RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

THIRD CIRCUIT

I. Assimilative Crimes Act / Sentencing Guidelines / Substantive Reasonableness

United States v. Jackson, --- F.3d ---, 2017 U.S. App. LEXIS 12054 (3d Cir. July 6, 2017).

Defendants, a husband and wife, were convicted of the New Jersey crimes of endangering the welfare of a child and conspiring to do so on a military base, and so they were charged federally under the Assimilative Crimes Act. The crime consisted of assaulting their children, withholding proper medical care, withholding proper nourishment, forcing the children to eat hot and spicy foods which caused them discomfort, causing one child to ingest excessive sodium, and employing cruel and neglectful disciplinary techniques.

The district court committed reversible error when it determined there was no "sufficiently analogous" offense guideline in this case, pursuant to U.S.S.G. § 2X5.1. This case adopts an "elements based" approach to determining whether there is a sufficiently analogous offense guideline. This requires the district court to compare the elements of the defendant's crime of conviction to the elements of federal offenses already covered by a specific offense guideline. The inquiry must be flexible an open-ended. The elements need not match perfectly; rather, the proffered guideline must be within the same ballpark as the offense of conviction. The offense of conviction may include more expansive elements or additional elements to the federal counterpart. Using this test, the Court concluded that the assault guideline, U.S.S.G. § 2A2.3, is sufficiently analogous to endangering the welfare of a child under New Jersey law.

The district court also committed reversible error by refusing to find aggravating facts that affected neither the minimum nor maximum punishments. The district court was required to make findings on these facts, which were relevant to the advisory guideline range and the 18 U.S.C. § 3553(a) factors. Further, while the Assimilative Crimes Act, 18 U.S.C. § 13(a), subjects a defendant to "a like punishment," the district court focused too heavily on what sentence the defendants would have received under New Jersey law to the exclusion of basic federal sentencing principles. Finally, the Court held that the probation sentence for the husband and 24 month sentence for the wife were substantively unreasonable. These sentences would have comprised a significant downward variance from the correct advisory guideline range and would have required a "correspondingly robust" explanation by the district court. These lenient sentences failed to hold the defendants responsible for the serious physical injuries their conduct inflicted on the children.

II. Cell-Site Location Information / Fourth Amendment / Evidentiary Issues

United States v. Stimler, --- F.3d ---, 2017 U.S. App. LEXIS 12158 (3d Cir. July 7, 2017).

Stimler and his co-defendants are Orthodox Jewish rabbis who participated in the *beth din* process - that is, they formed a tribunal empowered to hear a plea for relief from a wife seeking divorce whose husband has refused to provide her a contract of divorce. In this case, the FBI heard reports that Stimler and his colleagues were taking their coercive power to extremes, working with "muscle men" to beat up husbands who refused to divorce their wives. The defendants were trapped in a sting in which an FBI agent posed as one of the wives. They were arrested just before setting out to kidnap and beat up the putative "husband," and were charged with kidnapping, attempted kidnapping, and conspiracy. During trial preparation, the FBI obtained a court order compelling AT&T to turn over 57 days' worth of historic cell phone site location information (CSLI) generated by the cell phone of one of the defendants, Goldstein.

The district court did not err in refusing to suppress the CSLI. The Stored Communications Act authorizes the government to obtain CSLI upon a showing of "reasonable grounds to believe" the records are material to a criminal investigation. The majority held the decision is largely controlled by *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government (In re Application)*, 620 F.3d 304 (3d Cir. 2010) which held that, while the third-party doctrine does not apply to CSLI because its transmission is not truly voluntary, there is no Fourth Amendment violation in its disclosure because there is no reasonable expectation of privacy. The Magistrate Judge can, in his or her own discretion, require a warrant. The majority holds that SCOTUS decisions in *Riley v. California* (concerning searches of cell phones incident to arrest) and *United States v. Jones* (concerning warrantless placement of a GPS tracker) do not require revisiting *In re Application*. The government satisfied the statute because reasonable cause existed to believe the CSLI would provide information material to its investigation.

The prosecution did not violate the Religious Freedom Restoration Act. Although the kidnapping prosecution was a burden on defendants' sincerely held religious beliefs, they did not show it was substantial because there were alternative means of religious practice available. "[N]one of the defendant argue that they are unable to participate in the mitzvah of liberating agunot without engaging in kidnapping[.]" Moreover, the government has a compelling interest in uniformly enforcing the law pertaining to violent crimes.

The opinion next rejects the defendants' challenge to the exclusion of evidence about Orthodox Jewish marital law and the religious motivations for the kidnapping. The husbands' practice of Orthodox Judaism did not amount to consent to being kidnapped. Not only was the proffered evidence marginally relevant, but it would have had prejudicial impact because it might have given rise to jury nullification.

The Court rejected challenges to three aspects of the jury instructions, to the court's response to a jury question, and to the sufficiency of the evidence.

The Court also held that statements by alleged co-conspirators before the *beth din* did not qualify as "testimonial" because none of the participants would have believed they were assisting a criminal prosecution. Accordingly, there is no valid Confrontation Clause claim. Nor is there a hearsay claim because the statements were made in the course of and in furtherance of the conspiracy.

Finally, all three defendants argued that the sting operation was so outrageous that it violated due process. The Court rejected the claim as waived, and as having no merit even if it had been preserved, because the defendants "used their own knowledge and connections to set up and carry out the unlawful conduct."

NOTE: Judge Restrepo concurred in the judgment, but would have held that, by obtaining 57 days' worth of aggregated CSLI with only a showing of reasonable suspicion, the government conducted a warrantless search in violation of the Fourth Amendment. In his view, the intervening SCOTUS opinions in *Riley* and *Jones* trump the panel opinion in *In re Application*, but he would not have suppressed the evidence because of the good faith exception to the warrant requirement.

III. First Amendment / Filming Police Officers Conducting Official Duties

Fields v. City of Philadelphia, --- F.3d ---, 2017 U.S. App. LEXIS 12159 (3d Cir. July 7, 2017).

The First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.

IV. Deportable Immigrants / Supervised Release / Procedural Reasonableness

United States v. Azcona-Polanco, --- F.3d ---, 2017 U.S. Dist. LEXIS 13593 (3d Cir. July 27, 2017).

U.S.S.G. § 5D1.1(c) creates a presumption against imposing a term of supervised release upon a deportable immigrant. This case holds that, as with special conditions of supervised release, a district court must "explain and justify" its reasons for imposing supervised release on a deportable immigrant. The district court must state the reasons in open court and should directly address the presumption against imposing supervised release and provide the court's reasoning for taking a different course of action. The court need not cite the guideline section but should acknowledge and address its substance. Defense counsel must object at sentencing to preserve this issue for appeal. Azcona-Polanco lost his case on plain error review because counsel did not object at the sentencing hearing.

V. De Facto Arrest / Fourth Amendment / Eyewitness Identification / Jury Polling

United States v. Wrensford, --- F.3d ---, 2017 U.S. Dist. LEXIS 13894 (3d Cir. July 21, 2017).

Involuntary transportation to a police station without probable cause can constitute a de facto arrest. In this case, Wrensford was subject to a de facto arrest when he was ordered to the ground at gunpoint, handcuffed, searched, taken to the police station, placed in a cell, and then later taken to another police building where he was formally arrested. The court declined to decide exactly when the arrest occurred because, at the latest, the arrest was effectuated when Wrensford was placed in the cell. The government conceded there was no probable cause, and so the later eyewitness identifications, Wrensford's driver's license, his statement, and his DNA sample were all potentially subject to suppression. The Court remanded to the district court to allow the government an opportunity to demonstrate that an exception to suppression should apply, such as independent source, inevitable discovery, attenuation, or good faith.

After the jury had delivered its verdict, during a poll of the jurors, one of them gave inaudible answers on several counts and, when re-questioned, said that they were not her independent verdict. The court denied a motion for mistrials on the affected counts and sent the jurors back to deliberate. This time, all the jurors concurred on the guilty verdicts on the affected counts. The district court did not abuse its discretion or create an abusive environment because (1) the defendants did not object to continued polling even after it was clear one juror was the lone dissenter; (2) the court had an interest in continuing the poll to attempt to obtain at least a partial verdict; (3) the court gave a cautionary instruction before sending the jurors for further deliberations; and (4) there is no evidence the juror's will was overborne.

The Court also rejected claims that the court should have given a voluntary manslaughter instruction, and that there was insufficient evidence that Wrensford's co-defendant possessed a firearm in a school zone.

VI. Habeas / Due Process / Knowing Presentation of Perjured Testimony

Haskell v. Superintendent, Greene SCI, --- F.3d ---, 2017 U.S. App. LEXIS 13942 (3d Cir. Aug. 1, 2017).

Haskell filed a habeas petition challenging his conviction as tainted by perjured testimony in violation of his Fourteenth Amendment right to due process. This case holds that a defendant need not show "actual prejudice" to prevail when the State has knowingly presented or failed to correct perjured testimony. In other words, the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) does not apply under these circumstances. A petitioner carries his or her burden when he has shown a reasonable likelihood the false testimony could have affected the judgment of the jury, under *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). Haskell made the reasonable likelihood showing, and relief was granted.