Sixth Circuit Update

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Table of Contents

Sixth Circuit Update

Plea, Jury, and Trial Issues

U.S. v. Ferguson, 65 F.4th 806 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was a member of an anti-government militia group who was charged with attempted kidnapping of a federal agent. The jury convicted the defendant and he argued on appeal that the evidence was insufficient to prove that he committed an attempt. The court held that an attempt requires a proof of a "substantial step" toward commission of the offense. The evidence must establish an "overt act which objectively marks the defendant's conduct as criminal in nature." As such, a "fragment of the crime must essentially be in progress." In the case, the court found that no attempt to commit a kidnapping had occurred. The court focused on the facts that, although the defendant was in the planning stages, he "had no recruits, no location, no date or deadline, and not even a consistently expressed goal regarding how he intended to treat any responding officers." Moreover, the court emphasized that the "substantial step" toward commission of the offense needed to be near the time of the planned offense and after the intent to commit the crime had been formed. The court noted that the government admitted it did not know when the defendant acquired his gear, and the defendant indisputably owned his AR-15 rifle prior to espousing his criminal plan. Moreover, the defendant gave no firm date for his plan, only vaguely referencing the possibility of performing a strike in June, which was more than a month into the future. Accordingly, the court ruled that the defendant had not committed a "substantial step" under the law toward committing the offense of kidnapping, and thus the defendant's conviction was reversed.

Hardin v. B.A.T.F., 65 F.4th 895 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

Hardin owned several bump stocks and filed an action challenging the Bureau of Alcohol, Tobacco, and Firearm's (B.A.T.F.) determination under 18 USC § 922(o)(1) that a bump stock constituted an unlawful machine gun. The district court granted summary judgment to the B.A.T.F. and the defendant appealed. The court held that the definition of a machine gun is ambiguous as applied to a bump stock. Answering an open question in the Sixth Circuit, the court ruled that Chevron deference is inapplicable to interpretation of § 922(o)(1) because it is primarily a criminal statute. Thus, B.A.T.F.'s interpretation of the statute in the CFR sections was irrelevant to the analysis. Relying on the rule of lenity in criminal cases, the court thus construed the statute in favor of defendants and ruled that a bump stock does not make a rifle an unlawful machine gun under § 922(o). As such, the district court's ruling was reversed.

U.S. v. Harrison, 54 F.4th 884 (6th Cir. 2022)

- Links: **US Courts**; **Westlaw**; **Lexis**

During an investigation, agents used a confidential informant to record drug sales by the defendant. The informant died before trial. At trial, the government played the recordings of the transactions over the defendant's objection under the Confrontation Clause. On appeal, the court held that the statements of the informant were admissible. While the court noted that the statements of the informant were testimonial, the court found that they were not hearsay. Rather,

the statements of the informant were not offered by the government for the truth of the matter asserted, but rather were offered to give context to the defendant's inculpatory statements on the recording. As such, the statements were not hearsay and could not violate the Confrontation Clause. Thus, the admission of the evidence was affirmed.

U.S. v. Jaffal, 79 F.4th 582 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was charged with possession of narcotics with the intent to distribute. At the arrest scene, there was evidence that the defendant was using the drugs and had overdosed. At trial, an agent testified that the drug amount found would "usually" be inconsistent with personal use. Further, the government admitted recorded jail calls in which the defendant made statements about a fentanyl "business" in Detroit. At the close of trial, the defendant requested a lesser included offense instruction for mere possession of drugs, and the district court declined to provide the instruction. On appeal, the court held that the failure to provide the instruction on the lesser possession offense was error.

U.S. v. Liggins, 76 F.4th 500 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was charged with participating in a drug conspiracy in the Eastern District of Michigan. Initially, the defendant agreed to plead guilty, and requested to transfer a second drug case from the Western District of Kentucky for a joint resolution. Instead of pleading guilty, however, the defendant fired a number of attorneys and continued the case several years in the process. During a hearing related to the removal of one of the attorneys, the district court commented to the defendant as follows: "I'm tired of this case. I'm tired of this defendant. I'm tired of getting the runaround. . . . This guy looks like a criminal to me. This is what criminals do. This isn't what innocent people, who want a fair trial do." Approximately two years later, the case proceeded to trial. Shortly before trial, the defendant moved for recusal of the district judge, pursuant to 28 USC § 455, based on bias demonstrated by at the prior hearing. The court denied the motion, however, it apologized for it's mistake and becoming hostile with the defendant. The defendant was convicted at trial, and he appealed. On appeal, the court held that § 455 requires district judges to disqualify themselves from proceedings in any case in which "their impartiality might reasonably be questioned." The court found that the district court had expressed personal bias against the defendant, which demonstrated "a deep-seated antagonism that would make fair judgment impossible." The court noted that the district court did apologize for its behavior related to the comments, but this occurred over two years after the comments were made and only upon the prompting of the defendant in a motion for recusal. As such, the court held that recusal of the district judge was warranted. As such, the conviction was reversed, and the case remanded for retrial before a different district judge.

U.S. v. Wilson, 75 F.4th 633 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was involved in a shootout. As a result, he was convicted of being a felon in possession of a firearm. At sentencing, the district court applied a 4-level enhancement for

possessing the firearm in relation to another felony, namely felonious assault. The defense attorney argued the enhancement was inapplicable because the defendant fired the gun in self-defense. The district court refused to entertain the argument, repeatedly telling counsel to "take your seat," that the court "did not care," and other similar statements. On appeal, the court held that the case had to been remanded. Under Ohio law, self-defense is a valid defense to felonious assault. The defendant bears the burden of proving it as an affirmative defense. Thus, the proper procedure for the district court was as follows: (1) the government must prove by a preponderance of the evidence that the defendant committed felonious assault; (2) the burden of production then shifts to the defendant to establish the elements of self-defense; and (3) the government would then be required to disapprove one of the elements of self-defense by a preponderance of the evidence. Because the district court ignored the law and made none of these findings, the case was reversed and remanded for resentencing.

The Fourth Amendment

U.S. v. Waide, 60 F.4th 327 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

A shed caught fire on the defendant's neighbor's property. While investigating the fire, the fire department noticed that the defendant's residence had sophisticated video cameras, which they believed may have captured the source of the fire. The defendant declined the request to review his video footage. In response, the fire department, with the aid of law enforcement, sought a warrant to obtain the video footage from the defendant. Upon advising the defendant of the ensuing warrant execution, the defendant made statements implicating that drugs were in his residence. This led to additional search warrants and the discovery of contraband in the defendant's residence. The defendant moved to suppress the first warrant (for the video footage), and the district court denied the motion. On appeal, the court held that the first search warrant was unsupported by probable cause. The fire department had no actual evidence of a crime being committed related to arson of the shed. There was no evidence of an accelerant being used, and the only evidence in the affidavit of any potential foul play was double hearsay from two unidentified sources. The court found this information lacked the requisite probable cause to believe that the crime of arson had been committed.

Additionally, the court ruled that the fruit of the poisonous tree doctrine required suppression of the drug evidence seized based on the subsequent search warrants. The court held that the defendant's admissions and the officers' discovery of contraband were the fruits of "the threatened use of an unlawful warrant." Because the court concluded that the evidence would not likely have been otherwise discovered without this unlawful threat, the subsequently obtained evidence had to be suppressed. As such, the court concluded that the attenuation and inevitable discovery doctrines were inapplicable. Finally, the court held that good faith could not save the warrant because it found that the affidavit was bare bones. Accordingly, the district court's ruling was reversed.

Sixth Circuit Update

U.S. v. Morgan, 71 F.4th 540 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was passed out behind the wheel of a running car at 5:00 a.m. An officer was in the area helping another motorist, and noticed the defendant. Rather than trying to rouse the driver from outside the car, the officer immediately opened the car door. The interaction led to the defendant being arrested and contraband being found. In his prosecution, the defendant moved to suppress the drug and gun evidence. The district court denied the motion and the defendant appealed. The court held that the community caretaker exception did not justify the officer's actions. While an officer may take actions to prevent injury or ongoing harm to the community at large, the court found that the circumstances did not permit the unannounced opening of the defendant's car door. The court focused on the "myriad, less intrusive paths available" to the officer to address concerns about the defendant, including turning on police emergency lights, shining a flashlight, calling out to the defendant, or knocking on the window. As such, the court ruled that the officer's actions were unreasonable under the circumstances. Accordingly, the district court's ruling was reversed and the evidence suppressed.

U.S. v. Robinson, 63 F.4th 530 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was on supervised release when he was stopped for a traffic violation by an officer, and a gun was found. At the violation hearing, the government conceded a Fourth Amendment violation related to the stop, however the district court declined to apply the Fourth Amendment to violation hearings. Moreover, the court refused to require a jury trial on the issue of whether the defendant possessed a gun (a new crime) while on supervised release. On appeal, the court first held that the Fourth Amendment does not apply to supervised release violations. Thus, the district court properly considered the evidence found in the case in spite of the officer's misconduct. The court noted that there may be a "harassment" exception to this rule where the officer harasses a defendant based on the defendant's supervised release status. The court found no such harassment on the facts of the case, and accordingly declined to address the efficacy of the exception. Second, the court held that 18 USC § 3583(g) does not require the district court to hold a jury trial when imposing a sentence where the defendant had engaged in criminal conduct while on supervised release. In so holding, the court ruled that the Supreme Court's decision in U.S. v. Haymond (which required submission of the case to a jury) was narrowly limited to imposing mandatory prison sentences on sex offenders under 18 USC § 3583(k). Thus, the violation sentence was affirmed.

Sixth Circuit Update

U.S. v. Loines, 56 F.4th 1099 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

An officer executing a search warrant at the defendant's residence looked inside a vehicle parked out front and observed a "bag of dope." As a result, officers additionally searched the vehicle (which was not included in the warrant) and found a "bag of dope." The district court denied the defendant's motion to suppress the vehicle search. The defendant appealed. The government argued that the search of the vehicle was justified under the plain view exception. The court, however, held that the search was improper. The court found that the only indication a "bag of dope" was visible from outside the car was the officer's unsupported and conclusory testimony at the suppression hearing. However, video and photo evidence submitted by the government at the hearing contradicted this assertion. The court emphasized: "The government offers no plausible explanation as to how the officers could see the 'bag of dope' through the tinted window, but the cameras could not capture any view into the interior of the car." As such, the court found clear error in the district court's factual determination that the drugs were in plain view, reversed its holding, and granted suppression of the evidence from the car search.

Sentencing Guidelines

U.S. v. Carter, 69 F.4th 361 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

Upon his conviction for being a felon in possession of a firearm, the defendant received a sentence enhancement under USSG § 2K1.2 for his prior Ohio conviction for robbery. On appeal, the court held that the Ohio robbery offense, under ORC § 2911.02(a)(2), qualified as a generic robbery for purposes of the enumerated clause under the sentencing guidelines. Rather than analyze robbery in its generic sense, the court instead analogized to the elements of extortion, which the Sixth Circuit had previously held were "a match" for robbery. Under this standard, the court found that Ohio robbery contained the same basic elements as extortion. Thus, the court concluded that § 2911.02(a)(2) was the same as "generic" robbery, and the sentence was affirmed.

Sixth Circuit Update

U.S. v. Mosley, 53 F.4th 947 (6th Cir. 2022)

- Links: **US Courts**; **Westlaw**; **Lexis**

At the defendant's trial for participating in a drug conspiracy, a codefendant testified that the defendant had sold him drugs. After trial, the defendant sent a short letter to the district judge denying the sale. As a result, the district court imposed a two-level enhancement for obstruction of justice, pursuant to USSG § 3C1.1. On appeal, the court found the enhancement improper. The court held that a general, perfunctory denial of criminal responsibility is insufficient for obstruction of justice. The court found that the defendant's letter was brief, and did nothing more than deny that he was guilty, which he had already done at trial. Therefore, the court ruled that the obstruction enhancement was improperly applied and the case was remanded for resentencing.

U.S. v. Whitson, 77 F.4th 452 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

In 2011, the defendant participated in two Hobbs Act robberies—along with co-conspirators—in an attempt to obtain drugs and cash. After various appeals and motions, the defendant got his 924(c) convictions vacated. In 2022, the defendant was resentenced on his remaining convictions. At his resentencing, the district court found that because the defendant maintained that he was not guilty of the offenses charged by the government, the court could not deem the defendant to have been rehabilitated. The district court stated the defendant's sentence would be shorter if he admitted guilt. The district court made this statement despite the defendant's other evidence of rehabilitation, i.e., his exemplary record while incarcerated and his specific expression of remorse for the victims of these crimes. The district court proceeded to weigh the rest of the defendant's § 3553(a) factors and imposed a within-guidelines sentence of 360 months. The defendant appealed the procedural and substantive reasonableness of this sentence. The court found the district court plainly erred by using the defendant's exercise of his Fifth Amendment right against self-incrimination as a factor when fashioning his sentence. A district court cannot penalize a defendant for maintaining their innocence by discounting their evidence of rehabilitation and explicitly issuing a longer sentence because they refuse to admit guilt. Thus, the court found the district court plainly erred, and the defendant's sentence was procedurally unreasonable.

U.S. v. Reinberg, 62 F.4th 266 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant sold drugs for her boyfriend to an undercover informant. During the sale, she discussed a potential firearm that could be sold to the informant but deferred to her boyfriend to follow up with the informant. The boyfriend later sold the informant the firearm. At her sentencing for distribution of methamphetamine, the defendant sought a reduction under the safety valve, USSG § 5C1.2. The district court denied the request because the defendant had not told the government everything she knew about the uncharged firearm. On appeal, the court held that the defendant bears the burden to prove—by a preponderance of the evidence—that she has told the government everything she knew about the offense and any relevant conduct to obtain

safety valve relief. The court found that although the defendant was honest about her involvement with the drugs, she failed to disclose her knowledge about the firearm, contrary to what she said on the recorded meeting with the informant during the drug sale. As such, the defendant had not established by a preponderance of the evidence that she was honest about the relevant conduct related to the offense, and safety valve relief was not warranted.

U.S. v. Thomas-Mathews, No. 21-1824, 2023 WL 5491975, 2023 U.S. App. LEXIS 22464 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

The defendant was convicted of possession of crack cocaine with the intent to distribute and two firearm convictions under 18 USC § 924(c). At sentencing, the defendant requested that the district court consider a downward variance from the crack guideline based on: (1) a policy disagreement with the 18:1 crack to powder ratio (with which the government agreed); (2) application of the crack guideline based on the circumstances of the case; and (3) the defendant's history and characteristics. The district court rejected the downward variance and the defendant appealed. The court held that the district court's sentence was procedurally unreasonable. First, the court held that the district court appeared to treat the 18:1 ratio as mandatory based on its repeated assertions that Congress set that amount, and had at least two opportunities to change it, but did not. As such, this was error. Second, the court found that the district court failed entirely to consider the defendant's argument that the 18:1 ratio created unwarranted disparity in relation to the specifics of his case. Third, the court ruled that the district court did not adequately address his arguments for a downward variance based on his history and characteristics. The court found the district court's assessment of the § 3553 factors to be "terse" and considered only the defendant's criminal history. The court concluded: "Thus, while something less than a factor-by-factor recitation is acceptable, something more than a simple and conclusory judicial assertion that the court has considered 'the nature and circumstances of the offense and the history and characteristics of the defendant' is essential." As such, the case was remanded. The court declined to refer the case to a different district judge for resentencing.

U.S. v. Reed, 72 F.4th 174 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

At the defendants' sentencing for participation in a drug conspiracy, the district court calculated their sentence based on 4.5 kilograms of "actual methamphetamine." The defendants objected to this calculation and appealed. The court held that there are three types of methamphetamine for purposes of the guidelines: methamphetamine (meth mixture); methamphetamine (actual); and Ice (over 80% purity). A meth mixture is the total weight of the substance, including any mixture. Meth actual refers to the weight of the controlled substance in the mixture itself. The court found that the district court improperly attributed 4.5 kilos of "actual meth" to the defendants. At sentencing, only 2.66 kilos of the meth had been tested and determined to be "actual meth." Regarding the remaining amount, there simply was no credible evidence upon which the court could rely in determining whether it was actual meth or a meth mixture. As such, the district court's sentence was vacated, and the case was remanded for resentencing.

Sixth Circuit Update

U.S. v. You, No. 22-5442, 2023 WL 4446497, 2023 U.S. App. LEXIS 17495 (6th Cir. 2023)

- Links: **US Courts**; **Westlaw**; **Lexis**

District court's estimate of intended loss, in calculating the Sentencing Guidelines range for the defendant's crimes arising from stealing trade secrets from her employer, was speculative and not reasonable; the court declined to calculate anticipated profits for the defendant's new business in China based on projections she made in her application for business grants from Chinese government, then appeared to have relied on another estimate from the application in estimating annual Chinese market for product in question, and court confused profits with sales by claiming to determine loss amount based on anticipated profits but using numbers from anticipated sales. U.S.S.G. § 2B1.1.