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 Affirms Expanded Definition of Relevant Product Market

United States v. United States Sugar Corporation, et al. (July 13, 2023), No. 22-2806
https://www2.ca3.uscourts.gov/opinarch/222806p.pdf
Unanimous decision: Porter (writing), Amber, Freeman

Background

A sugar distributor sought to acquire a sugar producer. The district court determined that the relevant product market included distributors as sources of refined sugar, in addition to sugar producers. The distributors could source refined sugar from other states and foreign countries, and, as such, they were capable of undercutting efforts by a hypothetical monopolist to limit output and increase prices.

Holding

The Court affirmed the district court's decision to expand the definition of the relevant product market to include the distributors.

Key Quote

"But when an ostensible downstream party — a leasing company or wholesaler — has alternative sources for the same kind of product, e.g., computers or refined sugar, and places them in the stream of commerce, they impose a competitive check upon that source's power in the market. And this is more likely to be true the more homogeneous the product: customers generally place less value upon the question of who manufactured the product when the product is a commodity, like sugar, rather than a branded piece of technology, like a computer." (Slip Op. at 13.)

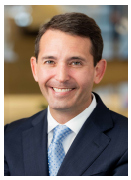
Court Rejects Double Jeopardy Challenge After Defendant Ordered to Disgorge Gains and Serve A Sentence

United States v. Jumper (July 14, 2023), No 22-2085
https://www2.ca3.uscourts.gov/opinarch/222085p.pdf
Unanimous decision: Porter (writing), Freeman, Fisher

Background

Defendant was a securities broker-dealer. He fraudulently transferred millions from a pension plan to accounts he controlled. The SEC filed a civil complaint against him, which resulted in a default judgment against Defendant. In that case, the court ordered him to disgorge $5.7 million in profits, along with prejudgment interest. DOJ successfully pursued criminal proceedings, as well. In the criminal case, the court imposed a period of incarceration. On appeal, the Defendant asserted a violation of the Double Jeopardy Clause because he had already been penalized through the disgorgement order in the civil case.

Holding



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The Third Circuit affirmed. Joining eight other Circuits, the Third Circuit determined that disgorgement is not a criminal penalty that implicates the Double Jeopardy Clause. In part, disgorgement is traditionally understood as a civil penalty and does not constitute a sanction that involves an affirmative disability or restraint (like incarceration).

Key Quote

"We find there is insufficient evidence 'to transform what was clearly intended as a civil remedy into a criminal penalty.' … 'Although disgorgement … appl[ies] to conduct that may also be prosecuted under a criminal statute, and [] posses[es] some characteristics common to criminal laws, such as requiring scienter and effecting deterrence, … disgorgement … [has not] historically been viewed as punishment.'" (Slip. Op. at 8.) (citations omitted).

Third Circuit Affirms Rejection of Conspiracy Charge under the Federal Food, Drug, and Cosmetic Act

United States v. Vepuri, et al. (July 20, 2023), No. 22-1562
http://www2.ca3.uscourts.gov/opinarch/221562p.pdf
Unanimous decision: Chagares (writing), Scirica, Rendell

Background

Defendants manufactured and sold a generic drug that required FDA approval. Defendants had received approval for abbreviated new drug applications (ANDA) for the specific drug. In their applications, they represented they would source the drug's active ingredient from certain facilities. But, without notice to the FDA, the Defendants sourced the active ingredient elsewhere and distributed the drug. The district court dismissed a portion of the Defendants' conspiracy charge — specifically, that the Defendants conspired to introduce unapproved new drugs in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*

Holding

The Third Circuit affirmed. It reasoned that the relevant statutory provision of the FDCA did not, in fact, prohibit introduction of the drug as the Government charged. The Government had not demonstrated that an entirely new drug was introduced into the market absent approval of an ANDA that was effective with respect to the new drug. *See* 21 U.S.C. § 355(a). That is, an alteration in the source for the active ingredient, alone, did not violate this provision.

Key Quote

"The superseding indictment in this case does not include any allegations that the KVK-Tech Hydroxyzine manufactured with active ingredient from DRL had a different composition or labeling than the KVK-Tech Hydroxyzine with the effective approval. In the language of the statute, the 'new drugs' at issue here are the 'such drugs' that have an effective approval. The Government, therefore, cannot state an offense under this theory of liability." (Slip Op. at 14-15.)

Third Circuit Affirms Admission of Evidence Voluntarily Provided by Spouse

United States v. Kramer (August 1, 2023), No. 22-1358
https://www2.ca3.uscourts.gov/opinarch/221358p.pdf
Unanimous decision: Freeman (writing), Ambro, Porter

Background

A jury convicted Defendant of sexual exploitation of a minor and related charges.

Defendant's wife had searched his phone for evidence and voluntarily submitted the evidence to authorities. The police then conducted a search of Defendant's cellphone and found incriminating images. The district court denied Defendant's motion to suppress this evidence and rejected that use of the evidence at trial would violate Defendant's Fourth Amendment rights.

Holding

The Court of Appeals affirmed. The Fourth Amendment does not protect against the independent actions of a private citizen, unless that person is acting as an agent of the Government. Here, the Defendant's spouse volunteered the incriminating evidence against her husband, without the government's knowledge and for her own independent reasons. For this reason, there was no Fourth Amendment violation.

Key Quote

"Terry searched Kramer's cell phone without the government's knowledge or acquiescence, and she did so to further her own legitimate and independent purposes. There is no state action when a private person voluntarily turns over property she discovered from legitimate private actions." (Slip Op. at 9.)

Third Circuit Holds Wire Fraud Does Not Require Convergence

United States v. Porat (August 7, 2023), No. 22-1560
https://www2.ca3.uscourts.gov/opinarch/221560p.pdf
Unanimous decision: Chung (writing), Krause, Phipps

Background

Defendant was the former dean of Temple University's Fox School of Business. A jury convicted Defendant of conspiracy to commit (and substantive) wire fraud charges. Specifically, Defendant submitted to U.S. News and World Report false data to inflate the school's ranking, luring donors to contribute to — and students to enroll in — the program.

Holding

The Third Circuit affirmed the convictions. The Court agreed that the students were deprived of money or property within the meaning of the wire-fraud statute. After news of the Dean's fraud went public, the school's ranking deteriorated, and the students lost the full benefit of their bargain. Moreover, the Court rejected Defendant's argument that the wire fraud statute requires "convergence"— *i.e.*, that the defendant deceive the same party deprived of money. Here, the target of the deceit (U.S. News) need not have been the ultimate victim of property loss (applicants, students, and donors).

Key Quote

"[W]e also reject Porat's argument because we hold that the wire fraud statute does not require convergence. Nothing in the text of the statute supports such a requirement. … Neither do our precedents limit wire fraud in this way. Accordingly, we join our sister circuits in rejecting the so-called convergence requirement and hold that a defendant need not deceive the same party he defrauds of money." (Slip Op. at 21.)

Court Rejects Unreliable Extrapolation For Sentencing Calculation

United States v. Titus (August 22, 2023), No. 22-1516
http://www2.ca3.uscourts.gov/opinarch/221516p.pdf
Unanimous decision: Bibas (writing), Chagares, Matey

Background

Defendant, a physician, wrote thousands of prescriptions for opiates. While some of those prescriptions were legal and medically necessary, many were illegal. A jury convicted him of multiple counts of unlawfully dispensing and distributing controlled substances. The Government introduced evidence of many prescriptions beyond those charged in the indictment, as well as testimony by a statistician and medical expert. The statistician offered conclusions about the total

amount of prescriptions Defendant wrote based on a random sample of 300 patients. The medical expert reviewed twenty-four of the patient files from that set and testified that eighteen involved illegal prescriptions. At sentencing, the District Court acknowledged that these twenty-four files were "not a statistically valid number," but nevertheless extrapolated from that sample to determine the drug weight for which Defendant was responsible. Defendant challenged his sentence, arguing the evidence was insufficient to support that drug weight.

Holding

The Third Circuit vacated Defendant's sentence and remanded for resentencing. The Court emphasized that any extrapolation must meet with "accepted standards of reliability." Noting the District Court's view that the sample size here was not statistically valid, it held that this extrapolation was not reliable, and that there was insufficient evidence in the record to support the higher drug weight the District Court used.

Key Quote

"The government may not use a small sample size to justify a much larger criminal punishment without explaining how that evidence satisfies its burden of proof. And courts must tread cautiously too. At a minimum, any extrapolation must be shown to be reliable, and defendants must have a fair chance to challenge its reliability. Because [Defendant's] sentencing fell short, we will vacate his sentence and remand." (Slip Op. at 11.)

Government Inaction Is Not Dispositive Evidence of Immateriality In False Claims Suit

United States ex rel. Druding v. Care Alternatives (August 25, 2023), No. 22-1035
http://www2.ca3.uscourts.gov/opinarch/221035p.pdf
Unanimous decision: Krause (writing), Bibas, Rendell

Background

Relators brought False Claims Act ("FCA") claims against a hospice provider based on insufficient documentation of patients' hospice eligibility, in violation of Medicare regulations. The Government investigated for seven years before declining to intervene in the case. The District Court granted summary judgment to the provider, concluding that there was no evidence that the provider's noncompliance with the regulation was material. The District Court reasoned that the failure was not material because the Government had continued to pay the hospice claims, and relators had no evidence countering the Government's "apparent disregard" of the lapses in documentation.

Holding

The Third Circuit vacated the grant of summary judgment. It reviewed all the factors relevant to materiality established in *Universal Health Services, Inc. v. United States ex rel. Escobar* (U.S. 2016), and emphasized that no single factor is dispositive. It faulted the District Court for focusing on one factor — continued payment by the government — to the exclusion of all others. And, after reviewing each of the factors in this case, it concluded there was sufficient evidence of materiality to create a genuine factual dispute for a jury to resolve.

Key Quote

"Thus, notwithstanding the government's prolonged inaction in the wake of Relators' fraud allegations, it was erroneous to treat this factor as determinative of immateriality." (Slip Op. at 22.)

Defendant Had Standing to Challenge Search of Girlfriend's Rental Car

United States v. Montalvo-Flores (August 28, 2023), No. 22-1752
http://www2.ca3.uscourts.gov/opinarch/221752p.pdf
Majority decision: Ambro (writing), Fuentes
Dissent: Hardiman

Background

Police arrested Defendant in a hotel room in connection with a robbery. During a search incident to that arrest, they found keys to a locked rental car in the hotel parking lot. Police searched the car and discovered 304 grams of cocaine. Defendant was charged with possession with intent to distribute, and moved to suppress the search of the car. At the suppression hearing, the detective testified that Defendant's girlfriend had rented the car, and had given Defendant the keys, and that police had seen Defendant operating the car. The District Court found, however, that Defendant was "never observed possessing, operating, or otherwise exercising any sort of control over the rental vehicle" and concluded that he lacked a reasonable expectation of privacy that would give him a Fourth Amendment interest in the car.

Holding

The Court reversed. It concluded that the District Court had clearly erred when it found that Defendant had not lawfully exercised control over the car in the face of unrebutted testimony to the contrary. It emphasized that Defendant's girlfriend had rented the car, had been seen giving him the keys, and that — under such circumstances — it was reasonable to infer that she had given Defendant permission to possess the car. He therefore had a reasonable expectation of privacy and standing to challenge the search on Fourth Amendment grounds.

Key Quote

"Much came out at [Defendant's] hearing to suppress evidence obtained from the car rented by Pisciotta: she was his girlfriend; she gave the car's keys to him; he possessed the keys when arrested; the car was parked outside his hotel room; it was locked; and he was observed by police possessing and operating it. This context strongly suggests that [Defendant] had dominion and control of the car with his girlfriend's permission. … The legal conclusion from the facts noted above is that [Defendant] had a reasonable expectation of privacy in the car and thus may challenge the evidence taken from it without a warrant." (Slip Op. at 16.)

Dissent

Judge Hardiman dissented, concluding that "the District Court's factual findings were not clearly erroneous and that [Defendant] failed to carry his burden to prove he had a reasonable expectation of privacy in the searched car" (Dissent at 1.)

Third Circuit Upholds Sentencing Guideline Commentary On Acceptance of Responsibility

> *United States v. Mercado* (August 29, 2023), No. 22-1947
> http://www2.ca3.uscourts.gov/opinarch/221947p.pdf
> Unanimous decision: Krause (writing), Jordan, Smith

Background

Defendant pleaded guilty to wire fraud. The District Court imposed conditions of bail pending sentencing, including that Defendant refrain from drug use, submit to drug testing, and attend drug treatment if ordered. On multiple occasions, however, Defendant tested positive for cocaine, refused to submit to tests, and refused to attend the drug treatment ordered by probation. At sentencing, the District Court declined to apply a downward adjustment for acceptance of responsibility, despite Defendant's guilty plea, relying on the Sentencing Guidelines commentary that makes post-plea conduct relevant to the application of the Guideline. Defendant challenged his sentence, arguing the District Court should not have applied the commentary under the Third Circuit's decisions in *United Sates v. Nasir* (3d Cir. 2021) and *United States v. Banks* (3d Cir. 2022).

Holding

The Court affirmed. It analyzed the post-plea conduct commentary under the three-step framework set out in *Nasir* and *Banks*. It reasoned that the text of the Guideline was genuinely ambiguous

because it did not clarify what evidence was relevant to a defendant's demonstration that he had accepted responsibility. It also concluded that the Sentencing Commission's commentary was a reasonable interpretation of that ambiguity that was entitled to deference.

Key Quote

"[T]he commentary to [U.S.S.G. § 3E1.1(a)] sets forth a list of 'appropriate considerations,' several of which expressly sweep in post-plea conduct. And where, as here, commentary helps to clarify a Guideline's 'genuinely ambiguous' text, that commentary may serve as an authoritative delimiting mechanism, provided that it is both 'reasonable' and invokes the Sentencing Commission's 'substantive experience.' … [T]he commentary to § 3E1.1(a) satisfies these criteria, and the District Court did not clearly err in relying on [Defendant's] post-plea misconduct to deny his request for a § 3E1.1(a) reduction." (Slip Op. at 2.)

Sentencing Court Did Not Commit Plain Error By Announcing Sentence Before Allocution

United States v. Packer (September 26, 2023), No. 22-2554
http://www2.ca3.uscourts.gov/opinarch/222554p.pdf
Unanimous decision: Jordan (writing), Bibas, Porter

Background

Defendant was serving a sentence of five years' supervised release when he made sent several threatening voicemails to his ex-girlfriend. The District Court revoked his supervised release and sentenced him to 24 months' imprisonment. At the revocation hearing, however, the District Court announced the sentence it intended to impose before it gave Defendant an opportunity to speak. Although he did not object at the time, Defendant challenged the sentence on appeal, arguing that he had been denied his right of allocution.

Holding

The Third Circuit affirmed the sentence. Although it recognized that the District Court's pre-allocution announcement of the sentence it intended to impose could be a violation of the right to allocution, it applied the plain error standard because Defendant failed to object at the hearing. And, while it assumed that a denial of the right of allocution satisfies the first three prongs of the plain error test, it emphasized that reversal of plain error is always discretionary, and declined to exercise its discretion here. It held that this error did require reversal because the District Court had permitted Defendant to speak, and that he did not suggest any mitigating circumstances or otherwise point to anything that could have impacted the outcome.

Key Quote

"[W]e understand our caselaw to mean that, when a trial court violates the right of allocution, an appellate court may choose to deem the fourth plain error factor satisfied, but it is not required to do so. " (Slip Op. at 9.)

Updated Opinion

United States v. Kousisis No. 19-3679
http://www2.ca3.uscourts.gov/opinarch/193679pa.pdf

The Third Circuit superseded its prior opinion in this case. However, the critical holdings remain unchanged. For our discussion of the prior opinion, please visit our Notice of Appeal, Summer 2023.

Non-Precedential Opinions of Note

United States v. Small (July 7, 2023), No. 22-1469

http://www2.ca3.uscourts.gov/opinarch/221469np.pdf

A divided panel affirmed Defendant's sentence, which the District Court did not enter until over four years after Defendant pleaded guilty. Most of the delay was attributable to continuances awaiting decisions from the Supreme Court and Third Circuit concerning the application of the Armed Career Criminal Act. The majority held that these continuances did not count against the Government, and that there was no violation of Defendant's right to a speedy sentencing. The dissent disagreed, concluding that Defendant opposed at least some of the continuances, and that those delays were sufficient to rise to a due-process violation.

United States v. Handerhan (July 11, 2023), No. 22-3138

http://www2.ca3.uscourts.gov/opinarch/223138np.pdf

Defendant, a convicted sex offender, participated in a sex offender treatment program as a condition of his supervised release, which included a polygraph examination. The District Court thereafter granted the Probation Office's request to modify the conditions of his supervised release to add a requirement that Defendant submit to periodic, non-therapeutic polygraph testing at the Probation Office's discretion. The Third Circuit affirmed the added condition, concluding that the District Court did not abuse its discretion in concluding that this polygraph testing would deter future criminal conduct and protect the public by helping to ensure that Defendant complied with the terms of his supervision.

United States v. Andrews (July 27, 2023), No. 17-2078

http://www2.ca3.uscourts.gov/opinarch/172078np.pdf

Agents searched a multi-unit building pursuant to a warrant that described the building as a single residence. Defendant unsuccessfully moved to suppress the evidence they found, arguing that the search was invalid because the warrant was objectively overbroad. The Third Circuit reversed, concluding that the agents' reliance on the warrant was objectively unreasonable because it was obvious upon arriving at the building that it was subdivided into multiple units. The Court also criticized the prosecution for failing to produce any witnesses at the suppression hearing and instead relying only on the "limited record" of the affidavit of probable cause that supported the warrant application. (Slip Op. at 5.)