

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Confrontation Clause / Non-Testimonial Statements to Teacher

Ohio v. Clark, --- S. Ct. ---, 2015 U.S. LEXIS 4060 (June 18, 2015).

The introduction at trial of statements made by a three-year-old boy to his teachers identifying his mother's boyfriend, the defendant, as the source of his physical injuries did not violate defendant's rights under the Sixth Amendment's Confrontation Clause, even though the child did not testify at trial. The statements were not testimonial in nature because neither the child nor his teachers had the primary purpose of assisting in the defendant's prosecution.

NOTE: The majority opinion has some troublesome *dicta* stating that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." A strongly-worded concurring opinion by Justice Scalia, joined by Justice Ginsburg, criticizes the *dicta* and provides strong support for defense counsel to rely upon if the government attempts to resurrect old, pre-*Crawford* "indicia of reliability" standards of admissibility.

II. Distribution of a Controlled Substance Analogue / *Mens Rea* / Knowledge

McFadden v. United States, --- S. Ct. ---, 2015 U.S. LEXIS 4062 (June 18, 2015).

In order to convict a defendant of distribution of a controlled substance analogue – a substance with a chemical structure that is "substantially similar" to a Schedule I or Schedule II drug and has a "substantially similar" effect on the user (or is believed or represented by the defendant to have such a similar effect) – the government must prove that the defendant knew the substance constituted a controlled substance analogue.

The knowledge requirement can be proven in two different ways. First, it can be established by evidence that a defendant knew the substance with which he was dealing is some controlled substance – that is, one actually listed on the federal drug schedules or treat as such by operation of the Analogue Act – regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.

III. Armed Career Criminal Act / Residual Clause / Void for Vagueness

Johnson v. United States, --- S. Ct. ---, 2015 U.S. LEXIS 4251 (June 26, 2015).

Imposing a fifteen-year mandatory minimum sentence under the residual clause of the Armed Career Criminal Act (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”) violates Due Process because it is unconstitutionally vague.

NOTES: (1) This case does NOT call into question application of the ACCA to the four enumerated offenses, or the remainder of the ACCA’s definition of a “violent felony.”

(2) This case overrules the Supreme Court’s contrary holdings in *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011).

IV. Cert. Granted – Law-of-the-Case Doctrine as Applied to a Sufficiency Argument and Waiver of Statute of Limitations Defense

Musacchio v. United States, No. 14-1095 (Cert. Granted June 29, 2015).

Questions Presented:

(1) Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

(2) Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

NOTES: The Third Circuit has not ruled on the First Question. The Third Circuit has ruled that failure to raise a statute-of-limitations defense results in waiver. *See United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986).

THIRD CIRCUIT

I. Terry Stops / Moment of Seizure / Submission to Authority / Reasonable Suspicion

United States v. Lowe, --- F.3d ---, 2015 U.S. App. LEXIS 11440 (3d Cir. July 2, 2015).

This case involved application of well-settled law that a seizure occurs when: (1) there is either a laying on of hands or application of physical force to restrain a suspect’s movement, even if ultimately unsuccessful, or (2) the suspect submits to a show of police authority. A “show of authority” seizure occurs at the moment when a stationary suspect reacts to a show of authority by not fleeing, not making any threatening movements or gestures, and by remaining stationary.

The officers made a show of authority when they first approached Mr. Lowe. Three marked police cars arrived at Mr. Lowe's friend's house at 4 o'clock in the morning, upon which four uniformed police officers exited the cars and approached Mr. Lowe and his friend, commanding them to show their hands. A reasonable person in Mr. Lowe's position would not have felt free to decline this interaction and leave. Mr. Lowe submitted to the officers' show of authority by staying put in front of his friend's house as the officers approached. Neither Mr. Lowe's action of taking a few steps backwards before stopping, nor his inaction, in keeping his hands still despite commands to raise them, negated his submission to the show of authority.

The officers approached Mr. Lowe on an anonymous tip made late at night that a male matching his description had a gun in front of a house located in a high-crime neighborhood in which a shooting had occurred over an hour earlier. This information was insufficient to give rise to a reasonable suspicion, and therefore the seizure was an illegal *Terry* stop.

II. Fifth Amendment / Post-Arrest, Post-Miranda Silence / Harmless Error

United States v. Edwards, --- F.3d ---, 2015 U.S. Dist. LEXIS 11547 (3d Cir. July 6, 2015).

The government violated Mr. Edwards's Fifth Amendment rights by repeatedly referring to his post-arrest, post-*Miranda* silence in its case-in-chief and in its closing argument. *See Doyle v. Ohio*, 426 U.S. 610 (1976). The government also failed to meet its burden of proving beyond a reasonable doubt that the *Doyle* error did not contribute to the jury's guilty verdict, so the error was not harmless.

The government's references to Edwards's silence were not made in passing; in fact, the government specifically asked the jury to infer guilt from Edwards's silence. Furthermore, the government relied heavily on a cooperating witness to prove Edwards's *mens rea*, making Edwards's competing testimony crucial to the outcome of the case. The district court's curative instruction was not a "proper and immediate action" necessary to mitigate the government's *Doyle* violation, because it came after the court overruled Edwards's contemporaneous objections during the government's closing. The efficacy of the district court's instruction was further undermined by earlier contradictory instructions the court had given the jury.

III. Hobbs Act Extortion / Color of Official Right / Mens Rea / Sentencing Challenges

United States v. Fountain, --- F.3d ---, 2015 U.S. Dist. LEXIS 11913 (3d Cir. July 10, 2015).

The government establishes the *mens rea* necessary to convict a defendant of Hobbs Act extortion under color of official right where its evidence proves (1) that the payor made a payment to the defendant because the payor held a reasonable belief that the defendant would perform official acts in return, and (2) that the defendant knew the payor made the payment because of that belief.

Fountain was an IRS customer service representative who enlisted the help of her hairstylist to recruit other clients to provide personal information so she could file false tax returns in their names. The victim of the extortion count never dealt with Fountain directly, but

was told by the hairstylist she had to pay a \$400 fee for her tax claims. A rational juror could have found the victim understood her \$400 payment to be compensation for services rendered, and that she reasonably believed Fountain would help her obtain the tax refund. The jury also could have found that the victim reasonably feared reprisal. The payment was made after the victim's claim for a refund had been submitted and despite her suspicions about Fountain's demand for payment. Additionally, the hairstylist testified that Fountain generally would threaten to "red flag" claimants who did not pay her fee. The reasonable inference to be drawn from this testimony was that the victim was concerned if she did not pay Fountain's fee, Fountain would prevent the tax refund or flag the claim to a superior for suspected fraud.

The Court also rejected various sentencing challenges from all three co-defendants. Most notably, the Court rejected their challenge to the two-level enhancement for employing sophisticated means under U.S.S.G. § 2B1.1. Fountain identified IRS programs that would pay substantial sums and designed her scheme to maximize payouts while avoiding detection, including the use of her inside knowledge of the IRS's enforcement thresholds. Fountain also concealed her identity from others involved in the scheme by employing third parties to recruit tax claimants. She also employed enforcement mechanisms to ensure she would get paid by submitting amended returns that would tip off the IRS when claimants failed to pay her. Using the IRS as her enforcer decreased the likelihood that claimants would report her, because they would fear prosecution themselves.

A co-defendant also used sophisticated means when he instituted additional practices to avoid detection, such as routing refunds into accounts that would not raise alarms, and electronically filing claims so they could only be traced to a third party's wireless network, rather than his own.

IV. Escape / 18 U.S.C. § 751 / Meaning of "In Custody"

United States v. Small, --- F.3d ---, 2015 U.S. Dist. LEXIS 12023 (3d Cir. July 13, 2015).

A defendant can be convicted of escaping from "custody" under 18 U.S.C. § 751(a) when he has been convicted of a federal crime before finishing his state sentence, and then fraudulently causes himself to be released from prison upon completion of his state sentence to avoid execution of the federal detainer. Section 751(a) criminalizes a defendant's escape from: (1) the custody of the Attorney General or an authorized representative; (2) confinement in an institution at the direction of the Attorney General; (3) "custody" by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge; or (4) the custody of an officer or employee of the United States pursuant to a lawful arrest. The custodial requirement is satisfied if a lawful judgment of conviction has been issued by a federal court against the defendant. The conviction itself is sufficient "process" under the statute to place the defendant in the constructive custody of the federal government upon completion of a state sentence.

Small was convicted of tax fraud in federal court while he still had time left to serve on a Pennsylvania state prison sentence. He arranged for a forged court order purporting to vacate his federal sentence to be presented to Pennsylvania state prison officials. This caused state prison officials to release him at the end of his state sentence rather than turn him over to federal

officials to begin serving his federal sentence. Small's efforts not to serve out his federal sentence were analogous to failing to report to federal prison on a self-surrender date, which is prohibited under the escape statute.

V. Assault / Aiding and Abetting / Sufficiency / Constructive Amendment / Double Jeopardy

United States v. Centeno, --- F.3d ---, 2015 U.S. Dist. LEXIS 12090 (3d Cir. July 14, 2015).

- (1) The evidence was sufficient to convict Baldwin and Santos Centeno of aiding and abetting an assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6) and 2, and assault by striking, beating, or wounding, in violation of 18 U.S.C. §§ 113(a)(4) and 2, even though the victim did not remember the attack and the cooperating witness, who remained in the car the entire time, did not see which individuals in a group of five men struck the victim. Some affirmative participation or encouragement in the crime beyond mere presence is necessary to convict a defendant of aiding and abetting, but the evidence met that standard.

The Centenos were amongst a group of five-men, one or more of which assaulted the victim, failed to render him any aid, and fled in a vehicle with the entire group of men. This evidence could allow a rational juror to conclude they encouraged the crime and had consciousness of guilt. Finally, four days later, the Centenos traveled together in the same car, to the same location, where Santos assaulted and robbed two other victims. A rational juror could have found that the Centenos acted with a method of operation as evidenced by a unique pattern, making it less likely they were merely present for the first assault.

- (2) Santos Centeno's sufficiency challenge to his assault and robbery convictions for the second date in question was also rejected. The two victims identified Santos either on the witness stand, from a photo array, or both. They also described the getaway car consistently with the vehicle in which the Centenos were found two days later. One of the victims testified that his wallet and cell phone were taken during the attack, which supported Santos's robbery conviction.
- (3) The Court reversed Baldwin Centeno's convictions for assault on the first night in question because the government constructively amended the indictment when it argued in closing that the jury could convict him of aiding and abetting for driving the getaway car. Driving a getaway car amounts to nothing more than assisting the perpetrator after the crime is completed, which violates the "accessory after the fact" statute, not aiding and abetting the substantive offense. Since "accessory after the fact" was not charged in the indictment, the government's improper argument created a substantial likelihood that the jury may have convicted Baldwin for an offense different from the charges indicted by the grand jury.
- (4) The Third Circuit declined to weigh in on a circuit split as to whether an assault resulting in serious bodily injury under § 113(a)(6) requires proof that the assault

occurred by intentionally striking the victim. However, the jury was instructed that striking was an element of both assault charges. As instructed, assault by striking constituted a lesser included offense of assault resulting in serious bodily injury, and Santos's conviction and sentence on both counts for the same conduct violated the Double Jeopardy Clause. Santos's conviction for assault by striking was vacated, and the case was remanded so the district court can merge the two convictions and resentence him.