

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

September 1, 2016
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THIRD CIRCUIT

I. Sentencing Guidelines / Career Offender / “Term of Imprisonment”

United States v. Rengifo, --- F.3d ---, 2016 U.S. App. LEXIS 14399 (3d Cir. Aug. 5, 2016).

This case holds that the phrases “term of imprisonment” and “sentence of imprisonment” are synonymous under U.S.S.G. §§ 4A1.2(e)(1), (e)(2), and 4A1.2(k)(1). Therefore, when determining whether a prior conviction qualifies as a career offender predicate under U.S.S.G. §§ 4A1.2(k)(1), the district court must add the time served as a result of the convictions on parole violations to the original term of imprisonment imposed by the sentencing court.

Mr. Rengifo was sentenced as a career offender under U.S.S.G. § 4B1.1(a), but disputed one of his predicate convictions for possession of marijuana with intent to distribute, for which he received a sentence of time served to twelve months. The Court upheld the district court’s determination that the sentence evolved into a prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of fifteen years within the time the defendant’s instant offense occurred. U.S.S.G. §§ 4A1.2(e)(1), (e)(2). The calculation required the district court to add the 294 days Mr. Rengifo served for parole violations to the twelve month sentence he originally received. Not only that, but the district court had to calculate the time served and time left on parole both in the original sentence and with each parole violation. This resulted in Mr. Rengifo’s sentence being 833 days, well over the one year and one day threshold necessary to make it a career offender predicate.

II. Speedy Trial Act / Dismissal Without Prejudice / Sufficiency of Indictment

United States v. Stevenson, --- F.3d ---, 2016 U.S. App. LEXIS 14592 (3d Cir. Aug. 9, 2016).

The Court upheld the district court’s decision to dismiss Stevenson’s indictment without prejudice to the government indicting him anew after it was conceded that the 70-day clock from the filing date (and making public) of the information or indictment had expired under the Speedy Trial Act. 18 U.S.C. § 3161(c)(1). When a Speedy Trial Act violation is found, the court may dismiss the indictment with or without prejudice, depending on three factors: (1) the seriousness of the offense; (2) the reason for the delay; and (3) the administration of justice. 18 U.S.C. § 3162(a)(2). The Court found that the offense here (drug and weapons ring run out of a hip-hop radio station) was serious, that the delay was largely due to the repeated delays and chaotic nature of the litigation (which it blamed on the 8 defendants, finding that any government contribution was relatively innocent and harmless), and it found no prejudice to Stevenson from the delay (the fact that a case gets stronger over time – including by co-defendant pleas – is not

prejudice, for purposes of the statute). The district court did not err in looking at the number of excludable days from the 70-day speedy trial clock, in this case due to the defendants filing and litigating dozens of pre-trial motions, *see* 18 U.S.C. § 3161(h)(1)(D), in the context of factor (2).

The Court also upheld the district court's refusal to dismiss one count of the indictment charging fraud in relation to identification documents, 18 U.S.C. § 1028(a)(7), on the basis that the government allegedly failed to charge the interstate commerce element. Although it was a "close case," the Court found an implied reference to interstate commerce in the indictment's description of interstate activity. It also found that any failure to charge this element would have been harmless. The Court looked to Supreme Court guidance in analogous circumstances – citing case law on defective jury instructions, which suggests defective indictments do not constitute "structural" error.

The Court also: (1) upheld the district court's denial of Stevenson's two motions to suppress, finding ample reasonable suspicion for a vehicle stop and ample probable cause in a search warrant; (2) held that the district court did not "vouch" for a cooperating witness when the court made a "casual and palliative" remark in response to the witness becoming agitated over cross examination on a decades-old conviction; and (3) upheld Stevenson's 360-month sentence as both procedurally and substantively reasonable.

III. Investment Advisor Enhancement / Breach of Plea Agreement / Sentencing

United States v. Miller, --- F.3d ---, 2016 U.S. App. LEXIS 14847 (3d Cir. Aug. 12, 2016).

The Court affirmed Miller's securities fraud and tax evasion sentence for selling fake promissory notes to investors and squandering \$41 million worth of their money. In its first opinion addressing the definition of "investment advisor" under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11), the Court held that the district court properly applied the investment advisor enhancement, U.S.S.G. § 2B1.1(b)(19)(A)(iii), because Miller was in fact an investment advisor.

The Court held that, considering the broad definition of "investment advisor" in the statute, the fact that no exception in the statute applied to Miller, and that the Sentencing Guidelines adopt the definition from the statute, Miller's activities qualified him for the enhancement. The statute defines "investment advisor" as any person who, for compensation, engages in the business of advising others on investments. Miller conceded that he gave personal advice to some victims. The advice given by others to the remaining victims constituted relevant conduct. Miller was in the business of advising, because he held himself out as an advisor, and was registered as such. And, he received compensation including the principal provided by investors, which he converted to his own use.

Miller's claim regarding an alleged breach of the plea was reviewed on plain error, because the objection wasn't clear. The Court found no breach, because the government, at worst, wavered in response to pressure from the district court. The Court also found the 120-month sentence reasonable, given that the district court accounted for Miller's poor health, and because of the "predatory and pernicious" nature of the crime.

IV. Collateral Attack to Sentence in Supervised Release Revocation Proceeding

United States v. Jones, --- F.3d ---, 2016 U.S. App. LEXIS 15089 (3d Cir. Aug. 17, 2016).

The validity of an underlying conviction or sentence may not be collaterally attacked in a supervised release revocation proceeding, and may be challenged only on direct appeal or through a habeas corpus proceeding.

Jones contended that he was not collaterally attacking his underlying gun possession charge, for which he was sentenced as an armed career criminal. Rather, he argued his offense should presently be classified as a Class C felony rather than a Class A felony because two recent Supreme Court cases, *see Johnson v. United States*, 559 U.S. 133 (2010) and *Johnson v. United States*, 135 S. Ct. 2551 (2015), nullified his status as an armed career criminal. The Third Circuit rejected this argument as an improper collateral attack on the underlying sentence. The district court properly sentenced Jones as an armed career criminal under the law in 2001, and therefore he was properly designated as a Class A felon at his later revocation proceeding, *see* 18 U.S.C. § 3583(e), because revocation proceedings are “part and parcel” of a defendant’s underlying conviction.

V. Repeat and Dangerous Sex Offender Guideline / Categorical Approach

United States v. Dahl, --- F.3d ---, 2016 U.S. App. LEXIS 15171 (3d Cir. Aug. 18, 2016).

The district court committed plain error by failing to apply the categorical approach in determining whether Dahl’s Delaware first- and third-degree unlawful sexual contact convictions constitute federal sex offense convictions under the federal repeat offender statute, 18 U.S.C. § 2426(b)(1)(B), and therefore subjected him to an increased sentence under the career sexual offender guideline embodied at U.S.S.G. § 4B1.5. Section 2426(b)(1)(B) refers to a “conviction for an offense . . . consisting of conduct that would have been an offense” under certain federal statutes, and § 4B1.5 refers to a “sex offense conviction” as “any offense [under 18 U.S.C. § 2426(b)(1)(B)], if the offense was perpetrated against a minor.” However, the Supreme Court’s decisions in *Descamps*, *Johnson*, *Mathis*, and *Nijhawan v. Holder*, 557 U.S. 29 (2009) demonstrate that the factual inquiry triggered by the qualifying language in the statute is limited to the facts relevant to the qualification itself. Therefore, the district court could make a factual inquiry into whether the victim of Dahl’s offenses were minors, but was required to apply the categorical approach to the underlying elements of the predicate offenses.

Applying the categorical approach, the Court determined that Dahl’s Delaware convictions were broader than the aggravated sexual abuse statutes embodied at 18 U.S.C. § 2241 in two ways, and therefore could not count as predicates for an enhanced sentence under U.S.S.G. § 4B1.5. First, the sexual contact prohibited under Delaware law encompassed touching genitalia and other specified areas through clothing, whereas the federal statute requires penetration or skin-to-skin contact between various body parts. Second, the Delaware third-degree unlawful sexual contact statute prohibited consensual contact the defendant nonetheless

knew was “offensive to the victim,” whereas the federal aggravated sexual abuse statute requires a nonconsensual act.

Dahl was entitled to resentencing under plain error review. The error was plain in light of recent Supreme Court precedents, it affected Dahl’s substantial rights because it subjected him to a much harsher guideline range, and the Court typically exercises its discretion to recognize a misapplication of the Guidelines as affecting the fairness, integrity, or public reputation of judicial proceedings.

VI. Habeas Corpus / *Bruton* Error / Harmless Error

Brown v. Superintendent Greene SCI, --- F.3d ---, 2016 U.S. App. LEXIS 15336 (3d Cir. Aug. 22, 2016).

At appellant's Pennsylvania murder trial, his non-testifying co-defendant’s statement to the police was read into the record. Although appellant's name had been redacted and replaced with the generic “the other guy,” that redaction was undone when the prosecutor identified appellant as “the other guy” during closing arguments.

The Circuit held that the prosecutor’s comments during closing arguments effectively unmasked appellant, giving rise to a violation of *Bruton v. United States*, 391 U.S. 123 (1968). The court rejected the Commonwealth’s argument that the prosecutor’s comments were made in good faith; under *Frazier v. Cupp*, 394 U.S. 731 (1969), the prosecution’s good or bad faith is irrelevant. The court determined that the error was not harmless because the co-defendant’s statement clearly implicated “the other guy” as the shooter and the only other admissible evidence that appellant was the shooter was unreliable.

VII. Habeas Corpus / *Brady v. Maryland*

Dennis v. Sec’y of PA Dep’t of Corr., --- F.3d ---, 2016 U.S. App. LEXIS 15434 (3d Cir. Aug. 23, 2016) (en banc).

This case affirms the district court’s grant of habeas relief to Mr. Dennis after the Commonwealth suppressed three key pieces of exculpatory evidence at his murder trial: a receipt corroborating Dennis’s alibi, an inconsistent statement by the Commonwealth’s key eyewitness, and documents indicating that another individual committed the murder.

Some important points from the decision:

- The majority rejects any “due diligence” exception to *Brady* disclosure obligations (i.e., that there is no *Brady* violation for failing to disclose favorable evidence that the defense could have obtained with reasonable diligence). The Court corrected some inconsistencies in its prior case law, and clarified that the government must disclose all favorable evidence. Only when the government is aware that the defense already has the material in its possession should it be held not to have “suppressed” it in not turning it over to the defense in discovery.

- The Court also rejected the state court’s inclusion of an “admissibility” requirement onto *Brady* material. The government has a duty to disclose favorable evidence without regard to its potential admissibility, although admissibility might be a factor to consider in the “materiality” analysis required by *Brady*. The Court also rejected the state court’s rule that the government has no duty to disclose “futile leads.” Such evidence must be disclosed so the defense can conduct its own investigation and/or challenge the reliability and thoroughness of the police investigation.

This opinion also addresses important habeas questions, and Judge McKee’s concurrence contains favorable language for defense practitioners on the reliability of eyewitness identifications.

VIII. Sentencing / Stash House Enhancement

United States v. Carter, --- F.3d ---, 2016 U.S. App. LEXIS 15428 (3d Cir. Aug. 23, 2016).

The district court properly applied the two-point “stash house” enhancement for maintaining a residence for the purpose of manufacturing and distributing a controlled substance, U.S.S.G. § 2D1.1(b)(12). The Sentencing Commission promulgated this enhancement in response to a Congressional directive contained in the Fair Sentencing Act of 2010, 21 U.S.C. § 856, which criminalizes the same behavior. The enhancement applies where the defendant (1) knowingly (2) opened or maintained any place (3) for the purpose of manufacturing or distributing a controlled substance. At issue was whether Carter “maintained” two properties in Pennsylvania, while he ran his drug operation from Detroit.

Relevant factors are listed in Comment Note 17 to the guideline, and can also be gleaned from case law interpreting § 856: (1) whether the defendant held a possessory interest such as owning or renting the premises; (2) the extent to which the defendant controlled access to, or activities at, the premises; (3) control, curation, acquisition of the site; (4) renting or furnishing the site; (5) repairing the site; (6) supervising protecting, supplying food at the site; and (7) continuity. There is no requirement that the defendant be physically present or involved on a daily basis in order to “maintain” the residence. A court may consider whether the defendant exercised control over the property or supervised or directed others to engage in certain activities at the premises. Ownership or leasehold is relevant but not required, because that would allow drug dealers to avoid the enhancement by putting the property in another person’s name.

Carter supervised the drug operation’s funds; his confederates had to account to him for all revenue and expenditures. Carter also played a major role in overseeing the acquisition and operations of the stash houses, even from Detroit, and he demanded details about rent and other expenditures from his employees in Pennsylvania. He also controlled the activities at both stash houses, directing his confederates to use one location to prepare drugs for distribution and ensuring that his employees were at the house working. On these facts, the district court did not err in applying the enhancement.

IX. Rules of Evidence / Authentication of Social Media Records / Hearsay

United States v. Browne, --- F.3d ---, 2016 U.S. App. LEXIS 15668 (3d Cir. Aug. 25, 2016).

Considered in their entirety, Facebook records, including chat logs made between two accounts, are not business records under Federal Rule of Evidence 803(6) and therefore cannot be authenticated by way of a certification made by a records custodian under Rule 902(11). The Facebook records were not self-authenticating for two reasons. First, the records custodian could not certify that the Facebook communications were authored by Browne and the victims; it could only be certified that the chats took place between two particular Facebook accounts. Thus, the evidence failed the “conditional relevance” threshold required by Rules 104(b) and 901(a). Second, the records are not “business records” under Rule 803(6) because Facebook does not purport to verify or rely on the substantive contents of the communications at issue in the course of its business. At most, the records custodian can attest to the accuracy of certain aspects of the communications, such as confirmation that the chats took place between particular accounts, on particular dates, or at particular times.

Nevertheless, the government introduced sufficient extrinsic evidence to authenticate the records under a traditional Rule 901(a) analysis, which allows authentication through a wide range of circumstantial extrinsic evidence. Although a testifying witness can authenticate a document by testifying that it is what the proponent claims it to be, that is only one method of authentication and is not required. The government presented testimony from four of the witnesses about the exchanges she had with defendant over Facebook, which was consistent with the content of the chat logs the government introduced. Second, Browne conceded that he owned the Facebook account in question and the phone seized from his residence on which images of the victims, sent pursuant to demands made on Facebook, were found. Browne also provided passwords to the Facebook account and the phone during a post-arrest statement. Browne also provided significant personal information when he testified at trial that corroborated personal information provided by the person chatting on his Facebook account, such as his address, occupation, and the fact that he had a fiancée. Finally, the government provided evidence supporting the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company’s automated systems, as opposed to submitting screenshots from the internet that could have been altered.

With respect to Browne’s hearsay objection to the admissibility of the chats, the government proved Browne’s authorship by a preponderance of the evidence, and therefore they were properly admitted as admissions of a party opponent under Rule 801(d)(2)(A). The statements made by the victims during the chats were not hearsay because they were not admitted to prove the truth of the matter asserted; rather, they were introduced to put what Browne said into perspective and to make his statements understandable and recognizable to the jury as admissions.

The Court held that the district court erred by allowing the government to introduce chats between two of the victims regarding Brown sexually assaulting one of them as inadmissible hearsay. The error was harmless because of the volume of evidence presented against Browne, and the chat at issue was, at most, duplicative of the witness’s admissible testimony.