants were prosecuted for fraud and tax evasion based on an investment scheme that lasted over an 8 year period. At sentencing, the defendants argued that 5 year statute of limitations prohibited the district court from considering financial loss that was beyond the 5 year limit. The district court disagreed and imposed sentence based on the full 8 years worth of loss. On appeal, the court held that **conduct may be considered under the relevant conduct provisions of the sentencing guidelines and used to properly calculate the guideline range even if that conduct is outside the applicable statute of limitations period.** Accordingly, the full loss amount for the entire 8 year period was properly attributable to the defendants.

L. Competency/NGRI

Competency – Forced medication

U.S. v. Berry, 17-2168 (12/19/18)

The defendant was charged with conveying false information regarding explosives in violation of 18 USC § 1038(a). He was determined to be incompetent and it was recommended that his restoration would require medication, which the defendant refused to take. After holding a hearing, the district court ordered that the BOP could forcibly medicate the defendant to restore him to competency. On appeal, the court held that forced medication was improper. Applying the factors from the Supreme Court’s decision in Sell v. U.S., the court ruled that the government’s interests in prosecuting the defendant were not sufficiently important to permit forced medication. The court based this determination on the following: (1) the statutory maximum for the offense was only 5 years; (2) the defendant had already served more prison time awaiting trial than would be called for by the sentencing guidelines if convicted; (3) the crime was non-violent, even though it involved a bomb threat; (4) the defendant did not present a risk of harm to himself or others; and (5) there was a high likelihood the defendant would be civilly committed. Accordingly, the district court’s ruling ordering forced medication was reversed.

M. Miscellaneous defenses

Right to bail – Illegal reentrants

U.S. v. Veloz-Alonso, 18-3973 (12/6/18)

The defendant was charged with illegal reentry into the U.S. after deportation. At the plea hearing, the district court found that the defendant qualified for bond under the Bail Reform Act (18 USC § 3142) and released him. Further, the district court held that the bond statute conflicted with the Immigration and Naturalization Act,

which required ICE to detain and deport the defendant because of his prior deportation. Accordingly, the district court enjoined ICE from detaining the defendant due to the court's bond order. The government appealed. Deciding an open question, the court held that **the district court has no authority to enjoin ICE from carrying out its statutory duty to detain an individual who has previously been deported. Thus, even if a district court chooses to release a defendant under the bond statute, ICE may nonetheless detain the defendant pursuant to its statutory obligation.** Accordingly, the district court's ruling was reversed.

XIII. Post-Conviction Remedies

Carter v. Parris, 17-5498 (12.10.18)

The petitioner was convicted of sex offenses in Tennessee state court. The initial evidence against the petitioner was obtained after a search of his car. The petitioner subsequently consented to a search of his home where additional evidence was found. Prior to trial, the petitioner's counsel moved to suppress the evidence against him on the ground that the search of the car had been unconstitutional, but the motion was denied and the ruling was upheld on appeal. In federal habeas corpus proceedings, the petitioner argued that his trial lawyers were ineffective in litigating the motion to suppress, and that they should have raised different arguments. **The Sixth Circuit held that the evidence obtained from the car was admissible under the automobile exception to the warrant requirement in any event, and as a result it would not have made any difference if the trial lawyers had raised different arguments in support of the motion to suppress.** The petitioner's allegation of ineffective assistance of appellate counsel, also based on the Fourth Amendment claim, was similarly rejected.

Snider v. United States, 16-6607 (11.9.18)

The petitioner was convicted of various federal drug and firearm offenses. The petitioner was designated as a career offender under the Sentencing Guidelines based on prior convictions for aggravated burglary in Tennessee state court. The petitioner subsequently filed a motion to vacate under 28 USC § 2255. The petitioner alleged that his career offender designation was invalid under intervening precedent because his Tennessee offenses did not qualify as "crimes of violence" within the meaning of USSG § 4B1.1(a), and further argued that his trial counsel had been ineffective in failing to object to the designation. **The Sixth Circuit concluded that to the extent that the petitioner raised a non-constitutional challenge to his advisory Guidelines range, it was not cognizable in § 2255 proceedings. With respect to the petitioner's ineffective assistance of counsel claim, the Sixth Circuit found that counsel could have reasonably concluded at the time of sentencing that any challenge to the career offender designation would have been unsuccessful, and as a result the petitioner could not establish deficient performance.** The judgment of the District Court was therefore affirmed.

Miller v. Parker, 18-6222 (11.28.18)

Miller v. Parker, 18-6222 (12.3.18)

The plaintiff was convicted of first-degree murder in Tennessee state court and sentenced to death. The plaintiff filed suit shortly before his execution and alleged that the use of lethal injection would violate his constitutional right against ex post facto laws, and further argued that forcing him to elect between lethal injection and electrocution required him to choose between two unconstitutional methods of execution. The plaintiff sought a stay of execution and a preliminary injunction in two separate appeals. The Sixth Circuit concluded in each case that the

plaintiff failed to demonstrate that a delay of his execution was warranted. With respect to the plaintiff's ex post facto claim, the court explained that "a change in a State's method of execution will not constitute an ex post facto violation if the evidence shows the new method to be more humane." Because the plaintiff failed to demonstrate "the new protocol is 'sure or very likely' to be less humane than electrocution," the court concluded that a delay of his execution was unwarranted. The court also rejected the plaintiff's claim that he was being forced to elect between two unconstitutional execution methods: "this court has concluded that neither of these methods violates the Constitution." In addition, the plaintiff elected to be executed by electrocution while the case was pending, and the court concluded that he therefore "waived any challenge to his execution by that method."