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 Upholds Secrecy Of Grand Jury Subpoena Over First Amendment Challenge

In re: Application of Subpoena 2018R00776 (January 10, 2020), No. 19-3124

http://www2.ca3.uscourts.gov/opinarch/193124p2.pdf

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

Background

A Company received a grand jury subpoena under the Stored Communications Act ("SCA") seeking information about an employee of one of the Company's customers, who was the target of a criminal investigation. The Company also received non-disclosure orders ("NDOs") pursuant to the SCA prohibiting it from telling anyone about the subpoena. The Company complied with the subpoena but challenged the NDOs, arguing they were unconstitutional infringements on its First Amendment rights.

Holding

The Court affirmed the constitutionality of the NDOs. The Court subjected the orders to strict scrutiny because they were content-based prior restraints on speech. However, it found that the government's compelling interest in maintaining grand jury secrecy was sufficient to withstand strict scrutiny, and therefore the orders did not violate the First Amendment.

Key Quote

"Our conclusion ... is that the governmental interest in maintaining grand jury secrecy is sufficiently strong for the NDOs to withstand strict scrutiny." (Slip. op. at 2.)

Knowledge Of Age Not An Element Of Child Prostitution Or Pornography Offenses

United States v. Tyson (January 14, 2020), No. 18-3804

http://www2.ca3.uscourts.gov/opinarch/183804p.pdf

Unanimous decision: Restrepo (writing), Chagares, and Jordan

Background

Defendant was indicted for transportation of a minor to engage in prostitution and the production of child pornography. The district court granted the Government's motion *in limine* to exclude any evidence that Defendant was unaware the victim was a minor. Defendant then pled guilty while reserving the right to appeal the *in limine* order.

Holding

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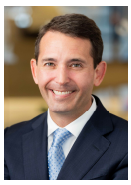

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Related Practice Areas
- White Collar Defense & Investigations

The Third Circuit affirmed the exclusion of the mistake-of-age evidence. The Court joined other circuits to consider the question to hold that knowledge of age is not an element of either the child prostitution or pornography statues. It further held that neither statute makes mistake-of-age an affirmative defense. Accordingly, the trial court appropriately excluded any evidence relating to knowledge of age.

Key Quote

"We ... join the overwhelming majority of our sister circuits holding that mistake of age is not a defense and knowledge of the victim's age is not required for a conviction under either [18 U.S.C.] § 2423(a) or § 2251(a)." (Slip. op. at 5-6.)

Third Circuit Sides With Majority In Split Over Personal Jurisdiction In Civil RICO Actions

Laurel Gardens, LLC v. McKenna (January 14, 2020), No. 18-3758

http://www2.ca3.uscourts.gov/opinarch/183758p.pdf

Unanimous decision: Cowen (writing), Greenaway, Jr., and Porter

Background

Plaintiffs brought a civil action in federal court in Pennsylvania against more than thirty defendants, alleging a wide-ranging conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). While most of these defendants resided or operated in Pennsylvania, the Isken Defendants were exclusively Delaware residents. The district court dismissed the claims against the Isken Defendants for lack of personal jurisdiction. Plaintiffs appealed, arguing that RICO authorized the district court to exercise nationwide jurisdiction.

Holding

The Third Circuit reversed, holding that RICO gave the district court personal jurisdiction over the Isken Defendants. The Court adopted the majority view of which RICO subsection controlled the Act's personal jurisdiction test, holding that RICO granted nationwide jurisdiction over "other" defendants only if: (a) at least one defendant first satisfies the traditional "minimum contacts" test for personal jurisdiction in the forum, and (b) the "ends of justice" require nationwide jurisdiction. It found the district court had nationwide jurisdiction here because (1) personal jurisdiction already existed over the many Pennsylvania defendants, and (2) the ends of justice required the exercise of jurisdiction over the Isken Defendants.

Key Quote

"Accordingly, '[w]hen a civil RICO action is brought in a district court where personal jurisdiction can be established over at least one defendant, summonses can be served nationwide on other defendants if required by the ends of justice.'" (Slip. op. at 28 (quotation omitted).)

Special Assessments Under Anti-Trafficking Law Assessed For Each Count of Conviction

United States v. Johnman (January 28, 2020), No. 18-2048

http://www2.ca3.uscourts.gov/opinarch/182048p.pdf

Unanimous decision: Matey (writing), Krause, and Rendell

Background

Defendant was sentenced under the Justice for Victims of Trafficking Act ("JVTA"), 18 U.S.C. § 3014, *et seq.*, after pleading guilty to a three-count indictment charging child exploitation offenses. The JVTA imposes a $5,000 special assessment on anyone "convicted of an offense" under certain

statutes. The district court therefore included $15,000 in special assessments in Defendant's sentence: $5,000 for each of his three counts of conviction. Defendant appealed, arguing that the JVTA should be read to impose the $5,000 special assessment for each case, rather than each discrete offense in a single prosecution.

Holding

The Court affirmed the sentence. It reasoned that the statute's language — "convicted of *an offense*" — is most naturally read to refer to each discrete offense. It also noted that the JVTA uses the same language as other special assessment statutes that the Third Circuit and other courts had interpreted to apply on a per offense basis. Finally, it rejected Defendant's argument that the Rule of Lenity favored his interpretation, concluding that the JVTA's language was not ambiguous, and therefore did not implicate the Rule.

Key Quote

"The $5,000 assessment under the Justice for Victims of Trafficking Act applies to each qualifying count of conviction. We will thus affirm the sentence imposed by the District Court." (Slip. op. at 16.)

Courts Retain Jurisdiction Over Collateral Attacks To Certain Deportation Orders

United States v. Dohou (January 28, 2020), No. 19-1481

http://www2.ca3.uscourts.gov/opinarch/191481p.pdf

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

Background

An immigration judge ordered Defendant, a legal permanent resident, be removed after he was convicted of a drug trafficking felony. He did not appeal the removal order, but resisted when agents tried to take him to the airport to remove him. Defendant was subsequently criminally charged with hindering removal. Defendant sought to collaterally challenge his removal order in his criminal prosecution. The district judge determined it lacked jurisdiction to hear Defendant's collateral challenge, and Defendant appealed.

Holding

The Third Circuit reversed, holding that the district court did have jurisdiction to resolve Defendant's collateral challenge. The Court analyzed two potential jurisdictional bars in the controlling statute: (1) a prohibition on collateral challenges to removal orders that were "judicially decided," and (2) a provision stripping the courts' jurisdiction to review removal orders resulting from drug offenses or aggravated felonies. First, the Court held that Defendant's removal order was not "judicially decided" because he did not exercise his right to appeal his original order to an Article III court. Second, the Court interpreted the jurisdiction-stripping provision to apply only to direct review of removal orders but not collateral challenges.

Key Quote

"We hold that a removal order that was never in fact reviewed by an Article III judge remains subject to collateral attack in a hindering-removal prosecution based on that order." (Slip. op. at 3.)

Third Circuit Adopts Standard For Affirmative Defense To Securities Violations

United States v. Fishoff (January 30, 2020), No. 18-3549

http://www2.ca3.uscourts.gov/opinarch/183549p.pdf

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

Background

Defendant pled guilty to securities fraud arising from his role in an insider trading conspiracy. Although Defendant had no formal training or licensing to relating to securities, he founded his own investment firm and had been trading securities for roughly thirty years. At sentencing, he sought to raise the "non-imprisonment" defense, whereby a person who lacks actual knowledge of the securities rule or regulation they violated is not subject to imprisonment. The district court did not apply the defense, finding that Defendant failed to present evidence he was unaware of the applicable SEC rule.

Holding

The Court affirmed Defendant's sentence. The Court held for the first time that defendants raising the non-imprisonment defense must show by a preponderance of the evidence that they did not know the substance of the rule they violated. In this case, the Court concluded the district court did not clearly err in finding that Defendant failed to meet his burden in light of his long experience as a trader, regardless of his lack of formal training.

Key Quote

"[A] defendant who wishes to qualify for the non-imprisonment defense must demonstrate, by a preponderance of the evidence, that he did not know the substance of the rule that he violated. It is immaterial that a defendant does not know the exact number of the rule, and immaterial that the defendant did not specifically intend to violate the rule." (Slip. op. at 18.)

Contempt Imprisonment For Refusal To Unlock Devices Capped at 18 Months

United States v. Apple MacPro Computer (February 6, 2020), No. 17-3205

http://www2.ca3.uscourts.gov/opinarch/173205p.pdf

Majority decision: Fuentes (writing), McKee

Concurrence: McKee

Dissent: Roth

Background

Defendant was the target of a child pornography investigation. His phones, computers, and external hard drives were seized during a search warrant. Defendant was ordered by a magistrate judge to unencrypt the devices. Although Defendant unlocked his phone, he failed to unlock the hard drives after several failed attempts. Defendant maintained that he did not remember the passwords to the drives, but the magistrate concluded Defendant did remember but was refusing. The magistrate held Defendant in civil contempt beginning in September 2015. Defendant challenged his confinement based on 28 U.S.C § 1826, which imposes an 18-month maximum on terms of confinement for civil contempt.

Holding

The 18-month maximum applies to Defendant. Defendant is a "witness" within the meaning of § 1826 because producing the devices, and thereby implicitly acknowledging possession thereof, is a testimonial act. Moreover, § 1826 applies to any material witness, even those that are also the target of the related investigation.

Key Quote

"[W]e hold that § 1826 applies to Rawls because he is a 'witness in [a] proceeding before or ancillary to any court or grand jury of the United States' presently confined for his refusal to 'comply with an order of the court to testify or provide other information': accordingly, § 1826 limits the duration of his confinement to 18 months." (Slip. op. at 15.)

Concurrence

Judge McKee joined the majority in full, but separately concurred to provide "additional comment" on the Government's conduct. He noted that the Government already had more than sufficient evidence to prosecute Defendant for child-pornography offenses and, in light of that, found no justification for insisting Defendant be first detained for contempt "before his all but certain prosecution." (Judge McKee concurrence at 1-2.)

Dissent

Judge Roth dissented, focusing on § 1826's language concerning "'any proceeding before or ancillary to any court or grand jury'" and arguing that, because "the investigation here is a preliminary one," there was as yet no "proceeding" sufficient to trigger the statute. (Judge Roth dissent at 1.)

Court Overturns Murder Conviction Based On Improperly Admitted Co-Defendant Confession

Johnson v. Superintendent Fayette SCI (February 7, 2020), No. 18-2423

http://www2.ca3.uscourts.gov/opinarch/182423p.pdf

Unanimous decision: Rendell (writing), Krause, and Matey

Background

A Pennsylvania jury convicted Defendant of murder. Wright, a co-defendant, confessed to his involvement in the shooting and named Defendant in the confession. At trial, Wright's confession was redacted to refer to Defendant only as "the other guy," and the judge instructed the jury not to consider Wright's confession when evaluating the charges against Defendant. During the trial, however, both the prosecutor and Wright's counsel accidentally named Defendant as the person referred to in Wright's confession. Defendant challenged the admission of Wright's statement as violation of his Sixth Amendment rights under *Bruton v. United States* (U.S. 1968) in both the state system and a federal petition for *habeas corpus*. The Pennsylvania court upheld his conviction, but the federal district court found Defendant's Sixth Amendment rights were violated. It nonetheless denied *habeas* relief, concluding that the *Bruton* error was harmless.

Holding

The Third Circuit reversed and granted Defendant's petition for *habeas corpus*. It reaffirmed that mere substitution of a neutral pronoun like "the other guy" is insufficient to protect defendants' Sixth Amendment rights in every case. Rather, courts must examine the statement in context of the entire trial. Here, the inadvertent references to Defendant by name, in combination with all the other circumstances of the case, were sufficient to create a *Bruton* error. The Court also reviewed the full record and concluded that the other evidence against Defendant was not overwhelming, and that consequently the *Bruton* error was not harmless.

Key Quote

"While using a neutral pronoun may satisfy *Bruton* in some circumstances, we have clearly stated that courts should not apply a bright-line rule that such use will never violate *Bruton*. *Bruton* and its progeny require courts to take a holistic approach when considering redacted confessions, by viewing the redaction in the context of the entire record." (Slip. op. at 6-7.)

Third Circuit Clarifies Fourth Amendment's Border Exception For Customs Searches

United States v. Baxter (February 21, 2020), No. 18-3613

http://www2.ca3.uscourts.gov/opinarch/183613p.pdf

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

Background

Defendant was charged with illegally transporting firearms after mailing guns from South Carolina to the U.S. Virgin Islands. Customs agents searched Defendant's packages without a warrant when they arrived in the Virgin Islands. Defendant moved to suppress the guns, arguing that the warrantless searches violated his Fourth Amendment rights. The district court granted Defendant's suppression motion and the Government appealed.

Holding

The Court reversed, holding that the warrantless search was reasonable and did not violate the Fourth Amendment. It reaffirmed the "border exception" to the Fourth Amendment's general requirements, under which searches at an international border or its functional equivalent are reasonable even without probable cause or a warrant. It went on to clarify that (a) the exception applies to the customs border between the United States and the U.S. Virgin Islands, even though it is not an international boundary, and (b) that the border exception applies regardless of whether the package was entering or leaving the mainland United States.

Key Quote

"We conclude that this directional distinction should have made no material difference to the District Court's analysis. The border-search exception applies regardless of the direction of a border crossing. " (Slip. op. at 18.)

'Subjective' Medical Opinions May Be False For Purposes of False Claims Act Liability

United States ex rel. Druding v. Care Alternatives (March 4, 2020), No. 18-3298

http://www2.ca3.uscourts.gov/opinarch/183298p.pdf

Unanimous decision: Greenaway Jr. (writing), Hardiman, and Bibas

Background

Plaintiffs brought a *qui tam* action under the False Claims Act ("FCA") against Defendant, a hospice care provider. Plaintiffs alleged that Defendant falsely certified that patients were eligible for hospice care under controlling Medicare regulations. Plaintiffs proffered a medical expert, who opined that the medical records for a number of patients did not support a certification of hospice eligibility. Defendant's expert disagreed. The district court granted summary judgment in favor of Defendant, holding that the FCA requires that a claim be "objectively" false, and that a mere difference of opinion between experts about a clinical judgment, without more, is insufficient for FCA liability.

Holding

The Third Circuit reversed summary judgment, finding that the Plaintiffs' expert created a triable issue of fact as to the element of falsity. It rejected the district court's "objective" standard, holding that opinions can be false for the purposes of the FCA. It discussed the distinction between the falsity and knowledge elements of the FCA, emphasizing that the requirement that a claim be knowingly false protects good-faith differences of opinion from liability. The Court also reaffirmed that claims can be false for FCA purposes based on non-compliance with government regulations, regardless of their "objective" falsity.

Key Quote

"[R]egarding FCA falsity, we reject the objective falsehood standard. Instead, we hold that for purposes of FCA falsity, a claim may be 'false' under a theory of legal falsity, where it fails to comply with statutory and regulatory requirements. We also find that a physician's judgment may be scrutinized and considered 'false.'" (Slip. op. at 23.)

Court Defines Class Of Loitering Offenses Excluded From Calculating Criminal History

United States v. James (March 9, 2020), No. 19-1480

http://www2.ca3.uscourts.gov/opinarch/191480p.pdf

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

Background

Defendant pled guilty to being a felon in possession of a firearm. At sentencing, Defendant disputed the calculation of his criminal history score, which included two points for a Pennsylvania conviction for loitering. Defendant argued that Pennsylvania's loitering statute fell within the category of loitering offense that are excludable for criminal history purposes under the federal Sentencing Guidelines. The district court disagreed and sentenced Defendant at the top of his resulting Guidelines range. Defendant appealed his sentence.

Holding

The Court affirmed, holding that Defendant's Pennsylvania loitering conviction was not excludable. The Court took the opportunity to define the class of loitering offenses that are excludable under the Sentencing Guidelines. It distinguished between loitering *simpliciter* and loitering "plus," holding that only the former is excludable. It defined loitering *simpliciter* as any loitering offense that does not require a purpose to act unlawfully. Because Pennsylvania courts have interpreted the loitering statute to include a purpose to engage in unlawful conduct as an element, the Court held that it is not a form of loitering *simpliciter*.

Key Quote

"We conclude that loitering *simpliciter* under the Guidelines encompasses all those offenses that do not require, either explicitly or by judicial interpretation, a purpose to engage in some type of unlawful conduct. On this understanding, we hold that the Pennsylvania law neither is a form of loitering *simpliciter* nor, as applied here, is sufficiently 'similar to' the offenses that constitute that category." (Slip. op. at 4.)

Non-Precedential Opinions of Note

Orie Melvin v. District Attorney Allegheny County (January 14, 2020), No. 17-2143

http://www2.ca3.uscourts.gov/opinarch/172143np.pdf

Defendant, a former Pennsylvania Supreme Court Justice, challenged her state convictions for misapplication of government property and conspiracy in a federal *habeas corpus* petition. Defendant's convictions arose from misusing her official staff and resources for her political campaigns. Defendant argued that her criminal convictions violated due process because they were based on mere violations of judicial workplace rules. The Third Circuit rejected this argument and affirmed Defendant's convictions, holding that her conduct violated criminal law, independent of whether it also violated judicial rules.

United States v. Brooks (January 15, 2020), No. 17-3764

http://www2.ca3.uscourts.gov/opinarch/173764np.pdf

The Third Circuit dismissed Defendant's appeal of his sentence for lack of jurisdiction because the sentencing court appropriately understood and exercised its discretionary authority to deny Defendant's request for a downward departure from the U.S. Sentencing Guidelines. It noted that the Court of Appeals only has jurisdiction to review a district court's understanding of the law

where it denies a request for a departure as a matter of law.

Schuchardt v. President of the United States of America (March 2, 2020), No. 19-1366

http://www2.ca3.uscourts.gov/opinarch/191366np.pdf

The Third Circuit affirmed the dismissal of Plaintiff's civil-rights suit for lack of factual standing. Plaintiff alleged that government surveillance programs involved the collection of email traffic of U.S. persons, and that this surveillance violated his Fourth Amendment rights. The Court affirmed the district court's holding that Plaintiff bore the burden of demonstrating his standing to bring suit, and upheld the lower court's finding that he had failed to meet that burden.

"Bonus" - Eastern District of Pennsylvania Decision

United States v. Rodriguez (April 1, 2020) (Brody, J.), No. 2:03-cr-0271-AB-1

The District Court interpreted 2018's First Step Act to provide authority for courts to decide whether "extraordinary and compelling reasons" exist to justify a "compassionate release" under 18 U.S.C. § 3582(c)(1)(A). The court exercised its authority and released Defendant early in light of the COVID-19 pandemic. The Court reasoned that Defendant's medical conditions placed him at elevated risk, there was already an outbreak in the prison in which he was housed, and Defendant had shown significant rehabilitation and posed no danger to the community.