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Please do not rely solely on the summaries below. Each case name links to the full text of the opinion, which we recommend you read in addition to these brief synopses. The SDR is sent to current TCDLA members.

Editors: [3]Tim Crooks, [4]Kathleen Nacozy, Chris Cheatham

FIFTH CIRCUIT

[5]United States v. Jackson, 625 F.3d 875 (5th Cir. 2010). District court violated defendant's rights under the Confrontation Clause by admitting into evidence notebook ledgers received from a co-conspirator during a proffer session, and an investigating officer's testimony pertaining thereto, both of which were used to show the amount of cocaine the co-conspirator distributed to defendant. The ledgers fell outside the business-records and co-conspirator-statement exceptions to the right of confrontation recognized in [6]Crawford v. Washington, 541 U.S. 36 (2004), and hence were "testimonial." The ledgers were not properly authenticated as business records because the agent through whom they were introduced offered no testimony as to who prepared the ledgers and entries, and under what circumstances. There was no evidence that they were kept in the regular course of a drug-trafficking enterprise. For similar reasons, the ledgers were not sufficiently authenticated so as to render them admissible under the co-conspirator-statement exception. Accordingly, the district court erred in admitting them. This error was not harmless beyond a reasonable doubt; given the government's reliance on the notebooks in its closing argument, the government could not show that the notebooks did not contribute to the conviction. The Fifth Circuit vacated the conviction and remanded for further proceedings, including an opportunity for a new trial. (Judge Dennis concurred, primarily to caution that authenticated business records that fall within the business-records exception to the rule against hearsay might still be "testimonial" under *Crawford* and progeny.)

[7]United States v. Houston, 625 F.3d 871 (5th Cir. 2010). Where defendant received a 25-year sentence under 18 U.S.C. § 924(c) for brandishing a firearm in connection with one Hobbs Act robbery, and a 7-year consecutive sentence under the same statute for brandishing a firearm in connection with *another* Hobbs Act robbery, the 7-year consecutive sentence was not barred by the first clause of § 924(c)(1)(A)(i), "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law...." The Fifth Circuit held that the statute's "greater minimum sentence" exception most reasonably refers only to another, greater sentence for *the same, specific crime* of firearm possession. Here, the 25-year sentence and the 7-year sentence were for separate crimes of possession. The Fifth Circuit noted, but rejected, the Second Circuit's different rule, namely, that the "except" clause applied to conduct arising from the same criminal transaction or set of operative facts as the crime yielding the greater mandatory minimum sentence,

see United States v. Parker, 577 F.3d 143, 147 (2d Cir. 2009).

[8]United States v. Bohuchot, 625 F.3d 892 (5th Cir. 2010).

(1) In prosecution for bribery, conspiracy to commit bribery, and money laundering conspiracy, defendants' objection to the definition of the "corruptly" element of bribery did not preserve their claim that the indictment was constructively amended by the proof adduced at trial. On plain-error review, it was questionable whether there was clearly or obviously a constructive amendment of the indictment. In any event, neither the third nor the fourth prong of plain-error review was satisfied. It was defendants who first touched upon the areas of evidence that they claimed on appeal should not have been before the jury. Moreover, the evidence of bribery was strong, and it was improbable that the jury would have acquitted if only the evidence had been excluded.

(2) Even if prosecutor's comments during closing argument could be construed as an impermissible comment on one defendant's failure to testify (and the Fifth Circuit suggested that this was questionable, as the government's innocent explanation of the statements was "plausible"), the comments nevertheless did not require reversal on plain-error review, because they were not sufficiently prejudicial to cast serious doubt on the correctness of the jury's verdict, especially given the court's cautionary instruction to draw no inference from a defendant's failure to testify.

(3) Assuming, without deciding, that the jury instructions for the money laundering conspiracy count (a violation of 18 U.S.C. § 1956(h)) incorrectly instructed the jury on the mens rea for that offense, the error was harmless beyond a reasonable doubt because, given the overwhelming evidence, no jury could fail to find the defendants guilty of money laundering conspiracy under the correct standard; *a fortiori*, there was no plain error (the standard applicable in the absence of an objection to the instructions).

(4) In bribery case, district court erred in calculating the value of the bribe for purposes of USSG § 2C1.1. Particularly, it was error to ascribe to defendant a portion of the value of two yachts he was permitted to use when he had no ownership interest in those yachts. However, the error was harmless because, including the fair rental value of comparable yachts as part of the value of the bribe to the defendant, the same 14-level Guideline enhancement would have applied, and thus the Guideline range would have been unchanged.

[9]United States v. Marquez, 626 F.3d 214 (5th Cir. 2010). Defendant's prior conviction for possession of a deadly weapon by a prisoner (in violation of N.M. Stat. Ann. § 30-22-16) was one for a "crime of violence" under the "residual clause" of USSG § 4B1.2(a)(2); therefore, defendant was properly treated as a "career offender" under the Sentencing Guidelines.

[10]United States v. Juarez, 626 F.3d 246 (5th Cir. 2010). District court did not clearly err in applying a 4-level increase under USSG § 2K2.1(b)(5) (for "engag[ing] in the trafficking of firearms"); there was considerable evidence from which the district court could infer that defendant knew, or had reason to believe, that her conduct would result in the transport, transfer, or disposal of a firearm to a person who intended to use or dispose of the firearm unlawfully. Nor did the court err in apply a 4-level increase under USSG § 2K2.1(b)(6) (for knowledge, or constructive knowledge, that the firearm "would be used or possessed in connection with another felony offense"); first, the district court did not plainly err in concluding that another firearms possession or trafficking offense (here, the illegal transportation or smuggling of guns into Mexico) could constitute "another felony offense" under this Guideline; amendments to the Guidelines make clear that another firearms offense may be the "another felony offense" if, as here, that other offense is not the one that serves as the basis for the defendant's instant federal conviction; finally, the district court did not clearly err in concluding that defendant knew or should have known that the guns would be used or possessed in connection with the offense of smuggling guns into Mexico.

[11]Henderson v. Thaler, 626 F.3d 773 (5th Cir. 2010). Where death-sentenced Texas defendant was

authorized to file a successive federal habeas petition raising a claim that he was mentally retarded and thus ineligible for execution under [12]Atkins v. Virginia, 536 U.S. 304 (2002), the Fifth Circuit vacated the district court's order finding the mental-retardation claim time-barred, and remanded for the district court to reconsider, in light of the intervening decision in [13]Holland v. Florida, 130 S. Ct. 2549 (2010), whether defendant was entitled to equitable tolling of the AEDPA limitations period. The Fifth Circuit also held that there was no exception to the AEDPA's limitation periods for person who are "actually innocent" of the death penalty. Accordingly, the Fifth Circuit remanded for reconsideration of whether defendant's successive petition was timely and, if it was found to be timely, whether the *Atkins* claim succeeded on the merits. (Judge Wiener filed a dissenting opinion, in which he opined that the AEDPA's statute of limitations was never meant to apply, and never should be applied, to claims that a person is categorically ineligible for the death penalty under *Atkins* or similar rules. He argued that a fundamental miscarriage of justice would occur if defendant were not afforded a federal habeas opportunity to prove that he is ineligible for execution under *Atkins*.)

COURT OF CRIMINAL APPEALS

Writ of Habeas Corpus & Stay of Execution from Tarrant County

[14]Ex parte Kerr, __S.W.3d__ (Tex.Crim.App. No. WR-62,402-03, 4/28/11)

Dismissed, denied: Per curiam; [15]Price dissented w/Johnson

In 2003, a jury convicted applicant of capital murder. The jury answered the special issues submitted pursuant to Tex. Code Crim. Proc. art. 37.071, and the trial court, accordingly, set applicant's punishment at death. CCA affirmed applicant's conviction and sentence on direct appeal. In 2004, applicant filed in the trial court his initial post-conviction application for writ of habeas corpus. CCA denied relief. Applicant filed his first subsequent application in the trial court in 2006. This Court dismissed that application because it failed to meet the dictates of Tex. Code Crim. Proc. art. 11.071, § 5. This, his second subsequent application, was filed in the trial court on April 27, 2011.

Applicant presents a single allegation that his initial state habeas counsel rendered ineffective assistance, which denied applicant a proper review of his ineffective assistance of trial counsel claims. Without elaboration, CCA says it has reviewed the application and finds that applicant failed to meet the requirements of Article 11.071, § 5. Accordingly, CCA dismisses his application and denies his motion for stay of execution. Judge Price dissents that applicant presents a more-than-colorable claim of ineffective assistance of counsel at the punishment phase of his trial.

Writ of Habeas Corpus from Tarrant County

[16]Ex parte Bohannan, __S.W.3d__ (Tex.Crim.App. No. AP-76,363, 5/11/11)

Dismissed: Johnson (8-0); [17]Keller concurred; [18]Keasler concurred w/Price, Hervey, Cochran

In 1983, applicant was convicted of aggravated rape and sentenced to 25 years' imprisonment. He did not appeal. In this writ, applicant contends he was denied a timely preliminary hearing to determine whether there is probable cause to believe he violated his parole. Although applicant has received a preliminary hearing, he argues that this case is not moot because the issues involved herein are clearly capable of repetition, yet evading review, due to the fact that when a writ of habeas corpus is filed seeking to insure the constitutional right to a preliminary hearing, the Texas Department of Criminal Justice (TDCJ) now convenes a late preliminary hearing.

CCA holds that applicant's claim is not justiciable under the "capable of repetition, yet evading review" doctrine of [19]Weinstein v. Bradford, 423 U.S. 147 (1975), because CCA cannot assume applicant will

again be held in custody facing the prospect of a preliminary hearing to determine whether there is cause to believe he violated a condition of his parole. And, applicant has already received such a preliminary hearing on the instant alleged violation. CCA notes that TDCJ must conduct preliminary hearings, as required by Tex. Gov't Code § 508.2811 and [20]Morrissey v. Brewer, 408 U.S. 471 (1972), within a time frame that meets the demands of due process so that releasees will not be required to seek CCA's intervention to enforce these rights.

For a list of issues pending before the court, click [21]here.

COURT OF APPEALS

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

[22]In re A.M., No. 11-09-00304-CV, 2011 WL 491018 (Tex.App.-Eastland Feb 11, 2011, pet. filed). State did not engage in "trickery or deception" in obtaining inculpatory statements juvenile made to polygraph examiner because prior to taking the polygraph exam, juvenile signed a release that expressly authorized polygraph examiner to disclose the results to the probation department. In addition, examiner explained to juvenile that he could be required by law to release the examination results to other parties. Moreover, "[a]bsent an express or implied promise to the contrary, a probation officer is duty bound to report wrongdoing by the probationer when it comes to her attention."

[23]Miles v. State, No. 11-09-00090-CR, 2011 WL 494885 (Tex.App.-Eastland Feb 11, 2011). Officer's observation of D in the act of "talking to a known cocaine addict" deemed a partial basis for RS as to D. "[Officer] testified that there had been at least two robberies in the recent past involving the convenience store where the incident occurred. He also testified that the owner of the convenience store had requested that the police provide extra patrolling in the area due to the high-crime activity. [Officer] observed [D] talking to a known cocaine addict, and he also observed [D] and the known cocaine addict acting suspiciously when he drove up. These facts provided [officer] reasonable suspicion to detain [D] for a Terry stop."

[24]Carlson v. State, No. 01-09-01030-CR, 2011 WL 649682 (Tex.App.-Houston [1 Dist] Feb 17, 2011). Minor victim took possession of video tapes containing her nude image with intent to turn them over to police, and, thus, said evidence was not subject to suppression under criminal procedure provision forbidding the admission of evidence seized by any person or officer when that evidence has been obtained in violation of state or federal law; also, the minor victim, unlike D, had a lawful ownership interest in the images, held court. The court observed that the minor victim filed a police report within 48 hours of retrieving the videotapes from D's (her uncle's) home. In addition, the minor victim had ownership interest in possessing the images, even though the images were illegal, because she did so in order to preserve her own privacy and to prevent further publication of the images by D.

[25]Hughes v. State, No. 06-10-00160-CR, 2011 WL 662325 (Tex.App.-Texarkana Feb 24, 2011). Interaction between officer and D was a mere "encounter" rather than an investigative detention, because officer activated squad car's white overhead lights rather than the red and blue lights; also the position of the quad car relative to D's vehicle did not entirely prevent D from leaving. "[Officer] observed [D's] car in a parking lot of [a park] legally parked with the headlights on. As [officer] approached, the headlights of [D's] vehicle turned off?. [Officer] parked his marked police jeep at an angle to [D's] car and turned on the vehicle's bright overhead white lights. [Officer] then illuminated the front of [D's] vehicle with his spotlight. [Officer] testified he did not observe any illegal activity, but testified the [the park] area has a high incidence of drug and prostitution activity?. [D] argues the initial interaction between [officer and D] was an investigative detention because [officer] parked in front of [D's] vehicle and activated his overhead [white] 'take-down' lights?. It is important to note that the lights activated by the police officer in this case were not his overhead emergency lights which flash red and blue, but rather the overhead white safety or 'take-down'

lights. We believe this distinction to be extremely important?. While under some circumstances, overhead 'take-down' lights could be sufficient along with other circumstances to indicate a sufficient demonstration of authority, [such was not the case here]."

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