Alert
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COZEN O'CONNOR

Notice of Appeal

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

Precedential Opinions of Note

Court Determines That 'Obviously Wrong' Crime Does Not Require Proof of Blameworthy Intent

United States v. Heinrich (January 23, 2023), No. 21-2723
http://www2.ca3.uscourts.gov/opinarch/212723p.pdf
Unanimous decision: Bibas (writing), Krause, Rendell

Background

Defendant undressed preschool children and took photographs of their genitalia. After the police found these photos and other child pornography on Defendant's phone, cameras, and computers, a jury convicted him of child pornography charges. At trial, Defendant argued that he had no ill intent nor the intent to engage in sexually explicit conduct. Instead, he took the images to show the girls' beauty and innocence. The trial court excluded a defense expert report that Defendant intended to show that he had no sexual interest in the children.

Holding

The Court affirmed the trial court's decision to exclude the expert report. The Court held that the criminal statute only requires that a defendant intend acts that are objectively sexually explicit. The defendant need not understand their sexual character.

Key Quote

"Crime requires blame. Our criminal law avoids punishing people unless they act with blameworthy intent. But when the intended act is obviously wrong, it is blameworthy no matter why the actor did it." (Slip Op. at 2.)

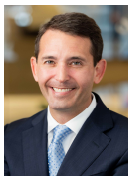
Court Finds Farm Improperly Deducted Company Losses

Skolnick v. Commissioner of Internal Revenue (March 8, 2023), No 22-1501
http://www2.ca3.uscourts.gov/opinarch/221501p.pdf
Unanimous decision: Hardiman (writing), Krause, Matey

Background

Appellants owned a horse farm, where they bought, sold, bred, and raised race horses. They employed several people who helped maintain the horses and the farm's records. Over the course of several years, Appellants claimed losses sufficient to eliminate any income tax liability from their horse-farm operation. The IRS notified Appellants of tax deficiencies. The U.S. Tax Court affirmed this determination, finding that the Appellants had improperly deducted losses. The Tax Court concluded that their horse breeding operation was "not engaged in for profit," which precluded them from making such deductions.

Holding



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The Third Circuit affirmed. Section 183(a) of the Internal Revenue Code states that, "[i]n the instance of an activity engaged in by an individual or S corporation, if the activity is "not engaged in for profit," no tax deduction can be made regarding such activity. 26 U.S.C. § 183(a). The Court weighed multiple factors and ultimately determined that the Appellants improperly made deductions. Reviewing the most important factor — the history of income and losses — the Court noted that the farm had lost millions over the history of its operation. Further, the manner in which the Appellants had operated the farm weighed against them. Indeed, one of the Appellants testified that neither income nor expenses were a priority to him. Finally, the farm's operations paid for many personal expenses. Such intermingling of funds also demonstrated that the Appellants had not engaged in the farm operations for profit.

Key Quote

"Because the history of income and losses (factor 6) was 'by far' the most important to the Tax Court's analysis, we begin with that factor before discussing the other four that favored the Commissioner. And it weighed heavily against Taxpayers. Between 1998 and 2013, the Company lost more than $11.4 million." (Slip Op. at 10 (citations omitted).)

Third Circuit Reaffirms Limits on Withdrawal of Guilty Plea

United States v. Rivera (March 17, 2023), No. 21-3133
http://www2.ca3.uscourts.gov/opinarch/213133p.pdf
Unanimous decision: Fisher (writing), Hardiman, and Porter

Background

Defendant pleaded guilty to bribery and tax evasion charges pursuant to a plea agreement. The District Court conditionally accepted the plea, pending its receipt of the pretrial report in advance of sentencing. Nine months later, before his sentencing, Defendant sought unsuccessfully to withdraw his plea. At sentencing, the District Court entered the agreed-upon sentence. Defendant appealed his conviction, arguing that the trial court should have permitted him to withdraw his guilty plea because the court had not yet accepted his plea at the time he sought to withdraw it.

Holding

The Third Circuit affirmed Defendant's conviction. It reasoned that the District Court had accepted the Defendant's *plea* at the time he pleaded guilty, acknowledged his waiver of rights, and agreed that he was factually guilty of the offenses. The District Court's comments about conditional acceptance referred to its approval of the *plea agreement* — that is, the agreement concerning the sentence to be imposed. Thus, because the lower court had already accepted the plea of guilty at the time Defendant sought to withdraw it, he needed to show a "fair and just reason" justifying the withdrawal. And, the Court held, Defendant failed to make such a showing.

Key Quotes

"The District Court accepted his guilty plea at the Rule 11 hearing. Because [Defendant] does not provide a "fair and just" reason for withdrawal, we conclude the District Court did not abuse its discretion in denying the motion to withdraw the guilty plea." (Slip op. at 17.)

Court Clarifies Law on Career Offender Enhancement and Polygraph Testing

United States v. Henderson (March 29, 2023), No. 18-1894
http://www2.ca3.uscourts.gov/opinarch/181894p.pdf
Unanimous decision: Roth (writing), Greenaway, Jr., and Matey

Background

Defendant pleaded guilty to a drug-distribution offense. The sentencing judge applied the career-offender enhancement from the Sentencing Guidelines, based in part on Defendant's prior Pennsylvania conviction for conspiracy to commit robbery. Under the applicable law at the time of

sentencing, that prior conviction qualified as a "crime of violence" for career-offender purposes, and Defendant did not object to the enhancement. However, Defendant did object to the District Court's imposition of polygraph testing as a condition of supervised release, which the Court noted that it required "all the time." On appeal, Defendant challenged both the application of the career offender enhancement and the polygraph condition.

Holding

The Third Circuit vacated the sentence and remanded for resentencing. In response to the Government's contention that Defendant waived his career-offender challenge by failing to object at sentencing, the Court discussed the distinction between the intentional waiver of a right for strategic advantage, which prevents appellate review, and mere forfeiture, which does not. The Court held that the Defendant's mere concession of a claim challenging the sentencing enhancement on the basis of then-controlling law constituted a forfeiture, not a waiver, and that his challenge was therefore reviewable for plain error. It then held that conspiracy could no longer be a crime of violence under intervening decisions in *Kisor v. Wilkie* (U.S. 2019), *U.S. v. Nasir* (CA3 2021), and *U.S. v. Abreu* (CA3 2022). Finally, while the Court acknowledged that polygraph testing can be a condition of supervised release for drug offenses in certain cases, it cautioned that it is not appropriate in every case, and instructed the sentencing judge to make individualized findings justifying its use on resentencing.

Key Quotes

"[Defendant] could not have had knowledge of an error, and thus could not have abandoned or intentionally relinquished a known right when no right existed at the time. The controlling law at the time of [Defendant's] sentencing no longer holds due to subsequent Third Circuit and Supreme Court caselaw. That subsequent law established the right that [Defendant] now seeks to assert." (Slip op. at 8.)

Third Circuit Refuses to Review Interlocutory Motion to Suppress Evidence

United States v. Nocito (April 3, 2023), No. 20-2955
http://www2.ca3.uscourts.gov/opinarch/202955p.pdf
Unanimous decision: Restrepo (writing), McKee, and Bibas

Background

The Government charged Defendant with a long-running tax-avoidance scheme that involved hiding business income in shell companies and using that income to pay personal expenses. During its investigation, the Government received potentially privileged documents from Defendant's CFO, an attorney, who cooperated with the investigation and voluntarily produced the documents. Defendant moved under Federal Rule of Criminal Procedure 41(g) to force the Government return his "property" interest in the attorney-client privilege. The trial court denied the motion, holding that it was effectively an improper attempt to suppress the privileged document. Defendant appealed the denial of the motion while the remainder of the criminal proceedings were ongoing, arguing that the denial of a Rule 41(g) motion is an appealable final order.

Holding

The Third Circuit dismissed the appeal for lack of jurisdiction. It held that, while Rule 41(g) motions *can* be appealable final orders, they are only final orders if they are truly distinct and unrelated to the ongoing criminal proceedings. Here, because the Court agreed that Defendant's motion was, in fact, an attempt to suppress evidence — and thereby influence the course of his criminal case — rather than a mere attempt to return seized property, the District Court's denial of his motion was not a final order. The Court therefore lacked appellate jurisdiction and dismissed the appeal.

Key Quotes

"An order deciding a suppression motion is 'considered to be merely a step in the criminal process' and does not constitute a final order. Alternatively, an order denying a Rule 41(g) motion can be final because such a motion, unlike a motion to suppress, could be premised entirely on

property rights and not intertwined with a criminal prosecution in any way. If a motion for the return of property is made independently of a criminal prosecution—in that it is not intended to gain some strategic advantage for a criminal defendant—the order denying relief is final." (Slip op. at 7 (citations omitted).)

Non-Precedential Opinions of Note

United States v. Davis (January 17, 2023), No. 22-1002

http://www2.ca3.uscourts.gov/opinarch/221002np.pdf

The Third Circuit upheld the District Court's admission of testimony from the representative of a health care nonprofit that was victimized by the Defendant's fraud concerning the *impact* the fraud had on its health care mission. The Court reaffirmed that "district courts may admit victim impact testimony, but they may not admit too much of it," and reasoned that the single exchange in this victim's testimony was not more than was "reasonable to prove [the defendant's] specific intent to defraud." (Slip op. at 10 (alteration in original).)

United States v. Lowmaster (February 24, 2023), No. 22-1531

http://www2.ca3.uscourts.gov/opinarch/221531np.pdf

The Probation Office accused Defendant of violating his probation following a federal conviction, based on new criminal charges in the state system. Probation requested an arrest warrant, but the Court issued a show-cause order instead. After the resolution of the proceedings in the state system — and, after Defendant's period of probation had expired — the District Court revoked his probation and imposed a federal prison sentence for the probation violation. The Third Circuit reversed, holding that, under the Sentencing Reform Act, district courts have jurisdiction to "revoke a term of probation after it has expired only if a warrant or summons issued before expiration." Because the lower court issued a show cause order instead, it lacked jurisdiction to revoke probation after expiration. (Slip op. at 2.)

United States v. Jackson & *United States v. Jackson* (April 3, 2023), Nos. 21-3122, 21-3123

http://www2.ca3.uscourts.gov/opinarch/213122np.pdf

The District Court twice sentenced Defendants following their convictions on almost a dozen counts of abuse of their three foster children, and the Third Circuit twice reversed. After a third sentencing, the Government again appealed, arguing that the sentencing judge had again refused to implement the appellate court's mandate. The Court agreed and again reversed, concluding that the lower court had refused to consider the children's injuries holistically when determining whether the Government had met its burden to prove causation at sentencing. The Court also ordered that the case be reassigned to a different district judge on remand.

United States v. Burgo-Montanez (April 4, 2023), No. 18-3538

http://www2.ca3.uscourts.gov/opinarch/183538np.pdf

Multiple Defendants were convicted of a multi-year drug-smuggling conspiracy and, on appeal, attempted to incorporate all other arguments made in their co-Defendants' briefs. The Third Circuit deemed these arguments forfeited because "blanket statements of incorporation" are insufficient. Instead, Defendants needed to "make clear the specific issues they [were] incorporating." (Slip op. at 4.)

United States v. Lane (April 11, 2023), No. 21-1730

http://www2.ca3.uscourts.gov/opinarch/211730np.pdf

Defendant failed to preserve his *Miranda* argument that questioning improperly continued after he invoked his Fifth Amendment rights, because he only argued to the District Court that he did not receive a *Miranda* warning at the **start** of his interrogation. The Third Circuit held that these *Miranda* violations are distinct, and that making one before the lower court did not preserve the other for appeal.