Summaries of Selected Opinions

No. 18-4146. Affliction Holdings, LLC v. Utah Vap or Smoke, LLC. 8/27/2019. D.Utah. Judge Lucero. *Trademark Infringement—Likelihood of Consumer Confusion—Similarity—Strength of Mark.*

Affliction Holdings, LLC (Affliction) is an apparel company that has registered trademarks that include the AFFLICTION Word Mark and a decorative upside-down fleur-de-lis with the words "AFFLICTION LIVE FAST" in Gothic lettering contained inside a circle. Utah Vap or Smoke, LLC (Utah Vap) is an e-cigarette accessary company that also sells promotional apparel. Its marks incorporate a right-side-up decorative fleur-de-lis inside a circle and the words "VAPE AFFLICTION" in a different font than the lettering used in Affliction's mark. Affliction sued Utah Vap for trademark infringement, contending that Utah Vap was selling products using marks that misrepresented the products as being from Affliction. The district court granted summary judgment for Utah Vap, holding there was no likelihood of confusion between the parties' marks.

Affliction appealed the grant of summary judgment. The Tenth Circuit observed that a trademark-infringement claim requires the plaintiff to establish that it has a legal right to a mark and the defendant's use of a similar mark is likely to generate consumer confusion in the marketplace. Summary judgment is available only if no reasonable juror could find a likelihood of confusion between plaintiff's and defendant's marks. The Tenth Circuit applied the relevant factors for determining a likelihood of confusion and determined that the degree of visual similarity between the marks was high. In addition, Affliction's mark was conceptually and commercially strong; the stronger the trademark, the more likely that encroachment upon it will lead to confusion. Accordingly, a genuine issue of material fact exists about the likelihood of initial interest and post-sale confusion between the marks, and the district court erred in granting summary judgment.

The grant of summary judgment was reversed and the case was remanded for further proceedings.

No. 18-2180. United States v. Romero, Jr. 9/5/2019. D.N.M. Judge Ebel. *Motion to Suppress—Probable Cause—Reasonable Suspicion—Resisting Arrest—Mistake of Law.*

An officer on patrol observed defendant standing outside a church and looking into a window. The officer approached defendant, who was filling his water bottle and trying to charge his cell phone. The officer gave defendant a series of instructions, which concluded with his command to defendant to get on the ground. When defendant was on the ground, the officer conducted a pat-down search that revealed a knife. The officer then searched defendant and found a gun in his backpack. The officer arrested defendant for resisting and failing to obey commands. Defendant was charged with being a felon in possession of a firearm and knowingly possessing a stolen firearm. Defendant moved to suppress the gun evidence, and the district court denied the motion. Defendant pleaded guilty to both charges but reserved his right to appeal the suppression issues.

On appeal, defendant challenged the district court's conclusions that the officer had reasonable suspicion and probable cause to arrest him, and even if the officer lacked probable cause, he effectuated the arrest under a reasonable mistake of law, so the search was reasonable nonetheless. There was substantial record evidence that defendant did not refuse to obey the officer's commands in any way that would constitute unlawful resistance, nor was it objectively reasonable for the officer to think defendant's conduct constituted "resisting or abusing." Thus, any mistake of law by the officer was not reasonable, and the subsequent search of defendant's backpack was unlawful. Because of this ruling, the Tenth Circuit did not address defendant's argument that there was no reasonable suspicion to support his initial pat-down search.

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

No. 18-4025. Watts v. Watts. 9/5/2019. D.Utah. Judge Phillips. *Hague Convention—Child Custody—Children's Habitual Residence—Length of Intended Stay—Parents' Shared Intent—Child Acclimatization.*

Shane and Carrie Watts were married in Utah and had three children. Shane and the children were dual citizens of Australia and the United States. The family moved to Australia in 2016 to get specialized medical care for one of the children. In 2017 the marriage deteriorated, and Carrie took the children to Utah without telling Shane. Shane petitioned a Utah federal court to return the children to him under the Hague Convention, claiming that Carrie had wrongfully removed them from their "habitual residence" in Australia. The district court denied the petition because Shane had not proved that Australia was the children's habitual residence.

On appeal, Shane argued that the district court erred by conflating the habitual-residence standard with the domicile standard that traditionally governs jurisdiction in child custody disputes. He claimed that, as a prerequisite for habitual residency, the district court required him and Carrie to have had a shared intent to stay in Australia "permanently or indefinitely." The Tenth Circuit first determined that a family need not intend to remain in a given location indefinitely to establish habitual residence there. Here, the district court concluded that Australia was not the children's habitual residence because the family was in Australia for a specific purpose that had a limited duration, and the family maintained a home and operated a business in the United States. The district court did not

require permanency as a necessary component of proving habitual residency and did not err.

Shane next argued that the district court erred by failing to consider his and Carrie's present shared intent regarding their children's presence in Australia. The district court considered all the circumstances surrounding the family's intent and properly determined that the parent's shared intent was to remain in Australia for a limited duration for a specific purpose.

Shane also contended that the district court misconstrued the habitual-residence determination under *Kanth v. Kanth*, No. CIV 99-4246, 2000 WL 1644099 at *1 (10th Cir. Nov. 2, 2000), by finding that the children did not acclimatize in Australia. The district court correctly considered both acclimatization and parental intent independently and did not err in weighing these factors.

Shane further argued that the district court legally erred by not fully crediting how long the children had been in Australia. The district court applied the correct legal standard by considering the totality of the circumstances, not just the amount of time spent in Australia, when determining whether the children had acclimatized.

Lastly, Shane contended that the district court erred by failing to determine which U.S. state was the children's habitual residence, as required by Article 31(a) of the Hague Convention. When, as here, a petitioner fails to establish habitual residence in the location that the petitioner claims, Article 31 is not implicated. Thus, it does not matter where the children now reside.

The order was affirmed.

No. 18-2105. United States v. Elliott. 9/9/2019. D.N.M. Judge Lucero. *Multiplicity—Double Jeopardy—Ambiguous Unit of Prosecution—Rule of Lenity.*

Execution of a search warrant on defendant's residence uncovered over 8,000 images of child pornography. Among other things, defendant was charged with five counts of possessing child pornography. Each count concerned a different electronic device or medium on which defendant stored the pornography. He possessed the different electronic devices containing child pornography in the same physical location and at the same time. Defendant moved to dismiss all but one possession count as multiplicitous. The district court denied the motion. Defendant pleaded guilty to four counts of possessing child pornography but reserved his right to appeal the denial of his motion to dismiss for multiplicity.

On appeal, defendant argued that three of the four possession counts are multiplicitous and thus violate the Double Jeopardy Clause because he possessed the different electronic devices containing child pornography in the same physical location and at the same time. He contended that 18 USC § 2252A(a)(5)(B) is ambiguous as to whether the unit of prosecution is a single device containing child pornography or the simultaneous possession of multiple devices containing child pornography. The Tenth Circuit determined that the statute's use of the modifier "any" preceding the enumerated list of storage materials creates sufficient ambiguity as to require lenity in multiplicity challenges. Under § 2252A(a)(5), the actus reus is the possession of the storage device, so the inquiry turned on whether the media images were possessed simultaneously. Here, defendant possessed the electronic storage devices simultaneously, thus the four counts of possession are multiplicitous. The appropriate remedy is vacatur of all but one of the convictions and resulting sentences.

The case was remanded with instructions to vacate the convictions and sentences on all but one of the possession convictions.

No. 17-1173. C5 Medical Werks, LLC v. CeramTec GMBH. 9/11/2019. D.Colo. Judge Eid. *Personal Jurisdiction—Forum State—General versus Specific Jurisdiction—Minimum Contacts—Trademark Promotion—Trademark Enforcement.*

C5 Medical Werks, LLC (C5) is a Delaware company headquartered in Colorado. CeramTec GMBH (CeramTec) is a German company that has no physical presence in Colorado. Both companies produce ceramic components for medical prostheses. The components contain chromium, which gives them a pink hue. CeramTec previously held a trademark on chromium-based materials in its ceramic medical implants. After its patent expired, other companies, including C5, began using a chromium composite in their ceramic components. In response, CeramTec tried to enforce its trademark against C5's use of the color pink in its components. C5 sued to cancel CeramTec's trademarks and for a declaratory judgment of non-infringement. CeramTec moved to dismiss for lack of personal jurisdiction. The district court denied the motion and, after a bench trial, found in favor of C5.

On appeal, CeramTec argued that the district court lacked personal jurisdiction. Personal jurisdiction in this case turned on the evaluation of specific jurisdiction because CeramTec had no continuous physical or business presence in Colorado at the time of the trademark dispute. Specific jurisdiction requires a plaintiff to show that a defendant has minimum contacts with the forum state. Here, CeramTec's alleged contacts with Colorado related to (1) the promotion of its trademark, which consisted of three occasions when CeramTec traveled to Colorado for tradeshows; and (2) CeramTec's trademark enforcement activities, which consisted of a seizure of C5's products from a tradeshow in France and a cease-and-desist letter sent to Colorado. Neither set of activities sufficiently established the minimum contacts necessary for CeramTec to be subject to specific jurisdiction in Colorado.

The denial of the motion to dismiss was reversed and the case was remanded with instructions that it be dismissed.

No. 18-3213. United States v. Malone. 9/11/2019. D.Kan. Judge Seymour. *Special Condition of Supervised Release—Requirement to Undergo Mental Health Treatment—Requirement to Take Prescribed Medication—Forfeiture versus Waiver.*

Defendant was convicted of two counts of distributing methamphetamine. The presentence investigation report included a recommendation for a special condition of supervised release requiring defendant to undergo mental health treatment, which included a mandate for defendant to "take prescribed medication as directed" by mental health staff or a treating physician. At sentencing, the district court imposed the special condition without making supportive findings. Defense counsel did not object to the condition or the court's failure to make supporting findings.

On appeal, defendant argued that the district court's failure to make particularized findings to support the special condition of supervised release was plain error. As a preliminary matter, counsel's failure to preserve the issue was closer to inadvertent neglect than an intentional decision to abandon a claim, so this situation presents a forfeiture rather than a waiver of the issue, and the Tenth Circuit reviewed for plain error. On the merits, the special condition on its face is an impermissible infringement of defendant's significant liberty interests, given the lack of particular findings to support it. The district court's imposition of a blanket medication requirement without particularized supportive findings was plain error affecting defendant's substantial rights and the fairness, integrity, and public reputation of judicial proceedings.

The case was remanded for clerical amendment of the judgment to strike the offending language "take prescribed medication as directed" from the written judgment. No resentencing may take place. 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.