

Precedential Value

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Issue #85 July - August 2021

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

2K2.1(b)(4)(B) – Altered Serial Number

U.S. v. Sands, 20-1652 (7/16/21)

At the defendant's sentencing for being a felon in possession of a firearm, the district court imposed a four level increase under USSG § 2K2.1(b)(4)(B) because the firearm had an altered serial number. In his first appeal, the court held that the district court applied the wrong legal framework and remanded the case. On remand, the district court examined the actual firearm, determined that the serial number was illegible in two of the three places it appeared, and imposed the same sentence. On the second appeal, the court held that the district court had appropriately applied the "naked eye" test to determine if the serial number was legible. The court found that the district court had properly determined that, because it could not be read in two locations on the firearm, the serial was "altered or obliterated" for purposes of the guideline, even though it was still legible in a third location. Accordingly, the application of the enhancement was affirmed.

3C1.2 –Reckless Endangerment

U.S. v. Clark, 20-1887 (8/26/21)

The defendant robbed two banks on different days in Michigan, and then later robbed a bank in

Ohio. During his flight from the Ohio robbery, the defendant got into a high speed chase wherein he crashed into another car causing significant injury to its occupant. At his sentencing, the district court applied an enhancement to each of the three robbery counts for reckless endangerment under USSG § 3C1.2 and for causing life threatening injuries, pursuant to § 2B3.1(b)(3)(C). The defendant argued on appeal that applying these enhancements to each of the robberies constituted impermissible double counting. The court held that application of the enhancements to each count of robbery was improper. The court first found that the reckless endangerment and causing life threatening injury enhancements applied only to the Ohio robbery, not the earlier Michigan robberies. Further, the court ruled that applying the enhancements to all three robberies constituted double counting the same conduct to multiple offenses. Finally, the court held that the double counting was impermissible because each of the defendant's robberies counted separately under the grouping rules of Chapter 3 of the sentencing guidelines. Thus, the enhancements being applied to all three of the robberies instead of only one resulted in an overall increase to the guideline sentencing range that the defendant was facing. As such, the enhancements were impermissibly double counted and the sentence was vacated.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

U.S. v. Brenner, 19-5647 (7/1/21)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that the defendant did not qualify for the armed career criminal enhancement because his Tennessee conviction for reckless aggravated assault was not a violent felony under the ACCA. The government appealed, but then moved to dismiss the appeal after the Supreme Court's decision in Borden v. U.S. The court held that dismissal of the appeal was proper. The court found that, after Borden, a reckless assault conviction under Tennessee law could not qualify as a violent felony under the ACCA because a greater *mens rea* than recklessness is required. Accordingly, the appeal was dismissed and the district court's ruling was affirmed.

Cartwright v. U.S., 19-5852 (8/31/21)

In 2005, the defendant was convicted of being a felon in possession of a firearm and sentencing to 24 years in prison under the ACCA. After Johnson was decided by the Supreme Court, the defendant filed a habeas petition arguing that his prior Tennessee burglary convictions did not count as violent felonies under the ACCA. The district court denied the petition and the defendant appealed. The court held that the Tennessee burglary convictions could not be considered "generic" burglaries for purposes of the enumeration clause of the ACCA. Specifically, the court found that, under Tennessee case law, the 1st and 2nd degree burglary statutes could both be violated where the defendant entered the home lawfully and then subsequently "broke" into a container in the home. This varied from the generic form of burglary under common law which required an "unlawful or unprivileged entry into, or remaining in, a building or structure." Because the 1st and 2nd degree Tennessee burglary offenses were broader than this generic burglary

definition, the offenses could not count as predicates under the ACCA. Accordingly, the defendant's sentence was vacated.

E. Fine/Restitution/Forfeiture

Restitution

U.S. v. Phillips, 20-1051 (8/17/21)

The defendant was convicted of bank robberies and ordered to pay over \$51,000 in restitution, with interest. The defendant did not object to the restitution order or challenge it on appeal. Rather, eight years later the defendant moved to amend the restitution order to remove the requirement of interest, based on his limited financial resources and post offense rehabilitation. The district court denied the motion believing it had no jurisdiction to entertain it. On appeal, the court held that a district court retains jurisdiction to modify the interest on a restitution order after the sentencing in a case, pursuant to 18 U.S.C. § 3612(f)(3). Thus, the interest on a restitution order may be modified by a district court at any time based on changes in the defendant's ability to pay. As such, the district court's ruling was reversed and the case remanded for consideration on the merits.

II. Plea Matters

A. Agreements

Appeal Waivers

U.S. v. Hollins-Johnson, 20-3330 (7/26/21)

The defendant signed a plea agreement in a fraud case which contained the following appellate waiver language: "Defendant waives the right to appeal the conviction and sentence imposed, except if the sentence imposed exceeds the statutory maximum." The defendant argued on appeal that this language did not prohibit a challenge to "the manner in which a sentence is to be served and the timing of the sentence." The court disagreed. The court held that "a challenge to the manner or timing of her sentence is a

challenge to the sentence imposed.” Thus, the court ruled that the broad appellate waiver language covered any appeal of the sentence except if the sentence exceeded the statutory maximum. The appeal was accordingly dismissed.

B. Breach/Withdrawal of Plea

Breach of Plea Agreement

U.S. v. Warren, 20-3045 (8/9/21)

The defendant’s plea agreement for being a felon in possession of a firearm obligated the government to recommend a certain guideline range and prohibited the government from “suggesting in any way that a departure or variance” from the defendant’s Guidelines range is appropriate.” At sentencing, the government pointed out that it did not know that the defendant’s prior assault convictions involved shootings and that it “quite probably would have made different recommendations had it known that information.” Nonetheless, the government recommended several times that the district court sentence within the guideline range. The district court imposed a significant upward variance and the defendant appealed. The court held that the government violated the plea agreement. The court found that the combination of the government’s recitation of the violent nature of the defendant’s prior assaults and the government’s suggestion that it would have made a different recommendation had it known about them resulted in a breach of the government’s obligations under the agreement. The court further ruled that it was of no consequence that the district court specifically stated that it did not believe the government violated the plea and that it was not influenced by the comments. Rather, the court remanded the case for resentencing before a different district judge.

C. Hearings

U.S. v. Kerns, 20-1563 (8/12/21)

The defendant pled guilty to kidnapping and brandishing a firearm during a crime of violence. Although he raised no objections in the district court, the defendant argued on appeal that he was not properly advised of the elements of the offense and that the factual basis for the plea was not established. The court first held that Fed. R. Crim. P. 11(b)(1)(G) requires a district court to determine that a defendant understands the nature of the charge in taking a plea. A district court may presume that a defendant understands the charge where the defendant is represented by competent counsel and has been provided a copy of the indictment. The court found that the district court had gone over the charging document with the defendant and he had expressed an understanding of it. Although the district court later summarized the charge without again covering every element, the court found that the record demonstrated that the defendant understood the charges to which he pled. Additionally, the court ruled that, pursuant to Fed. R. Crim. P. 11(b)(3), the district court had sufficiently established the factual basis that the defendant kidnapped his former girlfriend, he drove her across state lines, and that his “actions were motivated by his emotional ties to the victim.” The court found this sufficient to establish that the kidnapping was for “ransom or reward or otherwise,” at least to survive the plain error standard. Accordingly, the conviction was affirmed.

III. Evidence

A. Article IV – Relevancy

404(b) – Intent

U.S. v. Emmons, 20-5869 (8/9/21)

The defendant was charged with making unlawful political contributions to his daughter who was running for a U.S. Senate seat in 2014. At trial, the government introduced evidence of

similar unlawful contributions the defendant had made to his daughter's state election campaigns in 2011 and 2015. The defendant appealed the admission of the evidence under FRE 404(b) and 403. The court held that the evidence was admissible to show intent. The defendant had utilized the same method of supporting his daughter in 2011 and 2015 by paying for services with his corporate entity for his daughter's campaign, and then failing to invoice the campaign for the payment of the services. Further, in both instances, the defendant used vague invoices to the third party vendors to hide the fact that the services were for the campaign. As such, the court found that the other act evidence was sufficiently similar to the charged conduct to be probative of the defendant's intent to violate Federal Election Campaign Act prohibitions. Further, the court ruled that the probative value of the evidence was not substantially outweighed by the potential prejudice given the close similarity of the acts and appropriate jury instructions on the topic. Accordingly, the admission of the evidence was affirmed.

VI. Sixth Amendment

D. Right to Counsel/Self Represent

Right to Counsel of Choice

U.S. v. Trevino, 20-1104 (7/30/21)

Two weeks before his trial on drug conspiracy charges, the defendant's retained counsel moved to withdraw. The district court denied the motion and the trial proceeded. The defendant argued on appeal that he had been denied his right to counsel of his own choosing. The court held that the Sixth Amendment protects "the right of a defendant who does not require appointed counsel to choose who will represent him." This right may be balanced, however, against the needs of fairness and the demands of a district court's calendar, considering the following factors: (1) the timeliness of the motion, (2) the adequacy of the district court's inquiry into the matter, (3) the extent of conflict between counsel and defendant,

and (4) the public's interest in a prompt and efficient administration of justice. The court found that the motion was not timely two weeks before trial, the district court made a sufficient inquiry into the problems, the conflict between attorney and client did not rise to total lack of communication, and any continuance would have caused significant delay given the complexity of the case. Accordingly, the court found no violation of the defendant's rights and affirmed the district court's ruling.

VII. Other Constitutional Rulings

C. First Amendment

52 USC § 30118(a) – Election Campaign Act

U.S. v. Emmons, 20-5869 (8/9/21)

The defendant was the father of a political candidate for U.S. Senate. He was charged with unlawfully making in excess of \$25,000 in political contributions to his daughter through his closely held corporation. The defendant challenged the constitutionality of the Federal Election Campaign Act as applied to intra-familial contributions. The district court denied the motion and the defendant appealed. Relying on a footnote in the Supreme Court's decision in Buckley v. Valeo, the court held that the First Amendment does not protect intra-familial contributions against prosecution under the Election Campaign Act. Thus, the court ruled that the Act was not unconstitutional as applied to the defendant's corporation's contributions to his daughter's Senate campaign and the conviction was affirmed.

XI. Appeal

Type of Remand

U.S. v. Johnson, 20-5980 (8/27/21)

The defendant was convicted of drug trafficking and sentenced as a career offender. The Sixth Circuit subsequently decided United States v. Havis and the court accordingly remanded the

defendant's case with the following language: "Accordingly, [the defendant] should be resentenced in light of Havis." On remand, the district court determined that the defendant was no longer a career offender and sentenced him to 200 months imprisonment. The defendant again appealed and argued that he was entitled to a full resentencing. The court held that the remand in the first appeal was limited, meaning that the district court was directed to merely address the issue of whether the defendant was a career offender after Havis. In such circumstance, the district court was not directed to conduct a full *de novo* resentencing. As such, the sentence was affirmed.

XII. Specific Offenses

21 USC § 846 – Drug Conspiracy

U.S. v. Trevino, 20-1104 (7/30/21)

The defendant operated marijuana dispensaries around Michigan. After a long government investigation, he was convicted of participating in a drug conspiracy and substantive counts of the distribution of marijuana. The defendant argued in the district court that he could not be prosecuted under federal law and that he should be able to argue ignorance of the law before the jury. On appeal, the court held that the defendant's convictions were proper. The court noted that federal law contains a "congressional appropriations rider," commonly known as Section 538, which prohibits the DOJ from spending funds to prevent states from implementing their own state medical marijuana laws. Without deciding whether the rider applied in this context, the court ruled that Section 538 did not assist the defendant because he indisputably had not complied with Michigan law in running the dispensaries. Further, the court held that ignorance of the law was no defense. The court noted that a 1924 case from the Sixth Circuit, Landen v. U.S. had created a very narrow exception to conspiracy law which allowed a defense of ignorance where the crime itself was not an obvious illegality. This exception applies

only when (1) the contemplated act is not inherently wrongful, (2) the prohibitory statute is ambiguous, (3) lawyers and laypersons have good reason to believe that the planned act is not prohibited, and (4) the defendant acts in a good faith belief, based on advice of counsel, that the act is legal. Finding these conditions wholly unsatisfied as applied to the defendant, the court affirmed the convictions.

XIII. Post-Conviction Remedies

U.S. v. Hunter, 21-1275 (8/30/21)

The defendant was convicted of murdering a woman during a drug conspiracy and 21 years later moved for compassionate release from his life sentence. The district court granted the motion based on the following factors: (1) the defendant was sentenced before the change in sentencing law announced in Booker; (2) the defendant's "relative youth" of almost twenty-four years of age when he committed the murder; (3) the "sentencing disparities" between the defendant and three particular co-defendants who pleaded guilty and testified for the government at trial; and (4) the defendant's post-offense rehabilitation. On the government's appeal, the court held that "extraordinary and compelling" reasons did not support the district court's ruling. First, the court ruled that the fact that Booker was decided after the sentencing was a prohibited factor because Booker was not made retroactive. Second, the court held that the defendant's youth at the time of the offense and the sentences of codefendants were prohibited factors because those items were present at the time of sentencing. Finally, with the first three factors nullified, the court held that post-offense rehabilitation is statutorily prohibited from being the sole factor upon which a district court may base compassionate release relief. Accordingly, the district court's ruling was reversed.

Dunn v. Reeves, 20-1084 (7/2/21)
Supreme Court

The petitioner was convicted of murder in Alabama state court and sentenced to death. The petitioner raised a claim of ineffective assistance of counsel at the mitigation phase of trial in state collateral proceedings. The Alabama Court of Criminal Appeals denied relief, noting that the petitioner had failed to call any of his trial attorneys as witnesses. The Eleventh Circuit granted habeas corpus relief, finding that the state court had imposed an impermissible *per se* rule requiring claims of ineffective assistance of counsel to be rejected unless trial counsel is called to testify. The Supreme Court reversed, finding that the state court decision could plausibly be read as being consistent with the Court's precedents.

Hall v. Mays, 10-5658, 15-5436 (8/3/21)

The petitioner was convicted of first-degree murder in Tennessee state court and sentenced to death. In his federal habeas corpus proceedings, the petitioner alleged that the state violated Brady v. Maryland, 373 U.S. 83 (1963), by suppressing prison records demonstrating that one of the prosecution witnesses had severe mental illness. The Sixth Circuit rejected the claim, finding that the prosecution never had actual or constructive possession of the prison records, and that it was under no obligation to seek them out. Furthermore, the petitioner failed to demonstrate that the records were material under Brady. The denial of relief was accordingly affirmed.

Hill v. Shoop, 99-4317, 14-3718 (8/20/21)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death prior to Atkins v. Virginia, 536 U.S. 304 (2002). The petitioner presented evidence of

his intellectual disability at his sentencing proceeding, and the Ohio Supreme Court accepted it as a mitigating factor on direct review. Following the decision in Atkins, the petitioner returned to state court in an attempt to have his death sentence set aside, but the state courts concluded that the petitioner was not intellectually disabled, notwithstanding the earlier finding that he was. The Sixth Circuit, sitting *en banc*, concluded that the state court rejection of the petitioner's Atkins claim was entitled to deference under 28 USC § 2254(d), and as a result the denial of relief was affirmed.

McNeill v. Bagley, 19-3850 (8/20/21)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner alleged that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by suppressing, among other things, a police report demonstrating that the state's star eyewitness had initially failed to identify the petitioner in a photo array on the night of the homicide. The Sixth Circuit affirmed the denial of relief, concluding that the report was not material under Brady in light of the other eyewitness testimony that was presented at trial.

Taylor v. Jordan, 14-6508 (8/23/21)

The petitioner was convicted of capital murder in Kentucky state court and sentenced to death. During jury selection the prosecution used peremptory challenges to strike Black prospective jurors from the venire, to which the defense objected. Batson v. Kentucky, 476 U.S. 79 (1986), was decided shortly after trial while the petitioner's case was still pending on direct review. The Kentucky Supreme Court summarily rejected the petitioner's Batson claim without explanation. In a subsequent post-conviction proceeding in the petitioner's case, the Kentucky Supreme Court suggested in

dicta that a prima facie case of discrimination in support of a Batson claim cannot be established based solely on the number of peremptory challenges used to remove members of a particular race from the venire. The petitioner alleged that the state court's statements in this regard demonstrated that its earlier rejection of his Batson claim had contravened Batson and as a result no deference was warranted under 28 USC § 2254(d). The Sixth Circuit disagreed and determined that Harrington v. Richter, 562 U.S. 86 (2011), applied to the Kentucky Supreme Court's summary denial of the petitioner's Batson claim, and as a result the burden was on the petitioner to establish that there was no reasonable basis for the state court's denial of relief. The Sixth Circuit further concluded that the petitioner failed to carry his burden, and as a result the denial of relief was affirmed.

Gibbs v. Huss, 20-1973 (8/30/21)

The petitioner was convicted of armed robbery and other offenses in Michigan state court and sentenced to a term of imprisonment. Prior to trial, the petitioner's family members were excluded from the courtroom during jury selection. The Michigan Court of Appeals held that the petitioner's public trial claim was defaulted because he failed to contemporaneously object to the courtroom closure. In federal habeas corpus proceedings, the petitioner alleged that neither he nor his counsel were aware of the courtroom closure, and as a result the contemporaneous objection rule was not an adequate and independent state ground as applied to the facts of his case. The Sixth Circuit concluded that Michigan's contemporaneous objection rule would not be an adequate state procedural bar if neither the petitioner nor his defense counsel knew or had reason to know of the closure. The case was accordingly remanded to the district court to determine in the first instance if the

contemporaneous objection rule was an adequate state procedural bar.

Twyford v. Shoop, 20-3346 (8/26/21)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In federal habeas corpus proceedings, the petitioner filed a motion to transport him to a hospital for medical testing in support of his petition. The district court granted the motion, and the Warden appealed. The Sixth Circuit affirmed, concluding that the district court had jurisdiction to enter the transfer order under the All Writs Act.