Summaries of Selected Opinions

No. 16-2216. Farrell v. Montoya. 12/27/2017. D.N.M. Judge Hartz. *Excessive Force—Seizure—Submit to Officer—Compliance With Police Orders—Qualified Immunity—Ongoing Seizure.*

Farrell was driving with her five children in her minivan when Officer DeTavis pulled her over for speeding. Officer DeTavis told her she could pay a fine or appear in court, but she refused to make a decision. Officer DeTavis told her to turn off her engine while he informed the dispatcher that she was refusing to make a decision. As the officer walked to his patrol car, Farrell pulled back onto the road. Officer DeTavis followed her and the minivan stopped again, but Farrell continued to refuse to comply with the officer's requests. Back-up officers arrived and Farrell sped off. Officer Montoya fired his gun at the minivan's tire, but missed. After a high-speed chase, Farrell surrendered. As relevant to this appeal, the Farrells sued, claiming Officer Montoya used excessive force when he fired three shots at the minivan. The district court denied Officer Montoya's summary judgment motion based on qualified immunity.

On appeal, the Farrells argued that their constitutional rights were violated because Officer Montoya used excessive force when he fired his gun at the minivan. When an officer does not apply physical force to restrain a suspect, a Fourth Amendment seizure occurs only if the officer asserts his authority and the citizen submits to the assertion. Here, the Farrells were not seized because in fleeing, they were not submitting to the officers. Because they were not seized when Officer Montoya shot at their van, there can be no excessive force claim. Accordingly, the Farrells could not overcome the qualified immunity defense.

The Farrells also argued that they submitted to Officer Montoya's show of authority when they momentarily halted when he pointed his gun at the minivan. A momentary pause is not submission, and the dash-cam video showed that there was no pause in the minivan's departure.

The Farrells further claimed that they submitted to Officer DeTavis when they pulled over twice before Officer Montoya arrived, creating a seizure that continued at least until Officer Montoya fired his gun. The Tenth Circuit has not adopted the concept of an ongoing seizure.

The Farrells also argued that if ongoing submission is required for a seizure, they continued to submit by calling 911 while driving and looking for a police station at which to pull over. The Farrells' alleged subjective intentions are irrelevant to their claim. When the Farrells drove away from three officers and led them on a high-speed chase, they were not manifesting compliance.

Lastly, the Farrells argued that Officer Montoya's shots constituted excessive force regardless of their failure to submit to the officers' show of authority. The authority that the Farrells cited does not support this claim.

The judgment was reversed.

No. 17-6038. United States v. Arnold. 12/27/2017. W.D.Okla. Judge Matheson. *Asset Forfeiture—Amount Established in Amended Order After Sentencing.*

Defendant pleaded guilty to wire fraud and conspiracy to commit wire fraud in connection with a scheme involving vehicle-financing rebates. Before he was sentenced, the district court entered a preliminary order of forfeiture ordering him to pay "a money judgment in an amount to be determined" later by the court. At his first sentencing hearing, the district court sentenced defendant to prison but postponed a final determination on restitution and forfeiture. At a second hearing, it entered a final restitution order, but again left the amount of the forfeiture unresolved. The court later amended its preliminary forfeiture order and entered a revised order setting a specific amount to be forfeited.

On appeal, defendant argued that the government's failure to establish the amount of forfeiture before sentencing violated Fed. R. Crim. P. 32.2 and thereby deprived the district court of jurisdiction to enter its forfeiture order. Rule 32.2(b)(2)(C) permits a court to amend a preliminary, general forfeiture order once the amount of the money judgment has been calculated. Here, ongoing disputes between the parties prevented the district court from calculating the forfeiture amount before sentencing. Further, defendant's argument that he lacked proper notice of the forfeiture amount fails because Rule 32.2 does not require that a defendant be provided notice of the approximate amount, method of computation, or substitute assets associated with the request for forfeiture. From the time of the indictment, defendant had actual notice that the government planned to seek a forfeiture. Moreover, the ongoing factual disputes concerning the amount of illegal proceeds that were retained as part of the scheme provided a logical explanation for the government's delay.

Defendant also argued that the district court erred by failing to direct the government to apply the forfeited funds toward his restitution obligation. He contended that the government should have been required to apply his forfeiture payments toward the amount of restitution he owes his victims, thus reducing the total amount—restitution plus forfeiture—owed. Both forfeiture and restitution were mandatory in this case. The statutes mandating restitution and forfeiture do not allow a defendant's payments toward one to offset the amount owed for the other.

The order was affirmed.

No. 16-1493. United States v. McKibbon. 12/28/2017. D.Colo. Judge Ebel. *Sentencing Guidelines—Prior Conviction for "Controlled Substance Offense"—Categorical Approach.*

Defendant pleaded guilty to being a felon in possession of a firearm. In calculating his

sentence under the sentencing guidelines, the district court, without objection, deemed defendant's prior Colorado conviction for distribution of a controlled substance to be a "controlled substance offense" and enhanced his base offense level.

On appeal, defendant argued for the first time that his prior Colorado conviction did not qualify as a controlled substance offense. The Tenth Circuit determined that defendant satisfied the plain error standard of review and applied a categorical/modified categorical analysis to determine whether defendant's prior conviction qualified as a controlled substance offense. CRS § 18-18-405(1)(a) sets forth a single indivisible criminal offense that criminalizes a broader range of conduct than USSG § 4B1.2(b). Thus, any conviction under the Colorado statute will categorically not qualify as a controlled substance offense under the sentencing guidelines, and the district court erred. Further, this error was plain and affected defendant's substantial rights and the fairness, integrity, or public reputation of judicial proceedings because it increased his sentencing range.

The case was remanded to the district court with directions to vacate defendant's sentence and resentence him.

No. 16-6306. United States v. Saulsberry. 12/28/2017. W.D.Okla. Judge Hartz. *Fourth Amendment—Automobile Search—Probable Cause to Examine Cards in Bag.*

Police received an anonymous call from a restaurant employee who stated that a person was smoking marijuana in a car parked in the restaurant parking lot. An officer approached defendant's car and tapped on the driver's window, and when defendant rolled down the window, the officer detected the scent of burnt marijuana. Defendant gave his name but failed to provide his license or insurance information. He kept reaching in a bag on the passenger floorboard area. Defendant later exited the vehicle and gave the officer permission to search it for marijuana. The officer found a marijuana cigarette and arrested defendant. The officer then searched the car, including the bag on the floor. Inside the bag, he saw a stack of cards. After he pulled the cards out of the bag, the officer determined that they were credit cards, and none of them had defendant's name. He also saw a device on the front passenger car seat that looked similar to a machine used in credit card fraud that he had seen in a recent credit-card fraud investigation. Defendant moved to suppress evidence discovered during his detention at the parking lot. The district court denied the motion to suppress the seized cards. Defendant pleaded guilty to possession

of 15 or more unauthorized credit cards, with intent to defraud, reserving the right to appeal the denial of his motion to suppress the cards seized from his car.

On appeal, defendant argued that the marijuana search did not authorize the officer to take the credit cards out of the bag and examine them, because the officer could immediately see that there was no evidence in the bag relating to marijuana. The Tenth Circuit determined that defendant's initial detention was supported by reasonable suspicion. The Tenth Circuit further noted its belief that the officer would have had probable cause to examine the credit cards if he had seen the machine before doing so and had recognized it as a device used in credit card fraud. But the record is unclear about the extent and timing of the officer's knowledge concerning the machine, and the government did not point to the machine as a factor supporting probable cause. A police officer's observation that a suspect possesses a number of cards, which could have been library, membership, or other types of cards, does not provide probable cause to believe that the suspect has been or is committing a crime. Further, defendant's suspicious movements toward the bag while the officer was questioning him are not sufficiently probative to raise the evidence to the level of probable cause.

The denial of the motion to suppress was reversed and the case was remanded for further proceedings.

No. 17-1003. EEOC v. JetStream Ground Services, Inc. 12/28/2017. D.Colo. Judge Hartz. *Employment Discrimination—Spoliation of Evidence—Failure to Renew Objection at Trial—Objection Waived in Opening Statement—Jury Instruction—Presumption Rebutted by Evidence.*

Several Muslim women and the Equal Employment Opportunity Commission (EEOC) (collectively, plaintiffs) alleged that defendant discriminated against the women on religious grounds by refusing to hire them because they wore hijabs. During discovery, defendant revealed that it had not preserved notes its employees took during hiring meetings. The district court reserved ruling on plaintiffs' pretrial motion seeking spoliation sanctions. In her opening statement, plaintiffs' attorney extensively discussed the missing notes. Following a trial, a jury ruled in defendant's favor. Plaintiffs unsuccessfully moved for a new trial, in part based on the district court's spoliation rulings.

On appeal, plaintiffs' sole argument was that the district court abused its discretion by refusing to sanction defendant for disposing of records contrary to 29 CFR § 1602.14, which purportedly required their preservation. Plaintiffs asserted that the court should have excluded the evidence or instructed the jury that it must draw an inference that the missing documents were harmful to the employer. The Tenth Circuit assumed for appeal purposes that defendant had violated the regulation by failing to preserve the documents. However, it held that plaintiffs waived any objection to the missing documents by (1) failing to renew their objection at trial; (2) not arguing for plain error review; and (3) discussing the missing notes at length in the opening statement.

As to whether the district court should have given plaintiffs' proffered adverse-inference instruction, the main debate between the parties was whether such an instruction is proper absent a finding of bad faith by the party possessing the records. Plaintiffs conceded during closing argument that the loss or destruction of the documents was not in bad faith; thus, the district court's failure to give an adverse inference instruction was not an abuse of discretion. Plaintiffs nevertheless contended that under Tenth Circuit precedent in *Hicks v. Gates Rubber Co.*, 833 F.3d 1406, 1408 (10th Cir. 1987), any trial in violation of 26 CFR § 1602.13, even if not in bad faith, creates a presumption about which the fact-finder should be informed. The *Hicks* presumption required no more from defendant than to produce evidence that the destroyed documents were not favorable to plaintiffs, which it did. Thus the district court was required to reject an instruction stating the *Hicks* presumption.

The judgment was affirmed.

No. 17-1071. McDonnell v. City and County of Denver. 1/4/2018. D.Colo. Judge Murphy. *Preliminary Injunction—Airport Protests—Expediting Permit Applications—Exigent Circumstances—Nonpublic Forum—Protest Location—Picketing.*

Plaintiffs sought a preliminary injunction against the City and County of Denver, alleging that regulations governing protests at Denver International Airport violated their First and Fourteenth Amendment rights. The district court granted the injunction in part, concluding that plaintiffs showed that the regulations are unreasonable because they do not provide a formal process for expediting permits in exigent circumstances. The district court also enjoined defendants from enforcing certain regulations governing the locations of permitted protests and picketing restrictions, including the size of signage.

The Tenth Circuit reviewed the four criteria for a preliminary injunction and concluded that the district court's analysis on whether plaintiffs would likely succeed on the merits conflicted with the standard applicable to nonpublic forums and failed to apply the standard relevant to a preliminary injunction that disrupts the status quo. The district court's analysis of the three remaining preliminary injunction factors of irreparable harm, balance of the harms, and the public interest was based entirely on its conclusion that plaintiffs were likely to prevail on the merits of some of their claims. Based on the Tenth Circuit's ruling that the merits analysis was erroneous, the analysis of the remaining factors was flawed and does not support the grant of the preliminary injunction.

The grant of a preliminary injunction was reversed. CL

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.