

PRECEDENTIAL VALUE

Federal Public
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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.

I. Sentencing Issues

B. Guideline issues

2B1.1(b)(1) – Loss Amount

U.S. v. Moon, 14-2085 (11/4/15)

The defendant was convicted of conspiracy to commit wire fraud based on his use of stolen credit and gift card numbers. At sentencing, he requested a downward variance from the guideline range because the majority of the card numbers he obtained were no longer active and the intended loss amount overstated the seriousness of the offense. Further, the defendant argued that scoring each inactive card against him violated the parsimony provision of 18 USC § 3553 in that it required the court to impose a sentence that was “greater than necessary” to meet the statutory purposes of sentencing. The district court disagreed and applied the minimum \$500 per card loss amount for each of the inactive cards, pursuant to USSG § 2B1.1(b)(1), cmt. n.3(F). On appeal, **the court held that application of the \$500 per card intended loss amount was appropriate. In so holding, the court ruled that the “usability” of the cards did not alter this requirement.** Further, the court rejected the

defendant’s argument that the use of the \$500 minimum per card violated the § 3553 parsimony provision. The court found that application of the minimum loss per card did not overstate the significance of the criminality in the case. Thus, the defendant’s sentence was affirmed.

C. Procedural matters

Sentence Credits and Concurrent Sentences

U.S. v. James, 15-1088 (11/4/15)

The defendant was sentenced to a term of imprisonment of 15 years for drug and firearm offenses, and that sentence was ordered to be served concurrently with his State of Michigan sentence. At the sentencing hearing, the district court told the defendant that he would receive credit for the time he was sitting in the custody of the marshals awaiting sentencing. The BOP, however, did not credit the defendant for that time, reasoning that it was credited against the state sentence that the defendant was already serving. Accordingly, the defendant filed a motion in the district court for an order awarding him credit for the time he was in federal custody awaiting sentencing. The district court granted the motion and awarded the credit. The defendant

appealed and argued that the district court should also have given him “credit” against his federal sentence for the remaining time he spent in state prison after his federal sentencing hearing but before being turned over by the state to the BOP. The court held that a “credit” is different than a “concurrent” sentence. **The time in federal custody before the federal sentencing could be properly “credited” against his federal sentence by the district court. After the federal sentencing, the state and federal sentences were running “concurrently,” or at the same time. Thus, there was no reason for the “credit” of the post-sentencing period. As a result, the court concluded that the defendant already received from the district court everything that he had asked for on appeal. In this situation, the court concluded that it had no jurisdiction over the appeal, and it was accordingly dismissed.**

D. Recidivism enhancements

18 USC § 2252(b)(2) – Prior Sex Abuse

U.S. v. Mateen, 14-4165 (11/3/2015)

The defendant was convicted of possession of child porn and at sentencing the district court determined that he qualified for the sentencing enhancement under § 2252(b)(2) based on a prior Ohio conviction for gross sexual imposition. On appeal, the court held that a prior offense counts as a qualifying offense for the enhancement if the offense is “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” The court ruled that **the “relating to” language is to be read broadly in this context and means that the state statute of conviction must “be associated with sexual abuse.” Applying this standard, the court found that Ohio’s gross sexual imposition clearly “related to” sexual abuse. In so holding, the court relied on the standard dictionary definition of the terms “sexual” and “abuse.” Accordingly, the sentence was affirmed.**

18 USC 924(e) - ACCA

U.S. v. Priddy, 15-5136 (12/15/15)

The defendant was convicted of being a felon in possession of a firearm and the district court determined that he qualified for the enhancement under the ACCA based on Tennessee burglary and robbery convictions. While the appeal was pending, the Supreme Court decided Johnson, which held that the residual clause of the ACCA was unconstitutional. The court nonetheless ruled that the defendant’s Tennessee convictions qualified as violent felonies. First, the court held that **the defendant’s burglary and aggravated burglary convictions were violent felonies because burglary is an enumerated offense under the ACCA and the Tennessee burglaries qualified as the “generic” form of burglary. Second, the court ruled that the defendant’s robbery conviction was a violent felony under the “use-of-force” clause of the ACCA. Because robbery required, at a minimum, that the defendant “put the person in fear,” the offense qualified as a crime that involved “threatened use of physical force,” as required by the ACCA. Accordingly, the defendant’s sentence was affirmed.**

In re: Windy Watkins, 15-5038 (12/17/15)

The petitioner was convicted of being a felon in possession of a firearm in federal court and was sentenced under the Armed Career Criminal Act’s residual clause. The United States Supreme Court subsequently ruled in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the ACCA’s residual clause was unconstitutionally vague. The petitioner then filed an application for leave to file a second or successive habeas petition under 28 U.S.C. § 2255. The court concluded that **the petitioner made a prima facie showing that Johnson was fully retroactive on collateral review, and as a result the petitioner was permitted to file a second petition under 28 U.S.C. § 2255(h)(2).**

III. Evidence

B. Articles VI-VII - Witness and Expert

701 – Lay Witness Testimony

U.S. v. Gyamfi, 14-2247 (11/12/15)

The defendant was stopped at an airport checkpoint and heroin was found in his luggage. At trial, his defense was that he did not know the heroin was in the bag. As a result, the government presented multiple witnesses who testified that the defendant appeared nervous at the checkpoint based on his stuttering, excessive sweating, being fidgety, and exaggerated movements. Further, a witness testified that at one point the defendant hung his head in a “giving up motion.” The defendant was convicted and he argued on appeal that the lay opinion testimony about his nervousness and the “giving up motion” were improper under FRE 701. The court held that the testimony was rationally based on the witnesses’ “experiences from everyday life,” and thus did not amount to legal conclusions. The witnesses observations were helpful to the jury because they were separate from anything the jurors could observe in court and the observations were limited to the witnesses’ own “sensory and experiential observations.” Accordingly, the evidence was properly admitted and the conviction was affirmed.

C. Article VIII – Hearsay

801(d)(2)(E) - Coconspirator Exception

U.S. v. Meda, 13-2598 (12/23/15)

The defendant was charged with Medicare fraud. At trial, the government introduced hearsay testimony of doctors, an office administrator, and a marketer indicating the defendant’s knowledge of fraudulent acts. The defendant objected that the statements were hearsay, but the district court found the

conspirator exception applicable. The district court failed to make a finding that the hearsay declarants were part of the conspiracy. On appeal, the court held that ordinarily a district court is required to make a factual finding related to whether a hearsay declarant is part of the conspiracy before admitting evidence under the exception. The court ruled, however, that the record was clear that each of the declarants were conspirators and thus the court found no reversible error. Further, the court ruled that any error was harmless because the statements were just a small part of the government’s case. Therefore, the conviction was affirmed.

V. Fifth Amendment

A. Prosecutor Conduct

Prosecutorial Vindictiveness

U.S. v. Meda, 13-2598 (12/23/15)

The defendant was acquitted in a Medicare fraud conspiracy and a month later the government charged him in a second Medicare fraud conspiracy that had occurred shortly after the first one. The defendant was convicted, and after the appeal was filed, he moved to dismiss the case based on prosecutorial vindictiveness. Applying the plain error standard, the court held that four factors are relevant to such a claim: (1) the exercise of a protected right; (2) a governmental stake in the defendant’s exercise of that right; (3) unreasonableness in the prosecutor’s conduct; and (4) the intent to punish the defendant for exercise of the right. The court found that there was no evidence in the record that the government acted to punish the defendant for exercising his rights. To the contrary, the evidence showed that the government chose to indict him only because of his fraudulent conduct in the second case. Thus, the defendant’s conviction was affirmed.

Prosecutorial Misconduct

U.S. v. Meda, 13-2598 (12/23/15)

The defendant was prosecuted for Medicare fraud and attempted to present the testimony of a witness to support her defense at trial. The government indicated to the court that the witness was possibly involved in the fraud and asked the district court to appoint counsel in order to protect her Fifth Amendment rights. At the defendant's request, the district court held a hearing and required the government to indicate what the witness' potential criminal liability was and a summary of the evidence against her. The court then appointed counsel and, after consultation, the witness pled the Fifth. The defendant argued on appeal that the government engaged in witness intimidation and that the district court erred in failing to require the government to grant the witness immunity. The court held that in order to establish a witness intimidation claim, the defendant must show "substantial interference with a witness' free and unhampered determination to testify," and that the governmental conduct was not harmless. Further, in order to show error in failure to grant witness immunity, the defendant must prove either that (1) immunity was necessary to a fair trial because the government granted immunity to its own witnesses but not those of the defense, or (2) prosecutorial misconduct occurred by intentionally attempting to distort the fact finding process. The court first found that **no witness intimidation occurred. The prosecutor possessed legitimate information that the witness had committed criminal conduct and acted ethically in asking that the witness consult with counsel. Second, the court found no basis for a grant of immunity. The government had not immunized any of its witnesses and the government did nothing to distort the fact finding.** Accordingly, the court ruled that there was no improper prosecutorial conduct and affirmed the defendant's conviction.

D. Double Jeopardy

U.S. v. Meda, 13-2598 (12/23/15)

The defendant was charged in two Medicare fraud conspiracies. He was acquitted on the first conspiracy. He argued in the second charge that the two conspiracies were actually one big conspiracy and that double jeopardy prevented the subsequent prosecution. On appeal, the court held that, in conspiracy cases, five factors are relevant in determining whether the government violated double jeopardy: (1) the time period covered in the two cases; (2) the identity of the conspirators; (3) the statutory offenses charged in the two cases; (4) the overt acts charged and other descriptive language about the offenses charged; and (5) the places where the events took place. The court found that, **although the same crimes were charged in both cases and both conspiracies operated out of the same building, the time periods, the identities of the central conspirators and the acts charged were distinct enough to conclude that separate conspiracies were involved. Thus, although it was a "close case," the court found no double jeopardy violation and the defendant's conviction was affirmed.**

VII. Other Constitutional Rulings

A. Commerce Clause

18 USC § 842 – Explosives

U.S. v. Lechner, 13-1072 (11/20/15)

The defendant was convicted of offenses related to the illegal transportation of explosives. He raised for the first time on appeal that, because his possession of explosives was wholly intrastate, Congress exceeded its authority under the Commerce Clause in enacting the statute. The court held that, **similar to its treatment of drugs and firearms, Congress' comprehensive regulation of explosives is permissible under the**

Commerce Clause “because the misuse of such material, especially when transported on highways, has a substantial effect on interstate commerce,” even where a single defendant’s possession is wholly intrastate. Accordingly, the conviction was affirmed.

XI. Appeal

Appeal Waivers

U.S. v. Moon, 14-2085 (11/4/15)

The defendant pled guilty to conspiracy to commit wire fraud. The defendant waived his right to appeal except for “adverse rulings on any preserved objection asserting that the district court incorrectly determined the guideline range.” At sentencing, the defendant argued that discrepancies regarding the correct loss amount warranted a downward variance from the guideline range. The district court rejected the variance request and the defendant appealed. The court held that the appeal waiver language required dismissal of the appeal. The defendant’s request for a downward variance based on the loss amount was not technically an objection to the guideline range. As such, the appeal waiver provision was enforceable and the appeal was dismissed. In spite of the appeal provision, the court nonetheless addressed the merits of the defendant’s argument. (See *supra*).

Standard of Review

U.S. v. Priddy, 15-5136 (12/15/15)

The defendant was convicted of being a felon in possession of a firearm and the district court determined that the defendant was an armed career criminal. Defense counsel agreed with the court that the defendant qualified for the enhancement. While the appeal was pending, the Supreme Court decided Johnson, which struck down the residual clause of the ACCA. The government argued that the defendant waived the

issue of whether the ACCA enhancement applied by agreeing with it in the district court. The court held that ordinarily an agreement that an enhancement applies means the issue is waived on appeal. However, the court held that because the defense counsel was unaware that the Supreme Court would rule as it did in Johnson at the time of the sentencing hearing, the court found that the waiver rule was inapplicable and it proceeded to the merits of the issue under plain error review. (See *supra*).

XII. Specific Offenses

18 USC § 842(a)(3)(A) – Transporting Explosives

U.S. v. Lechner, 13-1072 (11/20/15)

The defendant was charged with two counts of transporting explosives without a permit. The defendant was a farmer who had lawfully obtained the explosives, however, he failed to store them in ATF approved containers and, when questioned about them, said that he “used them up.” The defendant was convicted at trial, and he argued on appeal that the statute was ambiguous and that it conflicted with 27 CFR § 555.205(d). Under the CFR, explosives must be kept in ATF approved containers unless being transported by a person who obtained them lawfully. The court held that there was no conflict between the statute and the CFR. The court found that the CFR required that the explosives were first stored lawfully before being transported. Thus, the defendant’s act of transporting the explosives from one unlawful container to another did not relieve him of criminal liability, even though he did originally acquire them lawfully. Accordingly, the court found that the statute was not unconstitutionally vague and that the rule of lenity was not applicable. Further, the court noted that entrapment by estoppel was not a valid defense to the charge because of the defendant’s incorrect interpretation of the CFR. Thus, the defendant’s conviction was affirmed.

18 USC § 842(i) – Explosives – Prohibited Person**U.S. v. Lechner, 13-1072 (11/20/15)**

The defendant was convicted of possession of explosives by a person under indictment. He raised two arguments for the first time on appeal: (1) The government was required to prove that he knew he was under indictment at the time he possessed the explosives; and (2) his compliance with the law was impossible because he already possessed the explosives at the time he was indicted, and therefore he was automatically guilty at that time. Applying plain error analysis, the court first held that **the defendant's substantial rights had not been impacted because the defendant clearly knew that he was under indictment based on his testimony at trial and his attendance at a state court hearing related to the state indictment. Further, the court noted that the law did not clearly establish that a defendant must know he is under indictment to be guilty of the crime.** Second, the court found no plain error in application of the statute to him even though he already possessed the explosives at the time he was indicted. The court ruled that **no prior case had found the statute unconstitutional on this basis and the defendant took no steps to rid himself of the explosives after being indicted.** Thus, the defendant's conviction was affirmed.

18 USC § 842(j) – Storage of Explosives**U.S. v. Lechner, 13-1072 (11/20/15)**

The defendant was convicted of unlawfully storing explosives. The defendant argued for the first time on appeal that the jury instructions were improper – even though he agreed to them in the district court – in that they failed to instruct the jury regarding the requirements in the CFRs for the proper storage of explosives. The court first held that the issue was waived because the defendant agreed to the jury instructions. The court further ruled that, even if the issue wasn't waived, no plain error occurred. The court found

that the requirements of the CFR were sufficiently explained in testimony by a government expert witness, without objection or cross examination by the defense. Additionally, the court held that the evidence established the defendant's failure to comply with those storage requirements. Accordingly, the court found no plain error in the district court's failure to instruct the jury on the CFR requirements.

18 USC § 1001 – False Statements**U.S. v. Lechner, 13-1072 (11/20/15)**

The defendant was being investigated by ATF for improperly storing, possessing, and transporting explosives. When asked whether he still had the explosives stored somewhere, he told the agents that they were "used up." This statement was not true because he had significant explosives that were improperly stored. At trial, the defendant admitted that the statement was a "white lie," although he explained that what he actually meant was that his son had the explosives. The defendant argued on appeal that the government did not prove the materiality of the statement. The court held that **the statement that the explosives were "used up" was material to the investigation because, if believed, it was capable of influencing the investigation and it was apparent that it was calculated to do so.** The court found it irrelevant to the materiality analysis that the district court ruled at sentencing that the statement did not rise to the level of obstruction of justice under the guidelines. Accordingly, the conviction was affirmed.

XIII. Post-Conviction Remedies**White v. Wheeler, 14-1327 (12/14/15)**
Supreme Court

The petitioner was convicted of murder in Kentucky state court and sentenced to death. During voir dire, a prospective juror stated that he could consider the death penalty as an available

punishment, but also gave inconsistent and equivocal answers regarding his ability to vote to impose a death sentence. The trial judge granted the prosecution's motion to strike the juror for cause. The court granted habeas corpus relief based on the removal of the juror from the venire, but the Supreme Court reversed. Under *Witherspoon v. Illinois*, 391 U. S. 510 (1968), and *Wainwright v. Witt*, 469 U. S. 412 (1985), a juror in a capital case may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law" with respect to the imposition of the death penalty. Because the Kentucky state courts had a reasonable basis for determining that the juror's dismissal was permissible under *Witherspoon* and *Witt*, relief in federal court was precluded under 28 U.S.C. § 2254(d).

Abdur'Rahman v. Carpenter, 13-6126 (11/4/15)

The petitioner was convicted of murder in Tennessee state court and sentenced to death. After his federal habeas corpus proceedings had concluded, the petitioner filed a motion for relief from judgment under Fed.R.Civ.P. 60(b), alleging that some of his previously raised claims could be reviewed on the merits under the decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The court rejected the petitioner's argument, concluding that *Martinez* and *Trevino* only apply to claims of ineffective assistance of trial counsel that had actually been procedurally defaulted as a result of ineffective assistance of post-conviction counsel. Because the petitioner was attempting to relitigate some claims that did not involve ineffective assistance of trial counsel, and other claims that had not actually been defaulted, *Martinez* and *Trevino* did not apply. Furthermore, to the extent that the petitioner alleged a defaulted claim of ineffective assistance of trial counsel, the claim was not substantial.

The denial of relief under Fed.R.Civ.P. 60(b) was therefore affirmed.

Bachynski v. Stewart, 15-1442 (12/23/15)

The petitioner was convicted of various offenses of Michigan state court. The petitioner requested an attorney after being arrested and read her *Miranda* rights by detectives, and the interrogation ceased. After being placed in a cell, the detectives offered to provide the petitioner with a phone book and a telephone to contact an attorney, at which point she told them that she had changed her mind and wanted to speak with them. The petitioner later claimed that she only changed her mind because she was told that her alleged accomplice was cooperating with police and incriminating her. The district court granted relief, concluding that the state court's rejection of the petitioner's Fifth Amendment claim was objectively unreasonable. The court reversed, concluding that the state courts made a factual finding that no impermissible questioning took place after the petitioner invoked her right to counsel, and that the petitioner had failed to rebut the finding as required by 28 U.S.C. § 2254(e)(1).

Board v. Bradshaw, 14-3199 (11/10/15)

The petitioner pleaded guilty to drug trafficking in Ohio state court. After the time for filing his direct appeal had expired, the petitioner filed a motion for leave to file a delayed appeal under Ohio Rule of Appellate Procedure 5(A). The state court of appeals denied the motion, and the Ohio Supreme Court denied discretionary review. The petitioner then filed a federal habeas corpus petition under 28 U.S.C. § 2254, which the district court dismissed as barred by the statute of limitations. The court reversed, concluding that the petitioner's motion for leave to file a delayed appeal qualified as "a properly filed application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. §

2244(d)(2), and as a result the petitioner was entitled to statutory tolling of the limitations period.

King v. Morgan, 13-4189 (12/1/15)

The petitioner was convicted of murder and related offenses in Ohio state court. After state court review of his convictions and sentence had concluded, the petitioner filed for habeas corpus relief in federal court, which was denied. The petitioner then returned to state court and obtained a new sentence. After state court review of the petitioner's challenges to his new sentence had concluded, the petitioner filed a second habeas corpus petition in federal court. The second petition raised claims relating to the new sentence, and also to the convictions that had already been at issue when the first federal petition was denied. The court concluded that, under *Magwood v. Patterson*, 561 U.S. 320 (2010), the petitioner's claims in his second petition were not "second or successive" within the meaning of 28 U.S.C. § 2244(b), even though they attacked the same convictions that were at issue in the first petition.

Matthews v. White, 13-5901 (11/10/15)

The petitioner was convicted of murder in Kentucky state court and sentenced to death. After his federal habeas corpus proceedings had concluded, the petitioner filed a request for funding under 18 U.S.C. § 3599 so that he could obtain a neuropsychological evaluation for use in state clemency proceedings. Under *Harbison v. Bell*, 556 U.S. 180 (2009), and 18 U.S.C. § 3599(f), federally appointed counsel may obtain funding for an expert witness whose services are reasonably necessary for the representation of the petitioner in connection with state capital clemency proceedings. The district court denied the petitioner's request, but the court reversed and remanded, finding that it was "unclear whether

the district court relied upon any legal standard other than its concern about the use of federal funds in state clemency proceedings in denying Matthews's motion and, if it did, whether that other standard may appropriately be applied to deny Matthews's motion." The case was accordingly remanded for further proceedings.

Scarber v. Palmer, 14-2364 (12/22/15)

The petitioner was convicted of murder and kidnapping in Michigan state court and sentenced to life in prison. Following review in state court, the petitioner filed a federal habeas corpus petition which was dismissed as untimely. On appeal, the petitioner alleged that he was entitled to statutory tolling of the limitations period for the period of time when he could have moved for reconsideration of the denial of discretionary review in the Michigan Supreme Court, notwithstanding the fact that a motion for reconsideration had not been filed. The court disagreed, concluding that "the limitation period resumed running the day after the Michigan Supreme Court upheld the denial of Scarber's request for leave to appeal."

Sheppard v. Robinson, 13-3165 (12/8/15)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. After the Supreme Court denied certiorari with respect to the petitioner's federal habeas corpus proceedings, the petitioner filed a motion for relief from judgment under Fed.R.Civ.P. 60(b), alleging that claims which had previously been found to be procedurally defaulted could be considered on the merits under the intervening decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Martinez* had been decided a month before the petitioner filed his petition for certiorari in the Supreme Court. The court concluded that the petitioner had not been diligent because he did not raise his *Martinez*

arguments in his certiorari petition, and as a result relief from judgment under Rule 60(b)(6) was not available.