

## RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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March 6, 2013  
Christopher Bates, EDPA

### SUPREME COURT

#### **I. Aiding and Abetting / Accomplice Liability / § 924(c)**

*Rosemond v. United States*, --- U.S. ---, 2014 WL 839184 (Mar. 5, 2014).

To convict for aiding and abetting a violation of § 924(c), government must show at least (1) that defendant acted to further the underlying offense (crime of violence or drug crime); and (2) that defendant had “advance knowledge” that a gun will be involved, meaning knowledge sufficiently early to give him a “realistic opportunity to quit the crime.” A defendant need not intentionally facilitate or encourage the use/carrying/possession of the gun.

- “advance knowledge” is a jury question, and might even include knowledge gained during the commission of the offense if defendant continues to participate/fails to object and realistically could have done otherwise
- this is an instructional issue
- we gain the “advance knowledge” jury argument, and lose the “no encouragement” argument
- in brandishing cases, government should have to show advance knowledge of brandishment, not just use/carrying/possession (probably no need to show advance knowledge in discharge cases, per *Dean v. U.S.*, 556 U.S. 568 (2009))

#### **II. Fourth Amendment / Consent to Search / Objecting Party Not Present**

*Fernandez v. California*, --- U.S. ---, 2014 U.S. LEXIS 1636 (Feb. 25, 2014).

Although police may generally search a jointly occupied premises if one of the occupants consents, there is a narrow exception where consent of one occupant is insufficient if another occupant is present and objects to the search. *Georgia v. Randolph*, 547 U.S. 103 (2006). *Randolph* does not apply where the objecting occupant is not present when another occupant consents, even if his absence is caused by his lawful arrest after objecting to the search.

### **III. Freezing Assets / Forfeiture / Challenging Probable Cause**

*Kaley v. United States*, --- U.S. --- , 2014 U.S. LEXIS 1634 (Feb. 25, 2014).

A defendant does not have a constitutional right to relitigate a grand jury's prior determination of probable cause to believe he or she committed the crimes charged at a pre-trial hearing to contest the legality of the government's asset seizure under 21 U.S.C. § 853(e)(1), even if the defendant wants to use the seized assets to hire an attorney. A defendant may challenge only whether there is probable cause that the assets are traceable to the charged offense.

- this had been Third Cir law all along

### **IV. Unauthorized Re-Entry At Military Installation / Protest Area and Easement**

*United States v. Apel*, --- U.S. --- , 2014 U.S. LEXIS 1643 (Feb. 26, 2014).

It is a federal crime to reenter a military installation after having been ordered not to do so by any officer or person in command, pursuant to 18 U.S.C. § 1382. A portion of an Air Force base that contains a designated war protest area and an easement for a public road qualifies as part of the military installation under the statute.

The Court did not decide whether § 1382 would be unconstitutional as applied to this protestor. That issue was reserved for consideration on remand.

### **V. Cert. Granted - FRE 606(b) / Juror Dishonesty During Voir Dire**

*Warger v. Shauers*, No. 13-517 (Cert. Granted Mar. 3, 2014).

ISSUE: Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce testimony about statements made during deliberations that tend to show the alleged dishonesty.

THIRD CIR: No (in *dictum*)

## **THIRD CIRCUIT**

### **I. Crime-Fraud Exception to the Attorney-Client Privilege**

*In re Grand Jury Subpoena*, --- F.3d ---, 2014 U.S. App. LEXIS 2593 (Feb. 12, 2014).

(1) Before a district court can undertake an *in camera* examination of an attorney-witness to determine the applicability of the crime-fraud exception, the party seeking to overcome the privilege must make a "showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." This

standard applies even to oral communications with the attorney. See *United States v. Zolin*, 491 U.S. 554, 572 (1989)

(2) The district court did not abuse its discretion in excluding the corporation and client from the attorney's *in camera* interview or declining to release a transcript or summary of the testimony. Even though some of the information regarding the investigation is public, the content of the investigation is entitled to protection as a grand jury secret.

(3) The district court did not abuse its discretion in finding the crime-fraud exception applied. The exception applies where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud **at the time the communications were made**, and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud (it is not enough that the communications merely "relate to" the fraud). Although an attorney informing a client about the criminality of a proposed action does not trigger the exception, here the attorney provided information about the types of conduct that violate the law, thus enabling the client to use the information to further the crime. It was not an abuse of discretion for the district court to find that there was a reasonable basis to conclude that the attorney's advice was used by the client to fashion conduct in furtherance of the crime, given that the client stated he would undertake the conduct notwithstanding the advice of illegality.

(4) A crime-fraud finding overcomes the work product privilege.

## **II. Appellate Waiver / Consecutive Sentence for VOSR**

*United States v. Banks*, --- F.3d ---, 2014 U.S. App. LEXIS 2094 (Feb. 12, 2014).

Banks' consecutive sentences for a new bank fraud conspiracy conviction and his supervised release violation were encompassed by his waiver of his right to appeal the sentence imposed by the court so long as the sentence fell within or below the guideline range. Consecutive sentencing was directly contemplated by the plea agreement, and since it was not explicitly excepted from the appellate waiver provision, the waiver covered the district court's imposition of a consecutive sentence on the supervised release violation. There was no miscarriage of justice here since the consecutive terms equaled 51 months, which was well below the statutory maximum of 30 years for the bank fraud offense.

## **III. Sufficiency of Indictment / Severance / V.I. Kidnaping / Sufficiency of Evidence / Prosecutorial Misconduct / Evidentiary Issues**

*United States v. John-Baptiste*, --- F.3d ---, 2014 U.S. App. LEXIS 2969 (3d Cir. Feb. 19, 2014).

(1) The indictment specified the time period in which the alleged crimes occurred but did not identify the alleged victims. This was enough specificity to allow Defendant Brooks to assert a future double jeopardy claim.

(2) John-Baptiste's joint trial with his co-defendants did not lead to clear and substantial prejudice and did not result in a manifestly unfair trial. The evidence against his co-defendants was much more extensive, but nothing in the record suggested that the jury was unable to compartmentalize the evidence as it related to separate defendants, and the district court's instructions to the jury adequately conveyed its duty to consider each count and each defendant's guilt separately and individually.

(3) The Virgin Islands' false imprisonment and kidnaping statute requires the defendant to act "without lawful authority." John-Baptiste's status as a former police officer with authority to make *lawful* arrests did not shield him from prosecution under this statute, because the detention in this case was for the unlawful purpose of collecting ransom. Similarly, the statute is not unconstitutionally vague, because it adequately puts police on notice that they cannot hold someone in custody for personal gain until ransom is paid.

(4) The Court reversed the district court's order granting Defendants Brooks and Edwards' Post-Verdict Rule 29 motions for conspiracy and extortion under the Hobbs Act. Extortion requires proof that the defendant knowingly and willfully obtained the victim's property through coercion resulting from wrongful force, threatened force, violence, or fear, or under color of official right, and that this obstructed, delayed, or affected interstate commerce. Here, the victim placed money on the dashboard of Edwards' police vehicle, so there was no direct evidence the victim's payment to recover his impounded truck went directly to Edwards. The circumstantial evidence, however, was sufficient to sustain the jury's guilty verdict. Edwards had repeatedly told the victim how much he would have to pay to get his truck back, she told him she had been taking money from people for 19 years, she ordered him to put the money on the dashboard, and the victim later saw the tow truck driver with only a few hundred dollars in his hands.

Likewise, the evidence was sufficient to sustain the jury's guilty verdict on the conspiracy to commit extortion charge related to Brooks and Edwards. Brooks sat in the police vehicle silently as Edwards told the victim she had been taking money from people for 19 years. Evidence of an explicit agreement was not required, and the evidence proved more than just Brooks' mere presence. Based on the unique circumstances of the case, the jury could have assumed that when one police officer boasts of committing extortion for almost two decades in the presence of another police officer, there must be an agreement and that the agreement arises from a longstanding pattern of activity and mutual trust between the two.

(5) The district court also improperly set aside the jury's verdict on the drug conspiracy count arising from Brooks and Edwards coercing someone to sell crack cocaine for them. There was no direct evidence that Edwards knew it was drugs in the bag when she handed it over for sale, but the circumstantial evidence was sufficient. The charged conduct took place in 2009, which was several years into a longstanding pattern of illegal activity between Edwards and Brooks that in the past had involved recruiting people to sell drugs for them.

(6) Brooks was not entitled to a new trial on the RICO Conspiracy count on the basis that the jury considered acquitted conduct in convicting him on that count. If the jury convicts the defendant on two or more of the predicate acts constituting a RICO violation,

the conviction on the RICO count itself withstands challenge even if the jury acquitted the defendant on several counts charging other predicates.

(7) The government did not commit prosecutorial misconduct. First, the agent improperly pointed out Edwards to one of the victims during the lunch break after the victim had not been able to identify Edwards in the courtroom. The district court properly addressed this situation by holding a hearing, and the government did not ask the victim to identify Edwards upon the resumption of his direct testimony after the lunch break. Further, the victim's testimony that was contrary to police officer testimony was a credibility issue for the jury to resolve.

Second, the government did not commit a *Brady* violation by omitting an exculpatory portion of a recorded conversation with a federal agent. Although this portion was not played for the jury, the entire tape was offered into evidence, and defense counsel was able to cross-examine with the exculpatory portion of the tape. Therefore, even if the evidence was suppressed by the government, there was no prejudice to Brooks.

Third, a controversy surrounding a government witness's identify and possible use of multiple social security numbers did not amount to the government suborning perjury in violation of the defendant's due process rights. Although the government should have done more pre-trial investigation into the issues surrounding the identity of its witness, there was no clear showing that the witness perjured himself and the testimony did not prejudice the entire case. The witness's testimony only pertained to five counts that were dismissed at the close of the government's case.

(8) Evidentiary errors raised by defendants: First, the Court upheld the district court's decision to limit the cross-examination of certain government witnesses. Second, the district court acted within its discretion in limiting defense witnesses' testimony about an incident with a victim to what they saw, not what they heard. The statements John-Baptiste sought to introduce did not qualify as legally operative statements ("verbal acts"), and to the extent the testimony would have qualified under the "state of mind" hearsay exception, there was other non-hearsay evidence that adequately informed the jurors on this point.

Third, the district court properly limited defense counsel's attempt to cross-examine the police chief with one of the victim's prior inconsistent statements, because the victim was not afforded an opportunity to admit or deny the prior inconsistent statement before such extrinsic evidence was offered. *See* FED. R. EVID. 613.

Finally, the district court did acted within its discretion in allowing a witness to testify in rebuttal to Edwards' alibi defense. Edwards properly notified the government of her alibi defense under Fed. R. Crim. P. 12(a) as it pertained to two counts of conviction, but her trial testimony expanded the defense. The court properly allowed the government to expand the testimony of its pertinent witness under Rule 12.1(3) to address Edwards' expanded alibi.

#### **IV. Motion to Suppress / Standing / Protection From Abuse Order**

*United States v. Cortez-Dutrieuille*, --- F.3d ---, 2014 U.S. App. LEXIS 3596 (3d Cir. Feb. 26, 2014).

Dutrieuille did not have standing to challenge the anticipatory warrant to search his girlfriend's residence. Although he was an overnight guest in the home, a valid protection from abuse order prohibited him from entering the home and having any contact with his child's mother. Since his presence in the home was illegal, any subjective expectation of privacy he had there was not one that society would recognize as reasonable.

Dutrieuille also lacked standing to challenge the search of the bag that he brought with him during the unlawful visit to his girlfriend's home. A person legally prohibited from entering a place cannot reasonably expect to use that place as a private place to store his personal belongings. He therefore lacked a reasonable expectation of privacy in the bag.