Summaries of Selected Opinions

No. 16-1464. Evanston Insurance Co. v. Law Office of Michael P. Medved, P.C. 5/22/2018. D.Colo. Judge Bacharach. *Foreclosure—Professional Liability Insurance—Overbilling Allegations—Duty to Defend—Estoppel—Prejudice—Reservation of Rights.*

Attorney Medved and his law firm (collectively, Medved) handled foreclosures and billed its fees and costs to its clients, who were lenders and investors. The fees, however, were ultimately passed on to the property owners or buyers (if the property was resold). The Colorado Attorney General investigated Medved and other foreclosure attorneys, questioning whether they had overbilled. When the investigation became public, a group of property owners filed a class action against Medved for overbilling. Medved submitted a claim under its liability policy with Evanston Insurance Co. (Evanston). Evanston defended Medved until it settled with the property owners, subject to a reservation of rights. The Attorney General ultimately filed suit against Medved, which Evanston agreed to defend under a reservation of rights. Medved settled for $1 million, obviating any need for a defense.

Evanston ultimately concluded that the overbilling allegations were outside of the law firm's professional services coverage. Evanston sued Medved, seeking a declaratory judgment that Medved's policy did not cover the class action or the Attorney General's investigation and requesting reimbursement of its attorney fees and costs in defending the class action. Medved countersued for breach of the insurance contract and bad faith. The district court granted summary judgment to Evanston.

On appeal, Medved argued that under the policy, Evanston was required to defend against the class action and the Attorney General's investigation. The Tenth Circuit determined that the policy did not create a duty to defend because the allegations had arisen from billing practices, not professional services.

Medved also argued that Evanston was estopped from asserting coverage defenses for the class action by failing to make an effective reservation of rights. Medved claimed it could have settled earlier or used a different attorney if it had known that Evanston would assert coverage defenses. Here, Evanston sent an effective reservation of rights letter before the start of trial or settlement talks. Even if Evanston had failed to reserve its rights when it assumed a defense in the class action, there was no prejudice, and Evanston was not estopped from denying a duty to defend the class action.

Medved also contended that its counterclaims for bad faith should have survived summary judgment even in the absence of a duty to defend. Medved failed to raise this argument in district court and thus forfeited it.

The judgment was affirmed.

No. 17-2159. United States v. Deiter. 5/24/2018. D.N.M. Judge O'Brien. *Armed Career Criminal Act—Elements Clause—Residual Clause—Bank Robbery—Crime of Violence—Aiding and Abetting.*

Defendant was convicted of being a felon in possession of a firearm and ammunition. The district court enhanced his sentence to 15 years under the Armed Career Criminal Act (ACCA), finding that he had two prior convictions for a serious drug offense and one prior conviction for a violent felony. Defendant filed a motion under 28 USC § 2255 to vacate or set aside his sentence. The motion relied in part on the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. (2015), which decided that the ACCA's residual clause is unconstitutionally vague. The district court denied the motion.

On appeal, defendant argued that his trial counsel was ineffective because counsel read a transcript of an officer's belt tape recorder to the jury that contained an incriminating statement from a witness. Defendant was not prejudiced by any deficient performance because the evidence against him was overwhelming.

Defendant also argued that counsel was ineffective for failing to challenge his ACCA sentence. He claimed that the judge improperly used his prior conviction of aiding and abetting a bank robbery as a qualifying offense under the ACCA. The Tenth Circuit found it unnecessary to determine whether the district court had relied at sentencing on the ACCA's overbroad residual clause because any such reliance would have been harmless if aiding and abetting a bank robbery also qualifies as a violent felony under the ACCA's elements clause.

The Tenth Circuit applied a categorical approach to analyze the elements clause. A prior conviction qualifies under the elements clause if the crime has as an element the use, attempted use, or threatened use of violent force against another person. Defendant argued that his crime, bank robbery under 18 USC § 2113(a), did not categorically qualify because it can be committed by intimidation, which does not require the intentional use of physical force. However, federal bank robbery by intimidation categorically has as an element the use, attempted use, or threatened use of physical force because intimidation involves the threatened use of physical force against another person. Proof that defendant acted willfully and with reckless disregard satisfies the physical force requirement, and a conviction under § 2113(a) requires more than mere recklessness or negligence. Nor was defendant's conviction disqualified because it was for aiding and abetting; aiding and

abetting is not a separate crime, but merely eliminates the legal distinction between aiders and abettors and principals. The Tenth Circuit determined that aiding and abetting a bank robbery constitutes a violent felony under the ACCA's elements clause.

The denial of defendant's motion was affirmed.

No. 16-1449. United States v. Francis. 6/5/2018. D.Colo. Judge Phillips. *Guideline Sentencing—Firearms Trafficking Enhancement—Sufficiency of Evidence.*

Defendant posted a YouTube video in which he offered to help people, including those who had felony convictions or convictions for violent crimes, acquire firearms. An undercover Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agent solicited defendant's straw purchase of a firearm. The agent gave defendant money to purchase the gun. In the store, defendant filled out the ATF paperwork in his own name, marking "yes" on a box that indicated he was the actual purchaser of the firearm, and cleared a background check. He then gave the agent the firearm. The agent paid defendant for his services. Neither man discussed the agent's criminal history.

The ATF then arranged a second straw purchase, this time using a felon who was a confidential informant (CI). The CI and the agent made statements to defendant indicating that the CI had a felony conviction, but they did not volunteer his specific criminal history. Defendant made the purchase and was paid a fee for his services. He again completed the ATF form, falsely declaring that he was the purchaser of the firearms. Defendant was convicted of making false statements to a firearms dealer and unlawful disposition of a firearm to a felon. The district court applied a four-level firearms-trafficking enhancement and sentenced defendant to 60 months' imprisonment, and imposed sex offender treatment as a special condition of defendant's supervised release.

On appeal, defendant first challenged the sufficiency of the evidence that the CI was a felon. The agent's trial testimony that he knew the CI and used him because of his felony criminal history was sufficient.

Defendant also argued that the firearms-trafficking enhancement shouldn't apply in calculating his guidelines range. The district court erred by applying the sentence enhancement merely on a finding that defendant had reason to believe that some of his solicited customers would be unlawful possessors, rather than on whether defendant had reason to believe that the CI had a conviction in one of the listed categories of offenses. The evidence was insufficient to show that defendant knew the specific customer had a disqualifying violent felony conviction.

Defendant also argued that the district court erred in imposing sex-offender treatment as a special condition of his supervised release. Defendant did not complete his previously ordered sex-offender treatment program, so there was a basis for this special condition.

The conviction and the sex-offender-treatment special condition were affirmed. The sentence was vacated and the case was remanded for resentencing.

No. 16-2018. United States v. Melgar-Cabrera. 6/8/2018. D.N.M. Judge Seymour. *Crime of Violence—Hobbs Act Robbery.*

Defendant was charged with several crimes related to robberies and a murder. After committing his crimes, he fled to El Salvador, but was extradited to the United States. One of the conditions of his extradition was that he could not be charged with or convicted of using a gun in relation to a crime of violence under 18 USC § 924(c), because that crime was not included in the extradition treaty. Defendant was convicted of Hobbs Act robbery, in violation of 18 USC § 1951(a), and sentenced to life in prison pursuant to 18 USC § 924(j) for causing the death of a person while using a gun to commit a § 924(c) crime of violence.

On appeal, the Tenth Circuit first addressed whether § 924(j) was a separate crime for which defendant could lawfully be convicted under the extradition treaty or was merely a sentencing enhancement. Overruling a prior decision, the Tenth Circuit determined that § 924(j) describes a separate crime rather than merely a sentencing enhancement.

Defendant contended that Hobbs Act robbery does not qualify as a crime of violence under the elements clause of § 924(c)(3)(A) and his conviction should therefore be vacated. Applying the categorical approach, the Tenth Circuit determined that Hobbs Act robbery is a crime of violence. The word "force" as used in § 924(c)(3)(A) means "violent force." Hobbs Act robbery is defined as common law robbery that affects interstate commerce, and common law robbery requires violent force, not merely offensive touching. Although Hobbs Act robbery can also be committed by causing someone to part with his property due to fear of injury, this constitutes the threatened use of physical force, which is also included under the definition of a crime of violence in § 924(c)(3)(A).

The conviction was affirmed.

Nos. 16-9555 & 17-9527. Jimenez v. Sessions. 6/19/2018. Board of Immigration Appeals. Judge Lucero. *Immigration—Cancellation of Removal—Crime Involving Moral Turpitude—Criminal Trespass—Modified Categorical Approach—Divisible Statute.*

Lujan pleaded guilty in Colorado state court to criminal trespass of a motor vehicle with the intent to commit a crime therein. The Department of Homeland Security later obtained a removal order against him. Lujan applied for cancellation of removal. An immigration judge (IJ) denied relief because of Lujan's criminal trespass conviction, which the judge considered to be a crime involving moral turpitude. The Board of Immigration Appeals (BIA) affirmed the IJ's ruling, holding that the crime intended is an element of the offense such that the statute is divisible on this basis.

On appeal, Lujan contested the BIA's finding that his prior conviction for first degree criminal trespass was a crime involving moral turpitude. An alien is ineligible for cancellation of removal if he has been convicted of a crime involving moral turpitude, which is one involving conduct that is "inherently base, vile, or depraved, contrary to the accepted rules of morality." The Tenth Circuit applied the modified categorical approach to determine whether the underlying conviction involved moral turpitude. This approach applies when a statute is divisible, meaning it lists elements in the alternative. The categorical approach is then applied to determine whether those alternative elements necessarily qualify as a crime involving moral turpitude. Under that part of the statute at issue, a defendant must have unlawfully entered a motor vehicle with intent to commit a crime therein. The BIA acknowledged that the motor vehicle part of the statute was broader than the definition of a crime involving moral turpitude, but held that the statute was divisible as to the ulterior crime. However, based on Colorado case law, the Tenth Circuit concluded that the Colorado statute was not divisible as to the particular ulterior offense. Thus the alien's conviction did not qualify as a crime involving moral turpitude.

The order of removal was vacated and the case was remanded to the BIA for further proceedings.

No. 17-1075. Auto-Owners Insurance Co. v. Csaszar. 6/19/2018. D.Colo. Chief Judge Tymkovich. *Automobile Insurance—Uninsured Motorist Coverage—Non-covered Driver—Declaratory Judgment—Public Policy.*

Csaszar's parents sought to renew their automobile insurance policy from Auto-Owners Insurance Company (Auto-Owners). Due to Csaszar's driving record, Auto-Owners told the parents it would renew their policy only if Csaszar was excluded. The parents agreed and the policy included an "excluded-driver" provision for claims concerning Csaszar.

Csaszar was then rear-ended by an uninsured motorist and she filed a claim with Auto-Owners for uninsured/underinsured motorist (UM/UIM) coverage. Auto-Owners denied the claim and sought a declaratory judgment that Csaszar was not entitled to any coverage under her parents' policy. Csaszar filed a counterclaim seeking a declaration that she was entitled to coverage. The district court granted summary judgment to Auto-Owners.

On appeal, Csaszar argued that the district court erred by granting Auto-Owners summary judgment because the excluded-driver provision does not unambiguously bar her coverage when she drives an unscheduled vehicle. Here, the excluded-driver provision unambiguously barred the daughter from all coverage, including UM/UIM coverage.

Csaszar also argued that the excluded-driver provision was void as contrary to Colorado public policy. Under Colorado case law, if an insurance company provides no liability coverage to a resident relative, denying that relative UM/UIM coverage comports with Colorado public policy. Here, the Auto-Owners policy barred Csaszar from liability coverage and it did not violate public policy for it to bar her from UM/UIM coverage.

The judgment was affirmed. 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.