

# Summaries of Selected Opinions

**No. 16-1348. Auto-Owners Insurance Co. v. Summit Park Townhome Ass'n.** 3/30/2018. D.Colo. Judge Bacharach. *Attorney Sanctions—Violation of Disclosure Order—District Court Authority—Due Process—Attorney Fees.*

Appellants are attorneys who represented Summit Park Townhome Association in a dispute with its insurer, Auto-Owners Insurance Company, about the amount payable for hail damage. The attorneys violated a disclosure order by failing to disclose information indicating that the appraiser they hired was not impartial. The district court assessed \$354,350.76 in attorney fees and expenses as sanctions.

On appeal, the attorneys argued that the district court exceeded its authority in entering the disclosure order. Regardless of whether the district court had authority to issue the disclosure order, the attorneys were required to comply with the order because the district court had jurisdiction over the subject matter and the parties, and they could be sanctioned for noncompliance.

The attorneys also challenged the district court's conclusion that they had violated the disclosure order. The district court acted within its discretion in concluding that the attorneys failed to disclose the extent of their relationship with the appraiser. The district court properly invoked 28 USC § 1927, which provides for sanctions against an attorney who unreasonably and vexatiously multiplies the proceedings, to award attorney fees to the insurance company for preparation of the sanctions motion, the application for attorney fees and expenses, and other related work. Further, the attorneys had an opportunity to respond to the application for attorney fees, which supplied them due process.

Finally, the Tenth Circuit held that the amount of the attorney fees awarded was reasonable in light of the complexity of the

case, the number of strategies pursued, and the responses necessitated by the other party's maneuvering.

The order was affirmed.

**No. 17-6001. United States v. Green.** 4/6/2018. W.D.Okla. Judge Baldock. *Motions for Sentence Reduction—Jurisdiction over Successive Motions—Sentencing Factors Considered.*

Defendant pleaded guilty to three counts of using a communication facility to facilitate the acquisition of cocaine powder. His presentence investigation report recommended an advisory Guideline sentencing range of 110 to 137 months' imprisonment. The district court concluded his range was actually 92 to 115 months, but it varied upwardly from this range, despite defendant's pleas for leniency, and sentenced him to 130 months' imprisonment. The U.S. Sentencing Commission subsequently enacted Amendment 782, reducing the Guideline offense level of many drug offenses by two levels. Citing Amendment 782, defendant filed two motions for a reduced sentence under 18 USC § 3582(c) (2), both of which the district court denied.

On appeal from the second denial, defendant argued that the district court abused its discretion by not considering all the facts and circumstances of his case. He argued that the district court's denial should be reversed or, alternatively, the case should be remanded. The Tenth Circuit first addressed whether the district court had jurisdiction to consider a second § 3582(c)(2) motion that relied on the same Guideline amendment as the previous motion. Applying the clear statement rule for jurisdictional limitations, the Tenth Circuit determined that the statute imposed no numerical restriction on the court's jurisdiction to entertain successive motions based on the same Guideline amendment. Thus, the district court

had jurisdiction. The Tenth Circuit declined to consider whether the statute imposed a non-jurisdictional bar on such successive motions, as the government had not argued that point.

On the merits, the Tenth Circuit noted there was no dispute that defendant was eligible for a reduced sentence under § 3582(c)(2). Defendant argued that the district court did not consider the courses he completed while in prison and therefore erred in determining that a reduced sentence was not warranted upon consideration of the applicable sentencing factors. The district court relied on defendant's extensive criminal history, the need to deter further criminal conduct, and the fact that defendant had already received a shorter sentence by entering into his plea agreement. It determined that his coursework while in prison and certificates of completed coursework did not overcome these considerations. The determination was within the district court's discretion.

Defendant also argued that the district court failed to consider his clean disciplinary record while in prison. This fact was not presented to the district court, so the Tenth Circuit did not consider it. Alternatively, defendant argued that the case should be remanded for consideration in the first instance of defendant's clean disciplinary record. Because defendant had the opportunity to present this evidence in the first instance, the Tenth Circuit declined to remand for consideration of this issue.

The order was affirmed.

**No. 17-3093. McCoy, Jr. v. Meyers.** 4/10/2018. D.Kan. Judge Matheson. *Arrest—Excessive Force—Qualified Immunity—Force Used to Restrain Suspect—Post-Restraint Force.*

Police officers responded to a reported armed hostage situation and arrested McCoy. The officers brought him to the ground, struck him, and rendered him unconscious with a carotid restraint maneuver. Then they handcuffed his arms behind his back, zip-tied his feet together, and moved him into a seated position. As he regained consciousness, the officers again struck him and again rendered him unconscious with a carotid maneuver. McCoy sued the police officers, alleging that

they violated his Fourth Amendment rights by using excessive force when they arrested him. The district court granted summary judgment to the officers, holding they were entitled to qualified immunity because they had acted reasonably under the circumstances and the relevant law was not clearly established.

The Tenth Circuit analyzed separately what happened before and after McCoy was rendered unconscious, handcuffed, and zip-tied. Officers are entitled to qualified immunity if their conduct does not violate clearly established law or if the law was not clearly established. McCoy failed to show clearly established law prohibiting the officers' pre-restraint use of force, so the officers are entitled to qualified immunity based on this conduct. But the officers were not entitled to qualified immunity for their post-restraint force. A reasonable jury could conclude that the post-restraint force was excessive, given that McCoy had been unconscious, his hands and feet were tied, and he did not resist or attempt to flee. Further, the law was clearly established that the use of force on effectively subdued individuals violates the Fourth Amendment.

The summary judgment was affirmed in part and reversed in part, and the case was remanded.

**No. 17-6086. Hall v. Conoco Inc.** 4/10/2018. W.D.Okla. Judge Bacharach. *Expert Testimony—Exclusion—Causation—Idiopathic Causes—Circumstantial Evidence—Summary Judgment.*

Plaintiff lived near defendants' refinery when she was a child. About two decades later, she developed leukemia, which she attributes to her early exposure to the refinery's benzene emissions. Plaintiff sued defendants for negligence, negligence per se, and strict liability. On the issue of causation, the district court excluded testimony from two of plaintiff's experts and granted summary judgment to defendants.

On appeal, plaintiff challenged the district court's exclusion of expert testimony by Drs. Gore and Calvey. The district court considered Dr. Gore's diagnosis unreliable based partly on his failure to justify ruling in benzene as a potential cause of plaintiff's disease or ruling out idiopathic causes of plaintiff's disease. This reasoning was within the court's discretion. Dr.

Calvey's opinion was excluded in part because Dr. Calvey had not adequately addressed the exposure issue. Plaintiff did not challenge this rationale, so reversal of the exclusion of this testimony is foreclosed.

Plaintiff also challenged the grant of summary judgment to defendants. She argued that the circumstantial evidence, such as the presence of hydrocarbon leaks and odors in her neighborhood, groundwater contamination, a high benzene reading near her residence, and estimates by the Environmental Protection Agency showing increased risk from the refinery, was sufficient to avoid summary judgment. The circumstantial evidence fails to create a genuine issue of material fact on causation because of the length of time between plaintiff's exposure to benzene emissions and the onset of her disease. Expert testimony was necessary to establish a link between plaintiff's disease and benzene emissions. The district court did not err in granting summary judgment on causation.

The summary judgment was affirmed.

**Nos. 16-6366 & 17-6044. United States v. Gieswein.** 4/16/2018. W.D.Okla. Judge Lucero. *Crime of Violence—Categorical Approach—Harmless Sentencing Error.*

Defendant was convicted of witness tampering and possession of a firearm by a felon. At sentencing, the district court determined that his prior Oklahoma state court conviction for lewd molestation qualified as a "forcible sex offense" and was thus a "crime of violence" under the Armed Career Criminal Act (ACCA). It then varied upwardly from the advisory Guideline range to 240 months, based on defendant's extensive criminal history.

Defendant later filed a 28 USC § 2255 motion based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), which struck down the ACCA's residual clause as unconstitutionally vague. The government conceded that the lewd molestation conviction no longer qualified as a violent felony for purposes of the ACCA, and the district court vacated his sentence. Although the lewd molestation conviction no longer counted as a predicate felony under the ACCA, the revised presentence report (PSR) recommended that it be considered a "crime of violence" under

the definition of a "forcible sex offense" in the Guidelines. The district court adopted the PSR's findings over defendant's objections, again varied upwardly, and re-imposed the 240-month sentence, indicating that it would have gone higher but for the statutory maximum.

On appeal, defendant challenged the characterization of the Oklahoma lewd molestation conviction as a forcible sex offense and thus a crime of violence for Guideline purposes. The Tenth Circuit determined that a categorical rather than a circumstance-specific approach applies to this determination. Applying a categorical approach, the Oklahoma statute included conduct that did not qualify under the federal definition. The district court therefore erred procedurally in concluding that the lewd molestation conviction was a forcible sex offense under the applicable Guideline. However, the error was harmless. The record clearly indicated this was an exceptional case where the district court would have imposed the same sentence even if it had not committed procedural error.

Defendant also argued that his sentence was substantively unreasonable in light of his correct Guidelines range. Here, the district court carefully considered the Guidelines, but concluded that other statutory factors required a substantial upward variance in view of defendant's wide range of prior criminal conduct. The sentence was not substantively unreasonable.

The sentence was affirmed.

**No. 17-6125. United States v. Howard.** 4/17/2018. W.D.Okla. Judge McHugh. *Mandatory Victims Restitution Act—Amount of Loss—Calculation of Value.*

Defendant stole laboratory equipment from Northwestern Oklahoma State University and Oklahoma State University (OSU) and transported it to his apartment in Texas. Authorities recovered most of the stolen items and returned them to the universities. However, a Fast Protein Liquid Chromatography (FPLC) machine stolen from OSU was damaged.

Defendant pleaded guilty to three counts of transporting stolen property. Among other things, his presentence investigation report recommended restitution of approximately \$25,000 for the amount that OSU paid for a

replacement FPLC machine. OSU presented evidence that the damage was beyond repair. But defendant argued for a reduction in the restitution award, claiming that some parts of the broken machine had value for which he should be given credit toward his restitution obligation. The district court rejected defendant's argument, noting that the evidence he presented concerned "refurbished" parts, but he presented no evidence concerning whether the parts could be refurbished, how much time or effort that would take, what OSU's selling costs would be, or how much employee time would be needed to sell the parts. Accordingly, it assigned a zero value to the broken machine and set restitution in the amount OSU had paid for a replacement machine.

On appeal, defendant contended that the district court exceeded its authority in ordering restitution for the replacement cost of the machine and provided an illegal windfall for

OSU. The Tenth Circuit noted that under the Mandatory Victims Restitution Act, the controlling measurement for a restitution award is the actual loss the victim suffered. Even where the item stolen is not unique or special, replacement cost may be used to make a victim whole. Here, OSU replaced the stolen machine with one that had less functionality and was less advanced, and whose cost was actually less than the original cost of the stolen machine. Use of replacement cost therefore did not result in a windfall to OSU. The district court acted within its discretion in using the replacement cost as the restitution value.

Defendant further argued that the district court abused its discretion in determining that the stolen machine had no value when it was returned to OSU. Defendant had the burden of establishing the offset value and failed to meet this burden. The district court did not abuse its discretion in holding that the machine had no

value when returned to OSU.

The district court's use of replacement cost of the machine and its determination that the stolen machine had no value when returned to OSU were affirmed. <sup>CL</sup>

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.



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