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"The Lawyer's Friend"

FEDERAL CRIMINAL LAW UPDATE:
A Newsletter of recent notable Supreme Court and Fifth Circuit Cases

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SEARCH AND SEIZURE:

Officers cannot prolong a traffic stop to perform a drug-sniffing dog search

Rodriguez v. United States, SCOTUS, April 21, 2015

- Rodriguez was stopped for a traffic violation. After giving Rodriguez a warning ticket, the officer asked for permission to walk his dog around the car. Rodriguez refused. The officer, nevertheless, ordered Rodriguez from the car and walked his dog which led to an alert from the dog and a search that uncovered drugs. Only 7-8 minutes elapsed from the time the warning ticket was issued to the time the dog alerted.
- The Court held that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitutional shield against unreasonable seizures. In order to prolong a stop beyond the time needed to issue a ticket, the officer must have new reasonable suspicion that another crime is occurring.
- "A seizure for a traffic violation justifies a police investigation of that violation" – not more — and "authority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been—completed."
- PRACTICE TIP: The critical question is not whether the dog sniff occurs before or after the officer issues the ticket, but whether conducting the sniff "prolongs" the stop.

The government conducts a search when it attaches a device to a person's body, without consent, to allow it to track that person's movements

Grady v. North Carolina,SCOTUS, March 30, 2015

- Grady was a convicted sex offender and after his release from prison a court ordered that he be subjected to satellite-based monitoring (by wearing a GPS bracelet) for the rest of his life, as required by a North Carolina statute.
- The Court held that a State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.
- The Court makes clear that the Fourth Amendment still applies in civil proceedings, such as the sex offender monitoring case at issue here.
- This case was remanded for a determination of whether such a search is reasonable.

Where a defendant is detained in violation of his Fourth Amendment rights, if he gives unsolicited consent to search his cell phone, evidence discovered on the phone is not suppressible as taint of the poisonous tree.

United States v. Montgomery, Docket 13-40880, January 27, 2015

- Montgomery was under arrest at his home for possession of cocaine that was discovered during an unconstitutional search of his person. While officers were searching his home for additional drugs, Montgomery repeatedly asked for his cell phone so that he could erase naked pictures that he did not want his father to see. 55 minutes after the illegal arrest, an officer brought Montgomery the phone and Montgomery (who was handcuffed) directed the officer to press a button on the phone. An image appeared on the phone that appeared to the officer to be a nude photo of an underage female. Montgomery was convicted for possessing and receiving child pornography.
- The Court held that, even if Montgomery was arrested for possession of cocaine as a result of an unconstitutional search, the photo on the cell phone was obtained via Harrison's consent and that consent dissipated the taint of a fourth amendment violation because it was an independent act of free will.
- The Court held that the intervening circumstance, that the consent to search the cell phone was unsolicited, and the reasonableness of the officers conduct (it was not "flagrant") outweigh the short period between the violation and the consent (55 minutes).
- PRACTICE TIP: To determine if the taint of a constitutional violation is dissipated, look at the amount of time since the violation, how flagrant the officer's conduct is, and whether there is an intervening circumstance.

A specific tip from the employee of a gun store regarding a possible straw purchase, combined with ATF officer's own observations justified a *Terry* stop

United States v. Ortiz, Docket 13-20564, March 18, 2015

- Ortiz purchased two .50 caliber rifles and the employee at the gun store suspected that Ortiz was conducting a straw purchase because (1) Ortiz asked how many more .50 caliber rifles the store had, (2) he paid for the first gun in cash, but insisted on going to the ATM to get cash for the second gun even though the store accepted debit cards, (3) the guns were sold without sights, and (4) only one box of ammunition was purchased. The employee notified the ATF who sent agents to the store. The agents watched Ortiz leave the store and place the guns in the trunk of his vehicle. The agents followed the vehicle and after watching the vehicle make several dangerous maneuvers designed to detect police surveillance, the agents followed the car to a gas station where the officers approached the car with their guns drawn
- The Court held that the officers had reasonable suspicion to stop the vehicle based on the gun store employee's tip and the agents own observations.

An officer's mistake of law that a turn signal statute applied to lane changes was not reasonable

United States v. Alvarado-Zarza, Docket 13-50745, April 6, 2015

- The defendant's vehicle was stopped for failing to signal 100 feet before turning and cocaine was discovered during the traffic stop. The stop was recorded on a dash cam and the defendant introduced expert evidence that he had in fact activated his turn signal more than 100 feet prior to turning. In response, the officer argued that the "turn" occurred when the defendant's car entered the turn lane, not when he it actually turned left.
- The Court held that the Texas statute does not apply to lane changes and the officers belief otherwise was not a reasonable mistake of law because the statute was not ambiguous.
- PRACTICE TIP: If an officer claims that he was mistaken about the law, that mistake must be "reasonable" which means there must be some ambiguity in the statute.

SUPPRESSION OF STATEMENTS:

In a voluntary interview (i.e. non custodial) a defendant does not have a right against self-incrimination and therefore cannot suppress statements even if the defendant asked for a lawyer during the interview

United States v. Wright, Docket 13-20533, February 3, 2015

- During the execution of a search warrant, Wright voluntarily accompanied an officer to the officer's vehicle where Wright signed a Miranda waiver and agreed to a recorded interview with the officer. During the interview, three times Wright stated, "I should probably talk to a lawyer," and the officer would change the subject, but eventually get back to the question.
- The Court held that Wright was not in custody for the purposes of Miranda's protection against self-incrimination because he was told his could leave and was not handcuffed or otherwise coerced into the conversation.

A defendant is not in custody for *Miranda* purposes when he is approached by officers at a gas station and questioned, even if the officers briefly drew their weapons and briefly handcuffed the defendant

United States v. Ortiz, Docket 13-20564, March 18, 2015

- Ortiz was suspected of a straw purchase and his vehicle was followed by ATF agents to a gas station. Agents approached Ortiz with their weapons drawn until observing that Ortiz was not armed. Ortiz was told he was not under arrest, but was not told that he was free to leave. Ortiz was questioned and made a first set of incriminating statements. Ortiz was then briefly handcuffed while he was frisked for weapons but was uncuffed after the frisk. Ortiz then agreed to sit in the back of the police vehicle to answer more questions and made a second set of incriminating statements. Ortiz never received a Miranda warning.
- The Court concluded that Ortiz was not in custody during the entire encounter and therefore no Miranda warnings were required.
- One judge dissented and would have held that the statements made in the back of the police car were made while in custody and thus should be suppressed for lack of a Miranda warning.

PLEA AGREEMENTS:

The defendant was not permitted to withdraw his guilty plea even though he submitted affidavits supporting his actual innocence and alleged that he was coerced into pleading guilty

United States v. Harrison, Docket 14-10078, January 22, 2015

- Harrison pled guilty (along with his siblings), pursuant to a written plea agreement, to conspiracy to defraud the IRS. There was a spoken agreement with the government that if all the Harrison brothers pled guilty, all would receive a Rule 11(c) plea with a binding sentence of 84 months. Harrison signed the plea agreement and factual basis and agreed under oath that he wanted to plead guilty and had not been threatened, forced, or coerced to plead guilty.
- Five weeks after he pled guilty, but prior to the preparation of the PSR, Harrison moved to withdraw his guilty plea asserting his innocence and alleging that he felt threatened and intimidated to pled guilty by "external pressure and influencing factors" and ineffective assistance of counsel. Harrison requested an evidentiary hearing and would eventually submit three statements: (1) an unsworn statement from a codefendant sibling that asserted Harrison's innocence (2) a sworn statement of an unindicted co-conspirator sibling asserting Harrison's innocence (3) Harrison's own sworn statement asserting his innocence. Harrison would explain that he only accepted the plea under duress and coercion because if he did not accept the plea his siblings would face up to 40 years instead of the 84 months pursuant to the Rule 11(c) plea. The district court denied Harrison's motion without a hearing.
- Harrison appealed the district court's refusal to hold an evidentiary hearing and denial of his motion to withdraw his guilty plea. The Court held that even if Harrison would have proven his allegations, the totality of the factors in United States v. Carr, 740 F.2d 339 (5th Cir. 1984), would not clearly justify relief. The court highlighted that an allegation of actual innocence is not enough to allow withdrawal of a guilty plea and that there was no evidence in the record establishing that there was a spoken agreement that all brothers must plead for each to receive an 84 month Rule 11(c) sentence.
- PRACTICE TIP: Make sure all agreements with the government are documented in the written plea agreement.

The government breaches a plea agreement when it uses information from the defendant's proffer to advocate for a higher sentence

United States v. Chavful, Docket 13-11173, March 20, 2015

- Harrison pled guilty with a cooperation agreement where he agreed to provide information to the government and the information was "not to be used to increase Chavful's Sentencing Guideline level or used against Chavful for further prosecution."At least three times at sentencing, the government referred to information it received from Chavful's proffer.
- The Court held that the government breached the plea agreement and remanded for sentencing in front of a new judge.

TRIAL ISSUES:

The Sarbanes-Oxley Act, which criminalizes destroying any "tangible object" to impede an investigation only applies to objects used to record or preserve information

Yates v. United States, SCOTUS, February 25, 2015

- Yates was a commercial fisherman who caught undersized red grouper in federal waters. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to throw the suspected catch back into the sea.
- Yates was charged with violating so-called Sarbanes-Oxley Act, 18 U.S.C. § 1519, which makes it a crime to destroy or conceal any "tangible object" with the intent to impede or obstruct an investigation. Sarbanes-Oxley was passed to protect investors and restore trust in financial markets following the collapse of the Enron Corporation.
- The Court held that although fish are "tangible," they do not fall within the meaning of § 1519 because fish are not an object used to record or preserve information. "It is highly improbable that Congress would have

buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record keeping." The Court alternatively held that the "rule of lenity" would dictate the same result if there is ambiguity in the statute.

- PRACTICE TIP: This is the second straight term that SCOTUS has issued a decision limiting the reach of a federal criminal statute and rejecting the government's broad application of criminal laws. See Bond v. United States.

A bank robber "forces [a] person to accompany him," for purposes of 18 U.S.C. § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance

Whitfield v. United States, SCOTUS, January 13, 2015

- After a botched bank robbery, Whitfield (who had by then discarded his gun) tried to hide from the police in the home of an elderly woman, Mary Parnell. Whitfield instructed Mrs. Parnell to go with him to another room – somewhere between four and nine feet away – where she suffered a heart attack and died. A jury convicted him of violating 18 U.S.C. § 2113(e)'s "forced accompaniment provision."
- The Court held that "to 'accompany' someone mean[s] to 'go with' him" – even if only for a relatively short distance.
- PRACTICE TIP: The Court does state that the forced accompaniment provision would not apply to truly minimal movement: "for example, the movement of a bank teller's feet when the robber grabs her arm."

When a defendant cross examined a witness at a first trial, and that witness is unavailable at the second trial, the testimony may be introduced without violating the Confrontation Clause

United States v. Richardson, Docket 13-31190, March 20, 2015

- The confidential informant (CI) testified at Richardson's first trial. That verdict was vacated on appeal because Richardson was denied the right to represent himself at the first trial. Before the second trial, the CI was murdered. The CI's testimony from the first trial was admitted against Richardson at the second trial.
- Richardson's confrontation clause rights were not violated because his attorney cross examined the (now deceased) witness at the first trial and that cross examination was introduced along with the testimony at the second trial.
- The Court held that if the defendant had an adequate opportunity for cross-examination in the first trial, then the witness's prior testimony may be introduced in the second trial (absent a finding of ineffective assistant of counsel at the first trial).

SENTENCING: NON-GUIDELINE ISSUES:

Imposing a fine on an indigent defendant is proper if the fine is based on the prospective ability of the defendant to pay the fine with prison earnings

United States v. Pacheco-Alvarado, Docket 13-31083, March 30, 2015
United States v. de la Cruz, Docket 14-30478, March 30, 2015

- In this consolidated case, both defendants were illegal aliens who had no assets and no financial ability to pay a fine. The Court imposed a fine of $2,500 and $5,000 on the defendants and set a monthly pay schedule of one-third of the prison earnings of each defendant.
- The Court held that the district court did not impermissibly encroach on the authority of the B.O.P. when setting a monthly pay schedule while the defendants were in BOP.
- The Court also held that the fines were not substantively unreasonable because a court can base a fine on a defendant's future ability to pay with prison wages.

SENTENCING: GUIDELINE ISSUES:

The two-level enhancement for a managerial role in the offense applies even if the defendant only managed property and not people

United States v. Ochoa-Gomez, Docket 13-41258, January 28, 2015

- U.S.S.G. § 3B1.1(c) provides a two-level enhancement for an aggravating role in the offense as an "organizer, leader, manager, or supervisor."
- The Court held that the two-level enhancement is appropriate if the defendant exercised control over either people or assets of the criminal enterprise and in this case the defendant exercised control over property and not people.
- PRACTICE TIP: There is a circuit split on the issue of whether control of property alone is enough to apply the § 3B1.1(c) enhancement. Judge PRADO & ELROD have expressed interest in an en banc rehearing but the lawyer in this case did not file a petition!

In order to establish the brandishing enhancement in § 2L1.1(5)(B), the defendant must brandish the weapon with intent to intimidate

United States v. Reyna-Esparza, Docket 13-41347, January 29, 2015

- U.S.S.G. § 2L1.1(5)(B) provides a four-level enhancement for brandishing or otherwise using a dangerous weapon.
- The Court held that to establish the "brandishing" enhancement, the district court must make a finding that there was an intent to intimidate with the brandishing of the weapon.

The government may not withhold the extra one-level reduction for acceptance of responsibility because the defendant contested the amount of loss in the PSR

United States v. Castillo, Docket 13-11007, February 26, 2015

- The government withheld the extra one-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 because Castillo challenged the amount of loss at sentencing.
- The government can only withhold the extra one-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 based on an interest identified in a subsection of § 3E1.1.
- The Court held that use of government resources to litigate a *sentencing* issue is not an interest identified in § 3E1.1 and therefore is not a valid basis to withhold the extra one-level reduction.
- This case was remanded to determine whether Castillo's objection to the loss amount was made in "good faith" because a frivolous objection would be a proper reason to deny the extra one-level reduction.
- One Judge dissented and would have held that no sentencing objection could be a valid basis to withhold the extra one-level reduction, regardless of whether the objection was made in good faith.

The government cannot withhold the extra point for acceptance of responsibility under § 3E1.1(b) because the defendant refused to waive his right to appeal

United States v. Torres-Perez, Docket 14-10154, January 29, 2015

In order to impose the § 3A1.4(a) enhancement for promoting a federal crime of terrorism, the district court must make factual findings about which federal crime of terrorism the underlying offense intended to promote

United States v. Fidse, Docket 13-50734, February 13, 2015

Knowing use of peer-to-peer filing software to download child pornography triggers the five level enhancement in § 2G2.2(b)(3)(B) for distribution for something of value, but not for pecuniary gain

United States v. Groce, Docket 13-50272, April 28, 2015

ILLEGAL REENTRY ENHANCEMENT CASES:

A conviction under the Texas stalking statue (TX Penal § 42.072) is not a crime of violence under U.S.S.G. § 2L2.2
United States v. Rodriguez-Rodriguez, Docket 13-51021, January 2, 2015

A conviction under the Florida drug trafficking statue (FL Stat. § 893.135(1)(f)) does not categorically constitute a drug trafficking conviction under U.S.S.G. § 2L1.2
United States v. Sarabia-Martinez, Docket 14-50064, February 20, 2015

- This Florida statute makes mere possession a trafficking offense based solely on the quantity possessed which is broader than the guideline contemplates.

A conviction under the Florida manslaughter statue (FL Stat. § 782.07) is not a crime of violence under under U.S.S.G. § 2L2.2
United States v. Garcia-Perez, Docket 13-20482, February 23, 2015

A conviction under the Georgia possession with intent to distribute marijuana statue (GA Code § 16-13-30(j)(1)) qualifies as a drug trafficking conviction under U.S.S.G. § 2L1.2
United States v. Martinez-Lugo, Docket 13-40924, March 27, 2015

- One Judge dissented and would have held that gratuitous sharing of a small amount of marijuana does not qualify as a drug trafficking offense and would have vacated the enhancement.

A conviction under the California possession for sale of a controlled substance statue (CA Health and Safety Code § 11351) does not categorically qualifies as a drug trafficking conviction under U.S.S.G. § 2L1.2
United States v. Gomez-Alvarez, Docket 14-40059, March 31, 2015

The length of the sentence imposed by the court, and not the actual amount of time served, determines whether a conviction for a felony that is a drug trafficking offense qualifies for the enhancement under U.S.S.G. § 2L1.2
United States v. Rodriguez-Bernal, Docket 14-10287, April 3, 2015

When reviewing whether a prior conviction for money laundering is an aggravated felony, the court may look to beyond *Shephard* documents to determine if the amount exceeded $10,000 as required by U.S.S.G. § 2L1.2
United States v. Mendoza, Docket 14-40168, April 9, 2015

SUPERVISED RELEASE:

The district court cannot impose a supervised release condition requiring a lifetime of computer monitoring on a defendant whose sex offense(s) did not involve use of a computer or the internet
United States v. Fernandez, Docket 14-30151, January 14, 2015

- Fernandez was convicted of failing to register as a sex offender and at sentencing the court imposed a lifetime of supervised release and required him to install computer filtering software to block/monitor access to sexually oriented websites on any computer he possesses or used.
- The court vacated the computer monitoring condition of supervised release because neither Fernandez's prior sex offense, nor his failure to register offense, involved computer or internet use.
- "In the absence of evidence to the contrary, the court's general concerns about recidivism or that Fernandez would use a computer to perpetrate future sex-crimes are insufficient to justify the imposition of an otherwise unrelated software installation special condition.
- PRACTICE TIP: OBJECT to supervised release conditions at sentencing!

A supervised release condition prohibiting a defendant from going places where minors are known to frequent without prior approval of the probation officer is reasonable where the defendant's prior sex offense involved a minor and he had failed to register as a sex offender on at least 4 occasions.

United States v. Fields, Docket 13-51060, February 9, 2015

- Fields was convicted of failing to register as a sex offender and at sentencing the court imposed a ten year term of supervised release and as a condition of supervised release, Fields was prohibited from residing or going to places where a minor or minors are known to frequent without prior approval of the probation officer.
- The Court affirmed the condition prohibiting contact with minors because Field's previous sex offense was against a minor and because he had repeatedly failed to register as a sex offender which shows he meant to undermine efforts to combat sex offender recidivism.
- Fields repeated failure to register was used by the Court to distinguish United States v. Windless, 719 F.3d 415 where a similar restriction was vacated. Fields failed to register four times, Windless only two times!
- PRACTICE TIP: OBJECT to supervised release conditions at sentencing!

When imposing a sentence upon the violation of supervised release, the district court cannot consider "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

United States v. Rivera, Docket 14-40389, April 29, 2015

- 18 U.S.C. § 3583(e) specifically excludes consideration of "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" by the court when imposing a sentence upon revocation of supervised release.