Alert
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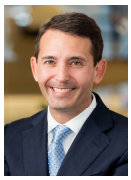
COZEN O'CONNOR

Notice of Appeal

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



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Related Practice Areas

- White Collar Defense & Investigations

Precedential Opinions of Note

Supreme Court Refuses to Review Third Circuit's Decision on Public Disclosure Bar

PharMerica Corp. v. United States, ex rel. Silver (October 7, 2019), No. 18-1044

https://www.supremecourt.gov/orders/courtorders/100719zor_m648.pdf

Denial of *certiorari*

Background

Last fall, in *United States ex rel. Silver v. Omnicare, Inc*. (3d Cir. 2018), the Third Circuit addressed the False Claims Act's public disclosure bar. The Court held that a *qui tam* relator's claim is not barred by reliance on publicly available information so long as the relator's allegations depend on reading the publicly disclosed facts in conjunction with non-public information. One defendant asked the U.S. Supreme Court to review that Third Circuit's decision.

Holding

The Supreme Court denied certiorari, declining to hear the case and leaving the Third Circuit's opinion in place.

Third Circuit Rejects Ex-Pa. State Senator Orie's Challenge to Ethics Convictions

Orie v. Secretary Pa. Dept. of Corrections (October 15, 2019), No. 16-1685

http://www2.ca3.uscourts.gov/opinarch/161685p.pdf

Unanimous decision: Bibas (writing), Jordan, and Matey

Background

Defendant was charged with several crimes stemming from her use of state-employed legislative staff to conduct political fundraising and campaign work in violation of Pennsylvania ethics laws. During the jury's deliberations at her first trial, the Commonwealth discovered that a number of Defendant's exhibits were forged, which led to a mistrial. A jury convicted Defendant after a second trial of theft of services, violation of the Pennsylvania Ethics Act, and other offenses related to the forgeries. The trial court sentenced Defendant to prison terms on all counts except the Ethics Act convictions, for which it imposed no further penalty. Defendant's convictions were upheld on direct appeal, and she then sought a writ of *habeas corpus* in federal court.

Holding

The Third Circuit rejected all of Defendant's claims for habeas relief. Among other things, it held that federal courts lacked habeas jurisdiction over Defendant's challenge to the Ethics Act convictions, because she was not in custody for those convictions. It also affirmed the lower

courts' determinations that the second trial did not violate the Double Jeopardy Clause because the mistrial was "manifestly necessary."

Key Quote

"All ... of Orie's arguments fail. She is not in custody for her Ethics Act convictions, so we lack jurisdiction to hear her challenge to that statute. [And] [t]he Superior Court reasonably affirmed the trial court's finding that the forged documents mad a mistrial manifestly necessary, so retrying her did not amount to double jeopardy." (Slip. op. at 18.)

Court Upholds Warrantless Home Search of Parolee

United States v. Henley (October 29, 2019), No. 18-1428

http://www2.ca3.uscourts.gov/opinarch/181428p.pdf

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

Background

Defendant was indicted on charges relating to contraband that his parole officer discovered during a warrantless search of his home. Defendant's parole officer initiated the search after noticing a change in Defendant's attitude and suspicious behavior during his supervision. Specifically, Defendant stopped working but still had unexplained cash, began associating with other parolees, suffered a home break-in that suggested to the officer that the burglar believed there were guns, drugs, or money in the house, and lied to the officer about why he was fired from his job. The officer also smelled marijuana during a home visit and received reports Defendant was dealing drugs. Defendant pled guilty but challenged the parole officer's search on appeal.

Holding

The Court upheld the search and affirmed the conviction. It noted that the U.S. Supreme Court has upheld parole schemes that subject parolees to warrantless, suspicionless searches as a condition of parole. Pennsylvania's scheme only imposes warrantless searches, but requires parole searches to be supported by reasonable suspicion. The Court upheld the search in this case because the officer's observations and information created reasonable suspicion to support the search.

Key Quote

"In sum, [Defendant's] search required reasonable suspicion because neither a statute nor a condition of parole provides that he was subject to search without suspicion." (Slip. op. at 9.)

Court Revives Prisoner 8th Amendment Civil Rights Suit for Prolonged 'Dry Cell' Detention

Thomas v. Tice (November 12, 2019), No. 18-1811

http://www2.ca3.uscourts.gov/opinarch/181811p.pdf

Majority opinion: Porter (writing) and Shwartz

Partial concurrence/dissent: Greenaway, Jr.

Background

Plaintiff was a Pennsylvania prisoner who was placed in a "dry cell" after a guard observed Plaintiff swallowing what he incorrectly believed to be contraband hidden in a bag of M&Ms. A "dry cell" is a cell that lacks any water or running plumbing that prisons use to closely monitor a prisoner passing suspected contraband. Plaintiff remained in the dry cell for a total of nine days, the last five of which took place after the Defendants interviewed Plaintiff, and after Plaintiff's x-rays and bowel

movements all revealed no contraband. Plaintiff sued for violation of his Eight Amendment rights against cruel and unusual punishment under 41 U.S.C. § 1983, claiming that (a) the conditions in the dry cell were inhumane, and (b) his continued confinement after Defendants interviewed him served no penological interest. The district court granted summary judgment in favor of the Defendants.

Holding

The Court affirmed summary judgment on the conditions-of-confinement claim, but reversed on the duration claim. A plaintiff asserting an Eighth Amendment claim based on deliberate indifference to his or her health or conditions of confinement must show that the defendants were personally involved in the wrongdoing. The Court agreed with the district court that there was no evidence the Defendants were personally involved in the conditions of his confinement. It held, however, that Plaintiff's duration claim should survive summary judgment. Defendants had the authority to end Plaintiff's dry cell detention, and there was genuine dispute of material fact over whether there was a penological justification to continue Plaintiff's confinement after his x-ray and bowel movements did not reveal any contraband.

Key Quote

"[W]e reiterate that when administrative confinement in a dry cell is not foul or inhuman, and serves a legitimate penological interest, it will not violate the Eighth Amendment. But here [Defendants have] not presented evidence of any penological justification for Thomas's continued confinement in the dry cell." (Slip. op. at 11-12.)

Dissent

Judge Greenaway, Jr. concurred in part but would also have reversed summary judgment on the conditions of confinement claim, writing that "the conditions of confinement in [Plaintiff's] dry cell were deplorable, to say the very least, and far more egregious than any set of circumstances to which we or the Supreme Court have lent our imprimatur." (Judge Greenaway, Jr. dissent at 1.)

Counsel Must Investigate Controlled Substances Not Listed in the Sentencing Guidelines

United States v. Sepling (November 29, 2019), No. 17-3274

http://www2.ca3.uscourts.gov/opinarch/173274p.pdf

Unanimous decision: McKee (writing), Shwartz, and Fuentes

Background

Defendant was sentenced for conduct involving a conspiracy to import ten kilograms of methylone, a Schedule I controlled substance that is not listed in the Sentencing Guidelines' drug conversion table, U.S.S.G. § 2D1.1. Because methylone is not listed in the table, the district court was required to select an analogue from the table that was most similar to methylone. The sentencing judge accepted probation's recommendation that it use MDMA as the analogue, to which Defendant's counsel did not object. The drug conversion table provides a 500:1 conversion ratio for MDMA, such that a single gram of MDMA is equivalent to 500 grams of marijuana. Using the Guidelines, the district court concluded that Defendant's conduct was equivalent to conspiring to distribute 5,000 kilograms of marijuana. However, the judge, Government, and defense counsel all agreed that they knew almost nothing about methylone. In particular, defense counsel acknowledged that he had relied only on his client and the Government to learn about the drug. Defendant eventually brought a post-conviction challenge to his sentence, arguing that his counsel had been deficient for failing to investigate methylone and appropriately address its severity at sentencing.

Holding

The Third Circuit granted Defendant's motion to vacate his sentence. It held that Defendant's counsel was deficient for failing to investigate methylone at all. It also noted the existence of a

wealth of publicly available information counsel could have used to argue that methylone is substantially less serious than MDMA and the scientific and policy arguments counsel could have made to suggest the 500:1 conversion ratio for MDMA is inflated.

Key Quote

"Sentencing Counsel cannot adequately represent a client at a sentencing involving a controlled substance not specified in the Guidelines without undertaking a reasonable inquiry into that substance in order to challenge the ratio set forth in the equivalency table, when appropriate." (Slip. op. at 22.)

Court Refuses to Suppress Incriminating Statements Made to Help Extortion Investigation

United States v. Ludwikowski (December 5, 2019), No. 18-1881

http://www2.ca3.uscourts.gov/opinarch/181881p.pdf

Unanimous decision: Fisher (writing), Ambro, and Restrepo

Background

Defendant, a pharmacist, participated in a seven-hour interview at a police station to help law enforcement investigate extortionate threats he received when he refused to continue filling certain customers' opiate prescriptions. Law enforcement questioned Defendant extensively about whether he had been filing illicit prescription in order to find out why he was vulnerable to extortion. Years later, Defendant was charged, tried, and convicted of drug distribution. He unsuccessfully sought to suppress his statements from the interview, arguing that he was (a) in custody and thus should have been given *Miranda* warnings, and (b) coerced into making the statements.

Holding

The Third Circuit affirmed the district court's denial of Defendant's suppression motion. The Court held that Defendant was not in custody after a thorough examination of the circumstances of the interview and, therefore, not entitled to Miranda warnings. Defendant was not in custody, even though he was interviewed at the police station, because he had voluntarily sought the interview to report the extortion, and a reasonable person in his position would have felt free to leave. It also held that Defendant was not coerced. But the Court noted that its holding was based on the unusual facts of this case.

Key Quote

"We emphasize that we apply the law only to the precise facts before us: the defendant was the victim of one crime and the perpetrator of another, intertwined crime; he reached out to police for help; and he engaged with the police in both an offensive and a defensive posture, reporting one crime while at the same time trying to conceal the other. Our analysis would have no bearing on a case lacking these facts. " (Slip. op. at 18.)

Third Circuit Orders Resentencing Because Sentencing Court Relied on Bare Arrest Record

United States v. Mitchell (December 5, 2019), No. 17-1095

http://www2.ca3.uscourts.gov/opinarch/171095p.pdf

Unanimous decision: Fuentes (writing), McKee, and Roth

Background

A jury convicted Defendant of numerous drug and firearms offenses. At sentencing, the district court recited Defendant's extensive criminal history, including eighteen arrests that did not lead to

conviction. The district court also enumerated each of those arrests, and included them in its comment that Defendant had "as long and serious of [a] criminal record as [the court had] seen in twelve and a half years on the bench." The district court also listed only "extensive criminal history" in its written Statement of Reasons for its sentence. On appeal, Defendant challenged his conviction and sentence on a number of grounds, including that the district court had relied on his record of bare arrests in reaching his sentence.

Holding

The Third Circuit rejected the challenges to Defendant's conviction but vacated his sentence. It concluded that the district court had erroneously relied on Defendant's bare arrests in reach its sentence, and that this reliance constituted plain error.

Key Quote

"[A]lthough a court can mention a defendant's record of prior arrests that did not lead to conviction, it cannot rely on such a record." (Slip. op. at 10.)

Non-Precedential Opinions of Note

Schlager v. Superintendent Fayette SCI (October 7, 2019), No. 18-1896

http://www2.ca3.uscourts.gov/opinarch/181896np.pdf

The Court applied equitable tolling to permit Defendant to bring an untimely petition for *habeas corpus* relief because his state post-conviction counsel actively mislead him into believing his appeal was still pending before the Pennsylvania Supreme Court, when in fact it had been dismissed.

G2A.com Sp. z.o.o. v. United States (October 15, 2019), No. 18-3401

http://www2.ca3.uscourts.gov/opinarch/183401np.pdf

Plaintiff, a Polish company, sought to quash a third-party IRS summons issued at the request of the Polish government in connection with its investigation of Plaintiff. The Court rejected Plaintiff's argument that the IRS's procedure for mailing notice of the summons to Plaintiff violated the Hague Service Convention, which prohibits service by mail in Poland. The Court reasoned that the relevant statute required the IRS only to give notice, which is distinct from *formal service*; because the Hague Service Convention only controls the latter, it did not apply.

United States v. Haisten, United States v. Haisten (October 24, 2019), Nos. 18-2094 & 18-2095

http://www2.ca3.uscourts.gov/opinarch/182094np.pdf

The Court affirmed the district court's exclusion of Defendant's testimony concerning his lawyer's advice as hearsay, reasoning that Defendant did not pursue an advice-of-counsel defense at trial and only raised it for the first time on appeal. Accordingly, the district court reasonably determined that Defendant intended the testimony to show that his conduct was not illegal, rather than to show the effect of the advice on his state of mind.

United States v. Harris (October 25, 2019), No. 19-1134

http://www2.ca3.uscourts.gov/opinarch/191134np.pdf

Defendant was initially sentenced to a prison term in the middle of his Guidelines range. He successfully moved for a sentence reduction after an amendment to the Sentencing Guidelines went into effect that would have reduced his range. The district court sentenced him at the top of his new Guidelines range. The Third Circuit affirmed the district court's new sentence, holding that Defendant had no right to a new sentence proportional to his old range when resentenced with a new range.

United States v. Korus (November 7, 2019), No. 18-2005

https://www2.ca3.uscourts.gov/opinarch/182005np.pdf

Defendant pled guilty to and was sentenced for being a felon in possession of a firearm. The sentencing court applied a sentencing enhancement for possessing the firearm in connection with another felony after an evidentiary hearing. The Third Circuit affirmed the sentence, holding that the district court did not err by relying on hearsay at the hearing because other evidence corroborated the hearsay statements.

United States v. Wright (November 27, 2019), No. 18-2924

https://www2.ca3.uscourts.gov/opinarch/182924np.pdf

The Third Circuit vacated Defendant's guilty plea, finding that Defendant's waiver of rights was invalid because the district court inadvertently misled the Defendant by telling him multiple times, in response to Defendant's questions, that there was "no such thing" as a conditional guilty plea under federal law.

United States v. Nunez & Rosario (December 4, 2019), Nos. 18-1579, 18-1580

http://www2.ca3.uscourts.gov/opinarch/181579np.pdf

Defendants sought dismissal of their indictments with prejudice after the district court found that the Government had willfully withheld *Brady* material about a witness's prior inconsistent statements. The trial court granted a mistrial but refused to dismiss the indictments because Defendants did not show that they were prejudiced by the *Brady* violation. The Third Circuit affirmed because Defendants did not suffer the sort of prejudice that would justify dismissal, such as "that any witnesses or other critical evidence became unavailable" or that a new trial would allow the Government "to salvage what the district court viewed as a poorly conducted prosecution." (Slip. op. at 7.)

United States v. Murphy (December 4, 2019), Nos. 18-3598, 19-2178

http://www2.ca3.uscourts.gov/opinarch/183598np.pdf

The district court ordered Defendant to pay restitution to his victim as part of his sentence for production of child pornography. The Third Circuit affirmed the amount of restitution, holding that the district court relied on evidence of the victim's loss, including letters from the victim's therapist and mother's employer, to reach a reasonable figure.

United States v. Carino (December 13, 2019), No. 19-1706

http://www2.ca3.uscourts.gov/opinarch/191706np.pdf

The Court affirmed that, absent a showing of bad faith, courts will defer to prosecutors to determine whether a defendant has provided "substantial assistance" that would mitigate a sentence, and will refuse to hold an evidentiary hearing on the issue.

United States v. Santos (December 23, 2019), No. 19-1543

http://www2.ca3.uscourts.gov/opinarch/191543np.pdf

At sentencing, the Government maintained that Defendant was undocumented, but Defendant argued he was actually a citizen. The district court did not clearly resolve the issue, noting that it was "not even sure" whether Defendant was legally in the country. The Third Circuit remanded for resentencing because Federal Rule of Criminal Procedure 32 required the lower court to either (a) resolve the dispute, or (b) formally decide a ruling is unnecessary, but the district court did neither.

United States v. Churuk & Botsvyknyuk (January 9, 2020), Nos. 16-1446, 16-1520

http://www2.ca3.uscourts.gov/opinarch/161446np.pdf

Defendants were convicted of conspiracy to participate in a racketeering enterprise in violation of the RICO Act, 18 U.S.C. § 1962(d), stemming from their participation in a human trafficking ring that brought victims from Ukraine to the United States. The Court rejected numerous arguments and affirmed their convictions. Among other things, the Court held that the Defendants were within the extraterritorial jurisdiction of the United States because the indictment alleged that the enterprise was intended to have an effect within the United States. It also affirmed the district court's jury instruction that the statute of limitations for RICO conspiracy begins when the crime is complete, which requires Defendants to show either that the purpose of the enterprise was accomplished or abandoned, or that they withdrew from the conspiracy.

United States v. Moffitt (January 9, 2020), No. 17-1196

http://www2.ca3.uscourts.gov/opinarch/171196np.pdf

Defendant was convicted of conspiracy and attempt to possess drugs after a "reverse-sting," whereby Defendant attempted to participate in an undercover agent's proposed robbery of a fictional stash house. Defendant argued in a post-conviction challenge that his lawyer was ineffective for failing to raise a "sentencing entrapment" defense, under which Defendant would have argued that his sentence was inflated by the fictional drug amount created by the government agent. The Third Circuit noted that it has not yet recognized a sentencing entrapment defense but again declined to resolve the question. Instead, it held that Defendant's counsel was not ineffective because, even if it were recognized, a sentencing entrapment defense would not have been successful in this case.