

Summaries of Selected Opinions

No. 17-3194. *United States v. Pullen*. 1/29/2019. D.Kan. Judge McHugh. *Second or Successive Motions Under 28 USC § 2255—Vagueness Challenge to Guideline § 4B1.1.*

Defendant was sentenced as a career offender under USSG § 4B1.1 at a time when the Guidelines were mandatory. His career-offender sentence relied in part on a determination that his prior conviction for escape constituted a “crime of violence” under the residual clause in Guideline § 4B1.2.

The Supreme Court subsequently decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), which invalidated the residual clause in the Armed Career Criminal Act, 18 USC § 924(e) (2)(B)(ii), as unconstitutionally vague. This residual clause enhances the statutory mandatory minimum for certain defendants who have three or more previous convictions for a violent felony or serious drug offense. The clause is identical to the residual clause in Guideline § 4B1.2, which defines “crime of violence” for purposes of the career offender guideline. The Supreme Court later made *Johnson* retroactively applicable. A *Johnson* claim therefore meets the requirements for a second or successive § 2255 motion under 28 USC § 2255(h)(2).

Because the residual clause in Guideline § 4B1.2 contains the same language found unconstitutional in *Johnson*, defendant sought authorization to file a second or successive § 2255 motion to challenge his sentence. The Tenth Circuit found he had made a sufficient prima facie showing and granted authorization. But the district court dismissed his motion, ultimately determining that *Johnson* did not create a new rule applicable to the mandatory Guidelines that would permit a second or successive § 2255 motion. The district court granted defendant a certificate of appealability.

On appeal, defendant argued that the district court procedurally erred when it relied on § 2255(h)(2) as the basis for dismissing his § 2255 motion and substantively erred when it determined that *Johnson* did not create a new rule applicable to the Guidelines. Notwithstanding the Tenth Circuit’s prior authorization, before reaching the merits the district court was required to determine whether the motion in fact could proceed as a second or successive motion under the requirements of 28 USC § 2255(h). The Supreme Court has not yet ruled on whether *Johnson* applies to the mandatory Guidelines. Thus defendant’s motion depended on a rule not yet established by the Supreme Court or made retroactively applicable on collateral review, as required by § 2255(h)(2). Because *Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines, the district court correctly concluded that defendant failed to satisfy the precondition for filing a second or successive § 2255 motion.

The dismissal was affirmed.

No. 17-1269. *United States v. Iley*. 2/4/2019. D.Colo. Judge Holmes. *Guidelines Sentencing—Enhancement for Violation of Prior Administrative Order.*

Defendant worked as a tax preparer. He was placed on probation for professionally negligent conduct under a stipulated administrative order (the order) of the Colorado Board of Accountancy (the Board). However, before and after the Board issued the order, defendant was engaged in a scheme in which he defrauded his clients by taking their funds to pay payroll taxes but using the funds instead for personal purposes. Defendant ultimately pleaded guilty to one count of wire fraud and one count of

aiding in the preparation of a false tax return. The district court imposed a two-level sentence enhancement under USSG § 2B1.1(b)(9)(C) for defendant’s violation of the order.

On appeal, defendant argued that his fraudulent conduct did not violate the administrative order because it did not expressly enjoin him from committing fraud. Here, although the order did not expressly enjoin defendant from defrauding his clients, the Guideline requirements were met because (1) the order imposed a concrete punishment for the same or similar conduct at issue in the subsequent offense; (2) it imposed prospective remedial conditions or obligations designed to curtail similar future conduct, such as practice monitoring and filing quarterly reports; and (3) defendant perpetrated that prohibited conduct while the order was in effect.

Defendant also argued that his offense didn’t violate the order because it only punished him for negligence, which is different from fraud. Here, defendant engaged in essentially the same or similar conduct when perpetrating the fraud scheme, and the district court did not err in ruling that defendant acted with the kind of aggravated criminal intent that Guideline 2B1.1(b)(9)(C) penalizes.

The order was affirmed.

No. 18-7004. *Kile v. United States*. 2/11/2019. E.D.Okla. Judge Carson. *Guardian ad Litem—Personal Jurisdiction—Conflict of Interest—Sealed Transcript.*

Plaintiffs are the parents of Lance, who suffered a brain injury during birth that rendered him unable to care for himself. Plaintiffs sued the government-operated hospital for medical malpractice as Lance’s parents and next friends and settled in 2001. The district court approved the settlement following a fairness hearing at which the parents stated they would care for Lance. The district court did not appoint a guardian ad litem (GAL). The court sealed the fairness hearing transcript and approved the settlement. Part of the settlement was placed into governmental and non-governmental trusts and part was paid to plaintiffs. The case concluded with a stipulation of dismissal with prejudice.

In 2017, Lance's grandmother and Hurley, Jr. (collectively, appellants) were appointed as guardians for Lance. In June 2017, appellants filed a motion to intervene seeking to reopen the case. They alleged that plaintiffs had presented materially inaccurate information to the court, the court lacked jurisdiction to approve the settlement because it did not appoint a GAL to represent Lance, and a conflict of interest existed between Lance and plaintiffs that required the appointment of a GAL. The United States objected. The district court determined that it lacked jurisdiction under Fed. R. Civ. P. 60(b) to consider the requested relief and denied appellants' request.

On appeal, appellants argued that a GAL for Lance was a necessary and indispensable party, so the district court lacked personal jurisdiction over Lance, and the judgment is void. Rule 60(b) provides that a court may relieve a party from a final judgment if it is void. A judgment is void if the court lacked power to enter it by lacking jurisdiction. Fed. R. Civ. P. 17(c) controls the appointment of a GAL. The rule does not require a GAL in all cases, but only where the person is not otherwise represented. An infant may sue by a next friend, and absent an apparent conflict of interest, the appointment of a GAL is not necessary where a parent is also a party to the lawsuit. Here, there was no inherent conflict of interest between Lance and his parents as representatives. Thus Rule 17(c) did not require the court to sua sponte appoint a GAL and the district court properly exercised jurisdiction over Lance. Accordingly, the judgment was not void and appellants are not entitled to relief.

Appellants alternatively argued that Rule 60(b)(6) permits reopening this case. A Rule 60(b) motion must be made within a reasonable time. Here, although the grandmother has cared for Lance since 2011, she waited until 2017 to file her motion, and the motion was made 16 years after entry of the judgment. The motion was not made within a reasonable time. Moreover, even if the settlement constituted a bad deal in hindsight, there is nothing sufficiently unusual or compelling about making a bad bargain to warrant relief under Rule 60(b). The district court did not abuse its discretion in denying the Rule 60(b) motion.

Appellants also sought access to the sealed transcript of the fairness hearing based on a common law right of access. Here, the district court concluded that because it denied intervention, appellants remain nonparties to the case and are therefore not entitled to access. Until appellants either substitute in the action or intervene for the limited purpose of obtaining the transcript, they are nonparties and are not entitled to the transcript. The district court did not abuse its discretion in denying appellants' request.

The judgment was affirmed.

No. 17-1388. Nelson v. United States. 2/12/2019. D.Colo. Judge McHugh. *Personal Injury—Air Force Academy—Colorado Recreational Use Statute—Exception for Willful Failure to Guard Against a Known Dangerous Situation.*

In 2008, plaintiff was seriously injured when his bicycle struck a sinkhole on an asphalt path on Air Force Academy land. An Acade-

my employee discovered the sinkhole before plaintiff's accident, but did not tell anyone or take any steps to warn of, fill in, or cordon off the sinkhole. The Academy knew the public used the path but did not take any affirmative steps to preclude the public or remove the bicycle path signs.

Plaintiff and his wife sued the Academy. The district court initially entered an award for plaintiffs. The Tenth Circuit reversed that award, holding that the Colorado Recreational Use Statute (CRUS) shielded the Academy from liability. The Tenth Circuit remanded, however, for the district court to determine whether an exception to the CRUS applied. On remand, the district court held that an exception applied and reinstated its prior judgment.

On appeal, the Academy challenged the applicability of the CRUS exception. The CRUS limits landowner liability toward persons entering the land for recreational purposes, thus providing a near complete liability shield to



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landowners who permit, without charge, any person to use their property for recreational purposes. But there is an exception for willful or malicious failure to guard or warn against a known dangerous situation. Colorado courts have not interpreted this exception, so the Tenth Circuit predicted how the Colorado Supreme Court would interpret it.

The Tenth Circuit held that the CRUS's liability shield must be construed narrowly and the exception broadly. It was undisputed that (1) the sinkhole was a dangerous condition, (2) the employee knew the path was being used for recreational purposes, (3) he failed to warn or guard against the danger, and (4) he knew about the sinkhole before plaintiff's accident. The disputes were over whether the employee knew the sinkhole was a dangerous condition likely to cause harm and whether his failure to warn or guard against the danger was "willful." After reviewing relevant Colorado law and the district court's findings and conclusions in

this case, the Tenth Circuit concluded that the district court properly determined the CRUS exception applied. Further, the employee's knowledge and conduct were properly imputed to the Academy as his employer, so plaintiff could recover against the Academy.

The judgment was affirmed.

No. 17-1103. Free the Nipple-Fort Collins v. City of Fort Collins. 2/15/2019. D.Colo. Judge Phillips. *Preliminary Injunction—Public Nudity Ordinance—Equal Protection—Intermediate Scrutiny—Governmental Objectives.*

In 2015, the City of Fort Collins enacted a public nudity ordinance permitting male toplessness, but prohibiting women from baring their breasts below the areola. Free the Nipple, an unincorporated association, and two individuals (collectively, plaintiffs) sued the City alleging that the ordinance violated, among other things, the Equal Protection Clause. They requested a preliminary injunction to halt

enforcement of the ordinance. The district court granted a preliminary injunction blocking the City from enforcing the ordinance to the extent that it prohibits women, but not men, from knowingly exposing their breasts in public. The City brought this interlocutory appeal to challenge the injunction.

The City argued that the ordinance's unequal treatment of male and female toplessness survives constitutional scrutiny, so injunctive relief is precluded. The Tenth Circuit first clarified that the applicable standard for evaluating whether a gender-based law violates equal protection is intermediate scrutiny. It then analyzed the four factors plaintiffs had to prove to obtain a preliminary injunction: (1) they are likely to succeed on the merits, (2) they will suffer irreparable injury if the injunction is not granted, (3) the threatened injury outweighs the opposing party's injury under the injunction, and (4) the injunction is not adverse to the public interest. The Tenth Circuit determined that plaintiffs were likely to succeed on their equal protection claim, rejecting the City's position that the inherently sexual nature of the female breast justified the restriction by furthering the important governmental objectives of protecting children from public nudity, maintaining public order, and promoting traffic safety. The Tenth Circuit then evaluated the remaining three preliminary-injunction factors and agreed with the district court that these factors also favored plaintiffs. Thus, plaintiffs should prevail on their preliminary injunction motion, and the district court did not abuse its discretion.

The order granting plaintiffs' motion for a preliminary injunction was affirmed and the case was remanded for further proceedings. **CL**

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- **Liability Based On Agency and Respondeat Superior:** two of the instructions have been revised to include definitions of when a person has notice of a fact
- **Ultrahazardous Activities Resulting in Strict Liability** - A new instruction has been added
- **Children's Code — Dependency and Neglect** has been changed extensively with renumbering of existing instructions and the addition of several new instructions
- The table of authorities and subject index have been fully updated

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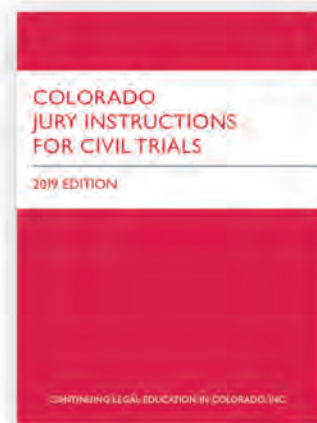
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