

Precedential Value

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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, under the Precedential Value tab.

I. Sentencing Issues

B. Guideline issues

2B3.1(b)(4) – Robbery – Physical Restraint

U.S. v. Ziesel, 20-4240 (6/29/22)

During a robbery, the defendant announced that it was a bank robbery and ordered the tellers to the floor. As a result, at the sentencing hearing the district court imposed a 2 level enhancement under USSG § 2B3.1(b)(4)(B) for “physical restraint.” On appeal, the court held that the district court erred in applying the enhancement. While the physical restraint enhancement may be applied where no actual physical contact occurs with the victims, the court found that the defendant did not use sufficient force or threat of force to qualify. The defendant did not have a weapon or suggest that he had one, and his mere announcement of a bank robbery and ordering the tellers to the floor was insufficient to constitute restraint of the tellers. The court emphasized that applying the enhancement in the case would essentially turn every bank robbery into a physical restraint, which was not the intention of the guideline. Accordingly, application of the enhancement was reversed. The court noted that the sentence imposed by the district court actually fell within the guideline range that would be applicable without the enhancement. But because the district court did not state that it would have applied the same sentence without

the enhancement, the error could not be harmless and the case was remanded.

2K2.1(a)(4)(B) – Knowledge of Prohibition

U.S. v. McKenzie, 21-5295 (5/3/22)

The defendant was convicted of being a straw purchaser of two firearms under 18 USC § 922(a)(6). At sentencing, the district court applied a higher base offense level because it determined that the defendant had “reason to believe” that the firearms were being purchased for two prohibited persons, pursuant to USSG § 2K2.1(a)(4)(B). On appeal, the court held that application of the enhancement was appropriate. The court found that the Sixth Circuit had never adopted a precise definition for “reason to believe,” but noted that some courts had applied the probable cause standard, and other courts had required even less proof than probable cause. Without specifically adopting a particular standard, the court held that the facts of the case met at least the probable cause analysis. The defendant knew that (1) neither of the true purchasers wanted to buy the guns themselves, (2) they both were willing to pay extra for the defendant to buy the guns for them, (3) the defendant asked no common sense questions of either purchaser as to why they couldn't buy the guns themselves, and (4) one of the purchasers actually said he wanted the defendant to buy the gun for him if he ended up not being able to buy

it for himself. Based on these facts, the court concluded that the defendant had “reason to believe” that both purchasers were prohibited from possessing firearms lawfully, and the sentence enhancement was affirmed.

D. Recidivism enhancements

USSG § 2K2.1 – Firearms

U.S. v. Miller, 21-5598 (5/12/22)

Upon defendant’s conviction for being a felon in possession of a firearm, the government argued that the defendant’s offense level should be increased based on two prior Tennessee convictions for drug delivery. Relying on the Sixth Circuit’s decision in U.S. v. Havis, the district court held that the convictions were not controlled substance offenses under the guidelines because the Tennessee statute encompassed conduct that constituted an attempt. On appeal, the court held that reconsideration of Havis was appropriate. In Havis, the parties agreed that the Tennessee drug delivery statute included conduct that constituted an attempt. However, the government had changed its view, and now resisted this conclusion. As such, the court found that the Tennessee drug delivery statute defined “delivery” as “the actual, constructive, or attempted transfer from one person to another of a controlled substance.” Contrary to Havis, the court concluded that the “attempted transfer” of drugs under the statute still constituted a completed delivery. Thus, the statute did not actually define an attempt offense. The court noted that an “attempted delivery” was actually governed by a separate Tennessee statute. Accordingly, the court held that the Tennessee drug delivery statute does not involve an attempt, and thus corrected the ruling in Havis. The court noted that its decision did not alter Havis’ determination that true attempt offenses were not controlled substance offenses under the guidelines. As such, the district court’s ruling was reversed.

E. Fine/Restitution/Forfeiture

Forfeiture

U.S. v. Maddux, 20-5972 (6/22/22)

The defendants were convicted of trafficking in cigarettes and avoiding tax liability. The defendant lost the subsequent appeal. Years later, the government sought and obtained a forfeiture order against the defendants from the district court for approximately \$35 million in owed taxes. The defendants appealed the belated forfeiture order. The court held that Fed. R. Crim. P. 32.2 requires that the amount of forfeiture be determined at the sentencing and included in the judgment in the case. The court found that this rule is a mandatory claims processing rule which must be followed. Because the district court neither entered a preliminary nor final order of forfeiture at the time it imposed sentence in the case, and the government did not appeal the district court’s failure to do so, the district court could not years later enter the forfeiture order requested by the government. The only potential exceptions to this requirement are found in Fed. R. Crim. P. 35 and 36 which permit the correction of certain errors in the judgment, but the court held that none of these exceptions were applicable. Accordingly, the forfeiture order was reversed.

II. Plea Matters

A. Agreements

U.S. v. Bell, 21-5008 (6/24/22)

The defendant was charged with distribution of heroin and fentanyl which resulted in the death of another, pursuant to 21 U.S.C. § 841. The parties entered a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C) wherein the government agreed to permit the defendant to plead to the lesser offense of distribution of heroin and fentanyl and agreed to a sentence of 168 months imprisonment. The district court accepted the guilty plea to the lesser included offense, but rejected the plea agreement. When the defendant

decided not to withdraw his guilty plea, the district court imposed a 30 month sentence. The government appealed and filed a petition for mandamus, arguing that it should be able to withdraw from the plea agreement and proceed to trial on the greater offense. On appeal, the court held that Rule 11(c)(1)(C) only specifically permits a defendant to withdraw a plea if the district court rejects the plea agreement, but provides no remedy to the government. Because the specific terms of the plea agreement did not provide for the government to withdraw its consent for the defendant to plead to the lesser included offense, the government could not force the district court to withdraw the guilty plea and set the case for trial. Moreover, the government could not proceed on the greater offense because jeopardy attached at the time the district court accepted the defendant's guilty plea, and the Double Jeopardy Clause prohibited further prosecution. Thus, the district court's ruling was affirmed. For the same reasons, the government's petition for mandamus was denied.

Portis v. U.S., 20-3776 (5/3/22)

The defendant entered into a plea agreement wherein he agreed to plead guilty to conspiracy to commit Hobbs Act Robbery and using firearms in relation to the crimes, under 18 USC § 924(c). The plea agreement contained a provision which waived appeal and collateral attacks under 28 USC § 2255, as long as the sentence did not exceed the statutory maximum. Subsequently, the Sixth Circuit decided in U.S. v. Ledbetter that conspiracy to commit a Hobbs Act Robbery is not a predicate crime of violence for purposes of a conviction under § 924(c). As a result, the defendant sought relief from the § 924(c) conviction through a petition under 28 USC § 2255. The district court denied the petition on its merits. On appeal, the Sixth Circuit held that the collateral attack waiver provision in the plea agreement required dismissal of the appeal. The court held § 2255 waivers in plea agreements are generally enforceable as long as they are knowingly and voluntarily entered. Further, the court found that the sentence imposed was within

the statutory maximum (life) because “the statutory maximum’ refers to the maximum sentence at the time of sentencing, not to maximum sentences throughout a defendant’s prison term based on future changes to the law.” Finally, the court ruled that the Sixth Circuit has never recognized a “miscarriage of justice” exception to plea agreement waivers, thus such a remedy was unavailable. Accordingly, the appeal was dismissed.

C. Hearings

U.S. v. Ramirez-Figueroa, 21-1221 (5/2/22)

During the defendant's guilty plea hearing for possessing methamphetamine with intent to distribute, the district court failed entirely to advise the defendant that the conviction could result in his deportation to Cuba, as required by Fed. R. Crim. P. 11(b)(1)(O). The defense did not object to this error in the district court. The defendant then argued on appeal that he would not have pled guilty had he been properly advised. Applying the plain error standard, the court held that no reversal was required. First, the court noted that the defendant was already automatically deportable before entering the plea in the case based on several prior felony convictions on his record. Further, the court found that the defendant had not “offered contemporaneous evidence indicating that preventing deportation would have weighed on his decision to plead guilty.” As such, the court found that the Rule 11 error did not affect the defendant's “substantial rights,” as required for plain error review. Thus, no plain error occurred and the conviction and sentence were affirmed.

IV. Fourth Amendment

B. Reasonable Suspicion/Veh. Stops

U.S. v. Whitley, 20-1955 (5/18/22)

Officers received a tip that heroin was being sold from a residence. Officers then observed the defendant leave the residence with a large wad of cash in his hand, drive away, and make two brief

stops at stores without buying anything. The defendant also met with another male at a residence for about 30 seconds. At one point he transferred a bag from his passenger seat to his trunk. The officers stopped the defendant's vehicle for a traffic violation and noticed a digital scale on his lap and "marijuana shake" on the console. At this point, the defendant was removed from the car and a drug dog detected the presence of narcotics in the vehicle. A search revealed drugs and a gun, and in his subsequent prosecution the defendant moved to suppress the evidence. The district court denied the motion and the defendant appealed. The court held that, although the police extended the stop beyond the permissible purpose of the traffic violation, the extension of the stop was justified by reasonable suspicion. The tip about heroin, the defendant's wad of cash, the short stops (consistent with drug activity), and the digital scale and marijuana shake all provided sufficient evidence to support reasonable suspicion that the defendant was involved in drug trafficking. This was true even though Michigan law permitted the possession of small amounts of marijuana. Further, the court held that once the drug dog alerted on the car, probable cause was established for the search. As such, the district court's ruling was affirmed.

E. Search Warrants

Probable Cause/Good Faith

U.S. v. Helton, 21-5144 (5/24/22)

Officers received complaints that the defendant was selling methamphetamine from his residence. Further, a reliable source advised that he had witnessed the defendant sell meth from the residence within the past few days. Finally, upon arresting the defendant, officers observed some small denomination bills and a baggie with what appeared to be residue. This information was used to obtain a search warrant for the defendant's residence. In his subsequent prosecution, the defendant moved to suppress the evidence and claimed that the search warrant was lacking in probable cause. The district court

denied the motion and the defendant appealed. The court held that the search warrant affidavit was deficient in probable cause. The complaints about drug trafficking were anonymous and entitled to little weight, particularly where there was no information in the affidavit about when the complaints were made. The informant who claimed to see the defendant sell drugs was unidentified and, although the officers indicated he was reliable, no facts at all were given to support this claim. Finally, the affidavit failed to indicate whether the defendant was at the residence upon his arrest, and failed to tie the small denomination bills to drug trafficking or to provide confirmation that the "residue" was in fact drugs. Under these circumstances, the court found probable cause for the search warrant, particularly related to establishing a nexus to the home, to be deficient. Nonetheless, the court ruled that good faith saved the warrant's execution. The court found that the affidavit was not bare bones because it minimally stated that drug dealing was occurring from the home through the mention of the anonymous complaints and the information from the informant in the past few days. This combined with the information about the defendant's arrest with residue and small denomination bills provided the minimal information required to avoid the affidavit being bare bones. Accordingly, the execution of the warrant was supported by good faith and the district court's ruling was affirmed.

V. Fifth Amendment

C. Confessions/Testimonial Rights

Miranda

U.S. v. Zabel, 21-5766 (5/23/22)

The defendant was a contractor working at Mammoth Cave National Park on a restoration project when he was accused by a female worker of sexual assault. Rangers arrived and accompanied the defendant to a location in the caves away from other workers to interview him about the allegation. The defendant made several

requests to go to the bathroom, which were denied, but before the questioning the rangers told him that he did not have to speak with them. The rangers did not read Miranda rights. The defendant made incriminating statements and was subsequently prosecuted for engaging in unwanted sexual contact pursuant to 18 USC §2244(b). He moved to suppress his statements and the district court denied the motion. On appeal, the court held that the defendant was not in custody, and thus Miranda warnings were not required. The court ruled that four factors are relevant as to whether a defendant is in custody for purposes of Miranda: (1) the location of the interview; (2) the length and manner of questioning; (3) whether there was restraint on movement; and (4) whether the suspect was told that he/she did not need to answer questions. The court found that, although the location was in a cave, the cave had been the defendant's workplace for the past 6-7 months. Further, the court held that the questioning only lasted about 20 minutes, which was not oppressive. The court found no restraint on the defendant's movement, although he had been denied use of the bathroom twice. The court ultimately held, however, that the defendant was advised that he did not have to answer their questions, thus a reasonable person would have felt free to terminate the interview and leave. Accordingly, the defendant was not in custody and the district court's ruling was affirmed.

D. Double Jeopardy

Denezpi v. U.S., 20-7622 (6/13/22) **Supreme Court**

The defendant was convicted by Tribal authorities for assault and battery, and sentenced to 140 days in jail. He was then subsequently prosecuted by the government in the District of Colorado for aggravated sexual abuse (for the same conduct) and sentenced to 360 months imprisonment. The defendant argued on appeal that the successive prosecutions by the same sovereign violated the Double Jeopardy Clause. The Tenth Circuit affirmed and the defendant

sought review in the Supreme Court. The Court held that a sovereign is only prohibited under the Double Jeopardy Clause from prosecuting a defendant twice for the same "offense." Because the defendant's acts transgressed two laws, he could be separately prosecuted by the same sovereign for each offense. As such, the lower courts' rulings were affirmed.

VII. Other Constitutional Rulings

A. Commerce Clause

U.S. v. Rife, 20-5688 (5/5/22)

The defendant moved to Cambodia and years later sexually abused two children. Upon his return to the U.S., he was charged under 18 USC § 2423(c) for engaging in illicit sexual conduct abroad. The defendant challenged application of the statute to him as a violation of both the Foreign Commerce Clause and Congress' power to enact legislation to implement treaties. The district court denied the motion and the defendant appealed. The court first held that exercise of Congressional authority under the Foreign Commerce Clause was improper. The court emphasized that the Supreme Court has never extended the full commerce authority that Congress enjoys in regulating interstate commerce under the Commerce Clause to foreign commerce. As such, the court found that, because the defendant' offense – the abuse of two minor children at a school – had no commercial element, the conduct could not be regulated under the Foreign Commerce Clause. Nonetheless, the Court held that § 2423(c) was a proper exercise of congressional authority under Article I which permits enacting laws to enforce a treaty. The U.S. ratified a treaty in 2002 called the "Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography." The court ruled that Article I provided an appropriate vehicle for Congress to enact § 2423(c) to implement this treaty. Accordingly, the court upheld application of § 2423(c) as a valid

exercise of congressional authority in the defendant's case.

XII. Specific Offenses

18 USC § 924(c) – Firearm Enhancement

U.S. v. Taylor, 20-1459 (6/21/22)

Supreme Court

The defendant was convicted of an attempted Hobbs Act Robbery (18 USC § 1951(a)) and using a firearm in connection with a crime of violence (18 USC § 924(c)). After the Supreme Court decided U.S. v. Davis, the defendant filed a *habeas* petition arguing that the § 924(c) conviction should be vacated because attempted Hobbs Act Robbery was no longer a crime of violence. The Fourth Circuit agreed with the defendant and the government appealed to the Supreme Court. The Court held that attempted Hobbs Act Robbery is categorically not a crime of violence for purposes of § 924(c). The Court reasoned that an attempt requires only a “substantial step” at committing the robbery. The Court determined that there were a number of ways in which a defendant could commit a substantial step toward a robbery without engaging in conduct that constituted “the use, attempted use, or threatened use of physical force,” as required by the elements clause of § 924(c). As such, the Court ruled that an attempt was not a crime of violence, as defined in the statute. Accordingly, the Fourth Circuit’s ruling was affirmed and the defendant’s § 924(c) conviction vacated.

21 USC § 841 – Prescription Drugs – *Mens Rea*

Ruan v. U.S., 20-1410 (6/27/22)

Supreme Court

Defendants were doctors charged with unauthorized distribution of opiates. At trial, the doctors argued that the government was required to prove that the defendants knew that their prescribing practices were unauthorized. The district court denied a jury instruction in this regard and, upon conviction, the Eleventh Circuit

affirmed. On *certiorari*, the Supreme Court held that the *mens rea* element of § 841 applied to the “except as authorized” provision. Thus, once a defendant establishes that he or she is authorized to prescribe medications, the government “must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.” Because the lower courts declined an instruction in this regard, the conviction was reversed and the case remanded.

26 USC § 7206(2) – False Tax Returns

U.S. v. VanDemark, 21-3470 (6/30/22)

The defendant ran a used car dealership. During a two year period he accepted down payments from low credit buyers on lease buy agreements, and failed to report the down payments to the IRS on his corporate or personal tax returns. As a result, the defendant was indicted for multiple counts of filing false tax returns in violation of 26 USC § 7206(2). On appeal, the defendant challenged the sufficiency of the evidence. First, the court held that the convictions were valid based on the corporate tax returns. The court found that the cars in question were purchased on “lease to own arrangements,” which technically would require the defendant to refund the down payments if the buyer ultimately chose not to purchase the cars. The court noted, however, that the government presented significant evidence that the defendant rarely, if ever, refunded any down payments due to the terms of the contracts. Thus, the court easily found that all of the down payment moneys were properly considered income for income tax purposes to the defendant’s corporation. Regarding the defendant’s personal taxes, the defendant argued that he never actually filed his personal return, and thus the statute was inapplicable. The court held that § 7206(2) applies to any individual who falsely procures the “preparation or presentation” of a false tax return. Even though the personal return in question was never filed, the defendant’s tax preparer testified that he had prepared it and attempted to file the return unsuccessfully. The

court ruled that the attempted filing of a return certainly constituted at least the “preparation” of a return for purposes of the statute, and thus the conviction was affirmed.

XIII. Post-Conviction Remedies

Concepcion v. U.S., 20-1650 (6/27/22)

Supreme Court

After passage of the First Step Act, the defendant sought review of his prior sentence for distribution of crack cocaine. In the district court, the defendant presented evidence that he was no longer a career offender because a predicate offense had been vacated after his original sentencing. Thus, he argued that his sentence under the amended crack laws should be reviewed and reduced. The district court held that it was not permitted to consider the post-offense information and the First Circuit affirmed. On *certiorari*, the Supreme Court held that district courts are permitted to consider changes in the law and facts that have occurred post-sentencing in reviewing a First Step Act motion. The court found that the First Step Act did not specifically prohibit district judges from considering this information. Thus, district courts are free to consider post-offense information: “It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court’s discretion to consider information is restrained.” Accordingly, the case was remanded.

Shinn v. MartinezRamirez, 20-1009 (5/23/22)

Supreme Court

The petitioners were separately convicted of first-degree murder and felony murder in Arizona state court and sentenced to death. In federal habeas corpus proceedings, the petitioners alleged that they had been deprived of the effective assistance of trial counsel in state court; the petitioners further argued that the ineffective assistance of state court post-

conviction counsel established cause to excuse the procedural default of their claims under *Martinez v. Ryan*, 566 U. S. 1 (2012). In each case, the lower federal courts found that the petitioners could introduce new evidence in support of their claims for relief. The Supreme Court held that this was error. Under 28 U.S.C. § 2254(e)(2), a petitioner may not normally introduce new evidence in federal court if the petitioner was not diligent in attempting to develop the factual basis for their claim during the state court proceedings. *Williams v. Taylor*, 529 U.S. 420 (2000). The petitioners were not diligent in seeking to develop the factual bases for their claims in state court, and they also could not satisfy the extremely narrow exceptions for a hearing set out in the statute. Furthermore, the equitable rule of *Martinez* does not provide an exception to the statutory restrictions set out in § 2254(e)(2). Accordingly, the lower federal courts erred in finding that the petitioners could introduce new evidence in their federal habeas proceedings.

Nance v. Ward, 21-439 (6/23/22)

Supreme Court

The petitioner filed a civil rights lawsuit under 42 U.S.C. § 1983 challenging Georgia’s use of lethal injection as a method of execution. The petitioner proposed death by firing squad as an alternative method, notwithstanding the fact that it was not authorized under Georgia law as a means of carrying out a death sentence. The Eleventh Circuit held that the petitioner was actually attempting to invalidate his death sentence because his proposed alternative method was unavailable under state law; this meant that his claim had to proceed in a habeas corpus petition rather than in a § 1983 lawsuit. The Eleventh Circuit further determined that the petitioner could not satisfy the requirements to litigate a “second or successive” petition, and accordingly dismissed the case. The Supreme

Court reversed, finding that the petitioner's claim was properly raised under § 1983.

Shoop v. Twyford, 21-511 (6/21/22)

Supreme Court

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. During the course of his federal habeas corpus proceedings, the petitioner filed a motion for a transportation order to a medical facility to have neurological testing conducted. The District Court granted the motion, and the Sixth Circuit affirmed. The Sixth Circuit concluded that the All Writs Acts, 28 U. S. C. §1651(a), permitted the transportation order. The Supreme Court reversed. The petitioner failed to explain exactly how the evidence he was seeking would be admissible in his federal habeas corpus proceedings, and as a result the order authorizing transportation to the medical facility was improper. In addition, permitting the requested testing without first making a determination as to the admissibility of the new evidence would needlessly prolong the federal habeas case, which is never permissible.

Kemp v. United States, 21-5726 (6/13/22)

Supreme Court

The petitioner was convicted of various drug and firearm offenses in federal court and sentenced to prison. Following his direct appeal, the petitioner filed a motion to vacate under 28 U.S.C. § 2255; the District Court dismissed the motion as untimely. The petitioner later filed a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6) alleging that the District Court miscalculated the deadline for his motion to vacate and that it was in fact timely. The Eleventh Circuit found that the petitioner's § 2255 motion did appear to be timely, but that the petitioner's 60(b) motion should have been filed under Rule 60(b)(1), and that the petitioner had not filed within the one-

year limitations period for that subsection. The Supreme Court held that Rule 60(b)(1) is the appropriate subsection to raise a judge's errors of law, and that the petitioner's motion for relief from judgment was accordingly untimely. The judgment of the Eleventh Circuit was therefore affirmed.