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Supreme Court

The circuit court erred in holding that any degree of judicial participation in plea negotiations automatically requires vacatur of a defendant's plea, irrespective of whether the error prejudiced defendant. *United States v. Davila*, 133 S. Ct. 2139 (2013).

D entered a guilty plea for filing false income tax returns. The district court denied D's motion to vacate the plea. D argued that a magistrate judge had improperly participated in the plea negotiations in violation of Fed. R. Crim. P. 11(c)(1). The Eleventh Circuit vacated the plea. The U.S. Supreme Court vacated the Eleventh Circuit's judgment and remanded.

During an in camera hearing, a magistrate judge told D that his best course, given the strength of the government's case, was to plead guilty. More than three months later, D entered a guilty plea, stating under oath that he had not been forced or pressured to enter the plea; D did not mention the in camera hearing. The Supreme Court held that under Rule 11(h), vacatur was not required if the record showed no prejudice to D's decision to plead guilty. The Court further held that violation of Rule 11(c)(1) was not a structural error and that in assessing Rule 11 errors, a reviewing court had to consider all that transpired. The circuit court should not have assessed the magistrate's comment in isolation but in light of the full record to determine if it was reasonably probable that, but for the magistrate's comments, D would have exercised his right to go to trial.

A sentencing court shall not apply the modified categorical approach to a federal defendant when the crime for which the defendant was previously convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013).

After petitioner was convicted of being a felon in possession of a firearm, the district court found that he had three prior convictions for violent felonies, including one for burglary under Cal. Penal Code § 2459, and enhanced his sentence with the Armed Career Criminal Act, 18 U.S.C.S. § 924(e). The Ninth Circuit affirmed. The U.S. Supreme Court reversed.

The ACCA can increase the sentence of a federal defendant who has three prior convictions for a violent felony, including burglary, arson, or extortion. To determine whether convictions qualify as ACCA crimes, courts use the categorical approach, or the modified categorical approach when convictions are for violating divisible statutes that set out one or more elements in the alternative. The lower courts erred when they used the modified categorical approach to look behind D's burglary conviction in search of record evidence that he actually committed the generic offense of burglary. The modified approach did not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one, and did not apply to statutes like §459 that contained a single, indivisible set of elements that criminalize a broader swath of conduct than the relevant generic offense.

As applied to D, the registration requirements of SORNA fall within Congress's authority under the Necessary and Proper Clause.*United States v. Kebodeaux*, 133 S. Ct. 2496 (2013).

Respondent was convicted of a federal sex offense. When he was released, he registered with Texas authorities as a sex offender. After Congress enacted the Sex Offender Registration and Notification Act, he moved within Texas without making SORNA registration changes. The Fifth Circuit reversed his SORNA conviction, noting that he had completed his sentence when SORNA was enacted. Concluding that D had been unconditionally freed, the Fifth Circuit further held that the federal government lacked power under the Necessary and Proper Clause, U.S. Const. art. I, §8, to regulate D's interstate movements. The Supreme Court reversed and remanded.

Contrary to the Fifth Circuit's critical assumption that D's release was unconditional, a full reading of the relevant statutes and regulations makes clear that at the time of his offense and conviction he was subject to the Wetterling Act, which imposed registration requirements very similar to SORNA's. Plus, when SORNA became law, it applied to offenders who had already completed their sentences. The fact that these federal-law requirements in part involved compliance with state-law requirements made them no less requirements of federal law. Further, SORNA and the Wetterling Act were properly promulgated under the Military Regulation and Necessary and Proper Clauses.

A stay upon a court of appeals' mandate must be lifted once the Supreme Court has acted upon the petition.*Ryan v. Schad*, 133 S. Ct. 2548 (2013).

D was convicted of murder and sentenced to death. After state and federal-court proceedings concluded with this Court's denial of D's petitions for certiorari and for rehearing, the Ninth Circuit declined to issue its mandate immediately as required by Fed. R. App. P. 41(d)(2)(D). The Ninth Circuit instead sua sponte reconsidered D's Motion to Vacate Judgment and Remand to the District Court for Additional Proceedings in Light of *Martinez v. Ryan*, 566 U.S. 1 (2012). Based on its review of that previously rejected motion, the Ninth Circuit issued a stay a few days before D's scheduled execution. The Supreme Court found that the Ninth Circuit abused its discretion.

The Ninth Circuit declined to issue the mandate based on an argument it had considered and rejected months earlier. There is no indication that there were extraordinary circumstances that called for the court to revisit an argument sua sponte that it already explicitly rejected. The Supreme Court reversed the Ninth Circuit, vacated the stay of execution, and remanded with instructions to issue the mandate immediately and without further proceedings.

Attempting to compel a person to recommend an investment does not constitute the obtaining of property from another for the Hobbs Act.*Sekhar v. United States*, 133 S. Ct. 2720 (2013).

A jury convicted D of attempted extortion, in violation of the Hobbs Act, 18 U.S.C.S. §1951, based on the jury's finding that D attempted to extort a general counsel's recommendation to approve an investment commitment for a state employee pension fund. The Second Circuit affirmed, and the U.S. Supreme Court reversed.

D was a managing partner of a firm, and the State Comptroller's office was considering whether to invest in a fund managed by that firm. The office's general counsel made a written recommendation to the Comptroller not to invest in the fund. The general counsel received anonymous emails, apparently from D, threatening to disclose information about counsel's alleged affair if counsel did not recommend the investment. The Supreme Court reversed D's convictions because the alleged property could not be extorted. The property extorted had to be transferable, but the alleged property in D's case lacked that defining feature. Attempting to compel a person to recommend that his employer approve an investment did not constitute "the obtaining of property from another" under §1951(b)(2). Whether one considered the personal right at issue to be "property" in a broad sense or not, it certainly was not obtainable property under the Hobbs Act. D's goal was to force the general counsel to offer advice that accorded with D's wishes, but that was coercion, not extortion.

Fifth Circuit

District court plainly erred in departing upward (from a Guideline range of 0 to 6 months to a 12-month prison sentence) without giving notice as required by Fed. R. Crim. P. 32(h); however, D failed to show this affected his substantial rights or seriously affected the fairness, integrity, or public reputation of proceedings.*United States v. Zelaya-Rosales*, 707 F.3d 542 (5th Cir. 2013).

Nor was the court's departure sentence an abuse of discretion or substantively unreasonable.

D's second habeas petition was an abuse of the writ and successive; the district court did not have jurisdiction to consider it because D did not obtain authorization.*In re Sepulvado*, 707 F.3d 550 (5th Cir. 2013).

Martinez v. Ryan, 132 S. Ct. 1309 (2012), did not apply to save D's second habeas petition because Louisiana, like Texas, permitted a defendant to raise ineffective-assistance-of-counsel claims on direct appeal. Because the petition was successive and D did not obtain prior authorization from the court of appeals, pursuant to 28 U.S.C. §2244(b)(3)(A), the district and Fifth Circuit courts did not have jurisdiction to consider D's motion to appoint counsel. Additionally, because the Fifth Circuit lacked jurisdiction, there was no basis for a stay of execution. Finally, the Fifth Circuit reiterated its holding that the lack of a ruling on a motion for a certificate of appealability in the district court causes the Fifth Circuit to be without jurisdiction to consider the appeal and that a request for a certificate of appealability must be made to the district court before it can be made to COA.

"Proceeds" in the money-laundering statute is defined as "profits," rather than "gross receipts," only where there is a "merger" problem.*United States v. Kennedy*, 707 F.3d 558 (5th Cir. 2013).

Under Justice Stevens' concurring opinion in *United States v. Santos*, 553 U.S. 507 (2008)—which is controlling, since there was no majority opinion and since it decided the case on the narrowest grounds—the term "proceeds" in the federal money-laundering statute is defined as "profits," rather than merely "gross receipts," only where there is a "merger" problem, i.e., where the defendant is convicted under the money-laundering statute for essentially the same conduct that constitutes the conduct of the "specified unlawful activity" upon which the money-laundering count is premised (in this case, wire fraud). A merger may be proved in two ways: (1) a defendant may demonstrate that the underlying unlawful activity was not complete at the time the alleged money laundering occurred; or (2) a defendant may show the transaction upon which the money-laundering count is based was not a payment from the profits of the underlying crime made in support of new crimes, but, instead, was a payment from gross receipts of the previously committed crime made to cover the costs of that same crime. Here, however, the crimes of wire fraud were complete before the conduct underlying the money-laundering counts began. Furthermore, the defendants used only profits from the underlying wire-fraud crimes to assist them in committing new crimes of wire fraud; therefore, there was no "merger," and Ds were properly convicted for money laundering.

Court of Criminal Appeals

Under the *Strickland* two-prong test, D received ineffective assistance but was not prejudiced. *Ex parte Lahood*, 401 S.W.3d 45 (Tex.Crim.App. 2013).

D was convicted of aggravated kidnapping and aggravated sexual assault. He filed for habeas relief, alleging ineffective assistance of trial counsel. The district court twice recommended denying relief. CCA agreed.

Counsel was deficient because a decision not to investigate D's mental-health history was unreasonable; counsel knew D was on medication, and signs of his mental instability arose at trial. However, D was not prejudiced because there was not a reasonable probability that the fact-finder would have found him incompetent to stand trial. The record showed that D engaged in a reasoned choice of legal strategies and options. Even if D failed to receive some of his medication, there was nothing to indicate that he lost the ability to understand the proceedings or rationally confer with his counsel.

The trial court's cumulation order was supported by evidence that the jury affirmatively found the offense occurred in a drug-free zone. *Ex parte Knight*, 401 S.W.3d 60 (Tex.Crim.App. 2013).

D, convicted of possession of controlled substance and felon in possession of a firearm, sought habeas relief alleging there was no evidence to support the cumulation order and the imposition of attorney's fees. The district court recommended relief be granted. CCA denied D's no-evidence challenge and dismissed D's challenge of the attorney's fees.

CCA found that D's no-evidence challenge to the cumulation order under Tex. Health & Safety Code §481.134(h) was not cognizable in the habeas proceeding because some evidence showed that the jury increased D's punishment due to the drug-free-zone violation when it found the allegation true, the trial court included that affirmative finding in its judgment, and the jury sentenced D at the higher punishment range. Further, D's challenge to the order requiring repayment of attorney's fees was not cognizable under Tex. Crim. Proc. Code art. 11.07 because that order did not affect the fact or duration of D's confinement pursuant to her conviction. Finally, CCA would not treat the habeas application as a petition for mandamus because such a petition directed against the district-court judge would have to first be decided by COA.

The variance between pleading and proof was immaterial in this case. *Ramos v. State*, 407 S.W.3d 265 (Tex.Crim.App. 2013).

D was charged with capital murder and felony murder of a child, but convicted of the lesser-included offense of manslaughter. D argued that because he was convicted of manslaughter, Tex. Code Crim. Proc. art. 21.15 required the State to plead the acts relied upon to constitute recklessness. COA and CCA affirmed D's manslaughter conviction.

CCA held that Article 21.15 did not apply because the indictment did not include manslaughter. Article 21.15 states that "[w]henver recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment... must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness[.]?"

Moreover, the variance in pleading and proof was immaterial because "(1) the gravamen of manslaughter is the death of the victim, and the evidence shows beyond a reasonable doubt that Appellant caused the death of the victim, (2) notice was adequately provided to Appellant, and there is no risk of double jeopardy, and (3) the cumulative force of the evidence supports the jury's verdict that, beyond a reasonable doubt, the Appellant caused the death of the victim[.]?"

The trial court determined D was indigent, and there was never a finding that he could re-pay any of the costs of court-appointed counsel; thus, there was no basis for a determination that D could pay the fees.*Cates v. State*, 402 S.W.3d 250 (Tex.Crim.App. 2013).

COA's reasoning that there may, in the future, be funds in D's inmate trust account and that such funds could be used to re-pay expenses of his court-appointed counsel was flawed. Tex. Code Crim. Proc. art. 26.05(g) requires a present determination of financial resources and does not allow speculation about possible future resources.

A court of appeals must consider all alternative legal theories raised on appeal, including those not argued at trial, that may uphold a trial ruling on a motion to suppress.*Alford v. State*, 400 S.W.3d 924 (Tex.Crim.App. 2013).

The State defended the trial court's denial of D's motion to suppress by contending that the officers' contact with D was justified under the community-caretaking exception to the warrant requirement and, alternatively, that the contact was consensual. The State, however, argued only the first theory to the trial court, and the trial court's conclusions addressed only that theory. COA reversed D's DWI conviction on the basis that the trial court erred in denying D's motion to suppress. CCA affirmed COA.

COA erred by applying ordinary procedural-default rules under Tex. R. App. P. 33.1(a) and holding that the State's consensual-encounter theory was procedurally defaulted. The State was the prevailing party in the motion to suppress, and COA should have applied the rule that permits the prevailing party at trial to rely on any applicable legal theory to uphold the trial court's ruling on appeal. Remand was unnecessary because, although COA initially determined that it need not address the State's argument, COA then addressed and rejected that argument; the State did not challenge that analysis in its petition to CCA, and CCA need not remand for COA to re-analyze that theory.

The Confrontation Clause was violated by the admission of a drug analysis when only the reviewing analyst (not the testing analyst) testified.*Burch v. State*, 401 S.W.3d 634 (Tex.Crim.App. 2013).

CCA affirmed COA's judgment to remand for a new trial. The State attempted to submit testimonial evidence that D possessed cocaine without giving D the opportunity to cross-examine the analyst who tested the cocaine and made the affirmation of its contents. Although the State did call the reviewing analyst at trial, that witness did not have personal knowledge of the testimonial facts being submitted; she was not an appropriate surrogate witness for cross-examination.

Double jeopardy was not violated because indecency with a child by exposure and contact are separate and distinct offenses.*Loving v. State*, 401 S.W.3d 642 (Tex.Crim.App. 2013).

D was convicted of three counts of indecency with a child by contact and two counts of indecency with a child by exposure under Tex. Penal Code §21.11(a)(1), (a)(2). COA vacated one of D's convictions for indecency by exposure on double jeopardy grounds and affirmed the other convictions. CCA reversed COA. D's conviction of indecency by exposure was not barred by double jeopardy, U.S. Const. amend. V, because the Texas Legislature intended to allow separate punishments. The gravamen of §21.11 was the nature of the prohibited conduct, whether the accused was charged with contact or exposure, and the commission of each prohibited act determined how many convictions could be had for a particular course of conduct. D's conduct violated §21.11 by two separate acts.

D could complain for the first time on appeal about the trial court's imposition, sua sponte and after proceedings adjourned, of costs for the appointed prosecutor pro tem and the investigator because D did not have the opportunity to object.*Landers v. State*, 402 S.W.3d 252 (Tex.Crim.App. 2013).

D was convicted for tampering with a witness and sentenced to two years' in prison and a \$10,000 fine.

The clerk's record included a bill of costs issued six days after judgment that had fees for the attorney pro tem and the prosecutor's investigative costs. COA held that D had not preserved a complaint about the fees for appeal. CCA reversed COA and remanded.

When D was convicted and sentenced, court costs were assessed at \$4,562.50. There was no indication of what the court costs were for and a bill of costs was not issued until six days later. The bill showed \$3,718.50 of the costs assessed were for the court-appointed attorney and \$440 of the fees were for the court-appointed investigator. No notice of this document was given to D or her attorney. Since D was not given an opportunity to object to the imposition of these costs, the absence of an objection was not fatal to her appeal. The preservation requirement under Tex. R. App. P. 33.1(a) did not apply.

Court of Appeals

Thank you to John Denholm of Musick & Musick, LLP, for alerting us to the following opinion!

Trial court properly granted D's motion to suppress; Fifth Amendment protections were triggered when officers began interviewing D. *State v. Jefferson*, No. 14-12-00296-CR (Tex.App.?Houston [14th Dist] Apr 18, 2013, pet ref'd).

In this murder case, the trial court did not err by granting D's motion to suppress incriminating statements because he was not given Miranda warnings. D was stopped because the vehicle he was driving had been involved in a homicide. Officers ordered D out of his car at gunpoint and then handcuffed him until he arrived in the interview room. D was not given an option of non-compliance. A reasonable person in D's position would have believed he was in custody when the officers began interviewing him, because his liberty was compromised to the degree associated with formal arrest. Accordingly, Fifth Amendment protections were triggered. D was entitled to the warnings mandated by Miranda and Tex. Code Crim. Proc. art. 38.22.

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