

Summaries of Selected Opinions

No. 18-3169. *United States v. Patton*. 6/24/2019. D.Kan. Judge Matheson. *Relevant Conduct—Robbery Sentencing Guideline—Official Victim Sentencing Guideline—Otherwise Accountable—Immediate Flight*.

Defendant was the getaway driver in an armed robbery. Police officers apprehended him shortly after the robbery, but his accomplice, Harris, remained at large. An hour after defendant was arrested, Harris shot a detective who was investigating the robbery. Defendant pleaded guilty to aiding and abetting a Hobbs Act robbery and carrying a firearm during the robbery. At sentencing, based on Harris's shooting of the detective, the district court increased defendant's U.S. Sentencing Guidelines advisory sentencing range by applying the Robbery Guideline, § 2B3.1(b)(3)(C), for infliction of permanent or life-threatening bodily injury. The court also applied the Official Victim Guideline, § 3A1.2(c)(1), for assault on a law enforcement officer. Each Guideline resulted in a six-level increase under the Sentencing Guidelines.

On appeal, defendant challenged the district court's decision to increase his sentencing offense level under the Robbery Guideline because the shooting was not his relevant conduct. A defendant's relevant conduct may include an associate's actions during flight. Harris's shooting of the detective was defendant's relevant conduct because it was within the scope of defendant's agreement to commit robbery, in furtherance of the robbery, and foreseeable. The district court did not err in applying the Robbery Guideline's increase to defendant's offense level.

Defendant also challenged the district court's decision to increase his sentencing offense level under the Official Victim Guideline because (1) the shooting was not his relevant conduct,

(2) he was not otherwise accountable for the shooting, and (3) the shooting did not occur during the immediate flight from the robbery. First, as stated above, Harris's shooting of the detective was defendant's relevant conduct. Second, the Official Victim Guideline applies to assaults on a law enforcement officer by a defendant or a person for whose conduct the defendant is otherwise accountable, and "otherwise accountable" is determined by the definition of relevant conduct. Third, under the Official Victim Guideline, the assault must take place during the course of the offense or immediate flight therefrom. Here, the district court determined that there was no break in causation between the flight from the robbery and the shooting, so the shooting was part of the immediate flight from the robbery. Accordingly, the district court did not err in increasing defendant's sentencing offense level under the Official Victim Guideline.

The sentence was affirmed.

No. 18-1056. *Colbruno v. Kessler*. 7/2/2019. D.Colo. Judge Hartz. *Public Exposure of Naked Body—Pretrial Detainee—Legitimate Governmental Purpose—Qualified Immunity*.

Plaintiff was in jail awaiting trial when he suffered a psychotic episode during which he swallowed metal components of an emergency call box in his cell. Plaintiff's complaint alleges that deputies in the Denver Sheriff's Department took more than two hours to transport him to the hospital. During transport to the hospital, plaintiff urinated and defecated on his clothes. Sheriff's deputies removed plaintiff's clothing and walked him into the hospital and through its public areas completely unclothed, except for a pair of mittens, before chaining him to a bed. Plaintiff was not treated immediately.

Plaintiff sued the six deputies involved in the incident (defendants), alleging violation of his due-process rights. Defendants moved to dismiss for failure to state a claim based on qualified immunity. The district court denied the motion.

On appeal, defendants argued that they are entitled to qualified immunity. They contended that plaintiff needed urgent medical care, so finding another covering for him before transporting him through the hospital would have taken too much time and effort. The Tenth Circuit assessed plaintiff's claim under the Fourteenth Amendment. Exposing a person's naked body involuntarily is a severe invasion of personal privacy, so defendants' alleged conduct constituted a Fourteenth Amendment violation. The only issue was whether the exposure of plaintiff's body was rationally related to a legitimate governmental objective or was excessive in relation to that purpose. The Tenth Circuit concluded that it is common sense that acquiring replacement clothing at the hospital would have taken only minutes, and it is reasonable to infer from their long delay in transporting plaintiff that defendants' actions were not based on a medical need so pressing that they had no time to get a covering for plaintiff. Plaintiff's complaint alleges facts supporting the inference that the public exposure of his naked body was unjustifiable and therefore states a claim under the Fourteenth Amendment. Thus, defendants are not entitled to qualified immunity up to the point that defendant was chained to the hospital bed. However, at that point, plaintiff's status as one facing criminal charges and the apparent risk he posed to himself provided a legitimate purpose for the constraints.

The order was affirmed except to the extent that plaintiff's claim is based on his treatment after being taken to his hospital room.

No. 18-2112. *A.N. ex rel. Ponder v. Syling*. 7/8/2019. D.N.M. Judge Briscoe. *Equal Protection—Release of Juvenile's Arrest Information—Qualified Immunity—Clearly Established Law*.

A.N. was arrested pursuant to a search warrant when she was 16 years old. On the day of her arrest, two adults were arrested and charged with the same crime. Four days later,

the Alamogordo Police Department (APD) prepared and provided to media a news release that included information related to A.N. and posted the release on the APD's Facebook page. Various media organizations published the news release. A.N.'s mother complained to the APD, and it removed the references to A.N. from its Facebook page, but information regarding A.N. and her arrest remains publicly available today on Internet sites.

A.N. and her mother (plaintiffs) sued various APD officers and employees (defendants) for equal protection violations. Plaintiffs asserted that defendants treated A.N. and others age 16 or 17 differently from similarly situated juveniles age 15 or younger with respect to publicly disclosing information about their arrest and delinquency, notwithstanding a state law prohibition on disclosing information about all children under 18. Defendants moved to dismiss based on qualified immunity, and the district court denied the motion.

On appeal, defendants conceded that their conduct was contrary to state law. But they claimed that the law was too general and thus not clearly established when they disclosed A.N.'s information, because there is no Supreme Court or Tenth Circuit decision holding that "disclosure of information about an older juvenile's arrest, when similar information about younger juveniles is not disclosed, violates the Equal Protection Clause." However, the law was sufficiently specific to put defendants on notice that they would violate A.N.'s right to equal protection if they intentionally and without a rational basis differentiated between her and similarly situated juvenile arrestees in applying the state law against disclosing juvenile arrests.

The order was affirmed.

No. 18-4058. Williams v. Utah Department of Corrections. 7/8/2019. D.Utah. Judge Baldock. *Takings Clause—Eleventh Amendment Immunity—Arm of the State—Prospective Injunctive Relief—Prison Bank Accounts.*

Plaintiff is an inmate in the Utah Department of Corrections (UDOC). Among others, he sued the UDOC and numerous prison officials (defendants), claiming that the UDOC failed to pay interest on prison accounts in violation of

the Takings Clause of the Fifth Amendment and due process, and that prison officials retaliated against him for raising this claim. Defendants moved to dismiss based on Eleventh Amendment immunity. The district court dismissed all claims.

On appeal, plaintiff conceded that the UDOC is an arm of the state, but he argued that Eleventh Amendment immunity does not bar his claims. The Eleventh Amendment bars suits in federal court against a nonconsenting state brought by the state's own citizens. The UDOC is an arm of the state entitled to Eleventh Amendment immunity. Therefore, the takings claim against defendants must be dismissed based on Eleventh Amendment immunity.

Plaintiff also argued that he was entitled to an exception from the Eleventh Amendment for prospective injunctive relief against the UDOC director. However, the request for prospective injunctive relief to pay interest on inmate funds was directed to a bank that is no longer a party to this case, and the remaining requests for injunctive relief appear to seek relief from the UDOC. Defendant did not name any prison official to be enjoined from a future violation of his federal rights, so the record does not support a claim for injunctive relief against the director.

The judgment was affirmed.

No. 18-4039. United States v. Gurule. 7/11/2019. D.Utah. Judge Tymkovich. *Motion to Suppress—Unlawful Detention—Reasonable Suspicion to Frisk.*

Officers initiated a traffic stop of a vehicle with three occupants. Defendant was the backseat passenger. The driver consented to a search of the vehicle. Defendant declined to consent to a search. When he stood up, an officer observed a gun in his pocket. Officers handcuffed defendant and confiscated the pistol. Upon further investigation, officers learned defendant had a prior felony conviction, and defendant confessed to knowingly possessing the pistol. Defendant was arrested and charged as a felon in possession of a firearm. Defendant moved to suppress both the pistol and his subsequent confession as the products of an illegal search. The district court granted the motion.

On appeal, the government contended that the officers were permitted to detain defendant

until completion of the traffic stop. Passengers may be detained for the duration of an otherwise valid traffic stop, and police officers may lawfully order passengers to remain in or exit a stopped vehicle, depending on the circumstances. The interest in officer safety outweighs any additional intrusion to a passenger's personal liberty created by investigatory detention. Here, because the officers needed to control the scene, at least for the duration of the consent search of the vehicle, the interest in officer safety outweighed the additional intrusion created by the investigatory detention. The district court erred in finding the officers unlawfully detained defendant before the pat-down search.

The government also contended that the protective search was lawful because during the detention, officers developed reasonable suspicion that defendant was armed and dangerous. During a valid investigatory detention, officers may conduct a limited protective search (a pat-down search or frisk) of the vehicle's driver and passengers if they develop an articulable and reasonable suspicion that the subject is armed and dangerous. Here, the totality of the circumstances created reasonable suspicion for officers to conduct the protective frisk: the officers noticed an unusual bulge in defendant's pocket; defendant was deceitful when asked if he had a weapon; the driver had at least one outstanding warrant; and the vehicle's back seat contained a great deal of property. Further, the stop occurred at night in an area that has a high volume of drug activity and property crimes. Accordingly, the protective search was lawful.

The order was reversed.

No. 17-4159. United States v. Hansen. 7/15/2019. D.Utah. Judge Holmes. *Knowing and Intelligent Waiver of Right to Counsel—Thoroughness of Colloquy Regarding Consequences of Waiver.*

Defendant was indicted for tax evasion and tax obstruction. He refused appointment of counsel at his initial appearance. The district court held a hearing on whether defendant validly waived his right to counsel. At the hearing, the district court asked defendant, among other things, whether he understood he would be required to follow federal procedural and evidentiary rules if he proceeded without

counsel. Defendant's response was ambiguous and unclear. Without seeking clarification from defendant, the court accepted the waiver. Defendant represented himself at trial, and a jury convicted him of tax evasion and tax obstruction.

On appeal, defendant argued that his waiver of counsel was invalid because it was not knowing and intelligent. A court must take reasonable steps to ensure that a defendant understands his obligation to adhere to controlling procedural and evidentiary rules. Here, defendant denied that he understood he would be obliged to follow procedural and evidentiary rules, and the district court failed to engage in a sufficiently thorough colloquy to properly warn him that if he proceeded pro se he would be obliged to adhere to those rules. Further, no case-specific factors, such as defendant's experience with the criminal justice system, sophistication, education, or trial conduct exist here from which to conclude that despite the district court's inadequate warnings, it nevertheless correctly concluded that defendant's waiver of his right to counsel was knowing and intelligent when it was made. The district court erred in accepting defendant's ostensible waiver of the right to counsel and allowing him to proceed pro se.

The waiver determination was reversed and the case was remanded.

No. 18-2170. United States v. Gonzales. 7/29/2019. D.N.M. Judge Bacharach. *U.S. Sentencing Guideline Enhancement—Assault of Law Enforcement Officer During Offense—Intent to Instill Fear of Bodily Harm—Common Law Definition of Assault.*

Police officers conducted a traffic stop in an attempt to arrest defendant on outstanding warrants. After the cars stopped, defendant ran away. As an officer approached him, defendant pulled a gun from under his shirt and then dropped it. Defendant pleaded guilty to possessing a firearm after a felony conviction. At sentencing, the district court enhanced defendant's base offense level under U.S. Sentencing Guideline § 3A1.2(c) (1), which applies when a defendant assaults a law enforcement officer during an offense.

On appeal, defendant challenged the sentence enhancement. He argued that the evidence permitted a reasonable inference that he was

trying to discard the gun rather than instill fear of bodily harm when he pulled the gun from his holster. The Tenth Circuit held that common law assault requires the specific intent to instill fear in another. Further, the burden of proof was on the government to trigger the enhancement. Here, the district court ruled that § 3A1.2(c)(1) had no intent requirement, and it made no finding on defendant's intent. Defendant's conduct would constitute assault only if he had intentionally threatened to hurt one of the officers, and the district court could apply the enhancement only if the government established an intention to instill fear. The district court erred in concluding that subjective intent is immaterial to applying the sentence enhancement.

The sentence was vacated and the case was remanded for resentencing.

No. 18-1188. Equal Employment Opportunity Commission v. Centura Health. 8/13/2019. D.Colo. Judge Lucero. *Administrative Subpoena—Unduly Burdensome—Discriminatory Policy—Americans with Disabilities Act—Relevance.*

Eleven current or former Centura Health employees filed discrimination charges with the Equal Employment Opportunity Commission (EEOC), alleging that Centura violated the Americans with Disabilities Act (ADA) by terminating their employment or refusing to allow them to return to work after medical leave. In conducting its investigation, the EEOC issued an administrative subpoena to Centura. Centura petitioned the EEOC to revoke or modify the subpoena. The EEOC denied the petition and directed Centura to provide the requested information, but Centura refused.

The EEOC then filed a subpoena enforcement action in district court. Centura challenged parts of the subpoena, arguing that compliance would be unduly burdensome and the information sought was not relevant. The court determined that the disputed information was relevant and referred the undue burden question to a magistrate judge. The magistrate judge concluded that producing the information would not be unduly burdensome and declined to take up Centura's contention that the information was not relevant. The district court overruled Centura's objections to the magistrate's undue

burden decision and ordered Centura to comply with the magistrate judge's order.

On appeal, Centura challenged the district court's relevance determination, arguing that in cases in which there is no pattern-or-practice charge, pattern-or-practice evidence is only relevant if there is a specific and substantial connection between the individual claims and the information requested, rather than a general possibility of finding patterns or practices. The EEOC has authority to subpoena evidence relevant to the charge under investigation, including material that might cast light on the allegations against the employer. A subpoena adhering to the geographical scope of individual charges supports a determination that pattern-or-practice evidence is relevant to the investigation of individual charges. In this case, the EEOC's subpoena was based on 11 charges and requested information pertaining only to the locations in Colorado where the charging parties worked. The EEOC met its burden to show a realistic expectation that the information requested would advance its investigation, and there was a link between its investigatory power and the charges of discrimination. The subpoena sought evidence of a discriminatory policy, which was relevant to the individual discrimination charges.

The orders enforcing the administrative subpoena were affirmed.

No. 18-1220. United States v. Blair. 8/13/2019. D.Colo. Judge Ebel. *Special Condition of Supervised Release—Complete Ban on Use of Computers and Internet Access—Reasonable Necessity.*

Police searched defendant's home and found thousands of images of child pornography on his home computer. Defendant pleaded guilty to possession of child pornography. After calculating defendant's 10-year sentence, the district court imposed a special condition of supervised release limiting defendant's use of computers and the Internet to "those the defendant requests to use, and which the probation officer authorizes."

On appeal, defendant argued that his 10-year sentence is substantively unreasonable. Defendant asserted that the district court failed to give sufficient weight to his (1) difficult childhood,

(2) poor mental and physical health, and (3) military service. Here, the court considered the first two factors, and while it did not specifically consider the third, it gave other reasons for its sentence, including its opinion that the sentence was just punishment to reflect the seriousness of the offense. None of the personal characteristics defendant highlighted are sufficient to rebut the presumption of reasonableness that applies to his within-guidelines sentence. The district court's sentence was reasonable given the circumstances of the case.

Defendant also argued that the special condition is more restrictive than is reasonably necessary, in violation of 18 USC § 3583(d)(2). District courts have broad discretion to prescribe conditions on supervised release, but that discretion is limited. In all but the most extreme cases, a special condition of supervised release that absolutely prohibits Internet use will unreasonably impede a defendant's liberty in violation of § 3583. Here, the special condition completely bans defendant's use of the Internet and offline computers, unless and until the probation office makes future exceptions to the ban, which it has no obligation to do. The special condition does not ensure that defendant will be allowed reasonable use of computers and the Internet, and nothing about this case suggests that a complete ban on defendant's Internet use is necessary to achieve the supervised release goals. Thus, the district court's special condition involves a greater deprivation of liberty than is reasonably necessary to achieve the goals of supervised release in violation of § 3583(d)(2).

The sentence was affirmed. The challenged special condition of supervised release was vacated and the case was remanded.

No. 17-3191. Bledsoe v. Vanderbilt. 8/16/2019. D.Kan. Judge Carson. *Absolute Prosecutorial Immunity—Fabrication of Evidence—Interlocutory Appeal.*

Plaintiff was wrongfully convicted of raping and murdering a 14-year-old girl. After he spent 15 years in prison, DNA evidence cleared him and implicated his brother Tom. Tom then committed suicide, leaving a note confessing to the murder and stating that the prosecutor had told him to deny that he had committed the

crimes. Plaintiff sued the prosecutor, alleging that he denied plaintiff's right to a fair trial by fabricating Tom's testimonial evidence, and conspiring to fabricate Tom's testimonial evidence, to secure his conviction. The prosecutor moved to dismiss, arguing that he was entitled to absolute prosecutorial immunity from suit and plaintiff had not alleged sufficient facts to demonstrate the existence of a conspiracy. The district court denied the motion.

On appeal, the prosecutor argued that the district court erred in denying him absolute immunity. Prosecutors generally enjoy absolute immunity from suit for activities intimately associated with the judicial phase of the criminal process, but this immunity does not apply to a prosecutor's investigative or administrative activities. It also does not protect a prosecutor who fabricates evidence during the preliminary investigation of a crime. Thus, the prosecutor was

not entitled to absolute immunity. Nevertheless, the prosecutor further argued that plaintiff's claims should be bifurcated into those that are barred by absolute immunity and those that are not barred by absolute immunity, and that those that are barred should be dismissed. The Tenth Circuit declined to consider this argument (which amounted to a claim that plaintiff failed to state a valid cause of action) because it lacked jurisdiction over this claim.

The prosecutor also argued that even if absolute immunity doesn't apply, plaintiff failed to allege sufficient facts to show the existence of a conspiracy. The Tenth Circuit lacked jurisdiction to adjudicate this issue.

The order denying the prosecutor absolute immunity was affirmed. The question whether plaintiff alleged sufficient facts to demonstrate the existence of a conspiracy was dismissed for lack of jurisdiction.

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No. 18-1080. *United States v. Williams.* 8/20/2019. D.Colo. Judge Phillips. *Army Veteran Benefits—Posttraumatic Stress Disorder—Materiality of False Statement—Expert Witness Testimony—Intrinsic Evidence.*

Defendant is a U.S. Army veteran who spent his entire career stateside. For years, he received benefits for combat-related posttraumatic stress disorder (PTSD). During a review of his benefits eligibility, the Department of Veteran Affairs (VA) discovered that defendant's claimed foreign service was not supported by his military records, and the VA proposed to decrease his benefits. Defendant challenged the proposal, and at an informal hearing, he claimed to have served overseas. The review officer upheld the VA's proposal to reduce defendant's benefits, finding that he lacked a service connection for his claimed combat-related PTSD.

Defendant was subsequently charged with violating 18 USC § 1001(a)(2) for making a false statement to the review officer. At the close of the government's case, defendant moved for a judgment of acquittal, arguing that the government had presented insufficient evidence that his false statement was material to the benefits decision. The district court denied the motion, and a jury found defendant guilty.

On appeal, defendant argued that the district court erred by not granting his motion for acquittal because the government presented insufficient evidence of materiality. Here, defendant falsely testified about combat service in Iraq to persuade the review officer of that service, and he put the issue before the review officer to decide. Defendant's false statement about his deployment to Iraq was material to the VA's determination of his eligibility for benefits under § 3.304(f)(2) for combat-related PTSD. Accordingly, the district court did not err in denying the motion for acquittal.

Defendant also argued that the district court violated his constitutional right to present a defense by excluding testimony from two defense experts. Because the proffered testimony could not make any element of the charged crime less probable, the district court did not abuse its discretion in excluding the testimony, and defendant's constitutional claim failed.

Lastly, defendant argued that the district

court abused its discretion by admitting as intrinsic evidence defendant's prior statements to VA providers about having served in combat zones. He contended that the statements were prohibited by Fed. R. Evid. 404(b). The statements explained defendant's earlier award of benefits for combat-related PTSD and helped the jury understand the importance of his lie to the review officer and were thus intrinsic to the charge. Accordingly, the district court did not abuse its discretion in admitting the statements.

The conviction was affirmed.

No. 18-1123. *Semple v. Griswold.* 8/20/2019. D.Colo. Judge Murphy. *Colorado Constitution—Ballot Initiative—Number of Voters—Equal Protection—Political Speech.*

In 2016 Colorado passed Amendment 71, a citizen initiative that made it more difficult to amend the Colorado Constitution through the initiative process. The amendment, Colo. Const. art. 5, § 1(2.5) (hereinafter "section 2.5"), added a requirement that initiative proponents gather signatures from at least 2% of registered voters in each of Colorado's 35 state senate districts.


Plaintiffs have been involved in the Colorado ballot initiative process as designated representatives of initiatives seeking to amend the Colorado Constitution. They challenged the constitutionality of section 2.5, alleging it infringes on their First Amendment right of political association and violates the one-person-one-vote principle inherent in the Equal Protection Clause of the Fourteenth Amendment. Defendant moved to dismiss the complaint for failure to state a claim. The district court denied defendant's motion and entered a permanent injunction enjoining enforcement of section 2.5.

On appeal, plaintiffs argued that section 2.5 violates the one-person-one-vote principle. They asserted that the population of either eligible or registered voters, not the total population, in each state senate district must be equal or voting power is diluted. It is not unconstitutional to base direct democracy signature requirements on total population. The Tenth Circuit observed that because elected representatives make decisions affecting both voting and nonvoting constituents, representation is equal when total population in each district is equal. The

district court erroneously granted judgment in plaintiffs' favor on their equal protection claim. Because there is no dispute that Colorado's state senate districts are approximately equal in total population, summary judgment must be entered in defendant's favor on that claim.

Plaintiffs also argued that section 2.5 violates the First Amendment by increasing the cost and difficulty of placing an initiative measure on the ballot. Section 2.5 is not content-based, so even assuming that it makes it more difficult and costly to amend the Colorado Constitution because it requires plaintiffs to collect signatures from all districts in the state, that process requirement does not give rise to a cognizable First Amendment claim.

Plaintiffs further contended that section 2.5 compels core political speech because it requires them to solicit signatures in all districts and if they fail to do so, their proposed initiative will not appear on the statewide ballot. However, there is not precedent holding that the failure of a ballot initiative is an adverse government action that discourages or penalizes the exercise of First Amendment rights. Further, the communication of the ideas and beliefs underlying a proposed initiative is not dependent on whether the initiative ultimately appears on the statewide ballot, so section 2.5 does not create a barrier to the expression of those ideas and beliefs. Thus, the consequence plaintiffs complain about minimally impacts their First Amendment rights and is not the type of state-mandated penalty necessary to establish a compelled speech claim.

The judgment was reversed and the case was remanded for the district court to grant judgment in defendant's favor. 

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.