

Notice of Appeal

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

Precedential Opinions of Note

Conviction for Drug Distribution Overturned for Lack of Proof Playground Was 'Open to the Public'

United States v. Zayas (April 21, 2022), No. 20-1265

<http://www2.ca3.uscourts.gov/opinarch/201265p.pdf>

Unanimous decision: McKee (writing), Smith, and Restrepo

Background

Defendant was indicted for selling fentanyl to a visibly pregnant woman who subsequently died of an overdose. A jury convicted him of multiple counts arising from the incident, including distribution of a controlled substance resulting in death, conspiracy, distribution of a controlled substance to a pregnant person, and distribution of a controlled substance within 1,000 feet of a playground. Defendant appealed, arguing among other things that the jury was erroneously instructed on the elements of the pregnancy- and playground-related offenses.

Holding

The Third Circuit vacated Defendant's playground conviction but affirmed his convictions on the other counts. The Court held that the jury was wrongly instructed as to both the pregnancy and playground counts. It held that the government must prove beyond a reasonable doubt that a defendant *knows* the recipient of a controlled substance is pregnant; similarly, it held the government must prove a playground matches the statutory definition of "playground" as an element of the offense. However, the Court concluded that the pregnancy-count error was harmless because there was sufficient evidence Defendant knew the victim was pregnant. The Court vacated the playground conviction because the playground at issue — a fenced-in recreation area attached to a private daycare — was not "open to the public" under the statutory definition.

Key Quote

"We now join several other circuit courts of appeals in holding that the definition of a playground must be proven as an element of § 860(a) Thus, due process requires that a conviction under § 860(a) be supported by proof beyond reasonable doubt of all the elements of that offense [I]nclud[ing] the distribution, or possession with intent to distribute, a controlled substance "within 1000 feet of (1) an 'outdoor facility,' which is (2) 'intended for recreation,' (3) 'open to the public,' and also (4) contains 'three or more separate apparatus intended for the recreation of children.'" (Slip op. at 20-21).

Court Declines to Defer to Sentencing Commission Commentary in Applying Guideline

United States v. Abreu (May 2, 2022), No. 20-2786

<http://www2.ca3.uscourts.gov/opinarch/202786p.pdf>

Unanimous decision: Krause (writing), Ambro, and Bibas



Andrew D. Linz

Associate

alinz@cozen.com
Phone: (215) 665-4638
Fax: (215) 665-2013



Stephen A. Miller

Co-Chair, White Collar Defense & Investigations

samiller@cozen.com
Phone: (215) 665-4736
Fax: (215) 665-2013



Catherine Yun

Associate

cyun@cozen.com
Phone: (215) 864-8021
Fax: (215) 665-2013

Related Practice Areas

- White Collar Defense & Investigations

Background

Defendant was sentenced under a Guideline that enhanced his sentence for a “crime of violence” based on a prior conviction for *conspiracy* to commit aggravated assault. Defendant argued that conspiracy to commit a violent crime was not, itself, a crime of violence; the District Court disagreed, applying the commentary to the Guideline that defined “crime of violence” to include conspiracy. Defendant appealed.

Holding

The Third Circuit vacated Defendant’s sentence. Applying the framework from *United States v. Nasir* (CA3 2021), the Court determined that the term “crime of violence” in the text of U.S.S.G. § 2K2.1 did not include inchoate offenses such as conspiracy and, consequently, it was not bound to defer to the Sentencing Commission’s interpretive guidance in the commentary.

Key Quote

“In short, the plain text, structure, and purpose of the Guidelines indicate that “there is only one reasonable construction” of “crime of violence” as used in § 2K2.1 ... and ... that construction excludes conspiracy offenses.” (Slip op. at 10).

Third Circuit Adopts Majority View in Circuit Split Over Speedy Trial Act

United States v. Adams (May 26, 2022), Nos. 19-1811 & 19-2574

<http://www2.ca3.uscourts.gov/opinarch/191811p.pdf>

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

Background

Defendant went to trial, and was convicted, of multiple firearms counts almost two years after arraignment. He thereafter moved for a judgment of acquittal, arguing the delay in bringing him to trial violated his Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.* (the Act) rights, which require Defendants to be tried within 70 days, subject to various exceptions. The District Court denied his motion, finding that enough of the delays before trial qualified for those exceptions to keep Defendant’s trial within the 70-day limit. Defendant appealed his convictions on those grounds, among others.

Holding

The Court affirmed Defendant’s convictions. It held that several different delays qualified for the Act’s exceptions which, together or on their own, were enough to keep Defendant within the 70-day limit. In particular, the Court confronted a circuit split over the question whether the delay attributable to a Government motion *in limine* was excludable. The Third Circuit adopted the majority view, holding that the filing of such motions *does* stop the Act’s clock unless the trial court reserves consideration of the motion for trial, either expressly or through established practice.

Key Quote

“We therefore hold that a motion *in limine* is treated as would be any ‘pretrial motion’ under [the Act] except when a district court clearly indicates that it is reserving judgment until trial, whether by stating as much or by following a regular practice of postponing decisions on motions *in limine* for trial.” (Slip op. at 24-25).

Court Upholds Finding of Willfulness in Case of Failure To Disclose Foreign Accounts

United States v. Collins (June 6, 2022), No. 21-1935

<http://www2.ca3.uscourts.gov/opinarch/211935p.pdf>

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

Background

The IRS sued Defendant for unpaid civil penalties under the Bank Secrecy Act, 31 U.S.C. § 5314, arising from Defendant's years-long failure to report holdings in foreign bank accounts. It specifically sought enhanced penalties due to Defendant's "willful" failure to report. The District Court held a bench trial and affirmed both the penalty calculation and the finding of willfulness, and Defendant appealed.

Holding

The Court of Appeals affirmed the finding of willfulness. It noted that the District Court properly relied on evidence that Defendant had actual intent to deceive, including that he purposefully avoided receiving mail from the foreign accounts in the United States, and concluded that the trial court had not erred finding that Defendant had willfully failed to disclose the accounts.

Key Quote

"[Defendant] had undisclosed foreign accounts, constructive knowledge of the requirement to disclose his accounts, and falsely represented that he had no such accounts. Therefore, the District Court did not clearly err when it held that [he] willfully violated the reporting requirement[.]" (Slip op. at 9).

Third Circuit Clarifies That Sanctioned Medical Marijuana Use Violates Release Conditions

United States v. Cannon (June 8, 2022), No. 22-1569
<http://www2.ca3.uscourts.gov/opinarch/221569p.pdf>
Per Curiam decision: Krause, Restrepo, and Smith

Background

Defendant was on pretrial release subject to certain conditions. One condition was that he not violate federal, state, or local law, and another was that he not use controlled substances unless prescribed by a physician. During his release, Defendant used marijuana pursuant to his doctor's recommendation and his Pennsylvania medical marijuana card. The District Court revoked his release, finding that his use of marijuana was a violation of federal law in violation of the first release condition. Defendant appealed, arguing that his release conditions contradicted each other and that his medical use of marijuana was a physician-prescribed use of a controlled substance.

Holding

The Circuit Court affirmed the revocation of Defendant's release. The Court, resolving an inter-circuit split among the trial courts, held that use of marijuana is *always* — even where permitted under a state's legal regime — a violation of release conditions because use of marijuana is never authorized under federal law.

Key Quote

"We have not yet weighed in on this issue and so take this opportunity to hold that the use of marijuana for medical purposes, even where sanctioned by state law, remains a violation of federal law for purposes of [release conditions], and a District Court may not disregard that violation when deciding if a defendant has complied with the terms of their release." (Slip op. at 3).

Anti-Cyberstalking Law Narrowed to Avoid First Amendment Concerns

United States v. Ho Ka Terence Yung (June 13, 2022), Nos. 19-1640, 20-3448
<http://www2.ca3.uscourts.gov/opinarch/191640p.pdf>
Unanimous decision: Bibas (writing), Restrepo, and Roth

Background

Defendant felt snubbed by an alumni interviewer when he applied to law school. He retaliated by engaging in an extensive cyberstalking campaign against the interviewer and his family, which included, among other things, solicitations for surveillance and sexual violence against the family. Defendant pleaded guilty to cyberstalking, but retained the right to challenge the law on appeal as facially overbroad for infringing on protected First Amendment speech.

Holding

The Third Circuit affirmed Defendant's conviction and held the cyberstalking law was not overbroad. However, because the broadest reading of the statutory text would have criminalized protected First Amendment speech, the Court narrowed the law to avoid constitutional concerns. Specifically, it reasoned that the law's prohibition against cyberstalking conducted with the intent to "harass" or "intimidate" must be limited to true threats that put a victim in fear of death or bodily injury.

Key Quote

"To 'intimidate,' we hold, a defendant must put the victim in fear of death or bodily injury. And to 'harass,' he must distress the victim by threatening, intimidating, or the like. That reading limits intent to harass to criminal harassment, which is unprotected because it constitutes true threats or speech that is integral to proscribable criminal conduct." (Slip op. at 15-16 (quotation omitted)).

Third Circuit Clarifies Definition of Leader/Organizer for Sentencing Enhancement

United States v. Adair (June 30, 2022), No. 20-1463
<http://www2.ca3.uscourts.gov/opinarch/201463p.pdf>
Unanimous decision: Phipps (writing), Smith, and Roth

Background

Defendant operated a prescription opiate distribution network, involving multiple suppliers of the drugs. She pleaded guilty to multiple felony counts and, at her sentencing the District Court applied a the four-point enhancement for being an organizer or leader of extensive criminal activity pursuant to U.S.S.G. § 3B1.1(a) when calculating her Sentencing Guidelines range. On appeal, Defendant challenged, among other things, the applicability of this enhancement.

Holding

The Third Circuit affirmed Defendant's sentence. Applying the framework from *United States v. Nasir* (CA3 2021), the Court determined that the terms "organizer" and "leader" had definite meanings and, consequently, the Sentencing Commission's interpretive commentary to Guideline 3B1.1 did not apply. The Court then concluded that Defendant met the definitive definitions of both "leader" and "organizer," and thus that the enhancement was properly applied.

Key Quote

"As used in § 3B1.1, an 'organizer' is a person who generates a coherent functional structure for coordinated criminal activity. Similarly, in § 3B1.1, a 'leader' is a person with high-level directive power or influence over criminal activity. Without a genuine ambiguity, the multi-factor test in the commentary ... is not controlling." (Slip op. at 18).

Non-Precedential Opinions of Note

United States v. Calloway (April 1, 2022), No. 20-1124

<http://www2.ca3.uscourts.gov/opinarch/201124np.pdf>

Defendant, who was convicted after a jury trial of murder in relation to drug trafficking, argued on

appeal that prosecutors had knowingly introduced false testimony before the grand jury that indicted him. The Court affirmed, reaffirming the principle that a petit jury's guilty verdict "renders harmless [any] such [prosecutorial] misconduct," because a grand jury's function is only to determine whether probable cause exists for an indictment, whereas a petit jury's verdict is a finding that a defendant is in fact guilty beyond a reasonable doubt. (Slip op. at 3).

United States v. Chiccini (April 6, 2022), No. 21-1036

<http://www2.ca3.uscourts.gov/opinarch/211036np.pdf>

In a challenge to Defendant's sentence for possession and receipt of child pornography, the Court determined that it was plain error to apply sentencing enhancement for "transportation" of materials where Defendant uploaded files to a personal cloud storage system.

United States v. Bergin (April 6, 2022), No. 20-2828

<https://www2.ca3.uscourts.gov/opinarch/202828np.pdf>

Defendant, a former lawyer who was convicted of conspiring to kill adverse witnesses and operating a drug-trafficking business, unsuccessfully sought a new trial on the basis of new witness testimony that would have impeached a key witness against him. The Court affirmed, concluding that the proffered evidence was unlikely to have resulted in acquittal.

United States v. Forde (June 1, 2022), No. 19-3654

<https://www2.ca3.uscourts.gov/opinarch/193654np.pdf>

The Court reversed the denial of Defendant's motion to suppress certain statements made to border patrol agents. Defendant had marijuana in his checked bag, which was detected by agents before he claimed it at the baggage claim. The agents had, therefore, resolved the question of admissibility before taking Defendant to secondary inspection for interrogation, and consequently the border search exception did not apply. Accordingly, the Court held, Defendant's un-Mirandized, custodial statements in interrogation must be suppressed.
