

Notice of Appeal

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

Precedential Opinions of Note

Court Rejects Potential Conflict-Of-Interest in Violent-Crime Case

United States v. Savage, et al. (October 24, 2023) No. 14-1493
<https://www2.ca3.uscourts.gov/opinarch/141493p.pdf>
 Unanimous decision: Jordan (writing), Fuentes, Smith

Background

Defendant and his co-conspirators firebombed an informant's house and killed several individuals. Six weeks into their trial on related charges, the Government disclosed that one of the defense attorneys previously worked as a prosecutor in the Philadelphia District Attorney's Office. During his employment there, counsel was assigned to prosecute a prior murder, which served as a predicate offense to a RICO conspiracy charge in the instant trial. The district court held an evidentiary hearing on the potential conflict after the trial concluded with a guilty verdict against the attorney's client. Ultimately, the district court determined that the potential conflict did not prejudice the Defendant and rejected a number of other appellate issues raised after trial.

Holding

The Court affirmed. On the conflict issue, it held that the district court did not err in holding a conflicts hearing after the jury returned a verdict. The issue arose well into trial and after considerable resources were expended. On the merits, the Court credited defense counsel's testimony that he had not worked on the prior murder case in substance, as it was reassigned days after he received it. Moreover, defense counsel had opposed his client's motion for a mistrial based on the potential conflict. But that act alone did not constitute the requisite prejudice. Rather, Defendant failed to prove that his counsel had an actual contrasting interest on a material factual or legal issue.

Key Quote

"Phillips's opposition to Kidada's mistrial motion falls short of evincing an actual conflict. First, Phillips explained at the hearing that he opposed Kidada's motion because he felt compelled to correct a factual misrepresentation, namely, that he had obtained confidential information about the Lassiter matter while serving as an assistant district attorney, when in fact he had not. It was fully proper for Phillips to endeavor to correct a factual misrepresentation that could harm his professional reputation." (Slip Op. at 13.)

Third Circuit Upholds 'Negligible' Extension of Traffic Stop for Criminal History Check

United States v. Hunter (December 5, 2023), No. 21-3316
<https://www2.ca3.uscourts.gov/opinarch/213316p.pdf>
 Unanimous decision: Restrepo (writing), McKee, Smith
 Concurrence: McKee



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Related Practice Areas

- White Collar Defense & Investigations

Background

A police officer stopped Defendant and his passenger for traffic infractions. The officer, who was alone, ran an additional criminal-history check of both occupants of the car that extended the stop by two minutes after the “mission” of the stop was complete. Because the check revealed that Defendant had an extensive history of firearms offenses, the officer ordered Defendant out of the car, frisked him, and found a firearm in Defendant’s waistband. After being indicted on gun charges, Defendant successfully moved to suppress the seizure of the weapon. The District Court relied on the officer’s testimony about his subjective intent to conclude that the criminal history check was unrelated to the stop, impermissibly prolonged it, and therefore granted the motion. The government challenged the ruling, arguing that the trial court should have applied an objective standard, and that the history check was related to the officer’s legitimate concern for his safety.

Holding

The Third Circuit reversed. It agreed with the government that the proper analysis is an objective one, and that officer safety is a legitimate, objectively reasonable concern that can support a criminal history check. It emphasized that this check, which extended the stop by two minutes when a sole officer was outnumbered two-to-one, was negligibly burdensome, and therefore not unrelated to the mission of the stop. But, it acknowledged that a record check may become unreasonable if, under the circumstances, it is more than negligibly burdensome.

Key Quote

“We therefore hold that this criminal record check — which lasted approximately two minutes and was supported by objectively reasonable safety concerns — was a negligibly burdensome officer safety precaution that falls squarely within the confines of the stop’s mission.” (Slip Op. at 10.)

Concurrence

Judge McKee wrote separately to emphasize the racial disparities in traffic stops, note the limitations in existing Fourth Amendment jurisprudence to address that disparate treatment, and to call for “refinement” of that jurisprudence to address those concerns “in an appropriate case.” (Concurrence at 6.)

Court Affirms Application of Serious-Bodily-Injury Sentencing Enhancement

United States v. Caraballo (December 8, 2023), No. 22-1976

<https://www2.ca3.uscourts.gov/opinarch/221976p.pdf>

Unanimous decision: Montgomery-Reeves (writing), Shwartz, Roth

Background

Defendant assaulted a fellow inmate while incarcerated. The inmate suffered stab wounds and a broken jaw from the attack. Defendant pleaded guilty to assault with a dangerous weapon and related charges. At sentencing, the district court applied a five-level sentencing enhancement under U.S.S.G. § 2A2.2(b)(3)(B) because the victim sustained “serious bodily injury.”

Holding

The Court affirmed after applying the test set forth in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). First, the Court determined that “serious bodily injury” was open to multiple interpretations based on the text, structure, and history of the term. Thus, the term was genuinely ambiguous. Next, because the term was ambiguous, the Court turned to the Sentencing Commission’s interpretation of the phrase in its Commentary. Finding that that the Commission’s interpretation was reasonable and due controlling weight, the Court held that the district court did not err in applying the sentencing enhancement.

Key Quote

“Because the phrase serious bodily injury as used in the relevant guideline is ambiguous, we turn to the Sentencing Commission’s interpretation of the phrase in the commentary to the Guidelines.

And we hold that the reasonableness, character, and context of the Sentencing Commission's interpretation entitles it to controlling weight." (Slip Op. at 2.)

Court Finds Error in Excluding Government Evidence without Examination

United States v. Long (February 8, 2024), No. 22-3033

<https://www2.ca3.uscourts.gov/opinarch/223033p.pdf>

Unanimous decision: Hardiman (writing), Freeman, Montgomery-Reeves

Background

Law enforcement officers received a tip that Defendant had downloaded child pornography. At trial for related offenses, the Government proposed the admission of a sample of the pornographic materials. Instead, the trial court ordered a written stipulation from the parties summarizing the materials, after Defendant objected to the prejudicial nature of the sampling. The court ultimately excluded from trial the proposed sample (a video and photographs) without examining the exhibits.

Holding

The Court reversed. In part, the Court determined that the Government typically elects which evidence it uses to prove its case. Moreover, the Court determined that, by failing to review the proposed video footage and photographs, the trial court failed to conduct a sufficient analysis of whether the risks of unfair prejudice outweighed the probative value of the proffered evidence, under Federal Rule of Evidence 403.

Key Quote

"[W]ithout viewing the exhibits, it is far from 'obvious' that the risk of unfair prejudice from the disturbing nature of the exhibits substantially outweighs their probative value as to Long's knowledge." (Slip Op. at 16.)

District Attorney of Philadelphia Ordered to Apologize for Misconduct

Wharton v. Superintendent Graterford SCI (March 8, 2024), No. 22-2839

<https://www2.ca3.uscourts.gov/opinarch/222839p.pdf>

Unanimous decision: Bibas (writing), Hardiman, Phipps

Background

A district court ordered the Philadelphia District Attorney's Office to investigate Defendant's habeas claim before agreeing to vacate his death sentence. It failed to do so. Moreover, it omitted key facts related to the Defendant's habeas claim — specifically, as to Defendant's dangerousness if spared from the death penalty. The Office also misrepresented that it had communicated with the victim's family members. The district court determined that the Office had engaged in misconduct and ordered an apology from DA Larry Krasner.

Holding

The Court affirmed and found that the sanctions were appropriate under Federal Rule of Civil Procedure 11. The DA's Office had failed to conduct a reasonable inquiry prior to conceding the death sentence. Moreover, the Office violated Pennsylvania's ethical rule requiring candor to the court by attorneys.

Key Quote

"Lawyers cannot avoid sanctions by unreasonably failing to investigate whether their factual contentions have support. ... (That is doubly true if they are aware of facts that could undermine their contentions. []) Nor can lawyers avoid sanctions by directing a subordinate to file a pleading that will violate Rule 11(b), especially if they work for a 'governmental agenc[y]' ... that frequently impose[s] substantial restrictions on the discretion of individual attorneys.' ... In other words,

courts can sanction lawyers for what they should have known, not just what they knew.” (Slip Op. at 13.)

Third Circuit Strikes Down IRS Attempt to Apply Tax Refunds to Disputed Tax Liability

Zuch v. Commissioner of Internal Revenue (March 22, 2024), No. 22-2244

<https://www2.ca3.uscourts.gov/opinarch/222244p.pdf>

Unanimous decision: Jordan (writing), Krause, Bibas

Background

A taxpayer challenged a tax assessment in a Tax Court collection proceeding. During the years of litigation over the dispute, the taxpayer continued to file returns that included tax refunds. The IRS retained these refunds, however, instead crediting them against the debt it maintained she owed on the disputed assessment. Once there was no further liability, the IRS successfully moved to dismiss the Tax Court proceeding as moot, because there was no more debt to collect.

Holding

The Third Circuit reversed. Relying on the common law of offsets, which it held was incorporated into the relevant Internal Revenue Code provision, the Court held that the IRS cannot unilaterally use an undisputed debt owed by the government, like a tax refund, to offset a disputed debt allegedly owed by a taxpayer. The Court reasoned that the IRS could not retain the taxpayer’s refund to satisfy the taxpayer’s liability and moot the Tax Court proceeding because the whole question at issue in the proceeding was whether the taxpayer had any liability in the first place.

Key Quote

“The dispute comes down to this: whether, in the midst of litigation over a contested tax liability, the IRS is free to deprive the Tax Court of jurisdiction by the expedient of taking the taxpayer’s tax refunds and applying them to that liability. The answer is no. The IRS’s arrogation to itself of the power to eliminate pre-deprivation judicial review of liability by seizing a taxpayer’s money to cover a disputed debt is not supported by relevant statute, common law (incorporated into statute), or mootness principles.” (Slip Op. at 16-17.)

Court Holds Armed Bank Robbery By Use of Threat or Force is Crime of Violence

United States v. Jordan (March 25, 2024), No. 22-2153

<https://www2.ca3.uscourts.gov/opinarch/222153p.pdf>

Unanimous decision: Bibas (writing), Jordan, Porter

Background

Defendant pleaded guilty to several counts of bank robbery and using a firearm “during and in relation to any crime of violence.” He later sought post-conviction relief, arguing that, because the federal bank robbery statute he was convicted under could be committed recklessly, it did not qualify as a “crime of violence” under *Borden v. United States* (U.S. 2021). The District Court denied post-conviction relief.

Holding

The Third Circuit affirmed. Applying the modified categorical approach, the Court examined the federal bank robbery statute to determine whether the elements of that offense necessarily included the use of force. The Court reasoned that the robbery statute incorporated several potential predicate offenses, only one of which charged Defendant; because the underlying predicate offense did require the use of force, the Court held that the version of armed robbery to which Defendant pleaded guilty constituted a “crime of violence.”

Key Quote

“Whenever a federal crime is predicated on committing, attempting to commit, or conspiring to commit another crime, the elements of the particular predicate crime at issue are elements of the nested crime too.” (Slip Op. at 16.)

Amendment Note

The Court superseded its original opinion in this case on March 25, 2024, but did not alter the critical holdings or the disposition of the appeal. Its order amending its opinion can be [found here](#).

Court Affirms Interstate Threats Conviction Over Constitutional Challenge

United States v. Davitashvili (April 1, 2024), No. 23-1024

<https://www2.ca3.uscourts.gov/opinarch/231024p.pdf>

Unanimous decision: Hardiman (writing), Scirica, Smith

Background

A jury convicted Defendant of transmitting threats to injure another person for threatening messages he sent his then-spouse during their divorce. Specifically, he sent messages to the victim telling her to choose between “coming clean” and a “wheelchair,” that he was “not going to leave DNA,” and that he would “not just depart this life” but would “take someone with me,” ultimately telling her that he would take “at least five” or “a minimum [of] 15 of you” with him. Defendant challenged his conviction, arguing that the First Amendment protected his messages because they did not fall within the constitutional definition of true threats.

Holding

The Third Circuit affirmed Defendant’s conviction. It assumed for the purpose of its decision that a true threat must target a particular person or group of people to be outside the protection of the First Amendment. It held, however, that in the context of all the evidence at trial, the jury could conclude that Defendant’s threats referring to others beyond his ex-wife targeted her co-workers, family members, and their mutual friends. Because those threats targeted particular people, it reasoned, the Defendant’s messages were true threats and not constitutionally protected speech.

Key Quote

“[A] communication must threaten ‘a particular individual or group of individuals’ to qualify as an unprotected true threat. Citing this particularization requirement, [Defendant] challenges his conviction on two bases. He argues that: (1) his threat to kill ‘others’ did not target a particular individual or group of individuals; and (2) the jury was instructed it could convict without finding that he threatened a particular individual or group of individuals. We disagree with both arguments and hold that there was no error under the Free Speech Clause of the First Amendment.” (Slip Op. at 10-11.)

Updated Opinion

United States v. Kousisis

(September 22, 2023) 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 [\[hyperlink:](#)

[https://www.cozen.com/news-resources/publications/2023/notice-of-appeal-summer-2023\]](https://www.cozen.com/news-resources/publications/2023/notice-of-appeal-summer-2023)

Non-Precedential Opinions of Note

United States v. Warren (December 4, 2023), No. 23-2119

<https://www2.ca3.uscourts.gov/opinarch/232119np.pdf>

Defendant pleaded guilty to violating the terms of his supervised release. As part of a plea agreement, the Government promised to recommend a sentence of five months incarceration, at the low end of the applicable Sentencing Guidelines range. The Court vacated the sentence and remanded after the Government failed to adhere to its promised recommendation at sentencing.

United States v. Johnson (February 14, 2024), No. 22-2845

<https://www2.ca3.uscourts.gov/opinarch/222845np.pdf>

The Court affirmed admission of portions of Defendant's rap music video in his trial for gun and drug charges. At trial, the district court had excluded references in the footage to affinity for firearms. But the district court admitted lyrical references to the crimes charged (that Defendant possessed drugs and a firearm magazine). Moreover, the video was uploaded to the Internet in temporal proximity to the commission of the offenses.

United States v. Robinson (March 8, 2024), No. 22-2795

<https://www2.ca3.uscourts.gov/opinarch/222795np.pdf>

A jury convicted Defendant of sex trafficking for his role as a lookout, recruiter, and reluctant participant in a forced prostitution ring operated by a co-defendant. The Third Circuit rejected his challenges to his conviction and sentence, holding that, among other things, the lower court did not err by denying his request to sever his trial from his co-defendant's.
