

Summaries of Selected Opinions

No. 18-1105. Kenney v. Helix TCS, Inc.

9/20/2019. D.Colo. Judge Seymour. *Fair Labor Standards Act—Controlled Substances Act—Colorado Marijuana Industry—No Implicit Repeal.*

Plaintiff worked as a security guard for Helix TCS, Inc. (Helix), which provides security services for businesses in Colorado's state-sanctioned marijuana industry. He sued Helix claiming entitlement to overtime pay under the Fair Labor Standards Act (FLSA). Helix moved

to dismiss, arguing that the FLSA did not apply because growing marijuana is illegal under the federal Controlled Substances Act (CSA). The district court denied the motion.

On appeal, Helix argued that the district court erred in denying its motion because the CSA implicitly repealed the FLSA's overtime mandate for employers in the marijuana industry. FLSA is focused on regulating the activity of businesses rather than the legality of individual workers'

activities, and employers are not excused from complying with laws, such as tax laws, because of their other federal violations. Moreover, the purposes of the FLSA do not conflict directly with the CSA. The FLSA applies broadly to employees, unless an exemption applies. Here, Helix did not argue that one of the enumerated exemptions applied to plaintiff.

The denial of the motion to dismiss was affirmed.

No. 17-1405. United States v. Thomas.

10/1/2019. D.Colo. Judge Hartz. *Federal Circuit Split—Counterfeit Substance—U.S. Sentencing Guidelines—Controlled Substance Offense.*

Defendant pleaded guilty to possession of a firearm by a convicted felon. He had a prior felony conviction for a crime of violence, so his base offense level was either 20 or 24, depending on the characterization of his Colorado conviction of distribution of an "imitation controlled substance" under CRS § 18-18-422(1)(a). At sentencing, the district court ruled that his conviction involved a "counterfeit substance" and therefore was a "controlled substance offense" under U.S. Sentencing Guidelines §§ 2K2.1(a) and 4B1.2(b). Accordingly, the district court increased defendant's base offense level.

On appeal, defendant argued that the Tenth Circuit should adopt a meaning of "counterfeit substance" as a controlled substance that has been mislabeled or misbranded fraudulently or without authorization. The statutory definitions of "counterfeit substance" usually refer to controlled substances that are fraudulently or falsely labeled. Thirty-six states and the District of Columbia have defined "counterfeit substance" in the manner urged by defendant. Eight states have concluded that that term means a noncontrolled substance that is passed off as a controlled substance, and five circuits agree with this conclusion. The Tenth Circuit concluded that application of defendant's proposed definition of counterfeit substance in USSG § 4B1.2(b) adds no substantive content to the Guidelines' definition of controlled substance offense. It further concluded that there is no good reason to split from the other circuits on this issue.

The sentence was affirmed.

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No. 18-3091. *Harte v. Board of Commissioners of County of Johnson*. 10/4/2019. D.Kan. Judge Carson. *Per Curiam Decision—Fractured Panel’s Decisions—Mandate Rule.*

Plaintiffs filed suit based on an allegedly illegal search of their home. The district court granted summary judgment to defendants, and plaintiffs appealed. On appeal, the Tenth Circuit issued a per curiam decision accompanied by a separate opinion by each of the three panel judges. Two of the judges shared a common rationale, yet reached different outcomes, while a different combination of two judges reached a common outcome by using different rationales. Specifically, plaintiffs alleged that probable cause dissipated during the search of their home. One judge on the prior panel held that plaintiffs abandoned the issue on appeal. Two judges agreed that probable cause dissipated, but one of those two judges voted to grant qualified immunity because he believed the law was not clearly established. The judgment was affirmed in part and reversed in part, and the case was remanded.

The district court, plaintiffs, and defendants all interpreted the opinion differently. On remand, the district court allowed one federal claim and four state law claims to proceed to trial. The jury returned a verdict in favor of defendants.

On appeal, plaintiffs argued that the district court deviated from the mandate issued in the first appeal by prohibiting them from proceeding to trial on their federal search and seizure claims and dissipation of probable cause claim. The “mandate rule” provides that a district court must comply strictly with the mandate rendered by the appellate court. In applying a fractured panel’s holding, the district court need only look to and adopt the result the panel reached, not the rationale. Here, the per curiam opinion reversed the district court’s entry of summary judgment regarding plaintiffs’ search and seizure claims. Accordingly, the district court erred by allowing only one of these federal claims to proceed to trial. In addition, two judges voted to reverse the district court on the dissipation of probable cause claim, so the district court did not err in not allowing this claim to proceed to trial.

Plaintiffs also claimed that the prior appeal’s mandate required entry of judgment as a matter of law on their state law claims for trespass and false arrest. When the prior panel denied qualified immunity on some claims and reversed the entry of summary judgment for defendants on the state law claims, it acknowledged the existence of a factual dispute. Therefore, the district court did not err on remand by permitting the jury to resolve the factual disputes.

The Tenth Circuit also addressed and rejected plaintiffs’ challenges to various trial rulings concerning jury selection, admission of evidence, and jury instructions.

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

No. 18-1062. *United States v. Duran*. 10/9/2019. D.Colo. Judge Bacharach. *Circumstantial Evidence—Abuse of Discretion—Hearsay.*

Authorities conducted an investigation of Birch, which included controlled buys of crack cocaine from Birch and wiretaps on his phones. The calls aroused suspicion that Birch was buying cocaine from defendant, which led to defendant’s prosecution on drug charges. In its case against defendant, the government presented evidence that included recorded calls between Birch and defendant and testimony from law enforcement officers describing the investigation and interpreting the conversations. Among other charges, a jury convicted defendant of distributing and possessing cocaine with the intent to distribute, and using a telephone to facilitate the manufacture, distribution, and possession with intent to distribute crack cocaine.

On appeal, defendant argued there was insufficient evidence to support his convictions. As to the conviction for distributing and



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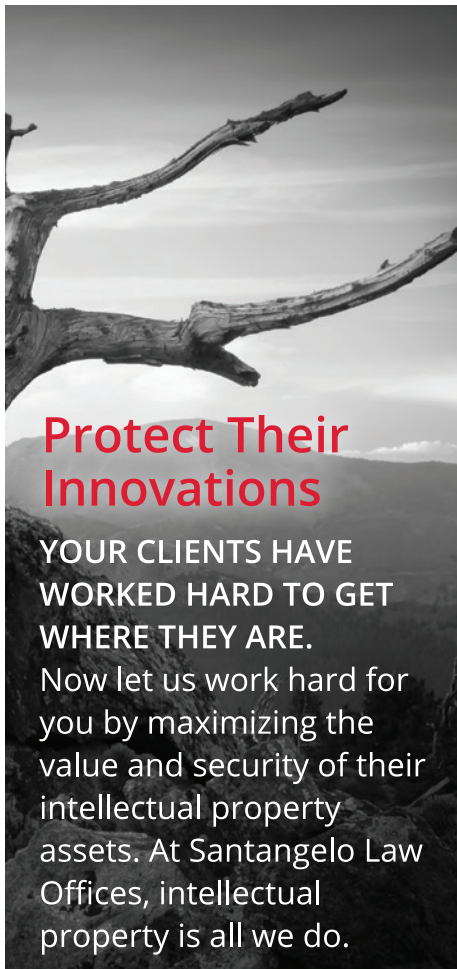
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possessing cocaine with the intent to distribute, defendant based his argument on the lack of physical evidence of the drugs or testimony from anyone who had seen defendant with the cocaine. Circumstantial evidence may suffice without the observation of illegal drugs. Here, the circumstantial evidence against defendant was sufficient to support the inference that defendant actually possessed the drugs in question.

As to the conviction for using a telephone to facilitate the drug offense, defendant's argument was based on the government's failure to prove that he received the cocaine and the fact that the jury found him not guilty of possessing cocaine on the day in question. Here, defendant knowingly and intentionally used a telephone, and the factfinder could reasonably infer that the calls had helped Birch to buy cocaine and convert it into crack cocaine. Further, defendant's acquittal on the underlying drug crime did not prevent his conviction on the facilitation charges.

Defendant also argued that the district court abused its discretion in admitting government testimony about prior drug transactions and interpretations of recorded telephone calls. The district court did not abuse its discretion by allowing officers' testimony about a confidential informant's earlier controlled buys and the meaning of code words. Further, the district court acted within its discretion in overruling defendant's hearsay objection.

The convictions were affirmed.

No. 18-9583. Escobar-Hernandez v. Barr. 10/18/2019. Board of Immigration Appeals. Judge McKay. *Immigration—Asylum—Political Opinion—Withholding of Removal—United Nations Convention Against Torture.*

Petitioner is a citizen of El Salvador who fled the country after he was assaulted, resulting in injuries requiring medical treatment. He entered the United States without a valid entry document and applied for asylum, claiming that he would be subjected to violence if he returned to El Salvador based on a beating he had received there from "Nelson." He argued that he was entitled to relief because he suffered persecution from Nelson due to his political opinions. The immigration judge denied his application for asylum, withholding of removal, and protection

against the United Nations Convention Against Torture (CAT). The Board of Immigration Appeals (BIA) affirmed the ruling.

On petition for review, petitioner contended that the BIA should have granted him asylum and withheld his removal because he suffered past persecution and has a well-founded fear of suffering future persecution based on political opinions imputed to him. An asylum applicant claiming fear of future persecution must show a genuine, subjective fear of persecution and demonstrate an objective basis for the fear through specific factual evidence in the record that would support a reasonable fear of persecution. The Tenth Circuit agreed with the BIA's determinations that petitioner did not show he was beaten due to his political opinion, and his fear of future persecution was unsupported because there was no evidence that Nelson would assault him again or was connected to the Salvadoran government. Further, petitioner's failure to meet the standard of proof for his asylum application forecloses his withholding-of-removal claim premised on the same facts.

Petitioner also argued that the BIA should have granted him protection under CAT because, if he returns to El Salvador, Nelson will likely torture him with the acquiescence of law enforcement. The Tenth Circuit agreed with the BIA's finding that petitioner did not show that any harm Nelson might inflict was with the consent or acquiescence of the Salvadoran government. Further, by itself, pervasive violence in a petitioner's country generally is insufficient to demonstrate that a petitioner is more likely than not to be tortured upon returning there.

The petition for review was denied. **CL**

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Jenine Jensen. 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.