Summaries of Selected Opinions

No. 18-8069. United States v. Carter. 10/28/2019. D.Wyo. Judge McKay. *U.S. Sentencing Guidelines—Variance—Forfeiture or Waiver—Presumption of Reasonableness.*

Defendant pleaded guilty to possessing a firearm as a felon and manufacturing counterfeit notes. At sentencing, the district court applied a cross-reference to U.S. Sentencing Guideline § 2K2.1(c) for the firearm offense based on defendant's use of the firearm in connection with an uncharged drug distribution offense, which resulted in a greater offense level than a straightforward application of the firearm offense Guideline. Defendant requested a four-level downward variance from the total offense level. The district court granted a two-level downward variance and sentenced him to 84 months in prison.

On appeal, defendant argued that the district court procedurally erred in applying the cross-reference and his sentence was thus unreasonable. He contended that the only evidence presented as a basis for the cross-reference, a confidential informant's proffer, was unreliable because it was unsworn, uncorroborated, internally inconsistent, and otherwise not credible, and was thus insufficient to support a finding by preponderance that defendant was responsible for trafficking nine ounces of methamphetamine. Here, defendant raised in district court the same objection to the cross-reference and then affirmatively abandoned it, so he waived this argument. Further, even assuming defendant merely forfeited the procedural challenge, he is not entitled to plain error review of the district court's factual findings.

Defendant also contended that his sentence was substantively unreasonable because the parties did not consider the cross-reference when negotiating the plea agreement. Defendant's speculation that the court would have granted the two-level downward variance in the absence of the cross-reference issue (or in addition to a four-level variance in light of the cross-reference issue) is not enough to overcome the presumption of reasonableness afforded the below-guidelines sentence he received.

The sentence was affirmed.

No. 18-6047. United States v. Anthony. 10/31/2019. W.D.Okla. Judge Phillips. *Trafficking Victims Protection Reauthorization Act—Mandatory Victims Restitution Act—Conspiracy—Disaggregation of Harms.*

Defendant was convicted of child sex trafficking and conspiracy to commit child sex trafficking. The district court sentenced him and ordered him to pay restitution to two victims, R.W. and M.M.

On appeal, defendant argued that the district court erred by ordering him to pay restitution for losses that R.W. sustained before the conspiracy occurred because he did not cause them. Restitution may be ordered only for losses actually resulting from the offense of conviction. In the circumstances of this case, both the Mandatory Victims Restitution Act (MVRA) and the Trafficking Victims Protection Reauthorization Act (TVPRA) limit restitution to losses that the defendant's conduct has directly and proximately caused. Here, the district court's restitution order requires defendant to compensate R.W. for harms sustained during her earlier exploitation by another man. The district court erred in failing to disaggregate the harms R.W. suffered.

Defendant also argued that the restitution award improperly held him accountable for all the losses that R.W. and M.M. sustained during the time that defendant's co-conspirator held them captive. Defendant argued that the evidence demonstrated his involvement in only a subset of the conspiracy, so restitution should have been limited to losses resulting from that proved subset of the broad conspiracy. Because only evidence of a smaller conspiracy was presented at trial, the smaller conspiracy is the conviction of conspiracy for purposes of restitution, and the district court erred by ordering restitution for the broader conspiracy. However, the error was not plain.

The restitution order was vacated and the case was remanded for recalculation of restitution.

No. 19-9510. Lopez-Munoz v. Barr. 11/4/2019. Board of Immigration Appeals. Judge Bacharach. *Immigration—Notice to Appear—Jurisdiction.*

Lopez-Munoz was served with a notice to appear for an immigration hearing on removal. She appeared at the removal proceeding and requested cancellation of removal. The immigration judge denied her request and ordered her deported. Lopez-Munoz appealed unsuccessfully to the Board of Immigration Appeals (the Board). She moved for reconsideration of the denial of her second motion to reopen her case, and the Board denied her motion.

Six years later, Lopez-Munoz filed this collateral challenge to her deportation order alleging that the immigration judge lacked jurisdiction over her because the notice to appear served on her did not contain the time or place of her hearing as required by the applicable regulations and statute. She later received another notice containing this information. An immigration judge obtains jurisdiction when a charging document is filed. The Tenth Circuit concluded that the regulatory mention of "jurisdiction" is colloquial, and the attorney general cannot restrict an immigration judge's jurisdiction

through a regulation. Further, the federal statutes do not suggest that the requirements for a notice to appear are jurisdictional. The alleged defect in the notice to appear was not jurisdictional. Therefore, Lopez-Munoz lacked grounds to seek collateral relief.

The petition was denied.

No. 19-1026. Tesone v. Empire Marketing Strategies. 11/8/2019. D.Colo. Judge Matheson. *Employment Discrimination—Americans with Disabilities Act—Good Cause—Medical Expert Testimony.*

Tesone worked for Empire Marketing Strategies (EMS) as a product retail sales merchandiser. Her job duties included changing retail displays in grocery stores. When she was hired, she informed EMS that she had back problems and could not lift more than 15 pounds. EMS later fired Tesone, citing violations of company policies. She sued EMS alleging that it discriminated against her in violation of the Americans with Disabilities Act (ADA) by firing her based on her inability to lift more than 15 pounds. The district court denied her pre-trial motions and granted summary judgment in favor of EMS.

On appeal, Tesone argued that the district court erred in denying her motion to amend the scheduling order to extend the time for her to designate an expert. Tesone filed her motion to amend the scheduling order nine months after the expert disclosure deadline, seven months after indicating her intent to file, and three months after EMS's motion for summary judgment. The district court did not abuse its discretion when it found she did not show good cause to extend the scheduling order.

Tesone also argued that the district court erred in denying her motion to amend her complaint. Tesone filed her motion 10 months after the deadline to amend pleadings. The district court did not abuse its discretion in finding she failed to show good cause for filing to amend after the deadline.

Tesone further contended that the district court erred in granting summary judgment to EMS. Tesone did not have a medical expert witness to prove she suffered from lower back pain that substantially interfered with her ability to lift, and the district court stated that she could not state a prima facie case of discrimination without producing expert medical evidence. However, although expert medical testimony may be used to establish a plaintiff's disability, the ADA does not require it. Instead, courts assess the necessity of expert evidence on a case-by-case basis and consider the type of disability alleged. The district court did not perform this case-specific analysis to determine whether expert testimony is necessary to establish the particular disability alleged here, and it erred in granting summary judgment.

The denials of the motion for an enlargement of time to designate an expert witness and of the motion to amend the complaint were affirmed. The summary judgment order was reversed and the case was remanded.

No. 18-1299. United States v. Williams. 11/14/2019. D.Colo. Judge Kelly. *Border Search—Personal Electronic Devices—Reasonable Suspicion—Motion to Suppress—Totality of the Circumstances.*

Defendant attempted to proceed through customs from an international flight. His passport triggered multiple "lookout" alerts in the U.S. Customs and Border Patrol (CBP) enforcement system. CBP officers escorted defendant to a secondary screening area, where a Department of Homeland Security special agent interviewed him. At the close of the interview, the special agent advised defendant that his laptop and smartphone would be searched. Defendant refused to provide the passwords for these devices, so the special agent held the devices but allowed defendant to leave.

The next day, a computer forensics agent found child pornography after three minutes of searching a copy of the laptop's hard drive. The forensics agent stopped the search and

the first agent obtained a search warrant. The search ultimately yielded thousands of child pornography images. Defendant was indicted and moved to suppress the evidence obtained from his laptop. The district court denied the motion after a hearing. Defendant pleaded guilty to transportation of child pornography and possession of child pornography, reserving his right to appeal the denial of the motion to suppress. He was sentenced to 84 months' imprisonment and five years of supervised release.

On appeal, defendant argued that the district court erred in holding that the search was supported by reasonable suspicion and that, without reasonable suspicion, the search of his personal electronic devices at the border violated his Fourth Amendment rights. Reasonable suspicion is sufficient to justify a border search of personal electronic devices. Here, the totality of circumstances surrounding the laptop search met the reasonable suspicion standard because defendant's criminal history involved border offenses, he lied on his customs declaration, his travel itinerary was suspicious, and he tried to distance himself from his electronic devices.

The sentence was affirmed.

No. 19-1008. Nathan M. ex rel. Amanda M. v. Harrison School District No. 2. 11/14/2019. D.Colo. Judge McHugh. *Individuals with Disabilities Education Act—Free Appropriate Public Education—Individualized Education Plan—Capable of Repetition Yet Evading Review—Mootness.*

Nathan M. is a child with a disability who is entitled to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). Pursuant to an individualized education plan (IEP), he attended a private program serving students with autism. Harrison School District No. 2 (the District) proposed moving him to an autism program in a public elementary school. Nathan M.'s mother (Parent) objected to the District's plan and filed a complaint with the Colorado Department of Education (the Department). A Department administrative law judge (ALJ) concluded that Parent had not met her burden of establishing that Nathan M. was denied a FAPE as a result of procedural violations alleged in the development of the IEP. The district court upheld the ALJ's decision.

On appeal, Parent reasserted various procedural and substantive IDEA violations she argued before the district court. The Tenth Circuit requested supplemental briefing on mootness, which revealed that Nathan M. has matriculated from elementary school to middle school and the IEP now recommends a different placement. Parent failed to show that any of the alleged IDEA violations are likely to recur, so no specific legal controversy exists that the Tenth Circuit could resolve. The case is therefore moot and not capable of repetition but evading review.

The district court's ruling was vacated and the case was remanded with instructions to dismiss the case as moot.

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.