United States Supreme Court

Marinello v. United States, No. 16–1144

This is a very significant tax case. The Supreme Court vacated a conviction under 26 U.S.C. § 7212. What is called the "Omnibus Clause" of this section criminalizes "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." Marinello was charged under this section. The district court instructed the jury that it had to find that Marinello had had engaged in at least one of eight different specified activities, including "failing to maintain corporate books and records," "failing to provide" his tax accountant "with com- plete and accurate" tax "information," "destroying . . . business records," "hiding income," and "paying employees . . . with cash." However, the district court did not charge the jury that Marinello had to have known that he was under investigation at the time he did these things.

On appeal, the Supreme Court significantly narrowed what is criminal conduct under this section. To sustain a conviction under this section now, the government must show a that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." *And* the government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant.

This brings this section in line with other obstruction of justice statutes where the defendant must know or should know that an investigation or proceeding is underway when committing the conduct.

Ayestas v. Davis, No. 16–6795

This is a funding issue in a death penalty writ appeal from—I know you'll be shocked—Texas. Writ counsel sought funding for an investigator. The district court denied the request and the Fifth Circuit affirmed on the basis that the defendant failed to show a "substantial need" for it under controlling Fifth Circuit precedent. However, the applicable statute, 18 U.S.C. § 3599(a), only requires the services to be "reasonably necessary." The Supreme Court found that the Fifth Circuit was applying a more rigorous test than that mandated by the statute and reversed. The Fifth Circuit compounded the problem by insisting that the petitioner be presenting "a viable constitutional claim that is not procedurally barred." This is incorrect when the petitioner can show that the claim is procedurally barred by previous counsel's ineffectiveness. Effectively, the Fifth Circuit was requiring a petitioner seeking funding to prove that he would prevail if given the funding. The correct "reasonably necessary" standard only requires an assessment of the likely utility of the services requested.

Fifth Circuit Court of Appeals

United States v. Marroquinn, No. 16-40367

In an opinion by Judge Costa, the court vacates the defendant's sentences and remands for re-sentencing under plain error based on

errors in calculating the defendant's criminal history. It's most notable for Judge Jerry Smith's dissent from denial of rehearing *en banc*. He must not want an invite to the Circuit Christmas party this year. Here's the first paragraph of the dissent:

> The panel opinion mutilates the test for plain-error relief. Every one of the panel's multiple mistakes favors Marroquin. And even under the relaxed standard that the panel accidentally announces, Marroquin falls far short of satisfying the test. Because the court should have vacated this aberrant opinion for en banc rehearing, I respectfully dissent.

United States v. Carlile, No. 16-50948

In an issue of first impression in the Fifth Circuit (and in what appears to be only the second circuit to address the issue; the first was the Sixth Circuit), the court held that being in custody on a case is not the same as being sentenced on a case. Here, the defendant spent 364 days in custody on a DWI case before being sentenced to probation for it. The 364 days in custody was credited on a different case for which the defendant was also sentenced. The Presentence Report calculated the criminal history score for the DWI based on the 364 days spent in custody on it assigning it 2 points rather than 1. The opinion held that spending time in custody on a case was not the same as being sentenced to custody on a case; therefore, this DWI should have counted only 1 criminal history point rather than 2 as the defendant was sentenced to probation and not more than 60 days in custody. However, this case was reviewed on plain error, and the defendant could not climb that mountain, so the sentence was affirmed. Nonetheless, it established the rule that time held in custody on a case is not the same as serving a sentence on a case.

United States v. Brown, No. 16-11340

This case is noteworthy because it discussed the meaning of "substantial disruption of a critical infrastructure" under sentencing guidelines section 2B1.1(b)(18)(A)(iii). This enhancement requires a lot. If you have a case involving this, you need to read this opinion. The first paragraph is below and summarizes the case fairly though the discussion of the issue is much more involved.

> Lennon Ray Brown, a former Citibank employee, pleaded guilty to intentionally damaging a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A) after temporarily disabling a portion of Citibank's network. He was sentenced to twenty-one months of incarceration followed by two years of supervised release. On appeal, Brown argues that his Guidelines range was improperly increased under U.S.S.G. § 2B1.1(b)(18)(A)(iii), which applies to conduct causing a "substantial disruption of a critical infrastructure." Because we conclude that Brown's conduct could not have had a serious impact on national economic security, we VACATE Brown's sentence and remand for resentencing.

Practice tip: Make your objections clear. Because the defendant did not raise this issue in his objections to the Presentence Report but did allude to it in his sentencing memorandum, the court found that he had preserved this issue but had to stretch a bit to get there.

United States v. Huerra, No. 16-11783

In a case that strains the credulity of the instruction to disregard, the Fifth Circuit affirmed the conviction for a mandatory life offense when the defendant's parole officer was on the venire and announced himself to the panel. Huerra was charged with several offenses including a 10–life drug offense. He had two prior felony drug offenses, and the government filed a section 851 notice elevating the punishment level to mandatory life. The defendant was on parole for a prior felony. His parole officer happened to be on the venire. During voir dire, the parole officer announced that he was the defendant's parole officer. The opinion falls all over itself to explain why the district court's actions were sufficient. The opinion even said the following: "Later, other panel members casually offered their opinions on drug enforcement, laws against felon gun ownership, and government regulation of private gun ownership. This panel was not hesitant to disclose its potential biases."

Comment: This is an odd position for the panel to take. Usually, opinions extoll the trial judge's superior position to evaluate the situation/witnesses/evidence/whatever and refuse to second guess based on the cold appellate record. That's not the case here though. Here, the opinion does exactly what they never do, which is interpret the cold record. At the end of the day, why not give the defendant a clean venire when he's facing mandatory life?

United States v. Garcia, No. 17-40175

This is a bringing unlawful aliens into the United States for the purpose of commercial advantage or private financial gain in violation of 8 U.S.C. § 1324(a)(2)(B)(ii). It's notable for the court's use of eight pages to find sufficient circumstantial evidence and inferences to find sufficient evidence to allow the jury to reasonably infer the requisite financial purpose.

United States v. Herrold, No. 14-11317

In a hotly contested 8–7 *en banc* opinion, the court held that the Texas burglary statute, Texas Penal Code § 30.02, is indivisible and broader than generic burglary. If you're not sure what that means, here's an except from the opinion:

> We must determine whether the statute sets forth alternative means of committing a single substantive crime, or separate elements, effectively defining distinct offenses. We refer to the former sort of statutes as "indivisible," and we call the latter "divisible." If a statute describes alternative means of committing one offense (i.e., if a statute is indivisible), we compare the whole thing to its federal generic counterpart and determine whether any part falls outside the federal template. In other words, we perform the classic categorical approach. If the alternative terms of a statute outline elements of distinct offenses (i.e., if a statute is divisible), we isolate the alternative under which the defendant was convicted and apply the federal template to only that alternative. This second analytical track has come to be known as the modified categorical approach.

In short, this case has tremendous importance for anyone dealing with a defendant with a prior Texas burglary conviction who may be eligible for sentencing under the Armed Career Criminal Act. Unless you're dealing with such a situation or you're just really interested

in the subject, I'd skip it. Otherwise, you might go catatonic. You are warned.

Border Search cases

Fifth Circuit United States v. Molina-Isidoro, No. 17-50070

At issue in this case was whether *Riley v. California*, 134 S. Ct. 2473 (2014) precluded a physical search and inspection of a cellphone at a border checkpoint. The CBP officer spent about five minutes looking at the contents of the phone—what the opinion called a "cursory" or "manual" search of the phone—no forensic examination was performed. The opinion side-stepped the real issue and affirmed on the good faith exception. The opinion reasoned that since *Riley* had left open the question of whether exceptions to the warrant requirement might justify a warrantless search of a cellphone and pre-*Riley* it was clear that no warrant was required, the officer acted in good faith.

The case is significant for Judge Greg Costa's special concurrence. Judge Costa was very critical of the dodging of the issue with the good faith exception and noted that the historical border exception might not justify the search of cellphones. This was so for two reasons. First, the idea behind the border exception was to detect the importation of contraband, and little (child pornography being the obvious exception) can be secreted in a cellphone. Second, there's a significant difference between searches for contraband and searches for evidence of contraband, and searches of cell phones are much more likely to reveal the latter.

Eleventh Circuit United States v. Vergara, No. 16-15059

In this 2–1 opinion, the 11th Circuit affirmed a warrantless search of a cellphone based only on reasonable suspicion. Vergara returned to Tampa, Florida from a cruise to Cozumel, Mexico. A CBP officer reviewed one of Vergara's cell phones (he had three). Finding a video of a two topless minors, he summoned a HSI special agent who conducted a warrantless forensic examination of the cellphones under the border search exception. Vergara contended that *Riley v. California*, 134 S. Ct. 2473 (2014), which requires a search warrant to search a cellphone incident to an arrest should control. In a 2–1 decision, the majority held that *United States v. Ramsey*, 431 U.S. 606, 619 (1977) controlled and per *Ramsey* border searches need only be reasonable and they are "considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." The dissent sets forth a detailed opinion on why a warrant should be required. It is worth reading.

This sets up an opportunity for the Eleventh Circuit *en banc* to consider the issue or for the Supreme Court to consider if *Riley* should extend to cell phones at the border.

Texas Court of Criminal Appeals

Ross v. State, PD-0001-17

Props to Michael Mowla for this win. In what was likely a politically motivated prosecution, a CPS worker was charged with official oppression for conducting a too-thorough search of a home. The indictment alleged that Ross

"intentionally subjected complainant, Leslie Hunt, to search and/or seizure that Ross knew was unlawful, and Ross was acting under color of her employment as a public servant, namely a CPS investigator for the Texas Department of Family and Protective Services, at the time of the offense."

One of the elements—and the element on which the CCA decided case—was that Ross had to know that the search was unlawful. The State's evidence fell far short of proof of this beyond a reasonable doubt. The search was conducted pursuant to a court order, the family had extensive CPS history, a baby was missing, and one of the rooms in the house looked like a crime scene with blood and bodily fluid sprayed on a wall and soaked into a mattress. Some of the evidence at trial was that the defendant searched the kitchen too thoroughly looking in cabinets and in a crock pot. The COA affirmed, but the CCA reversed and rendered based on the lack of evidence establishing the defendant's knowing that the search was unlawful.

Reynolds v. State, PD-1452-16

This case is related to *Reynolds*. Here, the defendant was charged and convicted for her search of a cellphone. Again, the CCA reversed and rendered because the evidence was insufficient to show that the defendant knew the search was illegal.

Safian v. State, Nos. PD-0323-16 & 0324-16 & 0325-16

Props to Daniel Collins for this win. In the trial of aggravated assault on a public servant, the trial court refused the defendant's request for a deadly conduct lesser included jury charge. The court of appeals affirmed determining that, as a matter of law, deadly conduct is not a lesser-included offense of the charged offense under the circumstances. Applying *Bell v. State*, 693 S.W.2d 434, 438–39 (Tex. Crim. App. 1985), the CCA disagreed: "Having already held in *Bell v. State* that deadly conduct, as a matter of law, is a lesser-included offense of aggravated assault by threat when it is alleged that the defendant used a deadly weapon during the commission of the offense, we now reach that same holding in the instant case where it was alleged that appellant used or exhibited a motor vehicle as a deadly weapon."

The case has been remanded to the COA for determination of whether there's evidence in the record justifying giving the instruction: "The second step of the lesser-included-offense analysis is to determine whether there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. Because the court of appeals addressed only the first step of this analysis, we limit our further discussion of the applicable law to the first step."

Ex parte Pue, No. WR-85,447-01

This is a very important case for Texas enhancements. The finality of out-of-state convictions will be determined under Texas law and not under the law of the state of the conviction. This paragraph from the opinion summarizes it:

> Unless a more specific Texas statute applies, Texas courts should follow Texas Penal Code § 12.42, requiring that a defendant be "finally convicted" of the alleged prior offense before punishment can

> be enhanced. And the determination of whether a defendant has been "finally convicted" for enhancement purposes under section 12.42 is to be made in accordance with Texas law. In this case, because Applicant had been placed on probation for his 2007 California felony conviction, and probation had not been revoked at the time that he was sentenced in this case in 2008, his 2007 California conviction was not "final" under Texas law, and thus it could not be used to enhance his sentence in this case.

Shortt v. State, No. PD-0597-15

An order imposing shock probation is a final, appealable order. Shortt pleaded guilty and was sentenced to 10 DFAJ with restitution as a condition of probation. He was subsequently adjudicated guilty and sentenced to 10 years TDCJ. The trial court did not then orally pronounce restitution. Five months later, the trial court signed an order suspending the sentence and placing the defendant on probation—shock probation. At that time, the trial court ordered restitution as a condition of probation. Shortt appealed the restitution, which he contended was improper since it wasn't part of the oral pronouncement of sentence. The COA dismissed the appeal for want of jurisdiction finding the order granting shock probation was not a final, appealable order. The CCA granted discretionary review and held that an order granting shock probation is appealable.

State v. Velasquez, No. PD-0228-16

The State complained that it had no notice that the defendant's motion to suppress would be heard the day of trial but before trial. The CCA held that notice of a trial setting with a motion to suppress pending is sufficient notice to the State that the motion to suppress will be resolved then. The State should expect that any pretrial matters not yet litigated will be litigated at the trial setting. Article 28.01 still controls notice of pretrial hearings.

Second Court of Appeals

Dunning v. State, 02-17-00166-CR

This is an appeal of the trial court's "not favorable" finding made by the trial court following post-conviction DNA testing pursuant to chapter 64 of the Texas Code of Criminal Procedure. This case contains an excellent explanation of post-conviction DNA testing, its purposes, and appellate standards. I highly recommend this case if you are dealing with post-conviction DNA testing.