

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

2A6.1(b)(6) – Threats – Deliberation

U.S. v. Osborn, 21-1005 (9/9/21)

The defendant left a threatening message on the voicemail of a Congressperson. As a result, he was convicted of threatening to commit an assault under 18 U.S.C. § 115(a)(1)(B). At sentencing, the district court declined to apply the 4 level reduction for “little or no deliberation,” pursuant to USSG § 2A6.1(b)(6). On appeal, the court held that denial of the reduction was proper. The court found that in the months preceding, the defendant had made two other threats. Although the prior threats were not “relevant conduct” to the instant offense under the guidelines, the district court did properly consider them as evidence of the defendant's motives and intent. Thus, the sentence was affirmed.

2B1.1(b)(4) – Selling Stolen Property

2B1.1(b)(11)(B)(i) – Trafficking Access Device

U.S. v. Nicolescu, 19-4247 (10/5/21)

Among other crimes, the defendants created a computer virus which extracted credit card numbers, which the defendants then sold to third parties on the dark web. At sentencing for wire fraud, the district court applied a 2 level

enhancement under USSG § 2B1.1(b)(4) based on its finding that the defendants were in the business of receiving and selling stolen property. Additionally, the district court applied a 2 level enhancement for trafficking an unauthorized access device. On appeal, the court first held that the selling-stolen-property enhancement was inapplicable. The court ruled that § 2B1.1(b)(4) applies only to “fences” who sell goods that are stolen by others. It does not apply to those who steal goods themselves and sell them later. As such, application of the enhancement was error, and the sentence was vacated.

Additionally, the court held that the trafficking enhancement was properly applied. The defendants were also convicted under 18 USC § 1028A for aggravated identity theft because they “transferred a means of identification to another person.” The court held that it did not constitute impermissible double counting to impose both a 2 year sentence for the § 1028A conviction and the 2 level increase under § 2B1.1(b)(11)(B)(i) because the two provisions punished different conduct. Namely, the § 1028A offense punished merely “transferring” the stolen credit card numbers on the dark web, while § 2B1.1(b)(11)(B)(i) targeted “trafficking” the stolen credit card numbers. The “trafficking” piece included a “commercial aspect” that was not encompassed in merely transferring the numbers. Thus, because the defendants “marketed [the stolen numbers] on AlphaBay and

accepted payment in return for their sale,” their conduct exceeded merely “transferring” the information. As such, no impermissible double counting occurred. Accordingly, this aspect of the sentence was affirmed.

2D1.1(b)(12) – Stash House Enhancement

U.S. v. Rich, 18-2268 (9/13/21)

The district court in a RICO prosecution imposed a 2 level stash house enhancement under USSG § 2D1.1(b)(12) based on the “relevant conduct” of codefendants. On appeal, the court held that the relevant conduct provisions of USSG § 1B1.3 apply to determinations of the stash house enhancement under § 2D1.1(b)(12). Thus, a defendant in a drug conspiracy may be liable for the 2 level increase based on the actions of a coconspirator who maintains a drug premises. Accordingly, the sentence was affirmed.

V. Fifth Amendment

D. Double Jeopardy

18 USC § 922(g) – Firearms

U.S. v. Grant, 20-4078 (10/1/21)

The defendant was convicted of one count of being a felon in possession of a firearm and one count of being a domestic violence misdemeanor in possession of a firearm. Both counts related to the same firearm and same date of possession. The district court sentenced the defendant to two concurrent terms of 10 years for each count. On appeal, the court held that imposition of 10 years on each count violated the Double Jeopardy Clause. The court ruled that Congress did not specifically authorize separate punishments for violating the differing provisions of § 922(g) based on a single firearm possession. Accordingly, the court found plain error in imposition of multiple sentences for the same conduct, and remanded the case for the district court to merge the convictions.

VIII. Defenses

L. Competency/NGRI

Competency

U.S. v. Prigmore, 20-3989 (10/12/21)

The defendant was charged with being a felon in possession of a firearm. During the course of representation, the defendant fired three lawyers and was psychologically evaluated three times for competency. Each doctor found him to have Antisocial Personality Disorder, but determined that he was competent. The district court judge, the prosecutor, and each of the defense attorneys stated at times on the record that the defendant may not be able to assist in his own defense, but the psychologists repeatedly confirmed that he was “capable” of cooperating. Throughout the case, the defendant engaged in repeated bizarre behaviors in court and several ruses where he pretended he would plead guilty, only to come to court and profess his innocence. After jury trial, the district court sentenced him to the statutory maximum 10 years in prison. On appeal, the court held that the district court did not err in finding the defendant competent. In spite of the bizarre courtroom antics of the defendant, the district court could reasonably rely on the opinion of the three psychologists. As the court emphasized: “Competency requires only the ability to consult with one’s attorney; it does not require the defendant to do so in every instance.” As such, the court affirmed the conviction and sentence.

XII. Specific Offenses

18 USC § 922(g) – Constructive Possession

U.S. v. Latimer, 20-3861 (10/18/21)

The defendant's parole officer discovered firearms, cash, and drugs in the residence into which the defendant had recently moved with his girlfriend. As a result, the defendant was convicted of possession of drugs with intent to distribute and being a felon in possession of a

firearm. The defendant challenged the sufficiency of the evidence on appeal. The court held that where a defendant resides with another occupant at a residence, the government must establish some additional evidence beyond the mere presence of the contraband in the home in order to prove constructive possession. The court found that standard easily met in the case because of pictures in the defendant's phone of drugs and scales, messages in his phone regarding carrying a gun, large amounts of cash in his room, and a gun in plain view when the parole officer entered the home. Thus, the conviction was affirmed.

18 USC § 924(c) – Firearm Enhancement

U.S. v. Woods, 20-1214 (9/17/21)

The defendants were convicted of attempted murder in aid of racketeering under 18 USC § 1959(a)(5) and assault with a dangerous weapon in aid of racketeering under subsection (a)(3). These two offenses were the predicates for a further conviction pursuant to 18 USC § 924(c) for each defendant. The § 924(c) conviction was premised on Pinkerton liability, the defendants being held responsible for shooting incidents committed by codefendants. On appeal, the defendants argued that the attempted murder and assault cases were not proper predicate crimes of violence for the § 924(c) conviction where it was based on Pinkerton liability. The court held that, although a conspiracy charge cannot be a predicate offense for a § 924(c) conviction after the Supreme Court's decision in United States v. Davis, the attempted murder and assault charges could be predicates even though based on Pinkerton liability. Reading Davis narrowly, the court ruled that because the defendants were not literally convicted of conspiracy, the attempt and assault charges could be considered crimes of violence and thus predicates for the § 924(c). This was true even though one of the defendants was actually acquitted of the attempt and assault charges. Accordingly, the convictions and sentence were affirmed.

18 USC § 1028A – Agg. Identity Theft

U.S. v. Nicolescu, 19-4247 (10/5/21)

The defendants were involved in an elaborate wire fraud scheme to defraud users of Ebay and steal credit card and other confidential information. Among other offenses, the defendants were charged with aggravated identity theft, pursuant to 18 USC § 1028A, for stealing and using credit card numbers of their victims. The defendants challenged the sufficiency of the evidence on appeal. The court held that it was sufficient proof that a defendant “used” a victim’s means of identification under § 1028A where the defendant tested the credit card number to determine if it was active. Although the defendant obtained no money from this test of the credit card number, the court found nonetheless that it constituted “use” of a means of identification for purposes of § 1028A. Accordingly, the conviction was affirmed.

18 U.S.C. § 1962(d) – Conspiracy – RICO

U.S. v. Rich, 18-2268 (9/13/21)

The defendants were charged with a conspiracy to commit RICO violations. At trial, the district court instructed the jury that it was sufficient for conspiracy if the defendants reached an agreement to form a RICO enterprise in the future, even if no enterprise were actually formed. The defendants challenged this “future-tense language” in the jury instructions on appeal. The court held that, similar to other forms of conspiracy, a RICO conspiracy charge targeted specifically the agreement to commit the crime. Thus, under existing law, an agreement to form a RICO enterprise was sufficient to violate the conspiracy statute, whether or not such an enterprise was in fact ever formed. Therefore, the jury instruction and conviction were affirmed.

XIII. Post-Conviction Remedies

U.S. v. Augustin, 20-5454 (10/20/21)

Over 10 years prior, the defendant was convicted in a murder for hire scheme which included a firearm conviction under 18 USC § 924(c). In a subsequent habeas petition, the district court vacated the § 924(c) conviction based on a change in law, but declined to conduct a full resentencing. The defendant appealed. The court held that upon granting a habeas petition, the district court may choose to resentence the defendant or merely correct a sentencing error as appropriate. The court found that, at the time of the original sentencing, “circuit precedent required the district court to set an appropriate sentence for each underlying conviction without considering the sentencing effects of his § 924(c) conviction.” Thus, the sentence for the § 924(c) conviction could not have affected the remaining sentence in the case. As such, the district court’s ruling was affirmed.

Hodge v. Jordan, 17-6032 (9/10/21)

The petitioner was convicted of murder and other offenses in Kentucky state court and sentenced to death. In his state court proceedings, the petitioner alleged that he had been deprived of the effective assistance of counsel at the penalty phase of his trial because his attorney failed to investigate and present mitigating evidence; the Kentucky Supreme Court rejected the petitioner’s claim. In federal habeas corpus proceedings, the Sixth Circuit agreed that trial counsel had performed deficiently (“Hodge’s mitigation case at trial consisted of a two-sentence stipulation: he had ‘a loving supportive family—a wife and three children’ and he had ‘a public job work record’ . . . The jury heard nothing else”), but nevertheless concluded that the state court’s finding that the petitioner could not establish prejudice was entitled to deference under 28 USC § 2254(d). The denial of habeas corpus relief was accordingly affirmed.

In re Kareem Jackson, 21-3102 (9/2/21)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following the conclusion of his initial federal habeas corpus proceedings, the petitioner filed a motion for authorization to file a second or successive petition. The petitioner alleged that his rights under Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959), had been violated. The Sixth Circuit concluded that the petitioner made a prima facie showing that he satisfied the requirements of 28 USC § 2244(b)(2)(B), and as a result authorization to file a second petition was granted.

Morrell, et al v. Wardens, 20-1238 (9/3/21)

The petitioners were convicted of various offenses in Michigan state court. In federal habeas corpus proceedings, counsel for the Warden conceded that the petitioners’ Sixth Amendment rights were violated when their sentences were enhanced based on judicially found facts under Michigan’s previously mandatory guidelines. The district courts granted relief and directed that the petitioners receive new sentencing hearings. On appeal, the government argued that the district courts should have granted a remedy that was more limited than requiring full resentencing, and should have instead allowed the state courts to make a preliminary determination as to whether they would have imposed a different sentence in the absence of mandatory guidelines. The Sixth Circuit rejected the government’s argument and concluded that the remedy chosen by the district courts was not an abuse of discretion; the judgments were accordingly affirmed.

Middlebrooks v. Parker, 20-5419 (10/15/21)

The plaintiff was convicted of felony murder and other offenses in Tennessee state court and sentenced to death. The plaintiff filed a lawsuit under 42 USC § 1983 alleging that Tennessee's lethal injection protocol was both facially unconstitutional and unconstitutional as applied to him. The district court granted the defendant's motion to dismiss for failure to state a claim, concluding that the plaintiff's causes of action were barred by *res judicata* in light of the Tennessee Supreme Court's previous rejection of a similar claim that the plaintiff had raised in state court. The Sixth Circuit affirmed as to the plaintiff's as-applied challenge, but reversed with respect to the plaintiff's facial challenge, finding that the plaintiff had alleged intervening factual changes following the earlier state court litigation that were sufficient to overcome the *res judicata* bar. Specifically, the plaintiff made plausible allegations that pentobarbital had subsequently become available for use in Tennessee executions. The judgment of the district court was accordingly reversed, and the case was remanded for further proceedings.