

Summaries of Selected Opinions

No. 18-1068. Cohen v. Chernushin (In re Chernushin). 12/21/2018. D.Colo. Judge McHugh. *Joint Tenancy—Death—Right of Survivorship—Real Property—Bankruptcy.*

Gregory and Andrea Chernushin owned real property in joint tenancy with right of survivorship. Gregory filed for bankruptcy, but Andrea did not. While the bankruptcy case was pending, Gregory died. The bankruptcy trustee then filed an adversary complaint against Andrea,

seeking to sell the property. The bankruptcy court granted summary judgment in Andrea's favor, holding that the bankruptcy estate had no interest in the property because Gregory's joint tenancy interest ended at his death. The district court affirmed the bankruptcy court.

On appeal, the bankruptcy trustee presented several arguments based on the Supremacy Clause. First, the trustee argued that Fed. R. Bankr. P. 1016 provides that the debtor's death

does not impact the bankruptcy estate. Under Colorado law, when one joint tenant dies, his or her property interest is terminated, and the right of survivorship instantly vests title to the whole property in the surviving tenant. While the rule directs that the bankruptcy proceedings continue, it does not prevent Gregory's joint tenancy in the home from terminating at his death to the detriment of the bankruptcy estate.

The trustee next argued that allowing Gregory's interest to terminate at his death would interfere with his authority or obligations as the trustee. Colorado's joint tenancy law does not interfere with the trustee's duties. Here, upon Gregory's death, the joint tenancy held by the estate extinguished automatically. Consequently, the trustee had no power to sell the property.

Finally, the trustee argued that 11 USC § 544, the strong arm clause, prohibits recognition of the effects of Gregory's death on the estate property. The trustee acknowledged that the strong arm clause gives a trustee certain powers to defeat the status of certain creditors. Here, Gregory was not a creditor, nor is there any question about the status of any creditors related to the property. The strong arm provision is inapplicable in this situation.

The judgment was affirmed.

Nos. 17-6165 & 17-6195. United States v. Johnson. 12/26/2018. W.D.Okla. Judge Bacharach. *Armed Career Criminal Act—Crime of Violence—Career Offender—Battery on Law Enforcement Officer.*

Defendant was convicted of possessing cocaine with intent to distribute and being a felon in possession of a firearm. The district court initially imposed concurrent prison terms of 192 months, relying in part on defendant's classification as an armed career criminal, which was based on his three prior convictions for violent felonies. It later concluded that one of the prior convictions had not involved a violent felony, vacated the sentence, and resentenced defendant to a lesser term as a career offender because his remaining two prior convictions constituted "crimes of violence" for sentencing purposes. The government appealed the vacatur of the initial sentence, and defendant appealed the new sentence.



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On appeal, the government contended that defendant had three convictions for violent felonies and thus qualifies as an armed career criminal. Defendant did not dispute the existence of two prior convictions for violent felonies. However, he disputed that the third conviction, for assault and battery on a law enforcement officer, constitutes a violent felony. The Tenth Circuit used the categorical approach to compare the Oklahoma definition of “assault and battery on a law enforcement officer” with the Armed Career Criminal Act’s definition of a “violent felony.” Under Oklahoma law, battery does not require violent force capable of causing physical pain or injury because this crime can be committed with only the slightest touching. Accordingly, battery on a law enforcement officer does not constitute a violent felony, and defendant does not qualify as an armed career criminal. The district court therefore properly vacated defendant’s initial sentence.

Defendant’s appeal challenged the new sentence. He contended that one of his prior convictions, the use of a vehicle to facilitate the intentional discharge of a firearm, is not a crime of violence. The Tenth Circuit determined that this conviction qualifies as a crime of violence, thus triggering enhancement of the guidelines range. The district court did not err in sentencing defendant as a career criminal.

The vacatur of defendant’s initial sentence and defendant’s new sentence were affirmed.

No. 18-6003. *Schulenberg v. BNSF Railway Co.* 12/27/2018. W.D.Okla. Judge McHugh. *Railroad Employee Injury—Expert Opinion—Reliability—Reasoning and Methodology.*

Plaintiff was a train engineer for defendant BNSF Railway Co. (BNSF). He was injured when the train he was riding hit rough track and “bottomed out,” causing him to injure his leg. He sued BNSF under the Federal Employers’ Liability Act. BNSF moved to exclude plaintiff’s expert witness and for summary judgment. The district court excluded the expert’s opinions because they lacked a reliable basis and granted BNSF’s motion for summary judgment.

On appeal, plaintiff argued that the district court erred in excluding his expert. In evaluating the admissibility of expert testimony, a district

court must determine (1) whether an expert is qualified to render an opinion, and (2) if qualified, whether the expert’s opinion is reliable. Here, whether the expert was qualified was not at issue. As to the reliability of the expert opinion, the expert ignored inconvenient facts, based his opinion on evidence removed in time from the incident in question, and failed to provide details to support his conclusions. Further, plaintiff failed to identify a methodology to support the expert’s opinions or to defend such methodology against an abuse of discretion standard. The Tenth Circuit also rejected plaintiff’s claim that the district court should have allowed his expert to testify about general standards for rail tracks. The district court did not err in excluding the expert testimony.

Plaintiff also argued that the district court erred in granting summary judgment. Here, the evidence to support plaintiff’s negligence per se claim was based on mere speculation. The district court correctly granted summary judgment.

The judgment was affirmed.

No. 17-3150. *United States v. Jefferson.* 12/28/2018. D.Kan. Judge O’Brien. *Hobbs Act Robbery—Crime of Violence—Use of Force—Distinction Between Elements and Means in Predicate Offense.*

Defendant was indicted with five counts of Hobbs Act robbery and three counts of use and carry of a firearm. The district court rejected defendant’s proposed jury instruction that would have required the jury to find that he committed the robberies using “force capable of causing physical pain or injury to another person or the person’s property.” The district court instructed the jury that robbery is a crime of violence. Defendant was convicted and sentenced to 454 months.

On appeal, defendant argued that he was entitled to a jury determination of whether Hobbs Act robbery is a crime of violence for purposes of 18 USC § 924(c). Whether a predicate crime fits § 924(c)’s definition of a “crime of violence” is a question of law for the court, not a question of fact for the jury.

Defendant also argued that Hobbs Act robbery is not a crime of violence under § 924(c)

(3)(A) because force is a means of committing the crime, not an element of the crime. The Tenth Circuit previously determined that Hobbs Act robbery is categorically a “crime of violence” because the force element can only be satisfied by violent force. Further, placing one in “fear of injury” to commit the offense requires the “threatened use of physical force” and therefore qualifies the crime as one of violence.

Defendant also argued that the jury should have been told that “force” in Hobbs Act robbery means “violent force.” The Tenth Circuit agreed but found the error harmless because the evidence provided uncontroverted proof of the use of violent force in each of the robberies.

Lastly, defendant argued that the prosecutor’s rebuttal closing argument improperly shifted the burden of proof to him. The prosecutor’s statements, which may have misstated the law concerning the government’s burden of proof concerning the use of actual firearms, were also harmless given the proper jury instructions and the substantial evidence of guilt.

The convictions were affirmed.

No. 18-1113. *DTC Energy Group, Inc. v. Hirschfeld.* 12/28/2018. D.Colo. Judge Briscoe. *Preliminary Injunction—Employment Agreement—Irreparable Future Harm.*

Hirschfeld signed an employment agreement with DTC Energy Group, Inc., a staffing company, that included non-solicitation and non-interference provisions. Neither provision applied, however, if he resigned because of a change in the current equity ownership of DTC. While employed by DTC, Hirschfeld used DTC’s resources to win business for Ally Consulting, LLC (Ally). Later, one of the two DTC owners bought out the other. Hirschfeld soon resigned, citing the change in the equity ownership of DTC, and immediately began working for Ally.

DTC sued Hirschfeld, another former employee, and Ally for using DTC’s trade secrets to divert business from DTC to Ally. DTC moved for a preliminary injunction based on its claims for breach of contract, breach of the duty of loyalty, misappropriation of trade secrets, and unfair competition. The district court found that although DTC showed a probability of irreparable harm from Hirschfeld’s ongoing

solicitation of DTC’s clients, DTC could not show that the ongoing solicitation violated Hirschfeld’s employment agreement. The district court denied the preliminary injunction.

DTC appealed the denial of the preliminary injunction. A preliminary injunction may be granted only when monetary or traditional legal remedies are inadequate and the right to relief is clear. A showing of probable irreparable harm is a prerequisite for issuance of a preliminary injunction. DTC argued that the district court’s finding that DTC failed to establish a significant risk of irreparable harm based on defendants’ past conduct was erroneous. Here, DTC did not establish irreparable future harm based on the employees’ past misconduct because a damages award would be an adequate remedy. Second, DTC did not establish that defendants currently possess DTC trade secrets, which could authorize a preliminary injunction to prevent misappropriation of a trade secret. And third, DTC did not show that confusion about the relationship between DTC and Ally persists, a showing necessary to establish unfair competition in respect to a trade name. The district court’s finding was not erroneous.

DTC also claimed that Hirschfeld’s ongoing solicitation of its customers violated his employment agreement. Hirschfeld’s present solicitation of DTC’s customers and consultants would not support issuing a preliminary injunction because such injunction would exceed the scope of the non-solicitation provisions in Hirschfeld’s employment agreement. Accordingly, the district court did not err in finding that DTC would not succeed on its breach of contract claim in connection with Hirschfeld’s ongoing solicitation of DTC’s customers and consultants.

The denial of the preliminary injunction was affirmed.

No. 17-2121. United States v. Lopez-Aguilar. 1/15/2019. D.N.M. Judge Bacharach. *Waiver of Collateral Review—Plea Agreement.*

Defendant entered a guilty plea based on an agreement with the government. His plea agreement included a waiver of the right to collaterally challenge his conviction. Despite the waiver, he filed a collateral challenge under 28 USC § 2255 in district court. The district court

summarily dismissed the § 2255 motion on the merits without ruling on the waiver and without directing the government to file a response.

On appeal, defendant argued that the government forfeited its opportunity to invoke the waiver by failing to raise the waiver in district court. The government argued that the waiver should be enforced. The Tenth Circuit recognized that the government can forfeit invocation of a waiver by failing to assert it in district court when given an opportunity to do so. Here, the district court summarily dismissed the motion rather than order a response, so the government had no opportunity to invoke the waiver in district court. Thus, the government did not lose its right to raise the waiver on appeal. Further, defendant did not challenge the government’s showing that the waiver met the requirements for enforcement.

The dismissal was affirmed. 

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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