

Precedential Value

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Issue #100 January – February 2024

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. Allen, 22-2158 (2/14/24)

After pleading guilty to possession with the intent to distribute methamphetamine, the defendant was sentenced to a bottom of the advisory guidelines range. On appeal, he argued that the sentence was both procedurally and substantively unreasonable. In the defendant's first argument, he averred that the sentence was procedurally unreasonable because the district court failed to address the government's role in the offense. Prior to and at the sentencing, the defendant argued that he was not a "kingpin" and had a limited drug trafficking history. On appeal, and specifically in his reply brief, the defendant reframed the argument to submit that the government engaged in both sentencing entrapment (i.e., the government induced the defendant to commit a more serious offense when he was otherwise predisposed to commit a less serious crime) and sentencing manipulation (i.e., the government engaged in a longer-than-necessary investigation to increase the defendant's relevant conduct). However, because the defendant waited until his reply brief to raise the argument, the court ruled that no procedural error had occurred. Importantly, the

court noted it will consider the availability of sentencing entrapment and manipulation arguments on another day. The defendant argued (as a second reason) that the court committed procedural error because it ceded its discretion to Congress by refusing to reject the methamphetamine guideline. In support of his argument on appeal, he relied on a case that addressed the crack/powder disparity. However, the case was not raised in the initial appeal; rather the defendant mentioned it in a 28(j) letter. The Court of Appeals held that the argument was not properly preserved, but even if it had been, the district court understood its discretion to depart from the guidelines and chose to impose a within guideline sentence, as the methamphetamine in the case was 100% pure. Finally, the defendant argued the sentence was not substantively reasonable because the court did not consider him as a "whole person." The court found that the district court did not abuse its discretion when imposing a within guideline sentence, as the mitigating factors were accounted for in the court's decision to sentence at the bottom of the range.

U.S. v. Axline, 23-5141 (2/27/24)

The defendant engaged in underaged drinking and then drove 90 miles per hour on winding mountain roads, ultimately crashing the car,

killing one of the occupants, and injuring others. He was convicted of vehicular homicide on federal lands. At sentencing, the district court imposed an upward variance 40% above the guidelines. On appeal, the court held that the sentence was reasonable. The district court properly considered the factors under 18 USC § 3553 and gave appropriate weight to each of the defense arguments. Regarding the upward variance, the court found that “the guidelines do not necessarily account for the confluence of the defendant’s underage drinking and extremely reckless driving, nor do they necessarily adequately account for the effect of the defendant’s actions on multiple victims.” Accordingly, the court ruled that the sentence was substantively reasonable and affirmed the district court’s ruling.

B. Guideline issues

2D1.1 – Drug Amount/Firearm Enhancement

U.S. v. Histed, 22-2080 (2/22/24)

As part of his plea in a drug trafficking case, the defendant admitted to possessing enough methamphetamine to equate to an offense level 30 under the sentencing guidelines. At sentencing, however, the district court imposed an offense level of 32 based on its belief that it had “no doubt” that the defendant was involved with additional meth. Further, the court imposed a 2-level enhancement under 2D1.1(b)(2) for an inert grenade that was found in the defendant’s abandoned pickup after a high-speed chase. The defendant challenged these enhancements, among others, on appeal. The court first held that the district court’s application of offense level 32 was error. The court ruled that a district court must reach a “final figure” as to drug amounts, even if it is an estimate, wherein the district court explains its methodology. Here, the court found that the district court failed to make sufficient findings in this regard, and thus remanded the case for reconsideration of the issue. The court limited the district court’s review to the record evidence, specifically forbidding the government

from a “second bite at the apple” in introducing any new evidence.

Additionally, the court held that the dangerous weapon enhancement was proper. When the officers discovered the grenade in the truck, they believed it was real and called in the bomb squad. Thus, although the grenade turned out to contain no explosives, it still created a dangerous situation for the officers. Because the grenade was in the truck after a high speed chase (during which meth was found) the court found that it was not improbable that the grenade was related to the offense. Thus, the grenade counted as a “dangerous weapon” that was related to the drug trafficking, and the 2-point enhancement was affirmed.

3A1.1 – Vulnerable Victim

U.S. v. Olear, 22-3835 (1/8/24)

The defendant was convicted of Medicare and Medicaid fraud. At sentencing, the district court imposed an enhancement under USSG § 3A1.1 because it found that the elderly residents at the nursing homes were vulnerable. The defendant argued on appeal that the elderly residents at the nursing homes were not victims of his crime (i.e., Medicare and Medicaid were his victims). Additionally, the defendant argued that he should have been able to cross examine non-victim witnesses at his sentencing hearing. In affirming the application of the enhancement, the court noted that the enhancement applies if the defendant “knew or should have known” the victim’s vulnerable state, whether or not the defendant targeted the victim because of that state. Further, the court held that the enhancement applies if the vulnerable victim was harmed by “relevant conduct” that the defendant engaged in while committing the offense, even if the victim was not harmed by the specific conduct that made up the elements of the offense. In this case, even though the nursing home residents did not suffer the monetary losses of the criminal offense, the court recognized that they could have suffered collateral harms due to the “misuse” of

their identities. By way of example, the Court highlighted that individuals have to fix credit problems when their identities are misused.

Additionally, the court rejected the defendant's argument that he should be permitted to cross-examine non-victim witnesses at sentencing. The court analyzed the definition of a "victim" under the federal statutes. The court found that because the Confrontation Clause does not apply at sentencing, and the defendant had not identified a statute or rule that permitted him to cross-examine a "non-victim," the district court did not abuse its discretion in prohibiting the cross-examination.

C. Procedural matters

D. Recidivism enhancements

USSG § 2K2.1 – Firearm – Crimes of Violence

U.S. v. Dorsey, 23-5082 (1/23/24)

Upon his conviction for being a felon in possession of a firearm, the district court enhanced the defendant's sentence under USSG § 2K2.1 for two prior Tennessee convictions for facilitation of aggravated robberies. On appeal, the court held that the facilitation offenses were, in fact, crimes of violence under § 2K2.1 based on its prior holding in U.S. v. Gloss. The court found that facilitation requires that the defendant knew that another person intended to commit an aggravated robbery, facilitated that offense, and that the robbery offense was, in fact, committed. The court ruled that this facilitation offense met the requirements of the "elements clause" under the guidelines (defining a crime of violence). Further, the court held that the "knowing" standard for facilitation was sufficient *mens rea* under Supreme Court precedent. As such, the sentence was affirmed.

U.S. v. Ivy, 22-4052 (2/20/24)

The defendant was convicted of being a felon in possession of a firearm, and the district court increased his sentencing guideline range under

USSG § 2K2.1 based on his prior Ohio conviction for aggravated robbery with a firearm. On appeal, the court held that Ohio aggravated robbery with a firearm (ORC § 2911.01(A)(1)) is not a crime of violence under the guidelines. First, the court ruled that this offense is not a crime of violence under the "elements clause" of the guidelines based on the court's prior precedent in U.S. v. White because the aggravated robbery offense did not necessarily involve the proper *mens rea*, namely a knowing or purposeful use of force. Second, the court held that the prior conviction was not a crime of violence under the enumerated offenses clause. The court found that Ohio aggravated robbery was not the same as generic robbery because the statute criminalized a broader range of conduct than encompassed in a generic robbery. Specifically, the court ruled that Ohio aggravated robbery (1) could be committed with a *mens rea* of less than recklessness, and (2) did not require "obtaining something of value from another," both of which were required for generic robbery. As such, Ohio's aggravated robbery was not the same as generic robbery, and thus not a crime of violence under the guidelines. Thus, the sentence was vacated.

IV. Fourth Amendment

A. Reasonable Expectation of Privacy

U.S. v. Whipple, 23-5126 (2/8/24)

The defendant purchased items used in bank robberies from Walmart. The defendant made the purchases in-store, using the Walmart Pay app which required him to disclose his name, address, and payment information. Upon learning of these potential purchases, the government issued an administrative subpoena for these individual purchases and obtained the Walmart surveillance video of the defendant leaving the store. This information was ultimately utilized to link the defendant to the robberies. The district court denied the defendant's motion to suppress the evidence, and he appealed. The court held that that the defendant had no reasonable expectation

of privacy in the customer information obtained from Walmart. The court ruled that the third-party doctrine generally permits the government to obtain voluntarily disclosed information to a business without the necessity of a search warrant. Given that the Walmart information was voluntarily disclosed by the defendant during the transaction, and the government's subpoena was narrowly tailored to obtain only this information, the court found that the defendant had no reasonable expectation of privacy in the information. Further, the court held that the Supreme Court's decision in Carpenter v. U.S. (dealing with cellphone geolocation data) did not alter the result. The court distinguished Carpenter on the grounds that it dealt with information involuntarily disclosed through use of a cellphone. In contrast, the defendant voluntarily disclosed his identifying information in making the Walmart Pay app purchase. As such, the court found Carpenter inapplicable and affirmed the district court ruling.

E. Search Warrants

U.S. v. O'Neill, 22-3793 (2/29/24)

The defendant's family reported him to the police for having child pornography on his devices in his home. As a result, the officer sought a search warrant. In creating the affidavit for the warrant, the officer used as a template another search warrant application that had been submitted, and the officer inadvertently left in a statement from the template that the defendant had accessed a peer to peer child porn file sharing network. After officers searched the defendant's home and found child porn, the family provided another tip to police that the defendant had additional child porn materials in a barn. The officers obtained a second search warrant, which "bootstrapped" on the first and contained the same false report about peer to peer file sharing. In searching the barn, the officers subsequently found that the defendant had been producing child porn at that location. The defendant was prosecuted for producing, receiving, and distributing child pornography, and he moved to suppress the evidence from the

two searches. The district court found that the search warrant for the home lacked probable cause, but that it and the warrant for the barn were saved by the good faith exception. The defendant entered a conditional plea, but only preserved appeal of the ruling on the search warrant for the barn; the house search warrant was left out of the conditional plea language. On appeal, the court first held that the defendant had not preserved his right to appeal the ruling on the search of the house. The court held that because a conditional guilty plea "represents an exception to the general rule that a guilty plea waives all non-jurisdictional defects in the pre-plea proceedings," if an issue is not specifically preserved by the language of the plea agreement, it is waived.

Second, the court found that the good faith exception to the warrant requirement applied with respect to the search of the barn. The court held that, although a false statement was made in the search warrant affidavit, it was the product of negligence on the part of the officer, and was not deliberate or reckless falsity which obviated good faith. Further, the court ruled that the barn search warrant was not bare bones. The search warrant affidavit "described an immense collection of images, saved in dedicated albums, that contained uniform subject matter—nude or partially nude young boys," which the family had described as obscene. As such, the affidavit contained sufficient information to clear the "bare bones" hurdle. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

D. Double Jeopardy

McElrath v. Georgia, 22-721 (2/21/24) Supreme Court

After jury trial in Georgia state court, the defendant was found not guilty by reason of insanity for malice-murder, and guilty but mentally ill for felony murder and aggravated assault. The counts all related to the killing of the

defendant's mother. On appeal to the Georgia Supreme Court, the defendant prevailed that the NGRI and the guilty but mentally ill were "repugnant" to each other under Georgia law. However, instead of just remanding the guilty counts, the Georgia Supreme Court also remanded for retrial the malice-murder count, for which the defendant was found NGRI. The Supreme Court granted *certiorari* on the issue. The Court held that an NGRI verdict under Georgia law qualifies as a not guilty finding by the jury. As such, the Double Jeopardy Clause prohibited retrial of the count after the acquittal on this count. Thus, the Court reversed the Georgia Supreme Court's ruling remanding the malice-murder count for retrial and affirmed the NGRI verdict on this count.

VI. Sixth Amendment

E. Indictment - Variance/Duplicity

Constructive Amendment/Variance

U.S. v. Belcher, 22-1650 (2/9/24)

The defendant was charged with murder for hire, under 18 USC § 1958(a), and hindering a federal investigation, under § 1512(b). The indictment did not contain a "death results" enhancement for the § 1958(a) charge, although prior to trial, during trial, and in the jury instructions, the government sought this enhancement. The defendant did not object at trial to these arguments. Additionally, the government introduced different facts from those alleged in the indictment related to the § 1512(b) charge. Upon his conviction the defendant appealed. The court first held that the indictment had been constructively amended by the addition of the "death results" enhancement at trial and in the jury instructions. The addition of this enhancement increased the statutory penalties from 0-10 years up to a maximum of life, which the district court imposed at sentencing. Although a constructive amendment to an indictment is ordinarily structural error requiring reversal, the court applied plain error review

because the defendant failed to object in the district court. As such, the court found that the defendant knew of the constructive amendment and in fact acquiesced in it: "The breadth of information in the record highlighting the defendant's possible punishment, and his knowledge of that punishment, alleviates the notice and due process concerns created by the constructive amendment." Accordingly, the court found no plain error and the § 1958(a) conviction and life sentence were affirmed.

Regarding the § 1512(b) charge, the court emphasized that not all facts are required to be pled in an indictment. The indictment in the case alleged false statements made by the defendant to investigators related to the first element of the offense (making false statements). At trial, the government introduced different false statements made by the defendant to the investigators in order to prove the third element of the offense (that the defendant tried to hinder a federal investigation). The court found that no fatal variance occurred even though these additional false statements were not listed in the indictment: "The government did not pivot its factual theory of the § 1512(b) charge or vary the superseding indictment by referencing trial testimony to meet the federal nexus element." Accordingly, the conviction was affirmed.

IX. Jury Issues

B. Juror Bias/Misconduct

U.S. v. Kechego, 22-2041 (1/31/24)

During the defendant's murder trial, the jury foreperson reported to the district court that deliberations had broken down, jurors were playing cards in other rooms, they were disregarding her opinion, and they had looked at their phones. The foreperson indicated that she wished to be replaced and would no longer deliberate. After discussion with the parties, the district court inquired whether the jury had reached a unanimous verdict on any of the counts. The foreperson responded that they had reached a verdict on all but three counts, so the district

court took the verdict accordingly, convicting the defendant of second degree murder. The defendant argued on appeal that the district court should have held a Remmer hearing to determine if jury misconduct had occurred, and that the district court erred in taking a partial verdict. The court first held that no Remmer hearing was required. A Remmer hearing is only proper where there is evidence of an outside influence on a jury; internal influences are generally not enough. Because the only suggestion of outside influence was that some jurors had looked at their phones, this was insufficient to require a Remmer hearing. Second, the court held that the taking of the partial verdict was proper. The court noted that the defense had actually acquiesced in this process. Further, the court found that no plain error occurred. A district court may inquire into a partial verdict where there is evidence that deliberations have broken down and/or deliberations have been ongoing for an extensive period of time. The court found that, based on the breakdown in communications of the jury and the acquiescence of the parties, the taking of the partial verdict was proper. Accordingly, the conviction was affirmed.

C. Voir Dire/Jury Empanelment

U.S. v. Olear, 22-3835 (1/8/24)

The defendant went to trial and was convicted of Medicare/Medicaid fraud. The jury found that he cheated Medicare and Medicaid out of \$2 million by filing claims for fictitious x-rays. In doing so, he used the identities of (at least) 62 elderly residents from nursing-homes. On appeal, with regards to the trial, the defendant challenged the district court's exclusion of individuals who had not been vaccinated against COVID-19 from the jury venire under the Sixth Amendment. The Court of Appeals held that unlike members of a particular race or sex, the unvaccinated do not qualify as the "distinctive group" that can trigger the Sixth Amendment concerns with excluding a "fair cross section of the community" from the jury pool. Accordingly, the conviction was affirmed.

XI. Appeal

Standard of Review

U.S. v. Cabbage, 22-3889 (2/2/24)

Prior to sentencing in a drug case, the defendant and the government agreed to a 2 level leadership enhancement under USSG § 3B1.1, rather than the 3 levels recommended in the PSR. The district court honored the parties' agreement and imposed the 2 level increase. The defendant then appealed. The court held that the defendant had either waived the issue or invited the error, but did not decide which because the defendant lost under either standard. Finding no manifest injustice, the court affirmed.

XII. Specific Offenses

18 USC § 1512(b) – Hindering Investigation

U.S. v. Belcher, 22-1650 (2/9/24)

During a murder investigation, the defendant denied any involvement in the murder and told local investigators that he believed that the victim was murdered because he was cooperating with DEA. This information was then conveyed by the local investigators to the DEA, who ultimately investigated and charged the defendant with murder for hire and hindering a federal investigation, pursuant to 18 USC § 1512(b). After trial, the defendant argued that the evidence was insufficient to support the verdict on the § 1512(b) charge. On appeal, the court held that the defendant's communication to local law enforcement that the witness was killed because he was believed to be a DEA informant was sufficient to invoke the federal jurisdiction. The court stated as follows: "A person's reference to a federal agency does not make it 'likely' that that information will be transferred to federal law enforcement. Viewing the evidence in the light most favorable to the prosecution, however, when, as here, a person repeatedly peddles a narrative that a deadly event took place because of the victim's involvement with federal law enforcement, a juror could find the federal nexus

element satisfied. This is true even when the alleged misleading statements are not about the killer’s motives, but about the speaker’s attempt to avoid detection.” Accordingly, the court found that the evidence was sufficient and the conviction was affirmed.

XIII. Post-Conviction Remedies

Hodge v. Jordan, 17-6032 (2/22/24)

The Sixth Circuit’s previous opinion in Hodge v. Jordan, 12 F.4th 640 (6th Cir. 2021), was vacated on panel rehearing and a new opinion was issued. The petitioner was convicted of murder and related offenses in Kentucky state court and sentenced to death. At the penalty phase of trial, the petitioner’s lawyers’ entire mitigation case was a two-sentence stipulation indicating that the petitioner had a loving and supportive family, that he had worked in the public sector, and that he was a permanent resident of Tennessee. State post-conviction counsel alleged ineffective assistance of trial counsel at the penalty phase, but the Kentucky Supreme Court denied relief on the ground that the petitioner could not demonstrate prejudice because there was no factual nexus between his mitigation evidence and the crime that he committed. The Sixth Circuit concluded that the Kentucky Supreme Court’s rationale for denying relief was contrary to United States Supreme Court precedent, and as a result no deference was warranted under 28 USC § 2254(d)(1). Furthermore, the petitioner’s claim was meritorious. As a result, the judgment of the district court denying relief was reversed.