RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. *Terry* Stops / Reasonable Suspicion / Anonymous Tips / Drunk Driving

Navarette v. California, --- S. Ct. ---, 2014 WL 1577513 (2014).

At issue in this case was an anonymous report called into 911 that a truck the tipster identified by license plate number had just run her off the road. Police located the truck 15 minutes later, traveling on the highway at a location consistent with the report. They followed the truck for 5 minutes, observing no traffic violations or anything suspicious, and then stopped the truck.

The Court held that there was reasonable suspicion for the stop. The anonymous tip was reliable because: (1) the tipster claimed to be an eyewitness; (2) the tip was made within minutes of the purported incident; and (3) the tip was made through a 911 system, which sometimes has tracing and recording functions that make tipsters identifiable. The suspicion raised by the tip suggested the ongoing crime of drunk driving, and was not dispelled by police's observation of the truck because "it is hardly surprising" that a drunk driver would act sober once he saw a police car following him.

Ways to distinguish this case:

- argue that the case is best read as limited to stopping motorists in response to reports of reckless driving because such reports are reliable in ways that other, more typical anonymous tips may not be.
- many tips lack even an implied claim of eye witness status, such as a call that says "man with a gun."
- many tips lack a clearly traceable time frame suggesting contemporaneousness
- the purported illegality must be continuing or a completed felony for *Terry* to apply.

II. Cert. Granted / Remanded for Reconsideration / *Mens Rea* / False Statements

Kelechi v. United States, No. 13-7264 (Cert. Granted. Apr. 29, 2014).

The Supreme Court granted cert. and remanded to the Ninth Circuit Court of Appeals for further consideration in light of the Solicitor General's agreement in the government's brief that a jury must find that the defendant acted "with knowledge that his conduct was unlawful" to sustain a conviction for making false statements under 18 U.S.C. § 1001, as well as under the medical records statute, 18 U.S.C. § 1035.

III. Cert. Granted - Mistake of Law / Fourth Amendment / Traffic Stop

Heien v. North Carolina, No. 13-604 (Cert. Granted Apr. 21, 2014).

ISSUE: Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop?

THIRD CIRCUIT: Currently says "no."

IV. Cert. Granted - Possession of Short-Barreled Shotgun / Violent Felony / ACCA

Johnson v. United States, No. 13-7120 (Cert. Granted Apr. 21, 2014).

ISSUE: Whether mere possession of short-barreled (sawed-off) shotgun should be treated as a violent felony under the Armed Career Criminal Act?

THIRD CIRCUIT: Has not ruled on this issue.

NOTE: The outcome of this case could be relevant to Career Offender and "crime of violence" calculations under the Guidelines.

THIRD CIRCUIT

I. Armed Career Criminal Act / Pennsylvania PWID Statute / Modified Categorical Approach

United States v. Abbott, --- F.3d ---, 2014 WL 1328178 (3d Cir. Apr. 4, 2014).

Pennsylvania's Possession With Intent to Deliver ("PWID") statute, 35 Pa. Stat. Ann. § 780-113(a)(30), is a divisible statute because the type of drug involved alters the prescribed range of possible penalties, making the drug type an element of the crime. The district court properly utilized the "modified categorical approach" by looking to the *Shepard* documents to determine whether Abbott's prior Pennsylvania PWID conviction constitutes a serious drug offense for purposes of the Armed Career Criminal Act ("ACCA"). *See Descamps v. United States*, 133 S. Ct. 2276 (2013) (holding that the modified categorical approach *only* applies to divisible statutes; if the statue at issue is indivisible, the district court may only look to the elements of the prior conviction, which is known as the categorical approach).

The charging document, the Bill of Information, specified that the drug at issue was crack cocaine, which is punishable by a maximum term of imprisonment of ten years. Abbott's prior conviction was therefore a serious drug offense within the meaning of the ACCA and the mandatory minimum sentence of fifteen years applied.

II. SORNA / Pre-Act Offenders / Nondelegation Doctrine

United States v. Cooper, --- F.3d ---, 2014 WL 1386816 (3d Cir. Apr. 10, 2014).

Congress' decision to delegate authority to the Attorney General to determine whether the Sex Offender Registration and Notification Act's ("SORNA") registration requirements apply to offenders convicted before SORNA's enactment did not violate separation of powers under the nondelegation doctrine.

The Court declined to apply a heightened standard here simply because Congress delegated the authority to create criminal liability. Instead, the Third Circuit analyzed the delegation under the more common "intelligible principle" test. Because Congress laid out the general policy underlying the SORNA, the public agency to apply the policy, and the boundaries of the delegated authority, its delegation to the Attorney General passed constitutional muster.

III. Venue / Computer Fraud and Abuse Act

United States v. Auernheimer, --- F.3d ---, 2014 WL 1395670 (3d Cir. Apr. 11, 2014).

The defendant was accused of hacking into AT&T's system and obtaining the email addresses of 114,000 iPad owners. Neither he, his co-conspirator, nor the servers he hacked were in New Jersey, but some of the iPad owners lived there, and the government prosecuted him in the District of New Jersey. The district court denied his request for a jury instruction on venue, reasoning that venue properly lied in New Jersey as a matter of law.

Venue is twice guaranteed to a criminal defendant in the Constitution, at Article III, Section 2, Clause 3 and in the Sixth Amendment. It is also codified in Federal Rule of Criminal Procedure 18. Neither of the "essential conduct elements" of the Computer Fraud and Abuse Act ("CFAA") offense - accessing a computer without authorization, and obtaining information - occurred in New Jersey. Further, because the government charged Auernheimer with conspiring to violate the CFFA in furtherance of a New Jersey state crime, neither of the conduct elements of that offense (accessing a computer without authorization, and disclosing information) occurred in New Jersey either. With respect to the identity fraud offense, neither of the essential conduct elements (transfer, possession or use, and doing so in connection with a federal crime or state felony) occurred in New Jersey, so venue was not proper on that charge.

NOTE: Although the Court declined to say it would never find a venue error harmless, the Court indicated that a venue error may be structural and in any case this error was not harmless.

IV. Sixth Amendment / Constitutional Speedy Trial Right

United States v. Velazquez, --- F.3d ---, 2014 WL 1410153 (3d Cir. Apr. 14, 2014).

After an initial effort to apprehend Mr. Velazquez, the government spent five years doing nothing other than running his name a handful of times through the NCIC database, despite having other available leads as to his whereabouts. The authorities resumed efforts after five years, but the defendant was ultimately apprehended when he was arrested on an unrelated case. The Third Circuit reversed his conviction and remanded the case to the district court to dismiss the indictment with prejudice for a violation of Mr. Velazquez's Sixth Amendment speedy trial rights.

Considering the four-factor test for a constitutional speedy trial claim established in *Barker v. Wingo*, 407 U.S. 514 (1972), the Court reasoned that: (1) the delay in bringing Velazquez to trial was extraordinary; (2) the government was not reasonably diligent in pursuing him; (3) Velazquez timely asserted his rights by moving to dismiss the indictment within four months of his arrest, which is when he learned of the indictment; and (4) the government failed to overcome the presumption of general prejudice to Velazquez's defense "that applies with considerable force in a case of such extraordinary delay."

V. Protective Sweeps / Defendant Arrested Outside the Home

United States v. White, --- F.3d ---, 2014 WL 1408748 (3d Cir. Apr. 14, 2014).

The Supreme Court's opinion in *Maryland v. Buie*, 494 U.S. 325 (1990) authorizes two types of warrantless home searches following a defendant's arrest. First, without probable cause or reasonable suspicion, officers may look in closets and other spaces adjoining the place of arrest from which an attack could be immediately launched (*Buie* "Prong One" searches). *Buie*'s "Prong Two" authorizes a warrantless search of the home based on reasonable and articulable suspicion that the areas being searched may harbor an individual who poses a danger to those present at the scene of arrest, which is commonly known as a "protective sweep."

In this case, Mr. White was arrested 20 feet outside his home. The Court reiterated its prior holding from *Sharrar v. Felsing*, 128 F.3d 810, 824 (3d Cir. 1997), that "a sweep incident to arrest occurring just outside the home must be analyzed under the second prong of the *Buie* analysis." Since the district court upheld the search as a *Buie* "Prong One" search, the case was remanded for the district court to determine if there was a reasonable suspicion that the home was harboring a dangerous individual at the time of Mr. White's arrest and/or whether there were exigent circumstances justifying the warrantless search of the home.

VI. Hobbs Act Extortion / Travel Act / Sufficiency / Double Jeopardy / Conduct of Trial Judge

United States v. Bencivengo, --- F.3d ---, 2014 WL 1613315 (3d Cir. Apr. 23, 2014).

(1) Even if a public official has no actual power to influence a decision, the evidence is sufficient to sustain a conviction for Hobbs Act extortion "under color of official right" if the defendant "has, and agrees to wield, influence over a governmental decision in exchange for financial gain, or where the official's position could permit such influence, and the victim of [the] extortion scheme reasonably believes that the public official wields such influence." There was sufficient evidence to support Bencivengo's extortion conviction because he accepted money from a friend in exchange for his agreement to influence members of the Hamilton Township, New Jersey School Board to refrain from putting the School District's insurance contract up for competitive bidding even though, as the Mayor, he had no actual power over such decisions.

(2) Bencivengo's sufficiency argument was also foreclosed by his failure to object to the government's proposed jury instructions, which stated that a public official's agreement to exercise influence over a governmental decision or the victim's reasonable belief in his ability to do so is sufficient to prove a violation of the Hobbs Act.

(3) The evidence was also sufficient to support Bencivengo's conviction for violating the Travel Act. The government's theory was that he made interstate telephone calls and caused his friend to travel from her home in Delaware to New Jersey to violate the New Jersey Bribery in Official and Political Matters Offense, which requires proof that the defendant accepted a benefit as consideration for a violation of an official duty of a public servant. He was performing a governmental function when he put pressure on School Board members even though he did not have actual power over the Board's award of insurance contracts. The New Jersey statute explicitly states that lack of actual jurisdiction over the decision is not a defense to the crime.

(4) The Hobbs Act and Travel Act convictions were not multiplicitous and therefore did not violate the Fifth Amendment's Double Jeopardy Clause. Looking to the *Blockburger* test, there were two offenses proven at trial, each of which contains an element the other does not. The Hobbs act does not require interstate travel and the Travel Act does not require proof of extortion that affects interstate commerce.

(5) The district court's comments during defense counsel's cross of Bencivengo's friend, the main cooperating witness, was not improper. The district court admonished defense counsel on several occasions to clarify questions that maybe did not need to be clarified, since the witness understood them. However, the district court did not cross examine any defense witnesses or conduct an examination of defense counsel in front of the jury. The Judge also instructed the jury twice not to draw any inferences from her comments as to whether she had an opinion regarding the defendant's guilt. In any event, any error would have been harmless because the evidence was overwhelming.