Summaries of Selected Opinions

No. 18-3159. Greer v. City of Wichita. 12/3/2019. D.Kan. Judge Bacharach. *Uniformed Services Employment and Reemployment Rights Act—Failure to Interview—Promotion—Anti-Military Animus.*

Plaintiff simultaneously served in the Navy Reserves and worked as a security guard for the Wichita Art Museum. She applied for a promotion at the museum but was denied an interview. She sued under the Uniformed Services Employment and Reemployment Rights Act (the Act). The district court granted summary judgment in the employer's favor.

On appeal, plaintiff challenged the grant of summary judgment. The Act prohibits employers from denying promotions because of an employee's military service. Here, based on the museum director's anti-military remarks, a factfinder could reasonably infer that plaintiff's military status was a motivating factor in denying her an interview. Further, given her statement on the application that she had supervisory experience, a factfinder could reasonably find that plaintiff would have been granted an interview if she had not been serving in the military. Thus, issues of material fact exist, and the district court erred in granting summary judgment.

The summary judgment was reversed.

No. 18-1486. Prison Legal News v. Federal Bureau of Prisons. 12/13/2019. D.Colo. Judge Matheson. *Prison Newspaper Delivery—Developments during Litigation—Mootness—Voluntary Cessation Exception—Redressable Injury.*

Prison Legal News (PLN) publishes a monthly magazine to help inmates navigate the criminal justice system. The Bureau of Prisons (BOP) rejected 11 publications PLN sent to inmate subscribers at the BOP's U.S. Penitentiary, Administrative Maximum Facility in Florence, Colorado (ADX). For each rejection, the warden signed a notice identifying the objectionable pages and explaining why the content was problematic, including that some pages contained certain information about inmates and staff (name-alone content). PLN sued, claiming the BOP violated its First and Fifth Amendment rights and the Administrative Procedure Act (APA).

Subsequently, ADX distributed the 11 publications, revised its institutional policies, and issued a declaration from its current warden that the revised policies would be followed going forward and the initial rejections of the publications at issue were improper. The parties filed cross-motions for summary judgment, and the district court granted the BOP's motion for summary judgment, denied PLN's motion for partial summary judgment, and dismissed the case without prejudice as moot.

On appeal, PLN argued that the district court erred in granting the BOP's summary judgment

motion. Here, based on the actions of ADX and the new warden, PLN no longer suffered a redressable actual injury. The voluntary cessation exception to mootness did not apply because the BOP satisfied its formidable burden to show that its allegedly wrongful behavior could not reasonably be expected to recur. Because PLN's APA claim is based on the same allegations as its constitutional claims, the APA claim is similarly moot.

The order was affirmed.

No. 18-5097. Murphy v. City of Tulsa. 12/16/2019. N.D.Okla. Judge Bacharach. *Municipal Liability—Summary Judgment.*

Plaintiff confessed to murdering her infant son after police allegedly threatened that she wouldn't be able to see her daughter again. The confession led to her conviction for murder. After she served 20 years in prison, plaintiff's conviction was vacated and the case was dismissed with prejudice. She then sued the City of Tulsa (City) claiming a City police officer had coerced her confession and the City was liable for the officer's violation of her constitutional rights. The district court granted summary judgment for the City.

On appeal, plaintiff contended that the district court erred in granting summary judgment because the City was liable under each source of potential liability. Municipalities can incur liability for their employees' constitutional torts only if those torts resulted from a municipal policy or custom. There are five potential sources for a municipal policy or custom: (1) a formal regulation or policy statement, (2) an informal custom that was a widespread practice, (3) the decision of a municipal employee with final policymaking authority, (4) a policymaker's ratification of a subordinate's action, and (5) a failure to train or supervise employees. Here, plaintiff failed to present evidence supporting municipal liability under any of the five theories.

The summary judgment was affirmed.

No. 18-1254. United States v. Fernandez-Barron. 12/17/2019. D.Colo. Judge Bacharach. *Sentence Enhancement for Obstruction of Justice—Perjury—Materiality—Willfully False Statement.*

The government alleged that defendant participated in a drug ring that transported cocaine from El Paso to Denver. The evidence supporting this allegation linked defendant to a BMW and an Impala. Defendant was convicted on charges of conspiracy, distribution, and possession with intent to distribute cocaine. At sentencing, the district court found that defendant had committed perjury when he willfully gave false testimony about when he

had sold his BMW and that he did not own an Impala. Accordingly, the district court imposed a two-level sentence enhancement for obstruction of justice.

On appeal, defendant challenged the sentence enhancement. He contended that his testimony that a text message related to the sale of his BMW, not a cocaine delivery, was immaterial and not willfully false. The government relied in part on a text message asking defendant about delivery of a "BMW," and a government witness testified that "BMW" was a code word for cocaine delivery. This explanation would be undermined if defendant had been conducting a transaction involving an actual BMW vehicle. Thus, the district court correctly reasoned that defendant's testimony could influence the jury's interpretation of the text message. Further, defendant testified that he sold the BMW in May 2014, but the district court found that he hadn't sold his BMW until September 2014. Defendant's testimony was thus material and willfully false.

Defendant also contended that his testimony about the Impala was neither willfully false nor material. A witness testified that she had driven cocaine to a man resembling the defendant who was in a car that looked like an Impala. To counter this identification, defendant testified that an Impala was registered under his name but insisted that he didn't own the car because he had sold it. Defendant also signed documents under penalty of perjury stating that he owned the Impala. Given defendant's sworn statements about ownership and his experience in buying and selling cars, the district court could reasonably find that he knew he was the owner and lied when he professed confusion over the questions about ownership. The district court did not err in determining that defendant had willfully given false and material testimony about his ownership of the Impala.

The sentence was affirmed.

No. 18-1357. United States v. Brewington. 12/17/2019. D.Colo. Judge Bacharach. *Exclusion of Evidence—Restriction of Testimony—Ex Post Facto Clause.*

Defendant recruited potential investors by making untrue statements that he owned or controlled billions in assets. Defendant admitted that much of what he said was untrue, but he argued that he had been duped. A jury convicted defendant of 11 counts of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, conspiracy to commit money laundering, money laundering, and monetary transactions in property derived from specified unlawful activity. He was sentenced to 70 months in prison, supervised release, and payment of restitution.

On appeal, defendant challenged the convictions based on the district court's exclusion of emails he had sent and received. Even if the district court had erred in excluding emails defendant sent and received (some of which were not offered as evidence), any errors were harmless because defendant testified about the emails and the evidence of his guilt was overwhelming.

Defendant also argued that the district court improperly restricted the testimony of a woman who was duped by the same man who had allegedly duped defendant. The district court didn't err in restricting the woman's testimony; the court allowed the woman to testify, and it had the discretion to exclude the details of how she had been conned.

Defendant further argued that the court improperly relied on a current version of the U.S. Sentencing Guidelines rather than the version in effect when the offenses took place. Under the Ex Post Facto Clause, the district court is required to apply the sentencing guideline that was in effect when the offense was committed. Here, the defendant's offenses ended in 2011, so the 2010 Guidelines applied, but the judge applied the 2015 Guidelines. The government conceded this error.

The convictions were affirmed. The sentence was reversed and the case was remanded for resentencing.

No. 18-7062. United States v. Waugh. 12/17/2019. E.D.Okla. Judge Baldock. *Possession of Methamphetamine with Intent to Distribute—Jury Instruction on Lesser Included Offense of Mere Possession.*

Defendant was traveling on an interstate when a trooper observed his vehicle cross the fog line. The trooper initiated a traffic stop, but defendant refused to yield. The trooper followed him for another 10 miles during which time he observed defendant moving erratically and reaching into the back seat. Ultimately, the trooper rammed defendant's vehicle to bring it to a stop. The trooper and other officers found shards of suspected methamphetamine and related drug production materials in defendant's vehicle.

Defendant was charged with possession with intent to distribute 50 or more grams of methamphetamine. He argued at trial that he possessed the methamphetamine but did not intend to distribute it and requested that the district court give the jury an instruction on the lesser included offense of simple possession. The district court denied this request and the jury convicted defendant.

On appeal, defendant argued that the district court erred in refusing to give the instruction for the lesser included offense. The dispositive question was whether the jury could have rationally acquitted defendant of the greater offense and convicted him of the lesser offense. Here, there was no evidence of defendant's personal use of methamphetamine, but substantial evidence of distribution: the quantity of methamphetamine seized in the traffic stop was more than would be typical for personal use, and its purity level was highly probative of distribution; and other circumstances of defendant's trip, including his intentional flight, all point to distribution. Thus, no rational jury could have found that the methamphetamine was intended for personal use rather than distribution, and the district court did not abuse its discretion in declining to give an instruction on simple possession.

The ruling was affirmed. CL

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