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.

I. Sentencing Issues

B. Guideline issues

2L1.2 – Illegal Reentry

U.S. v. Canelas-Amador, 15-6035 (9/14/16)

The defendant pled guilty in state court to assault but before sentencing the government picked him up on immigration charges and deported him. Years later the defendant was convicted by the government of illegal reentry by a deported alien. The district court determined that the defendant qualified for the 16 level enhancement under USSG § 2L1.2(b) because his prior assault plea counted as a "conviction" for a crime of violence. On appeal, the court held that the term "conviction" in the guideline was governed by the definition in 8 USC § 1101(a), which requires that the judgment become final, i.e., sentencing, in order to be considered a "conviction." Accordingly, the prior state guilty plea was not a prior "conviction" for purposes of the guideline, and thus the guideline enhancement was not applicable. The case was remanded for resentencing.

3B1.1(c) – Leadership Role

U.S. v. Tanner, 15-3719 (9/13/16)

The defendant was convicted of participating in a mortgage fraud scheme. At sentencing, the district court imposed a two level enhancement under USSG 3B1.1(c) for his leadership in the scheme. The defendant argued on appeal that the scheme was not his idea and that he just participated with others. The court held that a scheme need not be the brainchild of the defendant for the leadership enhancement to apply. The defendant need only have exerted control over one individual in a criminal enterprise. The court found that, although the defendant did not come up with the idea for the fraud scheme, he did recruit one person as a straw buyer who would not have otherwise been involved in the fraud. This was sufficient for the enhancement and the district court's ruling was affirmed.

4A1.1(e) – Relatedness – Crimes of Violence

U.S. v. Tanner, 15-3719 (9/13/16)

The defendant was convicted in a mortgage fraud scheme. At sentencing, the district court applied

USSG § 4A1.1(e) to assess two criminal history points for the defendant's two prior convictions for felonious assault and domestic violence. The offenses both involved an assault on the defendant's partner and resulted in a single sentence of probation. On appeal, the court held that § 4A1.1(e) requires the assessment of criminal history points for sentences for crimes of violence that do not receive criminal history points because they are related to sentences for other crimes of violence that have already received criminal history points. The key to application of the rule, however, is that the enhancement only applies if the defendant received separate sentences for the crimes. The court found that the defendant received only one sentence of probation for the two offenses, and thus the district court's imposition of the enhancement was improper. Accordingly, the case was remanded for resentencing.

Retroactive Application

U.S. v. Bonds, 15-2405 (10/14/16)

The defendant was convicted in 2010 of drug trafficking and received a large downward departure at sentencing. In 2015, the defendant filed a motion, pursuant to 18 USC § 3582, to reduce his sentence based on the amendments to the drug laws. In applying for the reduction, the defendant also requested that the district court reduce his sentencing range further based on a non-retroactive amendment to USSG § 4A1.1 which struck a two point criminal history enhancement for a defendant who had been released from prison for less than two years. The district court declined to apply the non-retroactive amendment, and the defendant appealed. Answering a question of first impression, the court held that the defendant could not bootstrap a non-retroactive guideline amendment to one that was retroactive, for purposes of a § 3582 motion. Accordingly, the district court ruling was affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

U.S. v. Ritchey, 15-2460 (10/26/16)

The defendant was convicted of being a felon in possession of a firearm. At sentencing, the district court determined that he qualified as an armed career criminal based on three prior convictions for Michigan breaking and entering. On appeal, the court held that the Supreme Court's decision in Mathis dictated that the breaking and entering offenses were not the equivalent of burglaries, which would be enumerated offenses under the ACCA. Specifically, the court found that breaking and entering was not a "generic" burglary because Michigan's definition of a "building" was broader than the generic definition, in that it included non-traditional structures such a tents. Further, the court held that the type of building was not a separate element of the offense but was instead a means of committing the element of breaking and entering a building. Thus, under Mathis, the court was not permitted to inquire beyond the statutory definition of the crime. Accordingly, because the statute did not define a generic burglary, none of the defendant's breaking and entering convictions counted as violent felonies under the ACCA and the case was remanded for resentencing.

IV. Fourth Amendment

B. Reasonable Suspicion/Vehicle Stops

Reasonable Suspicion

U.S. v. Pacheco, 16-3376 (10/28/2016)

Officers received a tip that a "two Hispanic men" were moving a large amount of narcotics in a silver Lincoln Navigator from a certain apartment building that evening. Officers observed the vehicle with the described occupants leaving the

apartments and, upon observing a traffic violation, conducted a stop. The defendant was the passenger in the car, and when the officer approached he failed to acknowledge the officer, appeared nervous, made furtive gestures to the glove box and floorboard, and ignored the officer when first asked to get out of the vehicle. In a subsequent pat down, the officer found a brick of cocaine and a large amount of cash. In his subsequent prosecution, the defendant moved to suppress the evidence and the district court denied the motion. On appeal, the court held that, although it was a very close case, the frisk of the defendant was supported by reasonable suspicion. The court found that the tip was sufficiently corroborated by the officer given that "two Hispanic males" were seen leaving the apartments at the allotted time in a Lincoln Navigator, which is an uncommon vehicle. Further, the defendant's actions in appearing nervous, making furtive gestures, and ignoring the officer's commands provided additional support. Finally, the stop occurred in a high crime area at night. Accordingly, the frisk was supported by reasonable suspicion that the defendant was armed and dangerous, and the district court ruling was affirmed.

U.S. v. Calvetti, 15-1526 (9/8/16)

The defendant was the driver of a vehicle stopped for a traffic violation. During the stop, the officers learned the following: (1) the defendant's behavior was suggestive of a person trying to not be stopped by police; (2) the vehicle contained very few belongings despite the stated plans that she was relocating a friend to another state; (3) the defendant claimed to own the vehicle but it was not registered to her; (4) she claimed to have been driving for 24 hours straight; (5) she was unusually nervous; and (6) she and her passenger both had prior drug convictions. Based on these factors, the officers summoned a drug dog and eventually found several kilos of cocaine. The defendant moved to suppress the evidence based on a claim that the prolonged detention was unlawful, the district court denied the motion, and the defendant appealed. The court held that while some of the factors utilized by police are of questionable significance, in total the factors amounted to reasonable suspicion sufficient to prolong the traffic stop to conduct further investigation. Accordingly, the subsequent search and seizure of drugs were lawful and the conviction was affirmed.

C. Warrant Exceptions

Plain View

U.S. v. Pacheco, 16-3376 (10/28/2016)

The defendant was the passenger in a vehicle stopped on suspicion of drug trafficking. Upon conducting a pat down of the defendant, the officer felt a large wad of cash in his pocket and a taped brick shaped object in another pocket. Both items were seized, and the brick turned out to be cocaine. The defendant was charged with drug trafficking and moved to suppress the evidence. The district court denied the motion and the defendant appealed. The court held that, in order to justify a search based on plain view or feel, (1) the officers must be in a lawful position from which to view or feel the object, (2) the incriminating nature must be immediately apparent, and (3) the officers must have right of access to the object. The court found that both the money and cocaine were plainly felt by the officer who could immediately determine what they were. The court noted the importance of the fact that the cocaine and money were obviously connected to the suspected criminal activity for which the officers conducted the stop – drug trafficking. Accordingly, the district court's ruling was affirmed.

V. Fifth Amendment

C. Confessions and Testimonial Rights

Miranda – Consents to Search

U.S. v. Calvetti, 15-1526 (9/8/16)

The defendant was arrested when officers found kilos of cocaine in a vehicle she was driving. In questioning after her arrest, the defendant asserted her right to remain silent. The officers did not honor this assertion and continued to question her. During this questioning, the officers obtained the defendant's consent to search her home. In the search, officers found drug paraphernalia tying the drugs in the car to the defendant. The defendant moved to suppress the evidence found in her home, the district court denied the motion, and the defendant appealed. Answering an open question in the Sixth Circuit, the court held that a consent to search is not an incriminating statement protected under the Fifth Amendment. Thus, even though the officers violated her Miranda rights, the subsequently obtained consent to search was valid and the evidence found in her home was admissible. Thus, the conviction was affirmed.

VII. Other Constitutional Rulings

B. Art. 1, § 10, Ex Post Facto Clause

Guideline Amendments

U.S. v. Beckham, 15-2592 (9/28/16)

The defendant filed a motion under 18 USC § 3582 to reduce his sentence based on the 2014 amendments to the drug laws, which were made retroactive to all defendants. At the defendant's original sentencing in 2009, he received a sentence of 135 months imprisonment based on the district court's downward departure in his criminal history category. In recalculating the guidelines for the purposes of the § 3582 motion, the probation department refused to apply the downward departure in criminal history based on a 2011 guideline amendment which instructed that courts may not reapply any departure or variance in determining the amended guideline range. Thus, the amended guideline range was actually higher than the 135 month sentence imposed. On appeal, the defendant argued that applying the 2011 guideline amendment violated the Ex Post Facto Clause because he was originally sentenced in 2009. Deciding an issue of first impression in the Sixth Circuit, the court held that the Ex Post Facto Clause only prohibits a change in the law that increases the potential punishment for past conduct. It does not, however, constrain the Sentencing Commission's authority to limit a district court's discretion to reduce a sentence based on future guideline amendments. Accordingly, the denial of the § 3582 motion was affirmed.

U.S. v. Kruger, 15-2581 (9/30/16)

The court reached the same conclusion as in Beckham that the Ex Post Facto Clause does not prohibit the Sentencing Commission from limiting a district court's discretion to reduce a sentence based on future guideline amendments.

XI. Appeal

Time to File – Mailbox Rule

U.S. v. Smotherman, 15-4331 (9/29/16)

The defendant was an inmate who mailed a notice of appeal on his case from prison. He placed it in the mail the day before the 14 day time limit expired for filing, but it did not get to the court until the day after the deadline. The government, acting through the U.S Attorney for the district, filed a motion to dismiss the appeal as untimely, and argued that the defendant failed to comply with a technical requirement of submitting a sworn statement along with his pro se notice, as required by Fed. R. App. P. 4(c)(1). The court first held that Rule 4(c)(1) does not require a

sworn statement where the pro se appellant avails himself of the prison's legal mail system. Further, the court found that the defendant did in fact submit a sworn statement that complied with the rule. Thus, the appeal was timely based on the mailbox rule, the court ruled in favor of the pro se appellant, and denied the motion of the U.S. Attorney.

XIII. Post-Conviction Remedies

Bosse v. Oklahoma, 15-9173 (10/11/16)
Supreme Court

The defendant was convicted of multiple counts of first degree murder in Oklahoma state court and sentenced to death. At the penalty phase of trial, the prosecution was permitted to elicit testimony from three of the victims' relatives recommending a death sentence. Under *Booth v. Maryland*, 482 U. S. 496 (1987), the Eighth Amendment prohibits testimony from a victim's family encouraging the imposition of the death penalty. The Oklahoma Court of Criminal Appeals concluded that *Booth* had been implicitly overruled by *Payne v. Tennessee*, 501 U. S. 808 (1991), and that no Eighth Amendment violation had taken place. The United States Supreme Court summarily reversed, holding that *Booth's* prohibition on this type of testimony remained good law.

Crangle v. Kelly, 14-3447 (9/22/16)

The petitioner pleaded guilty to various sex offenses in Ohio state court. After the petitioner's conviction and sentence became final on direct review, the petitioner moved withdraw his guilty plea on the ground that the trial court had failed to include post-control in its sentencing entry. The trial court denied the motion but issued a nunc pro tunc order imposing post-release control. Following additional appeals in state court, the petitioner filed an application for federal habeas corpus relief, which was dismissed as untimely. The Sixth Circuit reversed, concluding that the nunc pro tunc order imposing post-release control was a new judgment that restarted the AEDPA statute of limitations under 28 USC § 2244(d)(1)(A).

Franklin v. Jenkins, 15-3180 (10/7/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. Following his initial round of federal habeas corpus review, the petitioner moved for relief from judgment and alleged that the decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), constituted extraordinary circumstances under Federal Rule of Civil Procedure 60(b)(6). Specifically, the petitioner alleged that *Martinez* and *Trevino* would allow the federal courts to reach a claim of ineffective assistance of counsel that had previously been procedurally defaulted. The Sixth Circuit disagreed, and concluded that the petitioner was merely trying to supplement a claim that had already been denied on the merits with additional evidence. The court accordingly treated the petitioner's 60(b) motion as a motion for authorization to file a second or successive habeas corpus petition under 28 USC § 2244(b), and concluded that the petitioner failed to satisfy the statutory gatekeeping requirements.

Hill v. Masters, 15-5188 (9/7/16)

The petitioner pleaded guilty to federal drug crimes in 2001. After filing for relief under 28 USC § 2255 and losing, the petitioner filed a habeas corpus application under 28 USC § 2241. The petitioner alleged that his career offender enhancement was no longer valid under *Descamps v. United States*, 133 S. Ct. 2276 (2013), because one of his predicate convictions no longer qualified as a crime of violence. The district court dismissed the petition, concluding that the petitioner was required to demonstrate

that he was actually innocent of the underlying offense in order to proceed under § 2241. The Sixth Circuit reversed, and found that the petitioner fell within the savings clause of § 2255(e). As a result, the petitioner could raise his claim under § 2241: "In authorizing a petition under § 2241, we reiterate that our decision addresses only a narrow subset of § 2241 petitions: (1) prisoners who were sentenced under the mandatory guidelines regime pre-*United States v. Booker*, 543 U.S. 220 (2005), (2) who are foreclosed from filing a successive petition under § 2255, and (3) when a subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career-offender enhancement."

Hutton v. Mitchell, 13-3968 (10/12/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. The jury instructions at the penalty phase of the petitioner's trial failed to define or list the aggravating circumstances that were at issue in the petitioner's case. As a result, "there was no indication in the jury instructions which aggravating circumstances the jury could review to make a recommendation" with respect to the petitioner's sentence. The petitioner defaulted the claim by failing to raise it on direct appeal in state court. The Sixth Circuit found that the miscarriage of justice exception to procedural default set out in *Sawyer v. Whitley*, 505 U.S. 333 (1992), permitted the federal courts to reach the merits of the petitioner's claim, and further concluded that the petitioner was entitled to relief.

In re Sargent, 16-5632 (9/14/16)

The petitioner pleaded guilty in federal court to being a felon in possession of a firearm and received an enhanced sentence under the Armed Career Criminal Act. After the petitioner's first motion to vacate under 28 USC § 2255 was denied, the petitioner filed a motion for authorization to file a second or successive application, alleging that he was entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because two of his four predicate convictions were no longer valid for the purposes of the ACCA. The Sixth Circuit concluded that the petitioner made a prima facie showing of an entitlement to relief, and authorization to file a second or successive petition was therefore granted.

Shimel v. Warren, 15-2419 (9/22/16)

The petitioner pleaded guilty to murder in Michigan state court. Following sentencing, the petitioner moved to withdraw her guilty plea based on ineffective assistance of counsel and counsel's failure to investigate a battered spouse self-defense theory. The trial court granted the motion, but the state appellate court reversed. The petitioner then sought federal habeas corpus relief. The Sixth Circuit determined that the petitioner failed to demonstrate a reasonable probability that, but for counsel's deficient performance, she would not have pleaded guilty and would have insisted on going to trial, as required by *Hill v. Lockhart*, 474 U.S. 52 (1985). The court further concluded that there was no reasonable probability that the petitioner would have obtained a more favorable result if she had gone to trial. The denial of habeas corpus relief was therefore affirmed.