Summaries of Selected Opinions

No. 16-3324. United States v. Knox. 2/27/2018. D.Kan. Judge Ebel. *Probable Cause—Good-Faith Exception—Motion to Suppress—Facts Known to Officer but not Disclosed to Magistrate Issuing Warrant.*

Detective Finley sought to apprehend defendant after he removed his GPS monitor, fled from the apartment where he had been staying, and failed to appear in court on an unrelated state charge. Finley obtained an order to track a phone number he believed to be defendant's, which led to defendant's location at an apartment complex. Finley also obtained information from a former girlfriend that the defendant "always" carried a firearm and that he had been threatening people. Finley obtained a search warrant for the apartment complex to search for defendant and to seize him and "firearms." On executing the warrant, officers found defendant hiding under a bed and took him into custody. They then searched the residence and seized a rifle from a suitcase located next to the bed where defendant had been hiding.

Defendant was charged with possession of a firearm by a convicted felon. He moved to suppress the firearm. The district court held that though there was insufficient evidence of probable cause to justify the warrant, officers were entitled to rely in good faith on the magistrate's probable cause determination and the firearm was not subject to suppression. In so ruling, the court considered not only information in the affidavit but also information gleaned from Finley at the suppression hearing that was not included in the affidavit. Defendant pleaded guilty to the charge but reserved the right to appeal the denial of his motion to suppress the firearm.

On appeal, defendant challenged the district court's determination that the good-faith exception to the warrant requirement applied to the firearm. The Tenth Circuit held that a suppression court's assessment of an officer's good faith is confined to reviewing the four corners of the sworn affidavit and any other pertinent information shared with the issuing judge under oath before the warrant is issued, and information relating to the warrant application process. Here, the district court erred in considering information not disclosed under oath to the issuing magistrate. But the affidavit had enough indicia of reliability to support Finley's good-faith reliance on the warrant. The search warrant affidavit was based on the ex-girlfriend's statements. In light of the reliability of the former girlfriend's statements, the timeliness of the information in the affidavit, and the nexus between the item to be seized and the place to be searched, the affidavit was not so facially deficient that reliance on the warrant issued in response to it could not have been in good faith.

The denial of the motion to suppress was affirmed.

No. 17-5046. United States v. Chambers. 2/27/2018. N.D.Okla. Judge Matheson. *Probable Cause—Good-Faith Exception—Motion to Suppress—Nexus Between Criminal Activity and Place to be Searched.*

Police had been investigating defendant's brother and another individual (the Pair) on suspicion of selling methamphetamine. A confidential informant who bought methamphetamine from the Pair supplied the police with directions to defendant's home, where the Pair lived. The police obtained a warrant to search the home for methamphetamine and other items related to drug dealing. While executing the warrant, they discovered seven firearms loaded with ammunition and recovered various drugs and drug paraphernalia. Defendant, who had nine prior felonies, was indicted for being a felon in possession of firearms and ammunition. Defendant moved to suppress the firearms and ammunition evidence. The district court denied the motion, concluding that the affidavit provided probable cause and justified application of the good-faith exception. Defendant pleaded guilty as charged, reserving the right to appeal the denial of his motion to suppress evidence discovered in his home.

On appeal, defendant challenged the district court's rulings that probable cause existed and that the good-faith exception to the exclusionary rule applied. He argued that omission of the address in the "Residence Identified" paragraph rendered the affidavit devoid of factual support and precluded good-faith reliance on the warrant. An affidavit lacks indicia of probable cause when it does not contain factual support. An affidavit has enough factual support to justify reliance when it establishes a sufficient nexus between the illegal activity and the place to be searched. Here, the affidavit linked the Pair to defendant's home and linked his home to the address. It was objectively reasonable for officers to rely on the warrant. The district court properly applied the good-faith exception.

The denial of the motion to suppress was affirmed.

No. 17-1230. Fernandez v. Clean House, LLC. 3/2/2018. D.Colo. Judge Hartz. *Fair Labor Standards Act—Statute of Limitations—Willful Violations—Affirmative Defense—Burden on Defendant to Raise Issue at Pleading Stage.*

Plaintiffs were house cleaners who purported to work well over 40 hours per week. Plaintiffs' employment ended between two and three years before they filed suit. As relevant to this appeal, they sued their former employer under the Fair Labor Standards Act (FLSA), alleging that their employer misclassified them as independent contractors and denied them overtime pay, breaks, and minimum wages. FLSA's general limitations period is two years, but that period is expanded to three years for willful violations. Although the complaint alleged willful violations, defendants moved to dismiss for failure to timely state a claim, arguing that plaintiffs failed to support their willfulness allegations with sufficiently specific facts. The district court dismissed the claims with prejudice.

On appeal, the Tenth Circuit determined that the complaint adequately pleaded willfulness, and willfulness is relevant to the statute-of-limitations defense, not to the elements of a plaintiff's claim. The limitations issue is an affirmative defense, which the defendant has the burden to raise at the pleading stage. Further, even if the defendant has pleaded an affirmative defense, the federal rules impose no obligation on the plaintiff to file a responsive pleading. It may be proper to dismiss a claim on the pleadings based on an affirmative defense, but only when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements, which was not the situation here.

The judgment was reversed and the case was remanded.

No. 16-4173. Felders v. Bairett. 3/9/2018. D.Utah. Judge Ebel. *Offer of Judgment—Prevailing Party—Attorney Fees as Part of Costs—Civil Rights Action—Premature Offer was Ineffective.*

Plaintiffs filed a civil rights action against defendant Bairett and other police officers alleging violation of their Fourth Amendment rights during a traffic stop. Before plaintiffs served defendants with a summons and complaint, Bairett offered to settle the case, titling his offer "Defendant's Rule 68 Offer of Judgment." Plaintiffs did not accept the offer. Plaintiffs ultimately prevailed at trial and moved to strike Bairett's offer of judgment. The district court granted the motion, ruling that the offer did not qualify as a Rule 68 offer because Bairett made the offer before he became a party to the litigation.

On appeal, Bairett argued that he was "a party defending against a claim" as soon as plaintiffs filed their complaint naming him as a defendant with the district court. Fed. R. Civ. P. 68 allows a defendant to limit his liability for costs by making a timely pretrial offer of judgment. Although costs do not ordinarily include attorney fees, in a civil rights action under 42 USC § 1983 such as this one, attorney fees are awarded to the prevailing party as part of the costs. Thus, in this case, the costs dispute involves substantially more than would normally be at issue. To be effective, a Rule 68 offer of judgment must be made after the plaintiff files the complaint and obtains jurisdiction over the defendant, either by serving the complaint or obtaining a waiver of service. The Tenth Circuit emphasized that a district court cannot enter a judgment against an entity that was never made a party to the litigation. Defendant's offer of judgment was too early to be effective.

The decision was affirmed.

No. 16-2141. United States v. Ortiz-Lazaro. 3/16/2018. D.N.M. Judge Seymour. *Revocation of Supervised Release—Adequacy of Reasons for Upward Departure.*

Defendant pleaded guilty to illegal reentry of a deported alien and was sentenced to prison and a term of supervised release. One of his release conditions was that he not illegally reenter the United States. Upon his release from prison he was deported and was subsequently charged with reentry after deportation. He appeared before the district court for sentencing on the reentry charge and also for a hearing on revocation of his supervised release relating to the prior illegal reentry charge. His admitted that he violated the supervised release terms. The district court sentenced him to 12 months' imprisonment on the illegal reentry charge, the high end of the advisory Guideline range. On the supervised release violation, it calculated an advisory Guideline range of six to 12 months. But the district court departed upwardly to a 24-month sentence for that violation, to run consecutively with the illegal reentry sentence. It noted that defendant had reentered the United States barely a month after his term of supervised release commenced, had been deported twice before, had been voluntarily returned to Mexico on three prior occasions, and had previously been convicted of serious violent offenses.

On appeal, defendant contended that his sentence for violation of supervised release was procedurally unreasonable. The Tenth Circuit determined that the sentence was procedurally reasonable because (1) the district court adequately articulated specific reasons for departing upwardly from the applicable Guideline range, (2) the district court's failure to provide a written statement of its reasons was harmless in light of its comprehensive explanation in open court for its deviation from the Guidelines, (3) the district court's articulation of its reasons for departing from the advisory Guideline range meant that it had considered the need to avoid unwarranted sentencing disparities, and (4) its imposition of a consecutive sentence was in accordance with the Guidelines' advisory policy statement, and its statement that it had considered the statutory sentencing factors was sufficient to support its application of the policy statement's presumption in favor of consecutive sentencing.

Defendant also contended that the sentence was substantively unreasonable. Defendant conceded at oral argument that he had suffered no harm, and the Tenth Circuit reached the same conclusion.

The sentence was affirmed.

No. 17-9528. Afamasaga v. Sessions. 3/19/2018. Board of Immigration Appeals. Judge Hartz. *Immigration—False Statement in Passport Application—Crime Involving Moral Turpitude—Appellate Jurisdiction Over Purely Legal Question—Alien Ineligible for Cancellation of Removal.*

The Department of Homeland Security filed removal proceedings against Afamasaga after he pleaded guilty to making a false statement when applying for an American passport, in violation of 18 USC § 1542. Afamasaga sought cancellation of removal, but an immigration judge deemed him ineligible for relief on the ground that his false-statement conviction was a crime involving moral turpitude (CIMT). The Board of Immigration Appeals (BIA) agreed and dismissed his appeal.

On appeal, Afamasaga contended that a violation of § 1542 is not categorically a CIMT. A noncitizen applying for cancellation of removal must show, among other things, that he has not been convicted of a CIMT. The Tenth Circuit applied the categorical approach—comparing the statutory definition of the offense in question with the generic definition of CIMT—and concluded that making a false statement on a passport application was a CIMT.

The BIA's ruling was upheld. 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.