

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

2D1.1(b)(1) – Drug Offenses - Firearms

U.S. v. Pryor, 15-2123 (11/22/16)

The defendant was convicted of participating in a drug conspiracy. At sentencing, the district court imposed a two level enhancement under USSG § 2D1.1(b)(1) for the defendant's possession of a firearm at the time of his arrest and during the drug conspiracy. On appeal, the court held that an enhancement under this section is proper where the government can show that the defendant possessed a firearm during the commission of the offense. Once the government makes this showing, the defendant then has the burden to prove that it was clearly improbable that the firearm was connected to the offense considering (1) the type of firearm involved, (2) its accessibility, (3) the presence of ammunition, (4) the proximity of the weapon to the offense, (5) the defendant's evidence concerning use of the weapon, and (6) whether the defendant was actually involved in trafficking as opposed to manufacturing or possession. The court found that **the defendant was in actual possession of the**

gun and drug proceeds immediately after a drug transaction. Based on these facts, the court ruled that the enhancement was proper and the sentence was affirmed.

II. Plea Matters

A. Agreements

Plea Agreements – Appeal Waivers

U.S. v. Grundy, 14-2287 (12/22/16)

The defendant pled guilty one count of wire fraud. The plea agreement contained an appeal waiver provision which provided that the defendant agreed to "waive any right he may have to appeal his sentence if the sentence imposed does not exceed the 210 month [guideline] maximum." Upon his conviction, the defendant attempted to appeal the amount of restitution imposed by the district court and the government moved to dismiss the appeal. The court held that **an appeal waiver containing language that waives any right to appeal a sentence necessarily covers an order related to restitution.** The court ruled that restitution is part of a sentence, and that the broad appeal waiver language covered this aspect

of the case. Accordingly, the appeal was dismissed.

III. Evidence

D. Discovery/Miscellaneous

901(b)(5) – Voice Identification

U.S. v. Pryor, 15-2123 (11/22/16)

The defendant was charged with drug trafficking based on drug transactions that were arranged through a police informant. An officer listened in on phone conversations (which were not recorded) between the informant and the defendant. The officer then obtained jail calls of the defendant and compared the voice he heard on the informant calls and the defendant's voice in the jail calls. The district court permitted the officer at trial to identify the defendant's voice. On appeal, the defendant argued that it was error to permit the officer to identify his voice as the person talking to the informant. The court held that the identification testimony was properly admitted under FRE 901(b)(5). The court found that (1) the jail call was a proper exemplar, (2) it did not matter that the officer heard the voice before obtaining the jail calls to make the comparison, (3) it did not matter that the calls with the informant were not recorded (although it would have been preferable), and (4) it did not matter that the informant calls were only about a minute long. Accordingly, the defendant's conviction was affirmed.

IV. Fourth Amendment

E. Search Warrants

Probable Cause/Good Faith

U.S. v. Abernathy, 16-5314 (12/8/16)

Officers did a trash pull at the defendant's residence and found "several" marijuana roaches and some baggies with marijuana residue. In an

affidavit, the officers attested that they were aware of drug trafficking activities by the defendant and provided the details of the trash pull. The search warrant was issued and the officers found evidence of drug trafficking in the residence. During the hearing on the motion to suppress, the district court found that the officers lied about being aware of drug trafficking activity by the defendant, but nonetheless found that trash pull alone was sufficient to support probable cause for the warrant. On appeal, the court held that the trash pull was insufficient without further evidence to support probable cause to search the house. The court found that the "small quantity of marijuana" found in the trash was too logically attenuated from the residence to create a fair probability that there were more drugs in the residence. The court emphasized that it was impossible to tell if the drugs had ever been in the residence, and if so, how recently. Additionally, the court held that, due to the fact that the officers had lied in the affidavit about the defendant's drug trafficking activities, the government could not rely on good faith to save the warrant. Accordingly, the district court's ruling was reversed and the evidence was suppressed.

F. Arrest Related Issues

Probable Cause to Arrest

U.S. v. Price, 15-2041 (11/14/16)

Officers had a search warrant for the defendant's home based on drug trafficking activities. They staked out the house, and when the defendant arrived they observed him in what appeared to be a hand to hand drug transaction. The defendant then appeared to flee from the officers in a separate vehicle. The defendant was arrested and after three hours in custody admitted that he kept his drugs and guns in a vehicle at a storage unit, and he consented to a search. The district court declined to suppress the evidence and the defendant appealed. The court held that the arrest

of the defendant was lawful and thus his subsequent consent to the search was properly obtained. Specifically, the court found probable cause for the arrest based on the following: (1) averments in the search warrant affidavit that officers had multiple sources saying that the defendant was dealing in drugs; (2) defendant's prior record for drug dealing; (3) the defendant appeared to engage in a hand to hand transaction immediately before his arrest; and (4) the defendant appeared to flee from police before his arrest in a different vehicle. Accordingly, the defendant's subsequent consent was properly obtained and his conviction was affirmed.

V. Fifth Amendment

D. Double Jeopardy

Bravo-Hernandez v. U.S., 15-537 (11/29/16) **Supreme Court**

The defendant was charged with bribery and conspiracy to commit a bribe, stemming from the same facts. The defense was that the official never accepted any bribe. The jury acquitted the defendant of the conspiracy count, but convicted on the substantive charge. On appeal, the First Circuit found a jury instruction error, and reversed the remaining conviction. Upon remand, the defendant argued issue preclusion Double Jeopardy – that the jury verdict on the conspiracy meant that that jury necessarily found that the official did not accept a bribe. The Supreme Court held, however, that because the matter for vacation of the conviction was not insufficiency, and the jury *could* have convicted on other grounds, that no issue preclusion could be invoked. “Issue preclusion is not a doctrine they can commandeer when inconsistent verdicts shroud in mystery what the jury necessarily decided.”

VI. Sixth Amendment

D. Right to Counsel/Self Represent

Right to Self Representation

U.S. v. Pryor, 15-2123 (11/22/16)

The defendant was charged with drug trafficking and from the very first hearing in front of the magistrate he was non-responsive to the court's inquiries and continuously objected to the court's jurisdiction. When the court attempt to engage the defendant in whether he wished to have appointed counsel, the defendant repeatedly continued to provide nonsensical answers and challenged the court's jurisdiction. The court appointed counsel for the defendant, and throughout the trial proceedings the defendant objected to being represented by an attorney. Upon his conviction, the defendant raised on appeal that the district court violated his right to self-representation. The court first noted that the standard of review for such a claim is unclear in the Sixth Circuit. Because the defendant lost under either the de novo or abuse of discretion standard, the court chose not to resolve the conflict. The court held that the defendant's refusal to answer the district court's questions or meaningfully engage in the process amounted to a waiver of his right to represent himself. Further, the court ruled that a district court has no duty to consider self-representation for a defendant who acts in this non-responsive fashion until and unless the defendant makes “some indication that he will engage with the court at least to the extent of answering procedural questions such as the colloquy.” Thus, the court declined to consider the defendant's repeated objection to having counsel because he had not made such a showing. Accordingly, the defendant's conviction was affirmed.

IX. Jury Issues

D. Batson

U.S. v. Atkins, 16-5531 (12/13/16)

The defendant was charged with being a felon in possession of a firearm. During the jury selection process, the government used five peremptory challenges against black jurors. Upon striking the fifth, the defense objected based on Batson. The government countered that the fifth black juror was stricken because he had eight children, and therefore might be distracted, and because he had changed jobs in the past four months. The defendant did not request a comparative analysis of the jurors, and the district court denied the Batson challenge. Upon his conviction, the defendant appealed. The court held that the government's strike of the fifth black juror violated Batson. Specifically, the court found that similarly situated white jurors were not stricken by the government, the government asked the black juror no questions related to the government's alleged concerns about him, and the government's explanation of its strike "reeked of afterthought." Further, the court held that conducting a comparative analysis of jurors for the first time on appeal was proper where "the basis for comparison has been sufficiently explored [in the district court] that the analysis will not be unfair to the government." Accordingly, the defendant's conviction was reversed and the case remanded for a new trial.

XI. Appeal

Law of the Case Doctrine

U.S. v. Charles, 15-6074 (12/19/16)

The defendant was convicted of drug and firearm offenses and appealed his sentence. The Sixth Circuit determined that he was a career offender and affirmed his sentence in all respects. Years later, when the drug laws were amended, the

defendant filed motions under 18 USC § 3582 for a reduced sentence. The district court ultimately granted the motion and reduced the defendant's sentence from 420 months to 292 months imprisonment. Upon the government's appeal, the court held that the law of the case governed that the defendant was a career offender and thus not eligible for the sentence reduction based on the drug laws. Because the Sixth Circuit had already decided the issue of his career offender status in the original appeal, the district court's ruling reducing his sentence based on the drug amendment had to be reversed.

XII. Specific Offenses

Bank Fraud 18 U.S.C. § 1344

Shaw v. U.S., 15-5991 (12/12/16) Supreme Court

The defendant obtained the bank account number of another person, and used that information to make transfers out of the account. Defendant was charged with federal bank fraud. The defense was that, because Shaw was intended to defraud the owner/victim of the account, and not the bank itself, that no federal conviction could lie. The Supreme Court disagreed, finding "for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution,' at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds."

XIII. Post-Conviction Remedies

Bryan v. Bobby, 15-3778, 15-3824 (12/15/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In federal habeas corpus proceedings, the district court granted relief based on a violation of Batson

v. Kentucky, 476 U.S. 79 (1986). Under Batson, prosecutors may not use peremptory challenges to exclude potential jurors based solely on their race. The Sixth Circuit concluded that the Ohio Supreme Court's finding that there was no racial discrimination was entitled to deference under 28 U.S.C. § 2254(d), and as a result the district court's grant of relief was reversed.

Hill v. Mitchell, 13-3412, 13-3492 (12/1/16)

The petitioner was convicted of aggravated murder in Ohio state court and sentenced to death. In his federal habeas corpus proceedings, the petitioner raised an allegation that the prosecution had violated Brady v. Maryland, 373 U.S. 83 (1963), but did not identify the evidence that had been suppressed. In a subsequent amended petition, the petitioner identified Brady material that had been obtained in federal discovery, and alleged that his Brady claim was not time-barred because it related back to the earlier filing. Under the relation back doctrine, "when a prisoner files an original petition within the one-year deadline, and later presents new claims in an amended petition filed after the deadline passes, the new claims relate back to the date of the original petition if the new claims share a 'common core of operative facts' with the original petition." The Sixth Circuit concluded that the Brady claim raised in the earlier petition was too generalized for the relation back doctrine to apply, and as a result the petitioner's amended claim was barred by the statute of limitations.

Middlebrooks v. Carpenter, 14-6061 (12/19/16)

The petitioner was convicted of kidnapping and murder in Tennessee state court and sentenced to death. After the Sixth Circuit affirmed the denial of habeas corpus relief, the United States Supreme Court vacated and remanded for further consideration in light of Martinez v. Ryan, 132 S.Ct. 1309 (2012). Under Martinez and Trevino v. Thaler, 133 S.Ct. 1911 (2013), ineffective

assistance of state post-conviction counsel can establish cause for a procedurally defaulted claim of ineffective assistance of trial counsel in some circumstances. However, Martinez and Trevino do not apply to procedural defaults that occur during the appeal from the denial of post-conviction relief in state court, or to defaults that occur during federal habeas corpus proceedings. Furthermore, Martinez and Trevino do not apply to claims that were actually denied on the merits in state court. As a result, the Sixth Circuit concluded that Martinez and Trevino did not affect the earlier disposition of the petitioner's claims.

Fears v. Kasich, 16-3149 (11/18/16)

Death row inmates filed numerous causes of action challenging Ohio's lethal injection practices. During the course of the litigation, the district court issued a protective order shielding the identities of persons or entities who were involved in supplying Ohio's lethal injection drugs. The Sixth Circuit concluded that the protective order was not an abuse of discretion, and the entry of the protective order was therefore affirmed.