

Summaries of Selected Opinions

No. 18-3003. United States v. Orozco. 2/26/2019. D.Kan. Judge Kelly. *Prosecutorial Misconduct—Sixth Amendment—Witness Interference—Appropriate Remedy.*

Defendant was charged with drug-related crimes. Defendant intended to call a witness (the witness) who would have testified in contradiction to one of the government's witnesses. The witness had a pending federal drug case. The court agreed to allow the prosecutor to

interview the witness during a recess before he testified. After the recess, the witness no longer wanted to testify. Defendant alleged that the prosecutor had told the witness's attorney to tell the witness that "if you get in my way, I'm going to get in your way."

The prosecutor denied discussing the effect of the witness's testimony on his pending drug charge, stating she only discussed the possibility of perjury consequences if he lied under oath.

The district court proceeded with the trial, but agreed to hold a separate hearing to investigate the allegations against the prosecutor. A jury convicted defendant of drug-related crimes. He filed a motion for a new trial, alleging the government violated the Sixth Amendment by interfering with his right to call a witness. After two hearings, the district court determined that the prosecutor's statements went beyond a simple perjury warning and threatened the witness with possible perjury charges and adverse consequences in his own case if he testified. The district court granted defendant's motion, vacated his convictions, and dismissed the underlying counts of the superseding indictment.

On appeal, the government argued that the district court clearly erred in finding that defendant's right to a defense was violated by the prosecutor's conduct and the witness's subsequent refusal to testify. Here, although the government disputed the occurrence and content of the prosecutor's comments, the district court had considered and expressly rejected the government's position. Moreover, the Sixth Amendment error was not harmless beyond a reasonable doubt. The district court did not clearly err in determining that defendant's Sixth Amendment rights were violated. Further, the district court did not err in vacating defendant's convictions and ordering a new trial.

The government also argued that the district court abused its discretion by dismissing the indictment with prejudice rather than ordering a new trial. Dismissal is an extraordinary remedy to be used only in cases of serious and flagrant prosecutorial misconduct. A court may dismiss an indictment only when the defendant has been prejudiced. Here, the district court had less drastic remedies available to minimize prejudice to defendant, including postponing his trial until after the reluctant witness was sentenced in his own case. Even if it found the prosecutor had acted in bad faith, the district court was required to narrowly tailor its remedy. The district court abused its discretion in dismissing the superseding indictment with prejudice rather than ordering a new trial.

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



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No. 18-9005. Feinberg v. Commissioner of Internal Revenue. 2/26/2019. U.S. Tax Court. Judge McHugh. *Medical Marijuana Dispensary—Business Income and Losses—Fifth Amendment Privilege—Unlawful Trafficking of Controlled Substances.*

Feinberg and two others (the taxpayers) were shareholders in Total Health Concepts, LLC (THC), a Colorado company engaged in selling medical marijuana. They claimed THC's income and losses on their tax returns, but the Internal Revenue Service (IRS) disallowed certain deductions as prohibited for businesses engaged in unlawful trafficking of controlled substances, pursuant to 26 USC § 280E. The tax court affirmed on the basis that the taxpayers had failed to substantiate their business expenses.

On appeal, both parties agreed that the tax court erred by injecting a substantiation issue into this case not raised in the deficiency notice and then placing the burden on the taxpayers to refute that claim. Because proving THC was not engaged in unlawful trafficking requires presentation of different evidence than substantiating the business expenses, the substantiation theory constitutes a new matter. The burden of proof on that new matter falls on the Commissioner of Internal Revenue (the Commissioner), not on the taxpayers. As a result, the tax court erred by affirming the denial of the deductions based on the taxpayers' failure to adduce evidence to substantiate the expenses.

The Commissioner argued that the Tenth Circuit could affirm on the alternative ground that the taxpayers failed to meet their burden of proving the IRS erred in denying the deductions based on § 280E. The taxpayers argued that placing the burden on them to refute the IRS's determination would violate their Fifth Amendment privilege. Taxpayers normally bear the burden of proving the IRS erred in determining a business was engaged in unlawful trafficking. The Tenth Circuit determined that the taxpayers' possible failure of proof on an issue on which they bear the burden is not "compulsion" under the Fifth Amendment. Here, the taxpayers did not attempt to meet their evidentiary burden and failed to point to any evidence showing the IRS erred in determining they were engaged in unlawfully trafficking in a controlled substance.

The tax court properly rejected the taxpayers' challenge to the deficiency.

The judgment was affirmed on the alternative ground that § 280E prohibited the claimed deductions.

No. 18-8031. United States v. Knapp. 3/5/2019. D.Wyo. Judge Kelly. *Search and Seizure—Search Incident to Arrest—Items Within Arrestee's Immediate Control.*

Defendant called police to report a theft at a grocery store. During their investigation of the theft, officers discovered that defendant had an outstanding warrant for her arrest. An officer located her in the driver's seat of a parked pickup truck outside the store and informed her he had to arrest her. She retrieved her purse from the seat of the truck and followed the officer back into the store, where she sat and waited in a chair. The officer moved her purse,

which was zipped shut, a few chairs away from her. Defendant asked her friend, who was also present, to take her purse so she would not have to take it to jail. Officers warned defendant's friend against taking the purse, and the friend declined to take the purse. Officers refused to let defendant leave the purse in the truck, and they asked for consent to search the purse, which she refused. Officers then handcuffed defendant, led her outside, and placed the purse on the hood of a patrol car approximately three feet away from her. An officer warned defendant that she would be guilty of a felony if she brought drugs into a detention center, and defendant admitted she was carrying a pistol in her purse. Officers searched the purse and found the pistol.

Defendant was charged with unlawful possession of a firearm after a felony conviction. She moved to suppress the firearm. The district court denied the motion. Defendant entered

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a conditional guilty plea to being a felon in possession of a firearm, reserving the right to appeal the denial of her motion to suppress the firearm.

On appeal, defendant argued that the warrantless search of her purse was unreasonable because (1) it was not incident to her arrest, given intervening events; and (2) the search incident to arrest exception did not apply because police chose to put her in proximity to her purse, and she could not have accessed the purse's contents at the time of the search. The government argued the search was proper under the search incident to arrest exception. Searches of areas within an arrestee's immediate control must be justified on a case-by-case basis by the need to disarm or to preserve evidence.

Defendant's appeal turns on whether the search of her purse was "one of the person," and if it was not, whether it was otherwise justified because it was within an area from which she could have obtained possession of a weapon or destructible evidence. The Tenth Circuit determined that a search of a carried purse does not qualify as "of the person." Defendant's purse was not concealed under or within her clothing, so it was easily capable of separation from her person and the arresting officers had no authority to search its contents. Further, it was unreasonable for officers to believe defendant could have gained possession of a weapon or destructible evidence in her purse at the time of the search because she was handcuffed, an officer was next to her, two other officers were nearby, the purse was several feet away and closed, and officers had maintained exclusive possession of it since she was handcuffed. The search incident to arrest exception did not apply.

The denial of defendant's motion to suppress was reversed and the case was remanded.

No. 18-1067. *Bill Barrett Corp. v. YMC Royalty Co., LP.* 3/7/2019. D.Colo. Per curiam. *Oil and Gas Contract—Enforceability—Mutual Assent—Expert Witness—Gatekeeper Functions—Comment to Jury—Abuse of Discretion.*

The Bill Barrett Corporation (Barrett) and YMC Royalty Company, LP (YMC) are experienced oil and gas companies with mineral rights in Colorado. They entered into a joint

operation to develop oil wells. YMC executed documents authorizing joint expenditures, accepting responsibility for costs, and electing to participate and share in revenues. Barrett sued YMC for breach of contract after YMC refused to pay its share of costs in the joint operation. A jury found in Barrett's favor. YMC moved for judgment as a matter of law and for a new trial. The district court denied the motions.

On appeal, YMC argued that the parties did not have an enforceable contract. Here, sufficient evidence supported the finding that the executed documents were sufficiently definite to constitute binding contracts. Based on the documents and the parties' course of performance, the district court did not err in denying YMC's motion for judgment as a matter of law.

YMC also argued that there was insufficient evidence for a jury to find for Barrett on its breach of contract claim and the district court therefore erred in denying its motion for new trial. The Tenth Circuit interpreted the parties' intent from the face of the documents and found language that could be interpreted by a reasonable jury as that of offer and acceptance. Further, trial testimony indicated that YMC understood the obligation incurred by electing to participate in the wells, and its other actions, including orders confirming its working interest ownership and check deposits for revenue from the wells, suggest the existence of mutual assent. There was sufficient evidence for a jury to conclude the parties had a binding contract. The district court did not abuse its discretion in denying YMC's motion for a new trial.

YMC also argued that the district court's exclusion of its expert witness prevented it from obtaining a fair trial. Before trial, the district court ruled that the expert, an oil-and-gas attorney, would not be allowed to give opinion testimony on legal matters, but tentatively permitted him to opine on custom and practice in the industry. However, at trial, the district court ruled that YMC failed to establish the expert's expertise and excluded the testimony. The district court properly exercised its gatekeeper functions for the admission of expert testimony and did not abuse its discretion in excluding YMC's expert witness.

Lastly, YMC contended that the district court improperly influenced the jury when it excluded its expert's testimony by commenting that an opinion was not necessary. YMC argued that the only proper recourse was a mistrial. Here, the district court's comments on the evidence were reasonable, and the court gave a curative instruction clarifying that it held no view about the persuasive value or impact of the evidence. The challenged remarks did not clearly influence the verdict, and the district court did not abuse its discretion in denying the motion for mistrial.

The judgment was affirmed.

No. 18-8017. *United States v. Gonzales.* 3/12/2019. D.Wyo. Judge Murphy. *Money Laundering—Elements—Sufficiency of Evidence.*

Defendant owned and operated a business. He also had a side business selling cocaine and methamphetamine. Defendant used his personal and business bank accounts to launder the proceeds of his drug sales. A grand jury charged him with committing a multitude of drug and financial crimes. Defendant pleaded guilty to 10 counts in the indictment, including seven counts of concealment money laundering.

On appeal, defendant asserted for the first time that his pleas underlying two of the money laundering convictions were not supported by a sufficient factual basis. The first count he challenged involved a transfer of funds from a credit union account he controlled to another account he controlled at the same credit union but that was held in his daughter's name. Defendant admitted that he transferred money from one account to another, he knew the transaction involved money earned from drug sales, and he had made the transfer at least in part to conceal the nature, source, ownership, and control of the drug proceeds. Notwithstanding his admissions, defendant argued the facts he had admitted could, hypothetically, describe a lawful transfer of money from one account to another and that people transfer money from one bank account to another all the time for perfectly legitimate reasons. Because defendant admitted all the elements of the crime, the district court did not err when it accepted his plea to this count.

The second challenged count involved defendant's use of a safety deposit box to hold

cash earned from the unlawful distribution of controlled substances. Defendant admitted to facts that satisfy all elements of concealment money laundering, but he argued he kept the safety deposit box in his name or the name of a close family member and thus made no effort to conceal his identity. However, a conviction for concealment money laundering does not require that the financial transaction conceal anyone's identity. Defendant also argued that the factual basis failed to describe how he did anything with the illegally obtained funds in the safety deposit box to convert them to some form of legitimate wealth. It is not necessary that the money laundering transaction make the criminal proceeds appear to be legitimate. It is sufficient that the transaction is intended to conceal the location, source, nature, ownership, or control of the criminal proceeds, and defendant specifically admitted that he had such intent. The district court did not err in finding that defendant's guilty plea was supported by a sufficient factual basis, and the conduct defendant admitted established every element of the violation.

The judgment was affirmed.

No. 17-5097. *Kelvion, Inc. v. PetroChina Canada Ltd.* 3/15/2019. N.D.Okla. Chief Judge Tymkovich. *Forum Non Conveniens—Forum-Selection Clause—Equitable Claims—Public-Interest Factors.*

PetroChina Canada Ltd. (PetroChina) purchased 10 heat-exchanger units from Kelvion, Inc.'s (Kelvion) Oklahoma plant. The parties' purchase order agreement included a forum-selection clause subjecting the parties to Canadian jurisdiction. They had a dispute over delivery costs, and Kelvion sued PetroChina in Oklahoma asserting equitable claims of quantum meruit and unjust enrichment. Kelvion argued that the forum-selection clause did not apply to its equitable claims. The district court concluded that the forum-selection clause applied and dismissed the suit under the doctrine of forum non conveniens.

On appeal, Kelvion argued that its equitable claims related to expenses not bargained for in the contract, and thus the forum-selection clause does not control. Kelvion contended the forum-selection clause cannot apply because

the purchase order agreement is not a basis for its legal claims. The scope of a forum-selection clause is analyzed according to ordinary principles of contract construction. Here, two independent clauses address choice of law and forum selection and suggest that claims must be sufficiently connected to the purchase order. Kelvion's claims arose directly from and depend on the agreement, require the court to interpret the agreement, and involve the same operative facts as a claim for breach of the agreement. The claims are inextricably linked to the purchase order agreement, and the forum-selection clause applies.

The doctrine of forum non conveniens permits a court to dismiss a case when an adequate alternative forum exists in a different judicial system and there is no mechanism by which the case may be transferred. Generally, forum non conveniens is proper when an adequate alternative forum is available and public- and private-interest factors weigh in favor of dismiss-

al. Having determined that the forum-selection clause applies, the Tenth Circuit turned to a balancing of public-interest factors. Kelvion did not contend that the district court incorrectly or improperly weighed any of the public-interest factors, so the Tenth Circuit concluded that the district court did not abuse its discretion in weighing the factors and dismissing the case.

The judgment 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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