RECENT THIRD CIRCUIT AND SUPREME COURT CASES

June 5, 2014
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SUPREME COURT

I. Restitution in Child Pornography Cases

Paroline v. United States, 134 S. Ct. 1710 (2014).

(1) Restitution is proper under 18 U.S.C. § 2259 only to the extent the defendant's child pornography offense proximately caused the victim's losses.

(2) There is no rigid formula to determine causation. The Supreme Court suggested that district courts might start by determining the amount of the victim's losses caused by the continuing traffic in the victim's images, and then "set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses." The following factors may be relevant to this determination:

- the number of past criminal defendants found to have contributed to the victim's general losses;
- reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses;
- any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will never be caught or convicted);
- whether the defendant reproduced or distributed images of the victim;
- whether the defendant had any connection to the initial production of the images;
- how many images of the victim the defendant possessed;
- other factors relevant to the defendant's relative causal role.

II. Mortgage Fraud / Mandatory Victims Restitution Act

Robers v. United States, 134 S. Ct. 1854 (2014).

In a mortgage fraud case, the Mandatory Victims Restitution Act requires "a sentencing court [to] reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it."

In other words, the "property" returned is the money lent by the victim, not the collateral. When the collateral has not yet been sold by the time of sentencing, or will not be sold, the Act permits the sentencing court to adjust the restitution order as appropriate.

III. Capital Punishment / Intellectual Disability

Hall v. Florida, --- S. Ct. --- , 2014 WL 2178332 (May 27, 2014).

Florida's statute, which defines intellectual disability to require an IQ test score of 70 or less, and forbids any further exploration of intellectual disability if the prisoner is deemed to have an IQ over 70, violates the Eighth and Fourteenth Amendments to the United States Constitution because it creates an unacceptable risk that persons with intellectual disability will be executed.

Florida's statute "disregards established medical practice" by taking the IQ score as "final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and by relying "on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise."

IV. Double Jeopardy / Denial of Prosecution's Motion to Continue / Judgment of Acquittal

Martinez v. Illinois, --- S. Ct. --- , 2014 WL 2178529 (May 27, 2014) (per curiam).

The Double Jeopardy Clause bars a retrial when the prosecutor, annoyed that the trial court refused to grant a continuance to bring in recalcitrant witnesses, refuses to present evidence after the jury is sworn and the court directs a verdict of acquittal. The Illinois Supreme Court was summarily reversed in this case without merits briefing or oral argument.

V. Cert. Granted - Tangible Objects Under 18 U.S.C. § 1519

Yates v. United States, No. 13-7451 (Cert. Granted Apr. 28, 2014).

ISSUE: Whether the obstruction section of the Sarbanes-Oxley Act (18 U.S.C. § 1519, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with intent to obstruct an investigation), enacted after the Enron scandal and aimed at the destruction of documents, criminalizes the destruction of fish flagged as undersized by a fisheries ranger.

I. Willful Blindness Instruction / Abuse of Trust Enhancement / Aggravated Role Enhancement

United States v. Tai, --- F.3d ---, 2014 WL 1687814 (3d Cir. Apr. 30, 2014).

Defendant was a cardiologist convicted of mail and wire fraud in connection with claims for payment from the Fen-Phen Settlement Trust. The conviction was affirmed, but the case was remanded to address one sentencing issue.

(1) The district court's willful blindness jury instruction, which tracked the Third Circuit's Model instruction, did not implicitly shift the burden to the defendant to disprove intent. The instruction made clear when willful blindness does and does not exist, and it never implied that Tai was required to present any evidence concerning his subjective beliefs or knowledge. Further, the district court's other instructions on the government's burden of proof were sufficient to dispel any possible misconception that Tai was required to prove he was not willfully blind.

(2) The district court did not plainly err when it applied the two-level enhancement embodied at U.S.S.G. § 3B1.3, which applies when the defendant: (1) "abused a position of public or private trust," or (2) "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense."

With respect to "abuse of trust:" (1) Tai's position as a cardiologist with echocardiology training allowed him to commit a difficult-to-detect fraud; (2) Tai had a large degree of authority over the submission of settlement claims because he was one of the physicians authorized to read echoes and sign forms for submission to the trust; and (3) the nature of the Settlement and structure of the Trust required reliance on the integrity of the doctors who were signing the reports and forms that were submitted to the trust. Tai's credentials and the deference he was accorded placed him in a position that facilitated his criminal conduct. Application of the enhancement under an "abuse of trust" theory was proper.

With respect to use of a "special skill" to support application of U.S.S.G. § 3B1.3, Tai possessed special skills as a cardiologist and his skills and credentials were what allowed him to participate in the Fen-Phen claims process in the first place. Application of the enhancement was also proper under a "use-of-special-skill-theory."

(3) Although Tai originally objected to the application of the aggravated role enhancement for being an organizer, leader, manager, or supervisor of a criminal scheme with fewer than five participants, *see* U.S.S.G. § 3B1.1(c), he withdrew that objection and the government presented no further evidence supporting the enhancement at sentencing. The district court applied the enhancement without making any findings about whether the people Tai supervised were criminally responsible individuals as required by *United States v. Badaracco*, 954 F.2d 928, 934-35 (3d Cir. 1992). The error affected Tai's substantial rights because it affected the length of his sentence. Therefore, the case was remanded for

the district court to determine the applicability of the aggravated role enhancement. The government waived the waiver argument (based on the withdrawal of the objection in the district court) by not raising it until oral argument.

II. Reopening the Record / Evidence and Notice at Sentencing / Judicial Factfinding / 10-Victim Enhancement / Scope of Appellate Mandate

United States v. Smith, --- F.3d ---, 2014 WL 1856679 (3d Cir. May 9, 2014).

(1) At a resentencing after an initial remand, the district court did not abuse its discretion when it permitted the government to reopen the record to present additional evidence regarding the number of victims in the charged bank fraud scheme. Defendants were not prejudiced by reopening the record because they received notice of the evidence the government planned to introduce and were afforded an opportunity to respond to it and rebut the evidence through cross examination and by the submission of post-hearing memoranda. Defendants also had a chance to present their own witnesses and opted not to do so. Finally, the government had a reasonable explanation for not presenting the evidence at the first sentencing hearing. At the initial sentencing hearing, the law was unsettled as to whether an individual who recovers his or her losses is a "victim" under U.S.S.G. § 2B1.1(2).

(2) The additional evidence offered at the resentencing did not offend the Confrontation Clause, the Rules of Evidence, or Due Process. Since the Confrontation Clause does not apply at sentencing, the defendants were not entitled as a constitutional matter to confront the account holders whose statements were introduced into evidence at the hearing. Furthermore, the Federal Rules of Evidence do not apply at sentencing and the district court may rely on hearsay.

Although Due Process does require that any hearsay relied upon at sentencing bear minimal indicia of reliability beyond mere allegation, the evidence offered here satisfied that standard. The agent interviewed all the account holders, whose hearsay statements involved matters within the knowledge of each declarant. Finally, Due Process does not require the government to supply a criminal defendant with advance notice of evidence it intends to present at sentencing.

(3) The defendants' Sixth Amendment rights were not violated when the district court applied guideline enhancements on the basis of judge-found facts. The constitutional rights to a jury trial and proof beyond a reasonable doubt attach only to facts that constitute the elements of a crime, which means those facts that increase the statutory minimum or maximum punishment to which the defendant is exposed. The Fifth and Sixth Amendments do not prohibit the district court from finding facts, under a preponderance of the evidence standard, that are relevant to the application of various advisory guideline provisions.

(4) A party that is reimbursed for stolen funds but, as a practical matter, suffers additional pecuniary harm may qualify as a victim suffering "actual loss" under U.S.S.G. § 2B1.1(b)(2). One example of cognizable pecuniary harm is the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts. Therefore, the district court properly applied the two-offense-level enhancement for 10 or more victims under U.S.S.G. § 2B1.1(b)(2)(A).

(5) The district court exceeded the scope of the Third Circuit's original mandate when it reconsidered the restitution order against one of the defendants at the resentencing hearing. Remand was therefore appropriate for the district court to reinstate its original restitution order.

III. Nolo Contendere Plea / Acceptance of Responsibility / Possession of a Firearm "In Connection With" Another Felony / Stolen Firearm / Request for Variance

United States v. Harris, --- F.3d ---, 2014 WL 1856681 (3d Cir. May 9, 2014).

(1) The Third Circuit held that a nolo contendere plea does not preclude a defendant from receiving a three-offense-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The defendant was charged with felon-in-possession of a firearm and ammunition. He was acquitted of the ammunition charge and pled nolo contendere to the firearm charge, because he was heavily intoxicated on the night in question and did not want to admit to actions under oath that he could not remember. The district court found Harris's testimony credible, but denied him the reduction. The district court found that Harris showed a lack of remorse when the government played a surveillance video of him brandishing a gun in a bar. Reviewing for clear error, the Circuit upheld the denial. This is a narrow case that should be limited to its facts, but watch out for the government using the case to try to establish "remorse" as a new touchstone for acceptance.

(2) The district court applied the four-level enhancement for possession of a firearm in connection with another felony offense, namely, simple assault, under U.S.S.G. § 2K2.1(b)(6)(B). Not only did the surveillance video show Harris brandishing a gun in the bar, but the district court also listened to the 911 calls, which affirmed that Harris had also been threatening people in the bar. The district court's finding by a preponderance of the evidence that Harris's actions placed patrons in the bar in fear of imminent bodily injury (constituting a simple assault) was not reversible error.

(3) The owner of the firearm Harris was convicted of possessing passed away before his sentencing hearing, and Harris contended that he would not have been a credible witness if called to testify. Nevertheless, two Department of Justice reports indicated that the firearm was stolen, and Harris did not present any evidence to suggest he had a lawful right to the firearm. Under these facts, the district court did not clearly err when it applied the two-level enhancement for possession of a stolen firearm under U.S.S.G. § 2K2.1(b)(4)(A).

(4) The district court did not commit procedural or substantive error by denying Harris's request for a downward variance based on his mental health and substance abuse issues.

IV. Fourth Amendment / Warrantless "Knock and Talk" Investigations

Carman v. Carroll, --- F.3d ---, 2014 WL 1924672 (3d Cir. May 15, 2014).

A "knock and talk" encounter must satisfy three requirements: (1) a police officer, like any other visitor, must knock promptly, wait briefly to be received, and then absent an invitation to stay longer, leave; (2) the purpose of the knock and talk must be to interview the occupants of the home, not to conduct a search; and (3) the knock and talk encounter must begin at the door used by the public (typically the front door) because that is where police officers, like any other visitors, have an implied invitation to go.

The "knock and talk" exception to the warrant requirement did not apply in this case because the trooper, who was searching for an armed vehicle thief who allegedly fled to the Carmans' home, proceeded directly to the back door. The purpose of the trooper's investigation was to search for the thief, not to interview the Carmans. The fact that the back door to the property was actually closer to where the trooper had to park his vehicle did not alter the inquiry in his favor. The trooper's entry into the Carmans' curtilage, considered part of the home itself for Fourth Amendment purposes, was an unreasonable search in violation of the Fourth Amendment. The trooper was not entitled to qualified immunity because the Fourth Amendment's protection of the home's curtilage is well-established.

There was sufficient evidence to support the jury's determination that the trooper's brief investigatory detention of Mr. Carman comported with the Fourth Amendment. When he seized Mr. Carman, the trooper did not know whether or not he was the thief the troopers were looking for. The jury could have logically concluded that the trooper had reasonable suspicion to briefly question Mr. Carman regarding his identity.