

Precedential Value

Federal Public Defender's Office, Southern District of Ohio

Deborah L. Williams, Federal Public Defender

Editors: Richard Monahan & Jacob Cairns

Issue #87 November - December 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

A. 3553(a) factors and issues

U.S. v. Hymes, 20-5905 (12/3/21)

The defendant was convicted of drug trafficking and originally sentenced as a career offender. On appeal, the career offender designation was vacated based on the Sixth Circuit's *en banc* decision in U.S. v. Havis. On remand, the district court imposed a sentence within the guideline range for the offense, based on the drug amount. The defendant again appealed. The court found the within guideline sentence to be appropriate. First, the court held that the district court had sufficiently addressed the defendant's various arguments for downward departure or variance based on the lack of seriousness of his criminal history, likelihood of recidivism, post-offense rehabilitation, and national sentencing disparities. Further, the court held that the remand was limited to the Havis issue, but even if it wasn't, post offense rehabilitation does not warrant a downward variance where "he had no write-ups while incarcerated and participated in prison programming." These are expected from every inmate. Additionally, the court ruled that a district court is not required to consider national sentencing statistics issued by the Sentencing Commission in deciding whether to depart from the guideline range. Rather, if the district court chooses to do so, it should "measure the data with

extreme care." Accordingly, the sentence was affirmed.

B. Guideline issues

2K2.1(c)(1)(A) – Firearms – Cross Reference

U.S. v. Howell, 20-5858 (11/8/21)

During a bank robbery, the defendant discharged a gun at an employee through a glass door. The employee was not hit. In addition to the bank robbery charges, the defendant was charged with being a felon in possession of a firearm. At sentencing, the district court applied a cross reference in USSG § 2K2.1(c)(1)(A) to the attempted first degree murder guideline at § 2A2.1(a)(1) and increased the defendant's base offense level to 33. On appeal, the court held that application of the cross reference was proper. The court ruled that the defendant need not be charged with the cross referenced offense in order for the guideline to apply. Further, the court found that the facts demonstrated the requisite intent to kill through the defendant's actions in pointing the gun at the employee, demanding that the employee open the door, and then firing the gun directly at the employee. As such, the court found that a preponderance of the evidence supported that the defendant had attempted to commit a first degree murder and the application of the cross reference was affirmed.

II. Plea Matters

A. Agreements

Appeal Waivers

U.S. v. Presley, 20-5213 (11/23/21)

In the defendant's plea agreement for buglarizing pharmacies and assaulting a police officer, he agreed to the following appellate waiver: "In exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by 18 U.S.C. § 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range that the court establishes at sentencing." The parties also agreed to an offense level and allowed either party to withdraw from the plea agreement if the district court rejected the offense level determination. At sentencing, the district court imposed a sentence based on an offense level that was higher than the number agreed by the parties. The defendant neither tried to withdraw his plea nor objected to the appeal waiver provision. On appeal, the court applied plain error review and held that the appeal waiver was enforceable. The court found no basis to believe that the defendant's plea was not knowing and voluntary. Further, the court ruled that there was no evidence introduced nor objections made to indicate that the defendant did not understand that the district court could sentence beyond the stipulated range in the plea agreement. In fact, the defense actually argued in objection to the presentence report for an offense level higher than what was stipulated in the plea agreement. Accordingly, the court found no plain error and dismissed the appeal based on the appeal waiver.

III. Evidence

A. Article IV – Relevancy

414(a) – Prior Child Molestation

U.S. v. Hruby, 19-6363 (12/8/21)

The defendant engaged with an undercover agent online and made arrangements to have sex with the agent's fictional children. Upon crossing state lines to meet the children, the defendant was arrested and he confessed to sexually abusing another child. At the defendant's trial for crossing state lines to engage in a sex act with a minor, pursuant to 18 USC § 2241(c), the government introduced the defendant's statements about abusing another child, pursuant to FRE 414(a). Upon his conviction, the defendant appealed. The court held that admission of the defendant's statements under FRE 414(a) was proper. Rule 414(a) permits the government in a child molestation case to present evidence of prior instances of molestation of children. The court found that the district court had properly determined the conditional relevancy of the evidence under FRE 104(b) and ruled that a jury could reasonably find a preponderance of the evidence to believe that the prior molestation had occurred. Specifically in this regard, the court ruled that the defendant's confession alone was sufficient to support admission of the evidence and that no corroborating information in addition to the confession was required. Additionally, the court held that the evidence was admissible under FRE 403 because the prior acts were sufficiently similar to the charged offense. In both instances, the defendant committed or intended to commit sex acts with a child through an arrangement with the parents. As such, admission of the evidence and the conviction were affirmed.

B. Articles VI-VII – Witness/Expert

701 – Lay Witness Testimony

U.S. v. Howell, 20-5858 (11/8/21)

A victim from the defendant's bank robbery testified at trial that she could not identify the robber at the time because of his disguise. After seeing the defendant on the news as the person arrested for the robbery, and a second bank robbery, the witness came to the belief that the defendant was the person who robbed her. She also knew the defendant's wife and had seen the defendant in the bank before. The defendant appealed the admission of the witness' statements at trial identifying him as the robber. The court held that admission of the witness' lay person testimony identifying the defendant as the robber was improper under FRE 701. The court ruled that FRE 701 requires that a witness' testimony be "rationally based" on her perceptions, and helpful to the jury. The court found that the testimony failed on both fronts. The witness could give no objective basis for her belief that the defendant robbed her other than that she reached that conclusion when she saw that the defendant was arrested. As such, her opinion was not based on her rational perception of the robbery. Further, the testimony was not helpful to the jury because it merely told the jury in a conclusory fashion what it should find. Accordingly, the district court erred in admitting the testimony. Nonetheless, the court held that the evidence of the defendant's guilt was otherwise overwhelming, and the error was harmless. Therefore, the conviction was affirmed.

702 – Expert Testimony

U.S. v. Hall, 20-4128 (12/16/21)

At the defendant's trial for drug trafficking, the government presented two agents who testified both as experts and fact witnesses regarding drug trafficking lingo and identification of the defendant by his voice. Upon his conviction, the defendant appealed admission of the testimony.

The court first held that the agents were properly qualified through experience as having an understanding of the drug trade and the associated terminology. Further, the court ruled that the agents' interpretation of lingo used in the recorded calls was not simply based on the investigation as a whole (which had been prohibited in other cases). Rather the testimony was strictly based on the agents' personal knowledge of the calls themselves, and was helpful to the jury in interpreting the meaning of the "slang and jargon" involved. Additionally, the court held that the agents' testimony identifying the voice of the defendant in phone calls was proper lay witness testimony and was authenticated under FRE 901. The agents were familiar with the defendant's voice from the course of the investigation, and properly listened to and identified his voice in jail calls relating to drugs. Finally, the court held that it was not error for the government to fail to clearly demarcate the difference between the expert and lay opinion portions of the testimony where the district court provided a proper limiting instruction to the jury about the difference in testimony types. Accordingly, the conviction was affirmed.

IV. Fourth Amendment

E. Search Warrants

Fruit of the Poisonous Tree

U.S. v. Elmore, 21-5121(11/12/21)

The defendant was on supervised release for a child pornography offense when his supervision was revoked for possession of additional child pornography. While incarcerated, a fellow inmate notified authorities that the defendant was bragging about abusing a minor and taking picture of it, the pictures being hidden in the defendant's vehicle. As a result, officers retrieved the key fob from the defendant's mother, and searched the vehicle. No additional child pornography was found. The defendant was released from prison two months later and his mother informed him of the search. The defendant then "suspiciously" inquired whether

his mother had given the officers any other key fobs. This conversation caused the mother to locate two other key fobs, which she then turned over to the officers. A search warrant was obtained and child pornography found on one of the fobs. The defendant moved to suppress the evidence in the district court and the motion was denied. On appeal, the court first held that the search warrant for the key fob was not the fruit of the poisonous tree from the first searches of the key fob and car. The court found that two months separated the searches so they were attenuated. Further, the court ruled that the defendant's "suspicious" inquiry of his mother was an "independent action" that was the "product of the defendant's free will," and thus not the fruit of the unlawful search. As such, the court held that second search of the key fobs was not tainted by the original search. Finally, the court ruled that the search warrant was supported by probable cause based on (1) the defendant's prior involvement with child pornography, (2) the inmate's tips, and (3) the defendant's "suspicious" reaction to his mother. Accordingly, the district court's ruling was affirmed.

XII. Specific Offenses

18 USC § 924(c) – Firearm Enhancement

Harris v. U.S., 21-5040 (12/1/21)

The defendant was convicted of aiding and abetting attempted robbery under 18 USC § 2111, and using a firearm in relation to a crime of violence under 18 USC § 924(c). After the Supreme Court's decision in U.S. v. Davis, the defendant filed a habeas petition arguing that the district court had relied on the invalidated residual clause of § 924(c) to improperly enhance his sentence based on the firearm. The district court denied the petition and the defendant appealed. The court first determined that the district court record from sentencing was silent on the determination of which provision was relied on by the district court in finding that the robbery offense was a crime of violence. The

court held nonetheless that the offense of aiding and abetting attempted robbery under § 2111 was a crime of violence for purposes of § 924(c) based on the elements clause. This was so because the attempted robbery offense "has, as an essential element, the use, attempted use, or threatened use of physical force against the person or property of another." Accordingly, the court ruled that the § 924(c) enhancement was properly applied and the district court ruling was affirmed.

XIII. Post-Conviction Remedies

U.S. v. McCall, 21-3400 (12/17/21)

The defendant moved for compassionate release from prison based on three factors: (1) he would not have been a career offender based on the subsequently decided Sixth Circuit case of U.S. v. Havis; (2) the COVID conditions in the prison and his personal susceptibility; and (3) his post offense rehabilitation. The district court denied the petition and held that it could not consider a non-retroactive change in the law (such as the Havis decision) in deciding a compassionate release motion. On appeal, the court held that the district court erred in failing to consider the petition on its merits. The court ruled that non-retroactive changes in the law that would affect the defendant's original sentencing determination may be considered as one of the several factors in deciding whether a defendant has shown extraordinary and compelling circumstances to justify compassionate release. Thus, the district court's ruling was reversed.

U.S. v. Traylor, 21-1565 (11/1/21)

The defendant moved for compassionate release based on her significant health issues and concerns about catching COVID in prison. The district court denied the motion. On appeal, the court held that, where a defendant has received the COVID vaccination while in prison, a district court does not abuse its discretion to deny compassionate release based on increased risk of COVID due to medical conditions. As such, the district court ruling was affirmed.

U.S. v. Bass, 21-1094 (11/3/21)

The defendant was convicted of conspiracy to distribute drugs and committing murder during the course of a drug conspiracy. In lieu of imposing the death penalty, the defendant received two sentences of life imprisonment. Approximately 22 years into his sentence, the defendant sought compassionate release based on the high COVID rate at his prison facility and his post offense rehabilitation. The district court granted the motion. During the course of appeal, the Sixth Circuit learned that the COVID infection rate at the prison had significantly decreased, most inmates and staff had received a vaccination, and the defendant was offered and refused vaccination. The court held that the grant of compassionate release was improper. First, the court ordered a remand for the district court to determine in the first instance whether the vaccination rate at the prison and the defendant's refusal warranted denial of the petition. Further, the court determined that the district court had improperly balanced the factors under 18 USC § 3553 in weighing the seriousness of the offense against other considerations. Accordingly, the district court's ruling was vacated and the case remanded.

Wesson v. Shoop, 20-3613 (11/9/21)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In his state court proceedings, the petitioner alleged that his confession should have been suppressed under Miranda v. Arizona, 384 U.S. 436 (1966), because he was intoxicated at the time he executed his Miranda waiver. The Ohio Supreme Court rejected the petitioner's claim, finding that the record demonstrated that he did not appear to be intoxicated at the time of his waiver. Furthermore, the state court found that no police coercion occurred. The Sixth Circuit concluded that the state court decision was entitled to deference under 28 U.S.C. §

2254(d), and as a result the denial of relief was affirmed.