

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

2D1.1 – Drug Quantity

U.S. v. Tisdale, 19-1901 (11/18/20)

The defendant was convicted of RICO violations involving drug trafficking and crimes of violence. At sentencing, the defendant, who was second in charge in the conspiracy, was held responsible for the whole drug amount involved in the entire conspiracy. On appeal, the court ruled that the drug amount computation was proper. The defendant argued that the court's decision in U.S. v. McReynolds narrowed the scope of relevant conduct in a drug conspiracy and that the district court did not make sufficient findings in this case. The court, however, held that McReynolds was not the "Rosetta Stone" for relevant conduct drug amounts. The court ruled that it was sufficient that the defendant "knew" of the gang's drug trafficking activities and that it was "reasonably foreseeable" to him that the gang would distribute those amounts. In spite of McReynolds' narrowing holding, the court found the district court's findings sufficient and affirmed the sentence.

2K2.1(b)(6)(B) – Firearm – Another Felony

U.S. v. Mukes, 20-5134 (11/17/20)

The defendant got into an altercation with his girlfriend and discharged a firearm into the air. He was charged in Tennessee state court with reckless endangerment with a deadly weapon, which was ultimately dismissed. The defendant was charged federally with being a felon in possession of a firearm. At sentencing, the district court imposed a 4 level enhancement under USSG § 2K2.1(b)(6)(B) for possessing the firearm in relation to another felony. On appeal, the court held that the enhancement was improper. First, the court held that a district court may not rely solely on allegations in a state indictment to establish a sentencing enhancement. Second, the court found that the defendant merely shooting a gun into the air would not violate Tennessee's reckless endangerment law. Thus, no other felony was proven. Accordingly, the court vacated the sentence and ordered the district court to impose sentence without the enhancement.

3B1.2 – Minor Role

U.S. v. Hill, 19-2229 (12/9/20)

Upon being convicted for drug trafficking, the district court determined that he was a career offender. The defendant argued that he should receive a minor role adjustment under USSG §

3B1.2 because he only transported drugs for another. On appeal, the court held that the minor role adjustment is not applicable when the defendant has been properly determined to be a career offender. The minor role adjustment applies only to the guideline range determined under Chapter 2 of the guideline manual. As such, the district court's denial of the reduction was affirmed.

3C1.2 – Reckless Endangerment During Flight

U.S. v. Mukes, 20-5134 (11/17/20)

Officers encountered defendant during a domestic dispute holding a firearm and they ordered him to drop it. The defendant dropped the gun and then fled. At sentencing for being a felon in possession of a firearm, the district court imposed a 2 level enhancement for reckless endangerment during flight. On appeal, the court held that the defendant dropping the firearm and fleeing did not, in and of itself, constitute reckless endangerment. In order to establish the enhancement, the government must identify a specific risk to another that was engendered by the defendant's conduct. The court found that there was no evidence that the gun was cocked and likely to discharge upon being dropped. Further, there was no evidence that civilians were nearby when the gun was dropped. Finally, the court held that dropping a gun and fleeing in a residential area can pose a risk to anyone who may find the gun, but there was no evidence of that specific risk in this case. Therefore, the court held that application of the enhancement was improper and the sentence was vacated.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

U.S. v. Miller, 18-5578 (12/3/20)

Through routine hash value searches, Google identified two child pornography images sent through the defendant's email. Google turned the images over to the National Center for Missing and Exploited Children (NCMEC), who

confirmed they were child porn and reported the images to law enforcement. The assigned officer opened the images, confirmed they were child porn, and the defendant was charged with child porn offenses. The district court denied the defendant's motion to suppress and he appealed. The court first held that Google was a private actor and thus the Fourth Amendment was inapplicable to its actions. Further, the court found that Google was neither performing a public function, compelled to act by the government, nor working in concert with government. Second, the court ruled that there was a "virtual certainty" that the officer viewing the images was seeing nothing more than what Google had already discovered. The court ruled that the reliability of the hash value identification of pictures, which was unchallenged by the defense, met this "virtual certainty." Because the officer viewed no more than what Google had already discovered in the private search, the Fourth Amendment was not violated and the district court ruling was affirmed.

C. Warrant Exceptions

Plain View

U.S. v. Clancy, 19-6367 (12/12/20)

The defendant was shot while robbing a cell phone store and went to a local emergency room hospital. His bloody clothes were left on the floor next to his bed. When officers arrived at the room, they observed the bloody clothes, which exactly matched the description of one of the robbers. The defendant was airlifted to another hospital, but the clothes remained and were placed into a plastic bag by a hospital worker. The police later seized the clothes from the hospital room. The district court denied the defendant's motion to suppress the clothes and he appealed. The court held that the clothes were properly seized under the plain view exception. The court found that officers investigating a shooting can lawfully visit a hospital emergency room. The bloody clothes were an exact match of the description, and thus were obviously

evidence of the robbery. Because the clothes were left in the hospital room, albeit in a plastic bag, the officers were permitted to later seize them without a warrant. As such, the district court ruling was affirmed.

E. Search Warrants

Body Cavity Search

U.S. v. Ruffin, 19-3599 (11/3/20)

An informant accompanied the defendant to a house where the defendant received baggies of fentanyl from suppliers and went into the bathroom for 20 minutes. The defendant then left in a vehicle with the informant, who kept agents informed of these activities in real time. Upon making a traffic stop, a drug dog alerted on the vehicle, but the fentanyl could not be found. As such, the agents obtained a warrant to search the defendant's body cavity for the drugs. At the hospital, the defendant was subjected to rectal searches, an x-ray, and several "soap suds enemas" before the fentanyl baggies were excreted. The district court denied the defendant's suppression motion and he appealed. The court first held that probable cause supported the search warrant. The informant's real time predictions about the defendant's actions and the meeting with the suppliers confirmed her reliability. Further, the defendant's 20 minute stay in the bathroom and the positive drug dog alert (with no drugs being found) supported the body cavity search. Finally, the court held that the search itself was reasonable. The court found that the rectal searches, x-ray, and enemas "posed little to no risk to Ruffin independent from the obvious dangers Ruffin accepted by concealing drugs in his rectum." Additionally, the court ruled that the agents had little to make a case on without the drugs, so the search was necessary. The court held that these factors outweighed the affront to the defendant's dignity with being shackled throughout and repeatedly subjected to the procedures. Accordingly, the district court ruling was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

Prosecutorial Misconduct

U.S. v. Hall, 19-5329 (11/10/20)

During closing arguments at the defendant's bank fraud trial, the prosecutor told the jury that they were victims of the defendant's bank fraud and that everyone would have to pay for the defendant's actions. Further, the prosecutor misstated evidence by telling the jury she had purchased Suburban vehicles with the proceeds. The defendant failed to object to the statements at trial. On appeal, the court found that the prosecutors comments were improper and misconduct. A prosecutor may not make "Golden Rule" appeals to jurors putting them in the place of victims. Further, misstatements of evidence by a prosecutor are generally improper. Nonetheless, the court found that the statements were not flagrant because they were relatively isolated, the statements were not overly deliberate, the evidence was overwhelming against the defendant at trial, and the defendant did not properly object to the statements in the district court. Thus, the conviction was affirmed.

D. Double Jeopardy

U.S. v. Willis, 20-5229 (12/1/20)

The defendant was charged in state court with reckless homicide and being a felon in possession of a firearm. He was convicted after trial of the reckless homicide. The firearm charge was dismissed and picked up as a federal prosecution. The district court denied the defendant's motion to dismiss based on double jeopardy and the defendant filed an interlocutory appeal. The court held that dismissal of the appeal was appropriate because the double jeopardy claim was not colorable. The court found that the state and government were separate sovereigns and the double jeopardy clause did not apply in that context. Further, the court ruled that the narrow exception for "sham prosecution" did not apply.

The defendant could not prove that the government was “merely a tool” of the state in undertaking the prosecution of the firearm federally. Thus, there was no double jeopardy violation and the interlocutory appeal was dismissed.

VI. Sixth Amendment

B. Confrontation Clause

U.S. v. Miller, 18-5578 (12/3/20)

At the defendant’s trial for child porn, the government introduced records from the National Center for Missing and Exploited Children (NCMEC). The records reflected hash value information obtained from Google regarding suspected images of child porn. NCMEC’s automated computer system received the records and conducted a search for the location of the Google-provided IP addresses that went with the pictures. The defense argued that it violated the Confrontation Clause to admit this evidence without permitting cross examination of a NCMEC analyst about its accuracy. On appeal, the court held that the defendant had no right to cross examine information generated by an automated computer system. The Confrontation Clause permits only the cross examination of “witnesses,” not information generated automatically by a computer. The court ruled that any challenge to such information would have to be based on the rules of evidence. Thus, the conviction was affirmed.

X. Probation/ Supervised Release

Conditions of Probation

U.S. v. Budzynski, 20-1264 (11/25/20)

The defendant was convicted of fraudulently obtaining social security benefits and placed on probation. During her term, she was investigated by police for withdrawing funds from her husband’s account without permission while at a casino. When confronted, the defendant admitted that she frequented casinos. Additionally, the

defendant failed to make her required monthly restitution payments. Accordingly, the district court modified her probation to require that she not go to casinos and to permit her probation officer to search her property if reasonable suspicion existed to believe she had violated her probation terms. On appeal, the court upheld the amended conditions. The court found that the conditions were reasonably related to the underlying offense and the defendant’s conduct while on probation. Specifically, the terms insured that the defendant would be financially able to pay her restitution to the government and that she was not violating her probation terms. Accordingly, the district court ruling was affirmed.

XII. Specific Offenses

8 USC § 1326 – Illegal Reentry

U.S. v. Silvestre-Gregorio, 19-5801 (12/22/20)

The defendant was charged with illegally reentering the country after being deported. While the case was pending, the defendant collaterally attacked his prior deportation claiming that he was a juvenile at the time and was denied his right to counsel. On appeal, the court found no due process violation in the defendant’s prior deportation proceedings. A defendant has no right to appointed counsel in an immigration proceeding. Further, the court held that the fact that the defendant was a juvenile at the time did not alter this right. The court found that the immigration judge had advised the defendant that he had a right to retain an attorney and provided the defendant with a list of low cost and *pro bono* attorneys. The court ruled that this was all that was required: “Where, as here, the government holds a hearing, develops the record, provides an interpreter, and explains the rule of law, the alien has received due process. There is no constitutional right to a government-appointed counsel, regardless of age.” As such, the conviction was affirmed.

18 USC § 111 – Assault Federal Officer

U.S. v. Grant, 19-3824 (11/12/20)

While awaiting sentencing for armed robbery, the defendant was housed at the Northeastern Ohio Correction Center, a private facility that contracts with the government to hold detainees. During a transfer between jail cells, the defendant punched a guard. As a result, he was charged with assaulting a federal officer under 18 USC § 111. The defendant argued in the district court and on appeal that the contract guard was not a federal officer under the statute. The court held that a private guard under contract with the government to detain pretrial detainees in federal cases qualifies as a federal officer for purposes of § 111. This was true even though the guard was not assisting a specific federal employee at the time. Therefore, the defendant's conviction was affirmed.

18 USC § 1344 – Bank Fraud

U.S. v. Hall, 19-5329 (11/10/20)

The defendant took out loans in family members' names and then filled out an application for loan forbearance on one of the loans. Among other offenses, the defendant was convicted of bank fraud under 18 USC § 1344 for the fraudulent forbearance application. On appeal, the court held that loan forbearance was "something of value" for purposes of the bank fraud statute, and thus the proper subject of prosecution. Accordingly, the defendant's conviction was affirmed.

18 USC § 2339B(a)(1) – Material Support

U.S. v. Alebbini, 19-3647 (11/5/20)

The defendant was convicted after trial of conspiracy and attempt to provide material support to ISIS, pursuant to 18 USC § 2339B(a)(1). He challenged the sufficiency of the evidence for both convictions on appeal. Regarding conspiracy, the court held that the elements of the offense are (1) an agreement

between two or more people to violate the law and (2) defendant's voluntary joining of the conspiracy. No overt act need be proven under § 2339B(a)(1). The court found that the agreement was proven based on statements the defendant made about a plan he and his cousin had related to ISIS, their watching of ISIS videos, his cousin's travel and arrest by Jordanian authorities, and statements of his cousin about the two of them taking action together. The court ruled that a conspiracy could be proven based on statements of the defendant alone. Regarding the attempt to provide material support to ISIS, the court held that the government must prove (1) intent to provide material support, (2) intent to work under ISIS's direction and control, (3) knowledge that ISIS is a terrorist organization, and (4) an overt act which was a substantial step toward committing the crime. The court ruled that no actual contact with ISIS was required to prove the offense. The court found that the defendant's statements to an informant, his family, and the agents upon his arrest all confirmed that the defendant in fact intended to join ISIS and work for them. Further, the defendant's statements of intent combined with buying an airplane ticket and going to the airport to fly to Turkey constituted a substantial step sufficient to prove an attempt. Accordingly, the defendant's convictions were affirmed.

21 USC § 841 – Drug Trafficking

U.S. v. Mahaffey, 19-6061 (12/18/20)

The defendant was convicted of trafficking in marijuana and methamphetamine. After the trial, the Supreme Court rendered its decision in Rehaif. As a result, the defendant argued on appeal that the knowingly standard from Rehaif should apply to the defendant's knowledge of the type of drugs under 21 USC § 841. The court held that Rehaif did not change the long standing law that the government does not have to prove that the defendant knew the particular type of drug that the defendant was trafficking. It is sufficient if the defendant knew that he or she was trafficking in narcotics. Thus, the jury verdict

finding the defendant guilty of marijuana and meth trafficking was affirmed.

XIII. Post-Conviction Remedies

U.S. v. Jones, 20-3701 (11/20/20)

The defendant filed a motion for compassionate release which was denied by the district court. On appeal, the Sixth Circuit laid out the requirements for a district court's consideration of compassionate release motions filed by defendants. First, the district court must consider whether "extraordinary and compelling reasons" support the request. Second, the court should consider whether a reduction is consistent with the applicable guideline policy statements. The court noted that USSG § 1B1.13 is not applicable to the determination when the defendant files for compassionate release. Third, the district court must balance the factors under 18 USC § 3553 in determining whether compassionate release is appropriate and make specific factual findings regarding its reasoning. The court found that the district court had properly analyzed the factors and, although it found compelling reasons, it appropriately weighed the § 3553 factors and denied the motion. Therefore, the district court's ruling was affirmed.

U.S. v. Henry, 19-2445 (12/18/20)

The defendant was convicted of multiple counts of bank robbery (18 USC § 2113) and using a firearm during a crime of violence (18 USC § 924(c)). After a number of appeals, his case was remanded for resentencing. Before the resentencing occurred, the First Step Act was passed which allowed that multiple § 924(c) convictions no longer required an enhanced 25 year sentence for each one after the first. The district court declined to apply the First Step Act at resentencing. On appeal, the court held that the First Step Act may apply to a defendant who was resentenced on a limited remand after its passage. Thus, because the court had remanded the defendant's case for resentencing but he was not resentenced before passage of the First Step Act,

its reduced penalties were applicable. Accordingly, the sentence was vacated.

Shinn v. Kayer, 19-1302 (12/14/20)

The petitioner was convicted of first-degree murder in Arizona. The petitioner refused to cooperate with his trial lawyers and mitigation specialist after his conviction, and was sentenced to death after insisting on an expedited mitigation phase hearing. The petitioner alleged in his state collateral proceedings that his attorneys had been ineffective in failing to conduct a more thorough mitigation investigation. The state court denied relief on the ground that the petitioner could not establish deficient performance in light of his refusal to cooperate, and alternatively found that the petitioner could not establish prejudice. The Ninth Circuit subsequently granted habeas corpus relief on the petitioner's claim of ineffective assistance of counsel at the mitigation phase of trial. The United States Supreme Court reversed, concluding that the state court's rejection of the petitioner's claim was entitled to deference under 28 USC § 2254(d).

Pollini v. Robey, 19-5131 (11/25/20)

The petitioner was convicted of murder and other offenses in Kentucky state court and sentenced to life in prison with parole eligibility. In his state collateral proceedings, the petitioner alleged that his appellate counsel had been ineffective in failing to raise a ground for relief based on ex parte contact between the trial judge and jury. At the time of the petitioner's direct appeal, Kentucky law required ex parte contacts to be treated essentially as structural errors; the Kentucky Supreme Court subsequently adopted a more demanding standard that governed at the time of the petitioner's collateral appeals, however, and denied relief on the ground that the

petitioner could not satisfy it. In federal habeas corpus proceedings, the petitioner alleged that the Kentucky Supreme Court contravened and unreasonably applied United States Supreme Court precedent by requiring him to satisfy a more demanding prejudice standard than the one that would have been controlling at the time of his direct appeal. The Sixth Circuit concluded that the Kentucky Supreme Court's decision was consistent with Lockhart v. Fretwell, 506 U.S. 364 (1993), and that as a result the petitioner could not satisfy the requirements of 28 USC § 2254(d)(1).

Pollini v. Robey, 19-5131 (11/25/20)

The petitioner was convicted of murder and other offenses in Kentucky state court and was sentenced to life in prison with parole eligibility. The petitioner raised a claim of ineffective assistance of appellate counsel in his state collateral proceedings, but it was dismissed because it was not a cognizable ground for relief under Kentucky law at that time. The petitioner raised another claim of ineffective assistance of appellate counsel in his federal habeas corpus proceedings, but the district court dismissed it as being procedurally defaulted because it differed from the one that the petitioner had previously attempted to present to the Kentucky state courts. The Sixth Circuit reversed. Because Kentucky failed to provide a state corrective process for the petitioner's federal claim, there was no procedural default, notwithstanding the fact that the claim presented in federal court differed from the one that was presented to the state courts. "By not allowing appellants to bring certain types of ineffective assistance of counsel claims, Kentucky voluntarily forwent the opportunity to have a first pass at remedying violations of a state prisoner's federal rights." The judgment of the district court was accordingly reversed.

Taylor v. Simpson, 14-6508 (12/2/20)

The Sixth Circuit's earlier decision in Taylor v. Simpson, 972 F.3d 776 (6th Cir. 2020), was vacated for rehearing *en banc*.

Theriot v. Vashaw, 20-1029 (12/16/20)

The petitioner was convicted in Michigan state court of second-degree murder and related offenses. On direct appeal, the petitioner alleged, among other things, that his federal constitutional right to present a defense had been violated. The Michigan Court of Appeals found that the petitioner had forfeited his constitutional claim by limiting his objection at trial to an alleged violation of Michigan's state evidentiary rules. The petitioner raised the claim again in his federal habeas corpus proceedings, but the Sixth Circuit concluded that the claim was procedurally defaulted; the Sixth Circuit further concluded that the petitioner failed to make any showing of cause and prejudice to excuse the default. The dismissal of the claim was accordingly affirmed.

Thompson v. Skipper, 19-1779 (11/25/20)

The petitioner was convicted of firearm and drug offenses in Michigan state court. On direct appeal, the petitioner challenged his firearm convictions on the ground that the evidence was constitutionally insufficient to establish that he possessed a gun. The gun was found hidden under the back seat's folding mechanism in an SUV that the petitioner was driving at the time of his arrest, although it did not have his fingerprints on it. Drugs were also found in the vehicle, and the petitioner sold drugs to an informant earlier that same evening. The Michigan Court of Appeals found that the evidence was constitutionally sufficient to establish constructive possession of the gun. The Sixth Circuit found that the state court's

rejection of the petitioner's claim was entitled to deference under 28 USC § 2254(d)(1), and as a result the denial of relief was affirmed.