Precedential Value

Federal Public Defender's Office, Southern District of Ohio

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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

2K2.1(b)(4) – Stolen Firearms

U.S. v. Brown, 23-1212 (11/22/23)

The defendant was convicted of, among other crimes, using false identifications to purchase firearms. At sentencing, the district court applied a two-level enhancement, pursuant to USSG § 2K2.1(b)(4), because a firearm in the defendant's possession upon his arrest was stolen. On appeal, the court ruled that application of the enhancement was proper. The court held that, even though the firearm found at the time of arrest may not have been a part of the relevant conduct in the case, the defendant's fraudulent purchase of approximately 25 firearms qualified them as "stolen" for purposes of the guideline. The court found that firearms acquired by fraud were the same as stolen firearms under the law. Thus, the district court properly applied the two-level enhancement.

4A1.2(a)(2) – Crim. Hist. – Intervening arrest

U.S. v. Rogers, 22-5837 (11/6/23)

At the defendant's sentencing for drug trafficking, the district court determined that the defendant was a career offender based on two prior Kentucky drug trafficking offenses. In the first prior offense, the defendant was arrested and detained for 90 days, but then released and not indicted for the offense until he picked up the second drug trafficking offense about a year later. The defendant argued on appeal that the offenses should not count separately since was he sentenced on the same date for the two crimes and received concurrent sentences. The court held that the offenses were properly counted separately for purposes of the guidelines. Pursuant to USSG § 2K2.1(b)(4), prior sentences are always counted separately if they were "separated by an intervening arrest." The court ruled that the term "intervening arrest" in this context means "(1) a custodial arrest (2) that occurs at some point before the commission of the second offense." The court found this standard easily met in the case. The court further held that it was of no consequence that the defendant was never indicted for the first offense until the commission of the second. Accordingly, the sentence was affirmed.

III. Evidence

A. Article IV – Relevancy

401 – Relevancy

U.S. v. Wilder, 22-2129 (12/4/23)

Upon being approached by officers, the defendant fled clutching a firearm in his waistband. During the pursuit, the defendant dropped and retrieved the gun, and then fled into

a home where he hid it, later to be found by officers. At trial for being a felon in possession of a firearm, the district court permitted the officer to testify as to his extensive training and experience identifying firearms and individuals carrying firearms. On appeal, the court held that admission of the testimony was proper. Specifically, the court found that the testimony was relevant under FRE 401 because "an individual familiar with what a concealed weapon looks like is better able to identify one than someone who has no familiarity. And through this testimony, [the officer] demonstrated his familiarity with recognizing guns. In that way, [the officer's] testimony provided the jury information from which it could gauge the credibility of his identification." Further, the court found that the defendant failed to object under 403 to the prejudicial nature of the testimony. The court found no plain error related to the 403 balancing. As such, the conviction was affirmed.

B. Articles VI-VII – Witness/Expert

702 – Expert Testimony

U.S. v. Reynolds, 22-1431 (11/9/23)

The defendant was charged with distribution of fentanyl causing two deaths. The defendant challenged the government's expert testimony regarding cell tower location data for the defendant's phone during the relevant time period. Specifically, the defendant challenged the expert's use of "antenna coverage maps" created through use of a program called TraX. The program created area maps to show coverage of specific cell tower antennas that were "amoeba shaped" as opposed to the normal "wedge shaped" mapping for antenna coverage. The district court admitted the evidence and the defendant appealed. The court held that the evidence was properly admitted under the Daubert standard. Although the "amoeba shaped" maps were not peer reviewed or recognized as standard in the industry, the court found that the experts agreed that the TraX mapping actually provided a broader potential coverage area for each antenna. The court ruled that this choice actually resulted in a lower potential error rate on the relevant question: "whether a phone connected to that antenna would fall within TraX's coverage area." The court also noted that TraX was used by "pretty much every federal entity in the United States," and had recently been picked up by LexisNexis. As such, the court found no error in admission of the testimony under FRE 702 and the conviction was affirmed.

IV. Fourth Amendment

D. Consent Searches and Seizures

U.S. v. Tellez, 22-5902 (11/17/23)

Officers stopped the defendant's vehicle for a traffic violation and he consented to a search of the vehicle. The officer then asked him if he had a wallet, and when the defendant removed the wallet from his pocket, the officer said, "Let me see it for a moment." The defendant handed over the wallet, the officers searched through it, and found stolen credit cards. The defendant challenged the search claiming he did not consent. The district court denied the motion, the defendant was convicted, and he appealed. The court held that the defendant had consented to the search of his wallet. The court ruled that there is no specific formula for what constitutes consent and that consent may be non-verbal. The court found that the defendant had consented to the search of the wallet based on the totality of the circumstances. The defendant had consented to a search of the car, he was cooperative throughout and the officers did nothing coercive, and when asked about his wallet he reached for it and then handed it over. The court held that these facts were sufficient to establish the defendant's consent and the district court did not err in so finding. Thus, the defendant's conviction was affirmed.

VI. Sixth Amendment

D. Right to Counsel/Self Represent

Ineffective assistance of counsel

Carson v. U.S., 22-3386 (12/13/23)

The defendant was convicted at trial of robbing a bank and tampering with a witness. Thereafter the district court sentenced him to 20 years in prison. Both the conviction and sentence were upheld on appeal. In a *habeas* petition he argued his counsel was ineffective for failing to initiate plea proceedings, committing several trial mistakes, and knowingly waiving his right to testify. The court of appeals found that all three arguments lacked merit and accordingly affirmed the conviction and sentence. With regards to the first argument, the Sixth Circuit has held that defense counsel can provide ineffective assistance by failing to initiate plea negotiations when the prosecution has proposed no plea terms. To succeed on such a claim, the defendant must show a reasonable probability that the prosecution would have offered a plea deal, that the defendant would have accepted the proposed terms, that the trial court would have approved it, and that the deal would have contained better terms than the judgment that resulted from the trial. The court found that while the defendant indicated a willingness to plead to the charge of witness tampering, the government had made clear it would not negotiate on that count. Moreover, the defendant repeatedly denied his involvement in the robbery and professed his innocence, up to and including, at the time of sentencing. These two facts (in combination) established that no plea deal could have been reached. The defendant's second argument was also fatally flawed, as the purported trial errors (i.e., permitting his parole officer to identify him as the robber in a photo; failing to object to improper questioning of a defense witness, i.e., defendant's mother; and agreeing with some of the prosecutor's statements in opening) could not overcome the other overwhelming evidence of guilt. Finally, with regards to a knowing waiver of the right to testify, the court held that because the defendant did not object to his lawyer's representation that he did not want to testify, he could not later claim that he did. The court's reasoning was based on two presumptions. First, the court presumes that defense lawyers discuss the pros and cons of testifying with their clients; and second, the court presumes that defendants have knowingly declined to testify when they raise no objection to counsel's decision not to put them on the stand. The presumptions are intended to protect a defendant's right "not to testify" and thereby do not require courts to engage in a thorough colloquy before accepting counsel's representation that the defendant will not testify. In short, the court does not want a defendant to be pressured into testifying if he is forced to answer a litany of questions before being allowed to remain silent. Here, since the defendant did not raise a contemporaneous objection, he could not overcome the two presumptions regarding his waiver of the right to testify.

VII. Other Constitutional Rulings

A. Commerce Clause

U.S. v. Allen, 22-1698 (11/9/23)

The defendant was charged under the murder for hire statute, 18 USC § 1958(a), for using a facility of interstate commerce (cell phones) to commit the crime. The defendant argued that the application of the statute to his case, where the use of the cell phones was purely intrastate, violated the Commerce Clause. The district court disagreed, and the defendant was convicted. On appeal, the court held that binding Supreme Court and Sixth Circuit law required affirmance of the conviction. The use of cell phones, even where the usage did not cross state lines, is sufficient under the Commerce Clause to establish federal jurisdiction. Thus, the district court's ruling was upheld on this basis. Judges Murphy and Bush penned a concurrence in which they questioned whether, given more recent Supreme Court decisions, the use of cellular phones purely

intrastate should still pass muster under the Commerce Clause. Precedent required affirmance of the conviction in this case, but the judges suggested that this matter should be revisited by the Supreme Court and that a less expansive reading of the Commerce Clause was warranted.

IX. Jury Issues

A. Jury Instructions

8 USC § 1324 - Harboring illegal aliens

U.S. v. Zheng, 22-5516 (10/18/23)

A jury convicted two defendants on four counts of harboring illegal noncitizens for commercial gain, in violation of 8 USC § 1324(a)(1)(A)(iii) and (a)(1)(A)(v)(II). On appeal, the defendants challenged the jury instructions. The defendants argued that the definition of "harboring" required the district court to instruct the jury that they acted intentionally and knowingly. The court first looked at the history of the statute, finding that the 1952 version required the government prove that a defendant acted "willfully or knowingly" when harboring or attempting to harbor an illegal noncitizen from detection. Then, when the statute was amended and reenacted in 1986, the "willfully and knowingly" requirement was removed and replaced with a "knowing or in reckless disregard" mens rea (under 8 U.S.C. § 1324(a)(1)(A)(iii)). In addition to the statutory amendment, the court considered the dictionary definition of harboring. Finally, the court looked to other circuits and their interpretations of the word, and ultimately concluded that "harboring" encompasses conduct that tends to "substantially facilitate noncitizens remaining in the country illegally and prevent authorities from detecting the noncitzens' presence." In other words, the court rejected the notion that the jury should have been instructed that it must find that the defendants acted intentionally. Accordingly, the convictions were affirmed.

X. Probation/ Supervised Release

Supervised Release Violations

U.S. v. Esteras, 23-3422 (12/20/23)

At the hearing on the violation of the defendant's supervised release, the district court considered factors including the seriousness of the offense, promoting respect for law, and providing just punishment. As such, the court imposed an upward departure to a sentence of 24 months imprisonment. On appeal, the defendant argued that a district court is prohibited from considering these factors under 18 USC § 3583(c). The court held that, although there is a difference in the factors a district court is required to consider in a supervised release violation (§ 3583(c)) and at an original sentencing (§ 3553(a)), the two provisions do not prohibit or limit the factors that a district court may consider at a supervised release violation hearing. Thus, the district court did not err in considering factors that were not included in § 3583(c). Accordingly, the sentence was affirmed.

XI. Appeal

Standard of review

U.S. v. Carter, 22-2009 (12/27/23)

The defendant argued in a sentencing memorandum that the guidelines were too high for Ice (greater than 80% purity meth). At sentencing, the defendant focused instead on other arguments for a variance. As a result, the district court did not specifically address the meth purity argument. Prior to imposing sentencing, the district asked counsel as follows: "Pursuant to United States v. Bostic, is counsel satisfied that I've addressed on the record all non-frivolous arguments asserted?" Defense counsel responded, "yes, your honor." The defendant then challenged the procedural reasonableness of the sentence on appeal, claiming that the district court failed to address the argument at sentencing. Without deciding which standard applied, the court held that the defendant had

either "waived" or "invited the error" in the district court. Because the court found no manifest error in the district court's ruling (the invited error standard), the court held that the sentence could be affirmed under either standard.

XII. Specific Offenses

18 USC § 1512(b) – Attempt – Witnesses

U.S. v. Wilder, 22-2129 (12/4/23)

The defendant was charged with attempted witness tampering for calling his girlfriend from jail and suggesting she pay a witness to lie about the possession of a firearm that the defendant was charged with. Upon his conviction, the defendant argued on appeal that evidence was insufficient to establish an attempt. The court held that an attempt under the law requires that the defendant take a substantial step, which means something more than mere preparations. The court found that the defendant encouraged his girlfriend to go to the home, to take money to pay for the witness' testimony, and he continued to encourage the girlfriend when she reported that she was pulling up to the house. These facts constituted a substantial step toward witness tampering, and thus the conviction was affirmed.

21 USC § 841 – Distribution causing death

U.S. v. Reynolds, 22-1431 (11/9/23)

The defendant went to trial on charges of distributing fentanyl to two individuals and causing their deaths. The defendant argued in the district court and on appeal that the government did not prove that the drugs he distributed to the decedents were the same drugs that caused the death. On appeal, the court held that, in order to establish but-for causation in a fatal overdose case, the government must in fact prove that the drugs causing the death were the "same drugs" that the defendant had distributed. The court found that, even though an intermediary was used in one of the sales, the government had sufficiently met its burden. Cell phone evidence linked the defendant's sales to the decedents, the transactions were close in time to the deaths, and there was no other evidence of the decedents buying drugs from others. Further, the court ruled that the government need not prove that the defendant was acting in concert with the intermediary, as long as it proves that the drugs causing the death were the "same drugs" distributed by the defendant. As such, the evidence was sufficient and the conviction was affirmed.

XIII. Post-Conviction Remedies

U.S. v. Goodwin, 22-5845 (11/28/23)

In 2009, the defendant received a 262-month (bottom of the guideline range) sentence for conspiring to distribute crack cocaine. Following the passage of the First Step Act, the defendant sought to lower his sentence, which the district court denied. The defendant appealed, arguing that the district court erred by denying relief in a cursory order. Additionally, the defendant argued substantive error, claiming that his post-offense rehabilitation required a below-guideline sentence. The court affirmed the denial, reasoning that the district court had properly considered and denied the defendant's arguments, notwithstanding the brevity of the court's written order and the fact that the district court did not hold a hearing. Judge White, who authored the dissenting opinion, criticized the court's short opinion. Specifically, Judge White stated that the order offered no reasoning or discernible basis to support the sentence imposed. Moreover, because the written order did not respond to the defendant's complex arguments, it was unclear if the Court actually understood them. While the majority worried that reversing the district court could impose "opinion-writing standards on district courts," Judge White averred that affirming the order in this instance encourages "formulaic opinion-writing standards."

Davis v. Jenkins, 21-3404 (11/20/23)

The earlier decision in Davis v. Jenkins, 79 F.4th 623 (6th Cir. 2023), was vacated for rehearing *en banc*.

Fields v. Jordan, 17-5065 (11/3/23)

The petitioner was convicted of murder and first-degree burglary in Kentucky state court and sentenced to death. The petitioner was alleged to have entered the victim's residence while he was intoxicated by using a knife to unscrew a porch window. The petitioner subsequently claimed that the jury had violated his constitutional rights by conducting an experiment during deliberations; specifically, the petitioner alleged that the jurors used the same knife that was introduced into evidence to unscrew a cabinet in the jury room. The Kentucky Supreme Court rejected the petitioner's claim on the merits. Reviewing the claim exclusively under 28 U.S.C. 2254(d)(1), the Sixth Circuit, sitting *en banc*, held that the petitioner could not obtain relief because jury experiment claims are not based on clearly established United States Supreme Court precedent. The denial of relief was accordingly affirmed.

Fields v. Jordan, 17-5065 (11/3/23)

The petitioner was convicted of murder and first-degree burglary in Kentucky state court and sentenced to death. In his state postconviction proceedings the petitioner alleged that his trial lawyers deprived him of the effective assistance of counsel in various respects; the Kentucky Supreme Court found that counsel did not perform deficiently, however, and rejected the petitioner's claim on the merits. The Sixth Circuit, sitting *en banc*, 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.

Mack v. Bradshaw, 22-3201 (12/19/23)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner subsequently alleged in his state postconviction proceedings that his rights under Brady v. Maryland, 363 U.S. 83 (1963), had been violated, but the Ohio Court of Appeals rejected his claim on the merits. The Sixth Circuit concluded that the state court's rejection of the petitioner's claim was entitled to deference under 28 U.S.C. § 2254(d), and the availability of habeas corpus relief was therefore foreclosed.

Mack v. Bradshaw, 22-3201 (12/19/23)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The petitioner alleged in his state postconviction proceedings that he had been deprived of the effective assistance of counsel at both the guilt and penalty phases of trial because his attorney failed to argue that the petitioner was innocent even under the state's theory of the case. The Ohio Court of Appeals concluded that the claim was procedurally defaulted. The Sixth Circuit concluded that the petitioner could not satisfy either Schlup v. Delo, 513 U.S. 298 (1995), or Sawyer v. Whitley, 505 U.S. 333 (1992), and as a result he could not excuse his default on the basis of actual innocence. Furthermore, the petitioner had a meaningful opportunity to raise his claim on direct appeal, and he therefore could not rely on the ineffective assistance of postconviction counsel to excuse his default under Trevino v. Thaler, 569 U.S. 413 (2013), and Martinez v. Ryan, 566 U.S. 1 (2012). The denial of relief was accordingly affirmed.

Winters v. Taskila, 21-2615 (12/15/23)

The petitioner was convicted of armed robbery in Michigan state court and sentenced to prison. The petitioner, proceeding *pro se*, filed for federal habeas corpus relief following the conclusion of state court review. The petition was denied, but the petitioner did not receive a

copy of the order and judgment until after the time for filing the notice of appeal had expired. The petitioner subsequently filed a notice of appeal which included an explanation of the date on which he had received the order and judgment through the prison mail system. The Sixth Circuit concluded that the petitioner's initial notice of appeal could be fairly construed as a motion to reopen the time to appeal, and that the petitioner's appeal was therefore timely.