RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Retroactivity of *Johnson v. United States*

Welch v. United States, No. 15-6418, 2016 U.S. LEXIS 2451 (U.S. Apr. 18, 2016).

The rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague, was a substantive rule because it alters the range of conduct or the class of persons that the ACCA punishes. It is not a mere procedural rule because such rules "regulate only the manner of determining the defendant's culpability." Since *Johnson* announced a substantive rule, it is retroactive to cases on collateral review.

II. Plain Error Under Rule 52(b) When Court Applies Incorrect Guideline Range

Molina-Martinez v. United States, No. 14-8913, 2016 U.S. LEXIS 2800 (Apr. 20, 2016).

Neither FED. R. CRIM. P. 52(b) nor judicial precedent support a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that an erroneous (and higher) guideline range set the wrong framework for the district court's sentencing proceedings. This means that under plain error review, when a defendant is sentenced under an incorrect guideline range, that error in and of itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error, even if the ultimate sentence fell within the correct range.

III. Conspiracy to Commit Extortion Under Color of Official Right

Ocasio v. United States, No. 14-361, 2016 U.S LEXIS 2932 (May 2, 2016).

A defendant may be convicted of conspiring to violate the Hobbs Act under 18 U.S.C. § 371 based on proof that he reached an agreement with another member of the conspiracy who is the owner of the property in question to obtain that property under color of official right.

IV. Cert. Granted - Specific Intent in the Bank Fraud Statute

Shaw v. United States, No. 15-5991 (Cert. Granted Apr. 25, 2016).

QUESTION PRESENTED: Whether, in the bank fraud statute, 18 U.S.C. § 1344, subsection (1)'s "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as nine circuits (including the Third Circuit) have held?

V. Cert. Granted – Notice of Appeal in a Sentencing Judgment Deferring Restitution

Manrique v. United States, No. 15-7250 (Cert. Granted Apr. 25, 2016).

QUESTION PRESENTED: Whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award?

THIRD CIRCUIT

I. Sixth Amendment Right to Counsel / Deliberate Elicitation of Incriminating Statements / Harmless Error

Dellavecchia v. Sec'y, PA Dep't of Corr., No. 15-1833, --- F.3d ---, 2016 U.S. App. LEXIS 6831 (3d Cir. Apr. 15, 2016).

The Sixth Amendment right to counsel forbids an agent of the state from deliberately eliciting an inculpatory statement from an individual once formal adversarial proceedings have begun unless there is a knowing and voluntary waiver. The "deliberate elicitation doctrine" derives from *Massiah v. United States*, 377 U.S. 201 (1964) and its progeny. Here, a police lieutenant went to the hospital with the intent to facilitate Dellavecchia's speedy bedside arraignment so responsibility for his supervision could be shifted to local prison personnel. While at the hospital, Dellavecchia blurted out an incriminating confession, after which he asked if his words could be used against him and the lieutenant said they could.

The Third Circuit held that the lieutenant did not deliberately elicit the incriminating statement. The Court stressed that no interrogation occurred, that the lieutenant did not go to the hospital with the intent to question Dellavecchia, and that he advised him his statements could be used against him when asked. Nothing in the *Massiah* line of cases requires law enforcement to ignore a defendant's spontaneous and voluntary statements, nor is law enforcement required to interrupt the defendant and advise him to remain silent.

Even if the lieutenant had deliberately elicited the statement in violation of the Sixth Amendment, any error in the admission of the statement at trial was harmless. The evidence was overwhelming because Dellavecchia admitted shooting the victim, and the physical evidence cannot be reconciled with Dellavecchia's trial testimony that he pulled the trigger in self-defense.

II. Impeachment of Defendant Based on Post-Arrest Silence

United States v. Lopez, No. 14-4610, --- F.3d ---, 2016 U.S. App. LEXIS 7119 (3d Cir. Apr. 20, 2016).

The prosecution violated Lopez's due process rights under *Doyle v. Ohio*, 426 U.S. 610 (1976) by impeaching him with his post-*Miranda* silence and then referring to that silence heavily in its closing argument. This was a felon-in-possession of a firearm case in which the trial was a credibility contest between the arresting officers and the defendant, who claimed the officers framed him for refusing to divulge the identity of an unidentified man who fled the apartment building to evade capture. This opinion is the latest in a string of *Doyle* violations found by the Third Circuit, but is significant because it is the first Third Circuit precedent for unpreserved *Doyle* error.

All of the prosecution's cross-examination questions and closing arguments about Lopez's post-*Miranda* silence violated *Doyle*, even those that regarded his failure to file a police misconduct report. Those questions raised an impermissible inference that a defendant's assertion of his right to silence undermines his credibility.

Under plain error review, reversal was required because Lopez made the requisite showing of a reasonable probability the error affected the outcome of the proceedings. First, the case hinged entirely on the credibility of Lopez and the officers, with no corroborating evidence for either side's account; second, the *Doyle* violation was blatant; and third, the government's repeated emphasis of the error during closing argument exacerbated the prejudice.

III. Fourth Amendment / Consent / Common and Apparent Authority / Frisk

United States v. Murray, No. 15-2054, --- F.3d ---, 2016 U.S. App. LEXIS 7697 (3d Cir. Apr. 28, 2016).

(1) A prostitute had common authority to consent to law enforcement's entry into a hotel room. The officers had reason to believe she was a prostitute because they knocked on the hotel room door earlier in the day and she asked if they were looking for a "date." She also refused entry the second time they knocked until she knew they were police officers. This warranted a reasonable belief that the prostitute had been granted access to and control over the hotel room for most purposes, even though the room had been rented and paid for by her pimp. At a minimum, the prostitute had "apparent authority" to consent to the officers' entry. There was no evidence to suggest the consent was coerced, given the prostitute's testimony that she was glad police were there and wanted to let them inside the room.

(2) The police did not violate Murray's Fourth Amendment rights when they frisked him upon his arrival at the hotel room. The officers were justified in believing Murray might be armed given the information they had received that he was a drug dealer who was running a prostitution operation. The frisk was proper even though it took place inside the "home." In *United States v. Myers*, 308 F.3d 251, 258 (3d Cir. 2002),

the Court commented that *Terry v. Ohio* had never been applied inside a private home, but that to the extent it did apply, it would "only allow the officer to exercise control over [the individual] to protect himself and secure the situation." That is exactly what the officers did in this situation.

In any event, the items seized from Murray were not taken during the frisk. Murray consented to the items taken from his pockets and the lanyard around his neck.

IV. Fourth Amendment / Execution of Arrest Warrant / Probable Cause / Good Faith

United States v. Vasquez-Algarin, No. 15-1941, --- F.3d ---, 2016 U.S. App. LEXIS 7889 (3d Cir. May 2, 2016).

In order to enter the subject of an arrest warrant's home to arrest him, police officers must have a reasonable belief that the arrestee resides at the dwelling and is present at the time of the entry. This case holds that the "reasonable belief" standard means probable cause. Generic information that *someone* is present in the home is not sufficient to make out probable cause to believe the suspect lives there in the first place. Under such circumstances, the officers must obtain a search warrant. As to the second prong, once the officers have probable cause to believe the suspect lives at the dwelling, there is an increased likelihood the suspect will be home when the warrant is executed. However, the Court must still analyze whether the officers had probable cause to believe the suspect would be present on a case-by-case basis.

The officers lacked probable cause as to both prongs in this case. They relied solely on the basis of uncorroborated tips from another officer and informants that the subject of the arrest warrant lived at the home in question. The officers did not testify about the specificity of the information they received, whether the tips were made face to face, or whether it was even first-hand information. The mere fact that they could tell people were inside the home was not enough to satisfy probable cause as to the specific person they sought to arrest. Finally, the residence in question was not the address of record for the arrestee. The officers did not conduct any public record or database checks, they did not observe a car known to be associated with the arrestee outside the residence, and there was no on-the-scene confirmation he was present.

The Court also rejected the government's attempt to invoke the good faith exception. The government could not argue the officers reasonably relied on binding appellate precedent, because all the prior case law in this area supported suppression. Second, a reasonably well trained officer would have known the search was illegal under the circumstances. Given the sanctity of the home under Fourth Amendment jurisprudence, and the paucity of information supporting the raid in this case, the officers' conduct was grossly negligent at a minimum. Therefore, the conduct was sufficiently deliberate that exclusion of the unconstitutionally-obtained evidence can meaningfully deter it, and the officers' conduct is sufficiently culpable that the cost of deterrence is worth the price to be paid by the justice system.