

Notice of Appeal

A quarterly newsletter reviewing Third Circuit opinions impacting white collar defense lawyers

Precedential Opinions of Note

Defendants Re-Sentenced After Breaching Plea Agreements

United States v. Yusuf (April 2, 2021), No. 19-3472
<http://www2.ca3.uscourts.gov/opinarch/193472p.pdf>
Unanimous decision: Jordan (writing), McKee, and Smith
Concurrence: McKee

Background

Defendants pleaded guilty to their respective crimes and stipulated that they would not argue, at sentencing, for the imposition of a sentence outside the Guidelines range. At sentencing, the Defendants did just that, and asked the district court for leniency and below-Guidelines sentences.

Holding

The Court reversed and remanded for re-sentencing because the Defendants had breached their plea agreements with the Government. The Court noted that the plea agreements did not restrict the district court's obligation to consider the factors set forth in 18 U.S.C. § 3553(a). Nor was it improper for one of the defendants to provide the sentencing judge with information related to the sentence of a co-conspirator, imposed after entry of his plea agreement. However, the plea agreements precluded arguments for sentences below the stipulated Guidelines ranges, and the Defendants were bound to these contractual terms.

Key Quote

"Similarly, although courts must give both defense counsel and the defendant an opportunity to speak before imposing a sentence, we agree with the government that Rule 32(i) does not give defendants license to disavow their obligations under a plea agreement. *See United States v. Ward*, 732 F.3d 175, 182 (3d Cir. 2013) (declaring that 'the defendant's right of allocution is not unlimited'). To hold otherwise would allow defendants to reclaim rights they bargained away to minimize sentencing exposure." (Slip Op. at 21.)

Concurrence/Key Quote

"This certainly does not mean that one who signs a plea agreement forfeits the right of allocution and thereafter can make absolutely no statement to the court. It does mean that counsel cannot orchestrate a presentation that is clearly intended to shred a plea agreement while purporting to merely inform the court and safeguard a client's right of allocution." (McKee concurrence at 3-4.)

Court Remands for Re-Sentencing in Anti-Bribery Case

United States v. Raia (April 6, 2021), No. 20-1033
<http://www2.ca3.uscourts.gov/opinarch/201033p1.pdf>
Unanimous decision: Smith (writing), Ambro, and Chagares

Background



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Related Practice Areas

- White Collar Defense & Investigations

A jury convicted Defendant of conspiracy to bribe voters during his campaign for a city council seat. At sentencing, the district court varied from an offense level of 14, to an offense level of eight, and imposed a sentence of three-months incarceration. The district court declined to apply a two-point enhancement for obstruction of justice but applied a two-point enhancement for an aggravating role in the scheme.

Holding

The Court vacated and remanded for re-sentencing. The Court determined that it lacked a meaningful opportunity to review the sentencing decision. It found the district court did not adequately explain its reasons for declining to apply the obstruction of justice enhancement. The Court also determined the application of a two-point aggravating role enhancement contradicted the plain language of the Guideline. However, the Court declined to instruct the district court to apply a four-level enhancement for playing a leadership role in the conspiracy and a two-level increase for obstruction of justice.

Key Quote

“Because there are no detailed findings of fact to review nor an explanation as to how the District Court reached the sentence it imposed, we do not regard this as the ‘rare case where we can be sure that an erroneous Guidelines calculation did not affect the sentencing process and the sentence ultimately imposed.’ [*United States v. Langford*, 516 F.3d [205, 219 (3d Cir. 2008)]. Thus, the error was not harmless and we will remand so the District Court may correct the procedural errors involving the two enhancements.” (Slip Op. at 24.)

Court Vacates Conviction of Criminal Contempt

United States v. Morton (April 7, 2021), No. 18-3270

<http://www2.ca3.uscourts.gov/opinarch/183270p.pdf>

Unanimous decision: Matey (writing), Chagares, and Smith

Background

Defendant entered a plea deal with the Government for drug trafficking. She provided cooperating testimony on several matters. But then she invoked her Fifth Amendment privilege against self-incrimination and refused to testify at an alleged co-conspirator’s revocation-of-supervised-release hearing. Finding the invocation improper, the district court found Defendant in criminal contempt.

Holding

The Court vacated the contempt order and remanded for judgment of acquittal. After Defendant invoked the Fifth Amendment, the district court should have determined if the fear of incrimination was reasonable, before ordering Defendant to testify. The district court erred when it did not make this assessment. Further, Defendant’s fear — and invocation — was proper, because her plea agreement only bound the United States Attorney for the District of the Virgin Islands from further prosecution; it did not preclude prosecution in other jurisdictions.

Key Quote

“[T]he DVI obtained an indictment for criminal contempt and secured a guilty verdict. All fair if, as the DVI claimed, Morton’s invocation was improper. Answering that question required answering another question: whether the testimony the DVI sought could not have possibly tended to incriminate Morton in new crimes. Because that question remains unanswered, the District Court’s order requiring Morton to testify was invalid. And without a valid court order, there is no criminal contempt.” (Slip Op. at 2.)

Conviction of Charter School Operator Upheld

United States v. Shulick (April 13, 2021), No. 18-3305

Background

The former owner of a for-profit education company received public funding to run a charter school for the Philadelphia School District. Instead of using those funds earmarked for educational purposes, Defendant embezzled the funds for personal use and for the benefit of his co-conspirator, Chaka Fattah, Jr. A jury convicted Defendant of federal program embezzlement, among other related charges.

Holding

The Court affirmed his conviction and sentence. The Court rejected Defendant's arguments that the district court erred in instructing the jury on intentional misapplication. Agreeing with the First, Second, and Tenth Circuits, the Court held 18 U.S.C. § 666(a)(1)(A) reaches unauthorized use of property, even if it benefits the victim. And even under Defendant's reading of the offense-statute, the Government proved that Defendant actually embezzled the funds for his own benefit.

Key Quote

"This case is not like [*United States v.*] *Kelly*, where the prosecution's claim of property fraud rested only on a novel theory that the defendants temporarily 'commandeer[ed]' the George Washington Bridge (despite obviously not stealing the massive structure) or caused only incidental wage expenses associated with carrying out their regulatory action. 140 S. Ct. [1565,] 1572 [(2020)]. Shulick committed a real, tangible taking of money that was rightly owed to the School District and the at-risk children of Southwest. That was the Government's consistent, chief theory throughout the trial, and the evidence of this reality was overwhelming." (Slip Op. at 33-34.)

Successive Prosecution Did Not Violate the Double Jeopardy Clause

United States v. Brown (April 13, 2021), No. 20-1734

<http://www2.ca3.uscourts.gov/opinarch/201734p.pdf>

Unanimous decision: Porter (writing), Bibas, and Restrepo

Background

A state jury convicted Defendant of offenses related to arson, where the arson had led to several deaths. Defendant sought habeas relief, alleging that the Government failed to disclose it had paid witnesses to testify against Defendant. The state court granted Defendant a new trial, and, shortly thereafter, a federal grand jury indicted Defendant on related arson charges. Defendant unsuccessfully moved to dismiss the federal indictment.

Holding

The Court affirmed the denial of Defendant's dismissal motion. In doing so, the Court declined to extend *Oregon v. Kennedy*, 456 U.S. 667 (1982) to the facts of Defendant's case. In *Kennedy*, the Supreme Court held the Double Jeopardy Clause forbids retrial when the prosecution has enticed and caused a successful defense motion for mistrial. The Court explained that the *Kennedy* exception applies only in cases involving a successful motion for mistrial, not relief granted in post-conviction, collateral proceedings.

Key Quote

"[W]e resolve the issue and hold that the *Kennedy* exception does not apply beyond the mistrial context to cases in which a post-conviction court has ordered a new trial due to prosecutorial misconduct. In *Kennedy*, the Supreme Court already addressed the [following concerns: '[W]e ... hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.'" (Slip Op. at 12) (internal citation omitted).

Court Rejects Application of 22-Level Sentencing Enhancement for Fraud Loss

United States v. Kirschner (April 22, 2021), No. 20-1304

<http://www2.ca3.uscourts.gov/opinarch/201304p.pdf>

Unanimous decision: Restrepo (writing), Bibas, and Porter

Background

Defendant pleaded guilty to impersonating a federal agent and importing counterfeit items with intent to defraud. Defendant had sold the counterfeit U.S. coins for profit. The sentencing court applied a 22-level enhancement for fraud loss and two additional sentencing enhancements for the use of sophisticated means and the abuse of trust.

Holding

The Court vacated the sentence and held the district court's increase of the offense level for intended loss constituted clear error. The Court rejected the Government's fair market estimate of Defendant's intended loss — a loss that it held grossly over-valued the worth of the rare coins, where the Government never proved their value to the sentencing court.

Key Quote

"Kirschner challenges the inclusion of the intended losses associated with the six high-value counterfeits. Kirschner contends that the District Court never found by a preponderance of the evidence that he 'purposely sought to inflict' the losses the government claims he intended to inflict. He says that he never had access to the markets presupposed by the government's 'fair market value' methodology, nor did he attempt to access such markets. ... We agree. ... It is not clear whether Kirschner intended to evolve his operation to attempt the type of rarefied sales contemplated by the government's loss figures. Nor can we say the District Court's error adopting the government's methodology and resulting loss figure was harmless." (Slip Op. at 8-9).

Court Overturns Suppression of Evidence Based on Good-Faith Exception

United States v. Caesar (June 23, 2021), No. 19-3961

<http://www2.ca3.uscourts.gov/opinarch/193961p.pdf>

Unanimous decision: Rendell (writing), Chagares, and Scirica

Background

Indicted on child pornography charges, Defendant successfully moved to suppress seized images of child pornography. The warrant that was initially approved described child molestation. Although the supporting affidavit had no express allegations that the Defendant possessed child pornography, it asserted specific instances of sexual abuse in his home, interest in keeping images of children while undressed, and that sexual abusers often keep pornographic images. The district court excluded the seized pornographic images, finding the supporting affidavit insufficient to establish probable cause. The district court also rejected the good-faith exception to the exclusionary rule.

Holding

The Court held that the officer reasonably relied on the issued warrant in good faith, even if the warrant was later held to be defective. Further, the Court held that, because the initial warrant allowed both seizure and search of electronic devices, and supported good-faith reliance, a search pursuant to a successive warrant, and within the scope of the first warrant, was lawful.

Key Quotes

"The District Court's primary criticism of the affidavit was that it failed to formally accuse Caesar of violating Pennsylvania's child pornography statute and identified no direct evidence that Caesar took photos of his victims or kept child pornography in his home — the two categories of images

identified in the warrant application. But therein lies the rub. ‘[D]irect evidence linking the place to be searched to the crime is not required’ to establish probable cause.” (Slip Op. at 20.)

“Because the initial warrant permitted both the seizure and search of the electronic devices and supported the officers’ good faith reliance, the third warrant was unnecessary to review the contents of the devices.” (Slip Op. at 27.)

Non-Precedential Opinions of Note

***United States v. Taylor* (May 18, 2021), No. 19-3545**

<http://www2.ca3.uscourts.gov/opinarch/193545np.pdf>

The district court refused to suppress evidence obtained from an overbroad warrant (stating “any and all cellular telephones” used in furtherance of drug trafficking). While the warrant was overbroad, the Court determined the record supported that the warrant was obtained in good faith.

***United States v. Mills et al.* (June 9, 2021), No. 18-3736**

<http://www2.ca3.uscourts.gov/opinarch/183736np.pdf>

A jury convicted Defendants of crimes related to cocaine distribution. The Court affirmed the lower court’s exclusion of a defense expert. The Court held that the expert on aural spectrographic voice analysis did not meet the standard for reliability established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

***United States v. Bear* (June 16, 2021), No. 20-2722**

<http://www2.ca3.uscourts.gov/opinarch/202722np.pdf>

The Court vacated the district court’s denial of a motion for early termination of supervised release. The Court found the district court had failed to adequately assess the motion under the sentencing factors of 18 U.S.C. § 3553(a).
