

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

January 5, 2017
Christofer Bates, EDPA

SUPREME COURT

I. Cert. Granted – Forfeiture in Drug Conspiracy Cases

Honeycutt v. United States, No. 16-142 (Cert. Granted Dec. 9, 2016).

QUESTION PRESENTED: Whether 21 U.S.C. § 853(a)(1) mandates joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

Third Circuit precedent currently holds that § 853(a)(1) does impose joint and several liability. *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999).

THIRD CIRCUIT

I. Extortion / Bribery / Dismissal of Indictment / Sufficiency / Tenth Amendment & Spending Clause / Rule 404(b) Evidence

United States v. Willis, --- F.3d ---, 2016 U.S. App. LEXIS 22093 (3d Cir. Dec. 13, 2016).

This case involved the former Executive Director of the Legislature of the U.S. Virgin Islands, who was convicted on two counts of federal programs bribery and two counts of federal extortion for accepting kickbacks from contractors in order to continue awarding them work on renovations being done to the Legislature's main building in St. Thomas. The Court addressed a number of challenges to Willis's convictions:

- (1) The district court properly denied Willis's motion to dismiss the bribery counts. It is an open issue in the Third Circuit as to whether 18 U.S.C. § 666(a)(1)(B) requires charging and proof of a quid pro quo – that is, “a specific intent to give or receive something of value in exchange for an official act.” The Third Circuit did not make a decision on this issue, because even if a quid pro quo were required, there was one sufficiently alleged in both bribery counts. Each count alleged Willis accepted cash payments in exchange for him using his official position to provide favorable treatment in the awarding of more contracting work on the Legislative building.
- (2) Willis's sufficiency of the evidence challenge to his bribery convictions was also rejected. First, the Legislature of the Virgin Islands is part and parcel of the Government of the Virgin Islands, which is an entity that receives more than \$10,000

in federal funds per year as required by § 666(a)(1)(B). Second, Willis was an agent within the meaning of § 666 because he was authorized to act on behalf of the government in seeking out offers for particular projects necessary for the Legislature. Finally, the Virgin Islands received a federal “benefit” within the meaning of § 666, because it received \$150 million per year to support its Government during the time Willis was Executive Director.

- (3) Willis’s claim that his § 666 convictions violated the Tenth Amendment and Spending Clause was rejected. The Tenth Amendment reserves certain powers to the states but has never been extended to the Virgin Islands, and the Revised Organic Act of 1954, which dictates the limits on constitutional protection afforded to the territory, incorporates only the first nine amendments to the Constitution. Willis’s Spending Clause argument is foreclosed by Supreme Court precedent in *Sabri v. United States*, 541 U.S. 600 (2004), which held that the enactment of § 666 was an instance of necessary and proper legislation to execute Congress’s spending power.
- (4) The district court properly admitted evidence of Willis’s prior acceptance of bribes when he was Director of the Virgin Islands Bureau of Internal Revenue, in exchange for lifting a lien on one of the contractor’s bank accounts. Willis’s defense was that he did not know the money he solicited constituted bribes and that he instead thought they were loans. His prior acceptance of bribes rebutted his defense and constituted strong evidence of his intent, knowledge, and the absence of any mistake about the transactions. The district court engaged in a thorough analysis of the relevant 404(b) factors and provided a specific limiting instruction.

II. Hobbs Act Robbery / 18 U.S.C. § 924(c) / Crime of Violence / Other Issues

United States v. Robinson, --- F.3d ---, 2016 U.S. App. LEXIS 22458 (3d Cir. Dec. 19, 2016).

This case holds that the “categorical approach” does not apply to convictions under 18 U.S.C. § 924(c). The categorical approach is only implicated when looking to prior convictions, and § 924(c) convictions are contemporaneous convictions. Thus, the court may look to the elements of both the predicate offense and the § 924(c) offense to see if the requisite element of force exists. The requisite element of force will always be present if the § 924(c) conviction is for brandishing or discharging the firearm. Therefore, Robinson’s brandishing of a firearm during two Hobbs Act robberies supported his § 924(c) convictions.

NOTES: (1) this case does not resolve anything about the typical carriage/possession § 924(c) convictions; (2) this case is contrary to every other Circuit Court (except for one) and the position taken by the Solicitor General in current Supreme Court litigation, so the issue should still be preserved while recognizing the contrary authority in Robinson; and (3) this case does not change anything about when the “modified categorical approach” applies, and does not change the rule that sentencing courts can never look to the facts underlying prior or contemporaneous predicate convictions.

The district court did not err in holding that the difference in the lighting and the collar on Robinson's photo when compared to others in the photo array from which he was identified were slight and not unduly suggestive; therefore, his suppression motion was properly denied. Second, the district court did not err in failing to conduct a *Faretta* hearing to see whether Robinson could represent himself at trial because Robinson did not clearly and unequivocally express his desire to proceed *pro se*. Finally, the case was remanded for a determination of whether the career offender guideline applies.

III. Murder-for-Hire / 18 U.S.C. § 924(c) / Crime of Violence

United States v. Galati, --- F.3d ---, 2016 U.S. App. LEXIS 22457 (3d Cir. Dec. 19, 2016).

This case follows *Robinson* and holds that Galati was properly convicted of aiding and abetting the use of a firearm during and related to a crime of violence and conspiring to do the same under 18 U.S.C. §§ 924(c) and 924(o) in connection with a murder-for-hire scheme that resulted in the victim being shot in his hand, pelvis, and lower back. Since the murder-for-hire charge and the § 924 offenses were tried contemporaneously, the jury necessarily found that Galati's participation resulted in personal injury. Therefore, the discharge of the firearm resulting in personal injury satisfied the use of physical force requirement for a § 924(c) conviction.