

Precedential Value

Federal Public Defender's Office, Southern District of Ohio

Deborah L. Williams, Federal Public Defender

Editors: Richard Monahan & Jacob Cairns

Issue #88 January – February 2022

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, under the Precedential Value tab.

III. Evidence

A. Article IV – Relevancy

404(b) – Consciousness of Guilt

U.S. v. Clark, 20-5722 (1/24/22)

Prior to trial for distribution of child pornography, the defendant moved in limine to exclude evidence of older child pornography found on computers at his residence. In the motion, the defendant claimed that the computers did not come into his possession until after the child pornography was loaded on them. The government was able to establish that the evidence submitted with the motion was fabricated. The government then used the fabricated evidence against the defendant at trial. On appeal, the court held that the evidence of fabrication was properly admissible under FRE 404(b) to show "consciousness of guilt." The court found that use of the fabricated evidence demonstrated the defendant's "consciousness that his case is a weak or unfounded one." Accordingly, admission of the evidence was affirmed.

B. Articles VI-VII – Witness/Expert

701/702/901 – Expert/Lay Witness Testimony

U.S. v. Hall, 20-4128 (2/2/22)

During the defendant's trial for participating in a drug conspiracy, the government presented an agent who testified both as an expert and lay witness. The agent interpreted phone conversations, testified about indicia of drug trafficking, and identified the defendant's voice from phone calls. Upon his conviction, the defendant challenged admission of the evidence on appeal. The court first held that the agent was properly permitted to testify as both an expert and a lay witness because the district court provided a proper limiting instruction to the jury delineating the testimony. Second, the court ruled that the agent was properly qualified as an expert in the drug trade based on his 21 years of experience. Third, the court held that the agent properly limited his expert testimony to interpreting the conversations and lingo used by the defendants based on the agent's experience in drug investigations. Fourth, the court found that the agent properly opined that the drug amount possessed during a car stop was a trafficking amount, and he did not inappropriately provide opinion about the defendant's state of mind. Finally, the court found, pursuant to FRE 901, that the agent had established the proper foundation to identify the defendant's voice in

phone calls based on past known recordings of the defendant's voice. Accordingly, admission of the evidence was affirmed.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

U.S. v. Russell, 20-3756 (2/16/22)

The defendant was a passenger in a car that was stopped and searched by officers. In his subsequent prosecution for being a felon in possession of a firearm, the defendant moved to suppress the firearm that was located in the car. The government failed to raise standing in the district court; however, the district court *sua sponte* held that the defendant lacked standing to challenge the search and that the search was otherwise valid. In its opening brief on appeal, the government argued that the defendant lacked standing to challenge the search of the car as the passenger. The court first held that the government had not waived the issue in the district court, and thus plain error analysis applied. The court found that it was clear that the defendant, as a passenger in the vehicle, had no standing to challenge the search. The defendant did not claim ownership or possessory interest in the vehicle, nor was he the driver. Further, the court held that the issue of standing affected the government's substantial rights because the suppression of the evidence would mean that the defendant would go free. Accordingly, the court found the plain error standard satisfied, held that standing was lacking, and affirmed suppression of the evidence.

D. Consent Searches and Seizures

U.S. v. Cooper, 21-5209 (2/3/22)

Officers went to a residence with an arrest warrant, and during the arrest of the defendant conducted an unlawful protective sweep which uncovered a firearm beneath a mattress. The officers then obtained consent from the defendant's girlfriend to search the residence. In the defendant's prosecution for being a felon in

possession of a firearm, he moved to suppress the gun and the district court denied the motion. On appeal, the court first noted that the parties agreed that the protective sweep (which located the gun) was unlawful. Second, the court determined that the district court applied the wrong legal standard to the question of whether the after acquired consent from the girlfriend was valid. The court ruled that "inevitable discovery," as opposed to "attenuation," was the proper legal doctrine. Under the inevitable discovery doctrine, the district court must inquire whether the firearm would inevitably have been discovered based on the girlfriend's consent if the officers had not conducted the unlawful protective sweep. Thus, the court ruled that on remand, the district court must determine the following: (1) without the protective sweep, would the officers have sought consent; (2) would the girlfriend have the consented to the search; and (3) would the ensuing search have then located the firearm. With this direction, the case was remanded.

V. Fifth Amendment

A. Prosecutor Conduct

U.S. v. Wellman, 20-5876 (2/11/22)

During the defendant's trial for obstructing justice and making false statements to the FBI, the government at side bar requested that a witness be warned of perjury and advised of her Fifth Amendment rights. The witness already had counsel, who then consulted with the witness, and the witness chose to change her story to make it consistent with her grand jury testimony. The defendant argued on appeal that the prosecutor had committed misconduct by threatening to charge a favorable witness for the defense. The court held that, in order to establish prosecutorial misconduct through improperly threatening a witness, the defendant must show that the government "substantially interfered with the witness' free and unhampered determination to testify." The court found that the witness did in fact contradict her grand jury testimony and that the prosecutor was merely pointing out that

potential perjury to the district court. Further, the witness' own counsel warned her about the potential perjury thus "insulating her from direct government coercion." Under the circumstances, the court found no undue coercion by the prosecutor. Accordingly, the conviction was affirmed.

VI. Sixth Amendment

D. Right to Counsel/Self Represent

U.S. v. Johnson, 19-2418 (1/31/22)

The defendant was charged with kidnapping and interstate domestic violence. After burning through several attorneys, the district court held a hearing wherein the court permitted the defendant to represent himself with standby counsel. On appeal, the defendant challenged the propriety of the Faretta hearing. The court first held that the *de novo* standard was proper for reviewing the appropriateness of the Faretta inquiry by the district court, even where the defendant failed to object to the procedure. Second, the court ruled that the district court's Faretta inquiry was improper. Although a district court is not required to literally follow the Supreme Court's requirements from Faretta and the questions established for Faretta hearings in the Bench Book for United States District Judges, it must nonetheless be "substantially similar." The court found that the district court erred in several respects in failing to follow the standard requirements, but most notably failed in advising the defendant of the potential penalties. Not only did the district court not advise the defendant of what he was facing, it actively misrepresented to the defendant that he was not facing 50-70 years (as he was concerned). The defendant's ultimate sentence was 72 years. As such, the court found the district court's Faretta inquiry insufficient, and reversed the defendant's convictions. Finally, finding a number of errors throughout the trial and sentencing proceedings, the court determined that the case should be reassigned to a new district judge on remand: "Due to the serious errors at trial and sentencing, such

reassignment would serve to preserve the appearance of justice."

VIII. Defenses

F. Privileges

Attorney-Client Privilege

U.S. v. Sadler, 19-2217 (1/21/22)

Among other offenses, the defendant was charged with threatening government witnesses. During trial, the defendant's prior attorney testified to that he met with the defendant shortly before the threats were made and provided a copy of the witness list and grand jury testimony to the defendant, which identified the cooperating witness. The defendant argued on appeal that the testimony was protected by the attorney-client privilege. The court held that the attorney's testimony was properly admitted. The testimony did not divulge the contents of any meetings or conversations the attorney had with the defendant beyond the facts that were conveyed to the attorney by the government, i.e., the witness list and grand jury transcript. Because this information did not reveal any client confidence or legal advice, the court ruled that it was properly considered unprotected by the attorney-client privilege. Therefore, the admission of the evidence was affirmed.

XII. Specific Offenses

18 USC § 1001 – False Statements; and § 1512(c) – Obstruct Official Proceeding

U.S. v. Wellman, 20-5876 (2/11/22)

The defendant was a real estate developer who, through straw donations, attempted to influence city officials to utilize his firm. The FBI began investigating the straw donations and interviewing the donors. The defendant encouraged the straw donors to lie about the purpose of the donations. By the time the donors were brought before the grand jury, they dropped the false stories and testified that the defendant

was actually behind the bribes. As a result of the defendant's actions, he was convicted of aiding and abetting making false statements to the FBI, under 18 USC § 1001. On appeal, the defendant argued that his statements were not material and that jurisdiction was not established for the offense. The court held first that the false statements were material. The court found that the question of whether the defendant's "falsities fell within the realm of information already known to the FBI is irrelevant to the materiality inquiry." All that is required is that the statements are made with the purpose of misdirecting the agents on a material matter. Further, the court held that the defendant's lies about why he provided the money to the straw donors was material to the investigation. Second, the court ruled that statements made to FBI investigators, even if the statements debatably only related to violations of state campaign finance law, nonetheless fell within the federal jurisdiction of § 1001.

As a result of the defendant's actions, he was also convicted for corruptly obstructing an official proceeding, pursuant to 18 USC § 1512(c), namely the grand jury investigation. On appeal, the defendant argued that he did not obstruct a federal proceeding because at most he had violated state campaign finance laws. The court first held that when the defendant learned of the FBI investigation and that witnesses were to appear before a grand jury, this was a sufficient nexus to an "official proceeding" such that the defendant was on notice that his wrongful conduct would affect the administration of justice, as required by § 1512(c). Further, the court ruled that it was of no consequence that the defendant was never actually indicted for a federal crime related to the bribery. The court held that, in an obstruction charge under § 1512(c), the government need not prove the defendant's knowledge of the investigation's purpose or outcome, merely that he knew the official proceeding was underway. Accordingly, the conviction was affirmed.

18 USC § 2252(a) – Dist. Child Porn

U.S. v. Clark, 20-5722 (1/24/22)

An agent was able to download child pornography over the internet from the defendant's BitTorrent peer-to-peer file-sharing network. As a result, agents obtained a search warrant for the defendant's residence, seized computers, and located additional child pornography. The defendant was convicted of distribution of child pornography after jury trial and he appealed the sufficiency of the evidence. The court held first that the government need not prove that the child pornography images actually crossed state lines to sustain a conviction as long as a "means" of interstate commerce was used for the distribution. In this case, use of the internet was sufficient. Further, the court ruled that the government had proved "knowing distribution" of pornography through the defendant's intentional use of the BitTorrent peer to peer program. The court found that "absent concrete evidence of the defendant's ignorance that his program was set up to share," his knowing use of the software was sufficient to meet the *mens rea* element. Accordingly, his conviction was affirmed.

21 USC § 846 – Conspiracy – Overdoses

U.S. v. Sadler, 19-2217 (1/21/22)

The defendants were charged with participating in a large scale conspiracy to distribute heroin and crack cocaine. Although most of the defendants pled guilty, defendants Tempo and Sadler went to trial. Both were convicted, among other things, of the conspiracy count and causing overdoses of several individuals, pursuant to 21 USC § 846 and 841(b)(1)(C). The defendants appealed the sufficiency of the evidence for the conspiracy count and the overdoses, and challenged the jury instructions. The court first found the evidence sufficient for the conspiracy charge. The court held that the evidence supported that just one large conspiracy existed, known as "Polo," and that each defendant knew of the scope of the conspiracy and intentionally joined it. Defendant

Tempo was in a leadership position, packaged drugs, and controlled the phones that were used for the drug sales. Although a closer case, Defendant Sadler was connected to the organization through Tempo, and was seen with Tempo during drug packaging, and had fights with Tempo over control of the phones used for drug sales. Moreover, Sadler was connected with one of the residences used by the drug trafficking organization. Thus, the court found the evidence sufficient to establish the conspiracy counts for both defendants.

Additionally, the court held that the evidence was sufficient to prove that the overdoses were the result of the drugs distributed by the conspiracy. Answering an open question, the court held that toxicology testing is not a prerequisite for a conviction under § 841(b)(1)(C). As such, the court held that the evidence was sufficient for the overdoses where testimony established that victims took drugs sold by the conspirators and the victims overdosed, as evidenced by the administration of Narcan with positive results. As such, the court found the evidence sufficient to prove the link between the conspiracy and the overdoses.

Regarding the jury instruction for the overdoses, the court held that the district court erred. When a count is based purely on a Pinkerton conspiracy theory of liability for drug overdoses, a district court is required to instruct the jury that the defendant can only be convicted if he or she was in the “chain of distribution” that put the drugs into the victim’s hands. Neither defendant objected and requested this instruction so the court reviewed for plain error. With regard to Defendant Sadler, the court found that the government’s sole theory of prosecution was based on Pinkerton conspiracy liability. As such, the failure to provide the “chain of distribution” instruction was error that was plain. Accordingly, Defendant Sadler’s convictions for the overdoses were vacated and the case remanded for retrial. Regarding Defendant Tempo, however, the court found no plain error because “a rational jury could have found,

beyond a reasonable doubt, that Tempo was a principal in the crime and/or an aider and abettor. In this context, omitting a chain-of-distribution instruction did not substantially affect Tempo’s rights because he was not being held responsible for someone else’s actions based on his status as a co-conspirator, but rather was being punished for his own actions. As such, Defendant Tempo’s conviction was affirmed.

XIII. Post-Conviction Remedies

U.S. v. Johnson, 20-6249 (2/23/22)

The defendant was originally sentenced to 300 months as a career offender based on convictions for possession with intent to distribute 9 grams of crack cocaine and possession of a firearm in furtherance of drug trafficking. After a number of appeals, the career offender designation was removed, but the court nonetheless affirmed the 300 months sentence. After the First Step Act made the reduced crack penalties retroactive, the defendant again sought habeas relief, arguing that his new guideline range was 160-185 months. The district court agreed with the amended guideline range, but nonetheless held that the 300 month sentence was still appropriate. On appeal, the court held that the district court’s First Step Act resentencing was substantively unreasonable. The court found that the district court gave too little weight to the need to avoid unwarranted sentencing disparities in imposing a 115 month upward variance from the new guideline range, and at the same time “unduly weighed the nature of Johnson’s offense, his criminal history and characteristics, and the need for the sentence to deter future criminal conduct and protect the public.” Accordingly, the sentence was vacated and the case remanded for resentencing.

Chinn v. Warden, 20-3982 (02/04/22)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In his state post-conviction proceedings, the petitioner alleged that his rights under Brady v. Maryland, 373 U.S. 83 (1963), had

been violated because the mental health records of a juvenile eyewitness were suppressed at trial. The petitioner alleged that the records would have undermined the reliability of the witness' identification. The state courts concluded that the petitioner was not prejudiced by the suppression. The Sixth Circuit determined that the state court rejection of the petitioner's claim was entitled to deference under 28 USC § 2254(d)(1), and as a result the denial of habeas corpus relief was affirmed.

Cunningham v. Shoop, 11-3005, 20-3429
(01/10/22)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The jury foreperson at the petitioner's trial worked as an investigator for the local children's services agency and also as a counselor for a victim's services agency. In his state post-conviction proceedings, the petitioner alleged that the foreperson had received prejudicial information about the petitioner from her colleagues. The state court denied the claim without granting discovery or an evidentiary hearing, reasoning that the petitioner failed to demonstrate that the foreperson was aware of the prejudicial information at the time of her jury service. The petitioner raised a second juror bias claim following discovery in his federal habeas corpus proceedings, and returned to state court to exhaust it; the state courts dismissed the claim as procedurally defaulted. The Sixth Circuit concluded that the petitioner was entitled to a federal evidentiary hearing on both of his claims. Although the initial juror bias claim was rejected on the merits in state court, the refusal of the state court to grant an evidentiary hearing was an unreasonable application of Remmer v. United States, 347 U.S. 227 (1954), under 28 USC § 2254(d)(1); furthermore the petitioner was diligent in

attempting to develop the factual basis for the claim. As a result, the federal courts were not limited to the state court record in adjudicating the claim, and a federal evidentiary hearing was permissible. In addition, the petitioner was diligent in presenting his second juror bias claim to the state courts, and there was no state court decision on the merits. The case was accordingly remanded to district court for an evidentiary hearing.

In re Manning, 21-2682 (01.05.22)

The petitioner was convicted of first degree murder in Michigan state court at the age of 18 and sentenced to life in prison without the possibility of parole. The petitioner moved for authorization to file a second or successive petition under 28 USC § 2244(b), alleging that Miller v. Alabama, 567 U.S. 460 (2012), which prohibited mandatory life sentences for persons under the age of 18 at the time of their offense, should be extended to persons who were 18 years old when they committed the crime in question. The Sixth Circuit denied the motion. Although Miller is fully retroactive on collateral review, the petitioner sought a frivolous extension of Miller's holding, and authorization under § 2244(b) is not available under such circumstances.

Johnson v. Bauman, 20-2181 (02.22.22)

The petitioner pleaded no contest in Michigan state court to various drug offenses and was sentenced to prison. The petitioner subsequently sought state post-conviction relief alleging ineffective assistance of counsel, and also that his sentence violated his Sixth Amendment rights because it was based on facts that had neither been admitted nor proven beyond a reasonable doubt. Nearly four years later, the petitioner sought federal habeas corpus relief while his state post-conviction petition was still pending in the state trial court.

The petitioner alleged that he was not required to satisfy the exhaustion requirement due to inordinate delay in the state court proceedings. The Sixth Circuit disagreed, noting (among other things) that the case had not simply been sitting idle in state court; on the contrary, the state court “set a hearing date, received a response from the prosecution that disputed many of the factual claims in Johnson’s postconviction motion, and then granted Johnson’s motion seeking discovery to develop his ineffective assistance of counsel claim.” The district court’s dismissal for failure to exhaust was accordingly affirmed.

that the denial of the motion to extend the time to appeal was an abuse of discretion. The judgment of the district court denying the petitioner’s motion under Fed.R.App.P. 4(a)(5) was accordingly reversed.

Mizori v. United States, 19-2433 (01.20.22)

The petitioner was convicted of federal drug offenses. At sentencing, two government witnesses testified that the petitioner was a manager or supervisor within the drug conspiracy, and this resulted in an increase to the petitioner’s guideline range under the federal sentencing guidelines. Counsel for the petitioner did not call any witnesses. The petitioner subsequently filed a motion to vacate under 28 USC § 2255, alleging that his attorney had been ineffective in failing to call witnesses at the sentencing hearing who would have rebutted the government’s claim that the petitioner was a manager or supervisor. The district court denied the motion to vacate, but at the time of the denial the petitioner was confined in a high-security unit where he did not have access to postage stamps or a law library; the time for filing a notice of appeal expired before the petitioner was returned to general custody. The petitioner filed a motion under Fed.R.App.P. 4(a)(5) to extend the time for filing a notice of appeal, but the district court rejected it. The Sixth Circuit held that the petitioner did not need a certificate of appealability to appeal from the denial of his motion to extend the time to file a notice of appeal. The Sixth Circuit further concluded