

CASE UPDATE - END OF THE YEAR - 2009

by J. Anderson

Supreme Court Cases

Fourth Amendment - School Search

Safford Unified School District #1, et al v. Redding, ___ U.S. ___, 129 S.Ct. 2633, 174 L.Ed.2d 354 (June 2009) -

Although an assistant principal's reasonable suspicion that a middle school student might be distributing contraband drugs failed to justify a search of the girl's underclothing, school officials were entitled to qualified immunity since the law regarding strip searches of students was not clearly established at the time of the search. Concurring with the majority that the search was overly intrusive and unwarranted under the circumstances presented, Justices Stevens and Ginsburg, in separate dissents, expressed disagreement with the grant of qualified immunity. Justice Thomas disputed the Court's conclusion that school officials lacked reasonable suspicion for the search,

Sixth Circuit Cases

Child Pornography - Sentencing

United States v. Stall, 581 F.3d 276 (6th Cir. 2009) -

The district court's imposition of a one-day sentence of imprisonment with a ten-year term of supervised release following the defendant's conviction for two counts of possession of child pornography was not erroneous. In making the sentencing determination, the court properly considered the defendant's cooperation in the investigation, his progress in therapy and the therapist's prognosis for his successful rehabilitation, along with the defendant's strong expression of remorse for his actions. The Sixth Circuit panel noted the government's failure to cite any authority to challenge the reasonableness of the sentence and expressed that "[h]ad the government argued and given specific examples of how a variance of this magnitude would result in unwarranted sentencing disparities, the district court might have sentenced Stall within the Guidelines or at least no so far below the advisory range." The court affirmed the sentence after chiding the government for its failure to defend its sentencing recommendation.

Discovery of Presentence Reports

In re Siler, 571 F.3d 604 (6th Cir. 2009), rehearing and rehearing en banc denied (Sept. 22, 2009)

Petitioner appealed the district court's denial of his motion to unseal or release defendants/police officers' presentence reports following their guilty pleas to civil rights violations stemming from their conduct during the arrest of the Petitioner. Pursuant to the Rules of Criminal Procedure Rule 32(e)(2), presentence reports are confidential and may be released only to the defendant, his attorney, the attorney for the government, and the court. Denying Siler's petition for mandamus, the Court of Appeals noted that "[t]he scope of any common law right of access to court records is left to the sound discretion of the trial court."

Evidence - Hearsay Evidence - statements of coconspirator

United States v. Johnson (Earl), 581 F.3d 320 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 3409, 78 USLW 3728 (U.S. June 14, 2010) -

Recorded statements by a coconspirator describing details of an armed robbery he committed with the defendant and six other individuals were admissible at the defendant's trial pursuant to the hearsay exception of the Federal Rules of Evidence Rule 804(b)(3) as statements against penal interest. Statements in the recording were not testimonial and admission of the tape recording did not violate the defendant's rights under the Confrontation Clause. The probative value of the evidence outweighed any prejudice to the defendant and introduction of the recording was not an abuse of discretion.

Fourth Amendment - Arrest Warrant

United States v. Hardin, 539 F.3d 404 (6th Cir. 2008), *rehearing and rehearing en banc denied* (Jan 16, 2009) -

Information from a confidential informant failed to establish the necessary reasonable belief that the defendant, the subject of a pending arrest warrant, was inside the apartment of a third party prior to police officers' entry into the residence to execute the warrant. The apartment manager who entered the unit to verify the defendant's presence was acting as an agent of the government rendering the officers' entry immediately thereafter illegal. Any subsequent consent to search the premises was tainted by the illegal entry and not sufficiently attenuated to render it voluntary. Evidence seized pursuant to the defendant's arrest should have been suppressed. The parties' stipulation to the defendant's status as an "overnight guest" gave him standing to bring a Fourth Amendment challenge to the officers' actions. Reversing the district court's denial of the defendant's motion to suppress, the defendant's conviction was vacated, and the case was remanded for further proceedings. The Hardin court concluded that although "the officers may have reasonably suspected that Hardin was generally living at this residence, [] they had essentially *no* evidence to indicate that Hardin was *then* inside the apartment. Because Payton requires at a minimum that the officers have 'a reasonable belief that the subject of the arrest warrant is within the residence *at that time*,' United States v. Pruitt, 458 F.3d 477, 483 (6th Cir. 2006), *cert. denied* (2007)(emphasis added), the officers' entry violated the Fourth Amendment." Hardin, at pp. 423-424.

Fourth Amendment - "Knock and Talk"

United States v. Adams, 583 F.3d 457 (6th Cir. 2009), *reh. and reh. en banc denied* (Feb 10, 2010) -

The registered hotel room occupant's consent to a search of the room for contraband during a "knock and talk" by officers related to suspicion of drug activity included the defendant's jacket which was found on the floor. The defendant abandoned the jacket for Fourth Amendment purposes when he denied ownership. Officer safety concerns justified a search of the jacket during which drugs and a gun were discovered. Although the defendant did not expressly waive his Miranda rights, his statements to police officers were voluntary and the defendant admitted ownership of the gun in a Gun Questionnaire Form given to him by the officer to sign. The district court properly denied the defendant's motion to suppress physical evidence and inculpatory statements made to police. However, the court's failure to give the defendant's requested instruction to the jury that he could not be convicted exclusively on his own uncorroborated statement or admission, was reversible error

warranting a new trial.

Fourth Amendment - Inevitable Discovery Doctrine

United States v. Quinney, 583 F.3d 891 (6th Cir. 2009) -

The district court erroneously denied the defendant's motion to suppress the warrantless seizure of his printer by police officers and the inevitable discovery doctrine would not apply to the facts of the case. Although the court found that the officers had probable cause to support the seizure of the printer as evidence related to counterfeiting currency, their failure to obtain legal authorization rendered the seizure unconstitutional. The printer and the defendant's post-seizure statements should have been suppressed.

Fourth Amendment - Probable Cause for Search Warrant

United States v. Dyer, 580 F.3d 386 (6th Cir. 2009), *reh. and reh. en banc denied* (Nov 2009) -

Police officers had sufficient information to support probable cause for a warrant to search a rental cabin for evidence of methamphetamine distribution. An informant alleged that he had purchased drugs from the defendant and another individual in the cabin, the officers confirmed the defendant's identity from the informant's description, and police discovered that the defendant was wanted in another state for charges related to methamphetamine. The government's failure to challenge the defendant's standing in the district court waived the issue for appeal. The defendant's status as an overnight guest gave him standing to challenge the search despite the fact that the cabin had been rented in the codefendant's name. Judge Moore disputed the majority's probable cause determination contending that the officers had simply corroborated facts irrelevant to the probable cause analysis and had failed to discover any evidence of drug trafficking beyond that provided by the informant. Judge Moore warned that the majority had "condone[d] the real possibility of officers searching people's homes on the basis of unsubstantiated accusations of drug activity by dubious informants who themselves are criminal defendants currying favor for their own sentences or targeting persons out of enmity or spite." Hoo-yah.

Fourth Amendment - Probable Cause to Search Computer

United States v. Frechette, 583 F.3d. 374 (6th Cir. 2009), *reh. and reh. en banc denied* (Jan 27, 2010), *petition for certiorari filed* (Apr 27, 2010) (No. 09-0488) -

Information that the defendant had purchased a one-month subscription to a child pornography website for \$79.95 more than a year earlier was sufficient to provide probable cause for a warrant to search the defendant's residence for evidence of child pornography. A majority of the panel determined that the information was not stale and that the magistrate had not erred in concluding that there was a fair probability that evidence of child pornography, generally a continuing offense, would be found on the defendant's computer. Reversing the district court's order granting suppression of evidence seized from the defendant's computer, the Court of Appeals noted that, in addition to the subscription information, the agents had verified that the defendant had a previous criminal history and was listed on the Michigan State Sex Offender Registry at the same address. Dissenting, Judge Moore expressed that the one-month subscription, with no renewal for the subsequent 16-months, was simply insufficient to provide probable cause to believe that the defendant was involved in child pornography at the time of the search. Moore cautioned courts from finding probable cause based

upon “so few facts from which to draw an inference that the intrusion would likely uncover evidence of a crime.”

Fourth Amendment - Third Party Consent to Search

United States v. Penney, 576 F.3d 297 (6th Cir. 2009), cert. denied, 130 S.Ct. 1536, 176 L.Ed.2d 115 (U.S. Feb 22, 2010) (No. 09-752) -

Defendant Penney appealed his convictions and sentence for violations of federal drug and gun laws and for an attempt to kill a federal agent during the execution of a search warrant. Rejecting the defendant’s numerous challenges the Sixth Circuit held that: 1) Even if the defendant retained his right to possess firearms under Tennessee law, he was still prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1) as a result of his prior state conviction for distribution of a controlled substance; 2) The defendant’s on-again, off-again, and most recently on-again live-in girlfriend had apparent authority to consent to a search of his residence despite the fact that they had recently had a falling out. The officers knowledge about the couple’s history supported their belief that the girlfriend could lawfully provide consent; 3) Sufficient evidence supported probable cause for a warrant to search the defendant’s home and the informant’s signal to police officers that funds intended to purchase drugs were present provided the necessary triggering condition for the anticipatory warrant. Information that the defendant had previously received and distributed large quantities of marijuana at his home indicated a continuing criminal enterprise and the information was not stale for purposes of establishing probable cause for the warrant; 4) The defendant’s statement to police officers after he shot a federal agent during the execution of the search warrant, “you guys don’t understand, I thought I was being robbed,” was made after he had time and motive to “contrive or misrepresent,” and was properly excluded as unreliable hearsay under FRE 803(2). The statement did not qualify as an excited utterance or a present sense impression; 5) The testimony of two of Penny’s cellmates that Penney had said that he wished he had killed the police officers he had shot so they could not testify against him, was properly admitted after Penney testified, as a prior inconsistent statement under FRE 801(d)(1). The statement was relevant to Penney’s veracity, particularly with regard to testimony about the confrontation with law enforcement which conflicted with the police officers’ version of the events; 6) There was sufficient evidence to support the defendant’s conviction under 18 U.S.C. § 924(c) for possession of a firearm in furtherance of a drug trafficking offense. The jury could reasonably reject the defendant’s argument that the firearm was used only to protect the house. 7) The defendant’s two violations for § 924(c) were based on two distinct predicate offenses – the attempted murder of a federal agent, and the attempt to possess marijuana with the intent to distribute as the defendant was convicted of aiding and abetting an attempted possession of marijuana. 8) The sentence of 895 months, which equated to a life sentence, was within the guidelines range and the defendant failed to rebut the presumption of reasonableness. In dissent, Judge Merritt opined that the officers could not have reasonably believed that the defendant’s girlfriend had lawful authority to consent to the search since the defendant had asked her to leave the residence and she had no key.

Habeas Corpus - Ineffective Assistance of Counsel

Bigelow v. Haviland, 576 F.3d 284 (6th Cir. 2009), rehearing denied, 582 F.3d 670 (Sept 29 2009) Petitioner’s counsel provided constitutionally deficient representation by failing to search for

additional alibi witnesses to support his defense to charges of violating Ohio assault and kidnapping statutes. Evidence indicated that three other individuals could have corroborated the petitioner's alibi witness's testimony that Petitioner was working 150 miles away in another city at the time of the offense, and counsel's failure to investigate further was prejudicial error.

Habeas Corpus - Double Jeopardy

White v. Howes, 586 F.3d 1025 (6th Cir. 2009), cert. denied, 130 S.Ct. 3370, 78 U.S.L.W. 3701 (U.S. Jun 01, 2010) (No. 09-10306) -

The Michigan state court's imposition of cumulative punishments for convictions related to firearm possession, specifically, felon in possession of a firearm and possession of a firearm during the commission of a felony-second offense, did not violate double jeopardy. Petitioner White had been convicted under the Michigan statute for felony-firearm which includes the following elements: 1) that a person in possession of a firearm 2) while he was a felon 3) in possession of a firearm. He was also convicted under a related statute which criminalizes being 1) a felon 2) in possession of a firearm. The court assessed that a defendant convicted as a felon in possession will also be guilty of felony-firearm and that a conviction and sentence under both statutes constitutes cumulative punishment for the same offense. However, since the Michigan legislature is free to punish the same offense under separate statutes should it so choose, its express intent to do so in this instance precluded federal habeas relief. Reversing the district court's order granting relief, the Sixth Circuit explained that "although we agree with the district court that the two statutes at issue here punish the same offense under Blockburger, we can find no basis upon which to make the distinction drawn by the court in granting the habeas petition. *While this may be the case that prompts the Supreme Court to refine its analysis*, the Court has never held or intimated that the constitutional bar against Double Jeopardy circumscribes the legislative prerogative to define crimes and prescribe punishment in the context of a single prosecution." (Emphasis added).

Robbery - Life Sentence

United States v. Parks, 583 F.3d 923 (6th Cir. 2009), reh. denied (May 18, 2010) -

Affirming the defendant's conviction under 18 U.S.C. § 2113(e) for killing a person while attempting to avoid apprehension for a bank robbery, the Court of Appeals remanded the case for the district court to determine whether a life sentence is required for an *unintentional* killing occurring during an attempt to avoid apprehension for a bank robbery. On remand, the district court should consider whether the language of the statute is ambiguous and, if so, whether application of the rule of lenity requires a lesser sentence.

Sexual Offenders Registration and Notification Act (SORNA) - Retroactive Application

United States v. Cain, 583 F.3d 408 (6th Cir. 2009), reh. and reh. en banc denied (Feb 17, 2010) -

The provision of the federal Sexual Offenders Registration and Notification Act (SORNA) which criminalizes the failure of a sex offender to register with authorities after traveling in interstate commerce, 18 U.S.C. § 2250, does not apply retroactively to certain offenders who were convicted prior to the effective date of the statute, July 27, 2006.

Sentencing - Career Offender

United States v. Wynn, 579 F.3d 567 (6th Cir. 2009), *reh. denied* (Nov 04,2009) -

Looking only to the fact of the conviction and the statutory definition of the offense as instructed by the Supreme Court in Taylor, the defendant's prior conviction under Ohio's sexual battery statute is not categorically a crime of violence for purposes of sentencing him as a career offender. The factual description of the offense included in the presentence report could not be used to determine whether the prior conviction qualified for the enhancement. On remand for resentencing, the government would be permitted to submit further Shepard-approved documents to support its belief in the violent nature of the offense.

Sentencing - Criminal History - juvenile adjudications

United States Thompson, 586 F.3d 1035 (6th Cir. 2009) -

Following his conviction for possession with intent to distribute cocaine base, Defendant Thompson challenged the district court's application of U.S.S.G. § 4A1.1(e) to increase his base offense level. The guideline calls for a two point enhancement in criminal history if the instant offense was committed less than two years after the defendant's release from a prior confinement. Rejecting the defendant's contention that the guideline did not apply to his prior juvenile commitment, the Court of Appeals noted that it is clear from the commentary notes that the guideline applies to "an adult or juvenile offense."

Sentencing - Modification of Sentence - crack cocaine

United States v. Metcalfe, 581 F.3d 456 (6th Cir. 2009) -

The district court's inclusion of 3.18 grams of crack cocaine seized from a coconspirator to calculate the defendant's sentence would not be considered on the defendant's motion for reduction of his sentence due to the subsequent decrease in the sentencing guideline ranges for crack cocaine. Although the coconspirator admitted to police that the crack cocaine seized from his person was for personal use, the defendant failed to object to the drug quantity in his presentence report and at sentencing. The Court of Appeals held that "[t]he crack retroactive modification is not an open door to raise new objections to sentencing determinations."

Sentencing - Motion for Modification of Sentence - crack cocaine

United States v. Washington, 584 F.3d 693 (6th Cir. 2009), *cert. denied*, 524 U.S. 940, 118 S.Ct. 2348, 141 L.Ed.2d 718 (U.S. Jun 22, 1998) -

On the defendant's motion for modification of his sentence in light of the change in the drug quantity ratio for crack cocaine offenses, the defendant sought a further reduction in his sentence on the basis that the sentence imposed was greater than necessary to achieve the goals of 18 U.S.C. § 3553(a). Affirming the district court's refusal to depart below the minimum amended guideline range, the Court of Appeals noted that nine of the ten circuits that have decided the issue have concluded that the advisory nature of the Guidelines under United States v. Booker does not apply to sentence modifications under 18 U.S.C. § 3582. The court further instructed that "[t]he policy statements plainly provide that § 3582(c)(2) proceedings are not full resentencings and may not result in a sentence lower than the amended Guidelines range (unless the defendant's original sentence was lower than the Guidelines range). See U.S.S.G. § 1B1.10(b)(2)(A)-(B)."

Sentencing - Motion for Substantial Assistance

United States v. Rosenbaum, 585 F.3d 259 (6th Cir. 2009), cert. denied, 130 S.Ct. 1115, 78 USLW 3394 (U.S. Jan 11, 2010) -

The district court's denial of the government's motion under U.S.S.G. § 5K1.1 for a reduction in the defendant's sentence for substantial assistance was sufficiently supported by the record. The sentencing court determined that Rosenbaum had agreed to cooperate only when he had no other choice and that, at the time of sentencing, the defendant's assistance was incomplete and had led to no actual investigations or prosecutions. The court's reference to a possible Rule 35 departure in the future did not render the denial of the § 5K1.1 motion erroneous.

Sentencing Statement - No Jurisdiction for Appeal

United States v. Hebert, 584 F.3d 691 (6th Cir. 2009) -

The district court's request to the Bureau of Prisons that the defendant receive a mental health evaluation and addiction treatment was not a "final sentence" for purposes of 18 U.S.C. § 3742(a) providing for review of a sentence on appeal in limited circumstances.

Weapons - Armed Career Criminal Act - prior conviction

United States v. Young, 580 F.3d 373 (6th Cir. 2009), cert. denied, 130 S.Ct. 1723, 176 L.Ed.2d 202 (U.S. Mar 01, 2010) -

The district court did not err by sentencing the defendant as an Armed Career Criminal. The defendant's prior Michigan conviction for fleeing and eluding which involved the willful failure to obey an officer's direction, constituted a "clear challenge to the officer's authority," and created a serious potential risk of physical injury to others. Where the defendant pled guilty without a written plea agreement, his failure to express an intention to preserve a suppression issue barred him from raising the issue on appeal.

Weapons - Armed Career Criminal Act - prior conviction

United States v. LaCasse, 567 F.3d 763 (6th Cir. 2009), cert. denied, 130 S.Ct. 1311, 78 USLW 3438 (U.S. Jan 25, 2009) -

The defendant's prior conviction for fleeing and eluding a police officer under Michigan state law presented a serious potential risk of harm to another and involved aggressive and purposeful conduct such that it qualified as a violent felony under the Armed Career Criminal Act. The statute requires that the offender "attempt[] to outrun a police cruiser either in a law speed-limit area or in a manner that results in collision or accident." As such, it involves "aggressive" conduct that "presents a serious potential risk of physical injury" to another.

Weapons - Possession of a Firearm by an "Unlawful User"

United States v. Burchard, 580 F.3d 341 (6th Cir. 2009) -

Evidence was sufficient to support the defendant's conviction under 18 U.S.C. § 922(c)(2) for possession of a firearm by an unlawful user of drugs. The government's witness testified that she and the defendant smoked crack cocaine on various occasions over a one-year period and on several occasions for days in a row. Drug paraphernalia and four firearms were discovered on the defendant's property, and the defendant's drug screens were positive for cocaine. "Reasonable jurors could have concluded from this evidence that Burchard's use of crack cocaine was *regular*,

sustained, and contemporaneous with his possession of the five firearms.” The court’s instruction on the elements of 18 U.S.C. § 922(g)(3) was a clear statement of the law and its failure to give the defendant’s instruction on the offense was not error.

Weapons - Sentencing - enhancement for use of firearm in connection with another felony
United States v. Angel, 576 F.3d 318 (6th Cir. 2009) -

The district court did not err by enhancing the defendant’s sentence for possession of a firearm in connection with another felony offense under U.S.S.G. § 2K2.1(b)(6). The defendant was convicted of possession of a firearm by an unlawful user of a controlled substance, and knowingly and intentionally manufacturing less than 50 marijuana plants. Three firearms were discovered in the defendant’s house in close proximity to 81.2 grams of processed marijuana, drug paraphernalia, and assorted ammunition, clearly establishing a sufficient nexus between the firearms and the felony offense of manufacturing marijuana. The ready accessibility of the weapons led the court to conclude that the firearms would serve to protect the illegal substance and to embolden the defendant in the commission of the offense.

Weapons - No Factual Basis for § 924(c) Charge
United States v. Maye, 582 F.3d 622 (6th Cir. 2009) -

Evidence that a confidential informant had observed a revolver in the defendant’s apartment would not support the defendant’s plea to possession of a firearm during the commission of a drug crime. The government failed to demonstrate that the firearm was “possessed to advance or promote the commission of the underlying [drug trafficking] offense” as required by United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004). The district court’s erroneous belief that the mere presence of a weapon on the premises where a drug transaction took place was sufficient to convict under § 924(c) required a remand for a new plea acceptance hearing and a new sentencing hearing. On remand the district court should also consider its authority to vary from the crack cocaine guidelines in light of recent Supreme Court decisions in Kimrough and Spears.