

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

October 2, 2014
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THIRD CIRCUIT

I. Conspiracy to Extort Under Color of Right / Jury Instruction / Sufficiency / Selective Prosecution / Outrageous Government Conduct / Waiver

United States v. Salahuddin, --- F.3d ---, 2014 WL 4347184 (3d Cir. Sept. 3, 2014).

(1) Hobbs Act conspiracy under 18 U.S.C. § 1951(a) does not require proof of an overt act. Therefore, the district court did not err when it left an overt act requirement out of Salahuddin's jury instructions.

(2) A Hobbs Act conspiracy conviction does not require the jury to find that the defendant obtained something of value from the victim, which is a requirement of extortion, because the goal of the conspiracy need not be achieved to sustain a conviction.

(3) Salahuddin's indictment on charges stemming from his charitable and political contributions sufficiently alleged that he was "acting in concert" with the charitable organizations. Further, there was no requirement that the government prove an explicit *quid pro quo* for the non-campaign charitable contributions, and so the district court's failure to instruct the jury as such was not error. The jury instructions otherwise properly notified the jury as to the applicable law.

(4) Defendant Cooper waived his defenses based on selective prosecution and outrageous government conduct by failing to raise them in a pre-trial motion under Federal Rule of Criminal Procedure 12(b)(3)(A).

II. Distribution of Child Pornography / File Sharing

United States v. Husmann, --- F.3d ---, 2014 WL 4347186 (3d Cir. Sept. 3, 2014).

A defendant who places child pornography materials in a shared computer folder available to other users of a file sharing network cannot be convicted of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), unless the government presents evidence that another person actually downloaded or obtained the images stored in the shared folder.

The Court explained that knowingly placing child pornography in a shared folder on a file sharing network is still illegal under 18 U.S.C. §§ 2251(d)(1)(A) (offering to distribute child pornography) and 2252(b)(1) (attempted distribution), it just isn't distribution.

III. Fifth Amendment / Post-Arrest Silence

United States v. Shannon, --- F.3d ---, 2014 WL 4401054 (3d Cir. Sept. 8, 2014).

The government violated Shannon's Fifth Amendment right to remain silent when it cross-examined him about his post-arrest silence. A defendant only opens himself up to such cross-examination in the limited scenario where he testifies on direct that he told the police the same version of events when he was arrested. The defendant's trial testimony must be "blatantly inconsistent" with post-arrest silence, not simply ambiguous.

The constitutional error was not harmless. The evidence was mostly circumstantial, was not overwhelming, and none of the wiretapped conversations revealed Shannon's link to the conspiracy. His credibility was "likely important to the outcome of the case."

IV. *Alleyne* Error / Harmless or Plain Error / FED. R. CRIM. P. 52

United States v. Lewis, --- F.3d ---, 2014 WL 4413535 (3d Cir. Sept. 9, 2014).

The district court applied a seven year mandatory minimum at Lewis's sentencing for brandishing a firearm during a crime of violence, when the brandishing element had not been charged in the indictment, included in the jury instructions, nor found by the jury. This constituted a deprivation of Lewis's Sixth Amendment rights under *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

The Third Circuit held that *Alleyne* error is not structural. It is instead subject to harmless or plain error analysis under Federal Rule of Criminal Procedure 52. The error in this case was harmless because the evidence that Lewis brandished a firearm during the robbery in question was uncontested and overwhelming.

V. Ineffective Assistance of Counsel / Direct Appeal / First Amendment

Government of the V.I. v. Vanterpool, --- F.3d ---, 2014 WL 4473960 (3d Cir. Sept. 12, 2014).

(1) Although claims of ineffective assistance of counsel are typically not reviewed on direct appeal, the Third Circuit entertained Vanterpool's claim because he is no longer "in custody" under his conviction and sentence and the district court likely would not have the opportunity to engage in factfinding on a collateral attack.

(2) Vanterpool was prejudiced by his counsel's failure to raise a First Amendment overbreadth challenge to his statute of conviction, V.I. Code. Ann. tit. 14, § 706(1) (harassment by telephone). Section 706(1) violates the First Amendment because it impermissibly criminalizes communicative speech that does not fall into one of the defined categories of unprotected speech such as defamation, incitement, obscenity, child pornography, or "true threats." The Court remanded for the district court to engage in

factfinding as to whether the performance of Vanterpool's counsel unreasonably fell below professional norms.

VI. Statutory Index to the Sentencing Guidelines / Murder in Retaliation / Solicitation in Retaliation / Applicable Guideline

United States v. Boney, --- F.3d ---, 2014 WL 4494861 (3d Cir. Sept. 15, 2014).

Boney was charged with, among other things, attempting to kill a witness in retaliation for providing information to the government, in violation of 18 U.S.C. § 1513(a)(1)(B), and soliciting someone to commit murder in retaliation, in violation of 18 U.S.C. § 373. The district court erred when it chose the guidelines applicable to both these offenses under the Statutory Index (Appendix A) to the Sentencing Guidelines. The "most appropriate" guideline applicable to the offense is governed by the offense charged in the indictment, not the court's perception of the facts of the case presented at trial. *See* U.S.S.G. § 1B1.2(a).

The appropriate guideline for the attempted murder count was U.S.S.G. § 2A2.1 (attempted murder) rather than the obstruction of justice guideline applied by the district court. Likewise, the appropriate guideline for the solicitation count was U.S.S.G. § 2A1.5 (conspiracy or solicitation to commit murder), not the obstruction of justice guideline.

VII. Sentencing Guidelines / Corruption Charges / Cocaine Trafficking Cross-Reference / Abuse of Trust

United States v. Solomon, --- F.3d ---, 2014 WL 4494863 (3d Cir. Sept. 15, 2014).

Solomon was a police chief who accepted money from a confidential informant to provide protection for a drug sale. After the sale, he agreed to provide protection for future sales, and also to sell some police restricted tasers to the CI. Solomon pled guilty to extortion under color of official right, in violation of 18 U.S.C. § 1951.

U.S.S.G. § 2C1.1(c)(1) (for extortion under color of right) includes a cross-reference that requires, when the offense was committed for facilitating another crime, application of the offense guideline to a conspiracy to commit that offense if it is greater than the guideline initially determined. In this case, the cross-referenced crime was conspiracy to traffic in cocaine. The Court held that U.S.S.G. § 2C1.1(c)(1) was properly applied because Solomon's extortion was committed to protect the commission of another crime, even though the crime was actually staged by the government, there was no other crime, and there were no actual drugs.

However, the abuse of trust enhancement embodied at U.S.S.G. § 3B1.3 was improperly applied at sentencing. U.S.S.G. § 1B1.5(c) states that Chapter Three adjustments are determined with respect to the cross-referenced guideline, "unless otherwise provided." Application note 6 of U.S.S.G. § 2C1.1 prohibits the use of the abuse of trust

enhancement. The Court rejected the argument that the abuse of trust enhancement should be applied to the guideline for the cocaine transaction, which contains no such limitation. Even though the defendant was sentenced under the drug transaction guideline, that was due only to § 2C1.1, and therefore its limitation on the enhancement survived the cross-reference. The case was remanded for resentencing without the two level enhancement.

VIII. GPS Monitoring / Exclusionary Rule / Good Faith Exception

United States v. Katzin, --- F.3d ---, 2014 WL 4851779 (3d Cir. Oct. 1, 2014) (en banc).

This decision overrules the Third Circuit's earlier panel decision in *United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013). The Court held in an 8-5 decision that evidence derived from warrantless GPS tracking conducted before the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), is admissible under the good faith exception to the exclusionary rule. This decision was based on two alternative holdings:

(1) There was sufficient binding authority approving the officers' conduct when they acted. Although the Third Circuit had not ruled on the issue, the Supreme Court's old "beeper" cases (*Karo* and *Knotts*) are sufficiently analogous to authorize (pre-*Jones*) warrantless GPS attachment and tracking.

(2) Second, there is no bright-line rule requiring binding authority in this context. Under the good faith exception, a court must make an individualized determination in each case of "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." When the asserted basis for good faith is reliance on case law, that means courts and police can rely on non-binding authority and perhaps even the rationales of cases to find good faith. The ultimate suppression decision will turn on the reasonableness of the reliance. This case-by-case/totally of the circumstances approach will be applied in all good faith cases, no matter what the basis is for the good faith argument.

Note that this is an objective test, and if the court finds a reasonably well trained officer would have known his conduct was unlawful, that is the end of the inquiry and suppression is required. Furthermore, this approach does not displace other established exclusionary rule standards. For example, deliberate, reckless, grossly or systemically negligent conduct still requires suppression, and the government must still meet the tests for inevitable discovery, independent source, and attenuation to avoid suppression when those principles are implicated.

The Third Circuit declined to rule on whether a warrant is required to conduct GPS tracking after *Jones* due to its ruling that the exclusionary rule should not apply on these facts. However, the Court cautioned the government to get warrants for GPS attachment and tracking going forward.