CASE LAW UPDATE SCENARIOS

1. The defendant was found guilty by jury of two counts of robbery (§2B3.1), two counts of felon in possession (§2K2.1), and two counts of possession of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). On two separate occasions, the defendant and his brother robbed two individual methamphetamine dealers. On both occasions, the defendants threatened the victims with a modified semiautomatic firearm.

A violation of 18 U.S.C. § 924(c) provides a mandatory minimum penalty to be imposed consecutively "to any other term of imprisonment imposed on the person," including any sentence for the predicate crime. The first count of 18 U.S.C. § 924(c) provides a mandatory consecutive penalty of 5 years. The second count of 18 U.S.C. § 924(c) carries an additional mandatory consecutive penalty of 25 years.

The court calculated the guideline range for the robbery and felon in possession counts to be 84 – 105 months. The defendant faced an additional mandatory consecutive penalty of 30 years in addition to the guideline sentence imposed on the robbery and felon in possession counts. At sentencing, the defendant urged the court to vary from the guideline range and impose one day for the robbery and felon in possession counts, considering his lengthy mandatory minimum sentences.

The judge stated that he would have agreed to the defendant's request, but he understood that 18 U.S.C. § 924(c) precludes a sentence of one day of imprisonment for the predicate crimes to be followed by the 30-year consecutive penalty mandated by the statute.

Did the judge correctly state that he was prohibited from varying from the guidelines based on the mandatory consecutive minimum sentences required under 18 U.S.C. § 924(c)?

Answer:

No. The Supreme Court in *Dean v. U.S.*, 137 S. Ct. 1170 (2017), held that a court can consider the mandatory minimum sentence under § 924(c) when calculating an appropriate sentence for the predicate offense. Thus, the judge can consider the 30-year mandatory minimum when considering the sentence for the underlying bank robbery offenses.

2. The defendant pleaded guilty to one count of felon-in-possession, under 18 U.S.C. § 922(g). The court applied a base offense level of 20 at §2K2.1 because it concluded that the defendant's prior Tennessee state conviction for aggravated burglary qualified as a crime of violence. The defendant's guideline range is 77-96 months.

The district court sentenced the defendant to 96 months. The judge emphasized that the offense was "extremely dangerous and egregious" and that "domestic violence is prevalent" throughout the defendant's criminal history. The court also stated that even if the aggravated burglary were not a crime of violence, the court would have varied upward to 96 months.

The appellate court has concluded that Tennessee aggravated burglary is not a crime of violence and that the guideline range should have been 27-33 months.

Must the appellate court remand the case for resentencing?

Answer:

In *Molina-Martinez v. U.S.*, 136 S. Ct. 1338 (2016), the Supreme Court held that if there is an error in calculating a guideline range, the court has committed a significant procedural error. However, the Court also noted that if the record shows that the court thought the sentence was proper irrespective of the guideline range and that the sentence was reasonable, the error may be harmless.

In *U.S. v. Morrison*, 852 F.3d 488 (6th Cir. 2017), the Sixth Circuit held that while the district court incorrectly held that aggravated burglary was a crime of violence and improperly calculated the guideline range, the mistake was harmless because the court stated it would have varied upward to the same sentence because the offense was extremely dangerous and egregious, and domestic violence was prevalent throughout the defendant's criminal history. The Sixth Circuit held that even though the court erred in concluding that aggravated burglary was a crime of violence, the error in calculating the range did not entitle the defendant to resentencing because the court's weighing of the factors was reasonable. In this scenario, because the judge provided reasons for the sentence, the court would likely affirm the sentence even with the guideline error.

3. What if the judge instead stated that he would sentence the defendant to 96 months even if his guideline calculation was incorrect. The judge did not make any statement regarding why 96 months was appropriate but only said that he would sentence at the high end of the range.

If the appellate court determined that the guideline range was calculated incorrectly, will the appellate court remand the case for resentencing?

Answer:

As discussed in question two, a guideline error can be considered harmless if the government can point to parts of the record to show that the court would have imposed the same sentence and the sentence was reasonable. Here, as the district court did not provide any reason for why he/she would impose the same sentence even if the guideline range was calculated incorrectly. If this were the court's only statement, the case would likely be remanded.

---

4. The defendant pleaded guilty to one count of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g). The defendant had a prior conviction for Massachusetts Armed Robbery (Mass. Gen. Laws Ann. Ch 265, § 17). The PSR stated that this offense qualifies as a crime of violence under the guidelines because the definition enumerates robbery as a crime of violence. The government stated this robbery contains an element of force because the defendant admitted in a plea agreement that he pointed a gun at the victim during the robbery. The defendant objected to the PSR, stating that the prior conviction was not a crime of violence.

Is this offense a crime of violence under the force clause?

Probably not. For an offense to qualify as a crime of violence at §4B1.2, it must contain as an element the use, attempted use, or threatened use of physical force against the person of another or be listed as an enumerated offense. In making this determination, the court must use the categorical approach. Furthermore, even though the defendant admitted that he pointed a gun during the robbery, facts do not matter under the categorical approach. For this robbery statute to qualify as a crime of violence under the force section at §4B1.2 the Supreme Court has held that the force must involve "force capable of causing pain or injury to another person." See *Johnson v. U.S.*, 130 S. Ct. 1265 (2010). Massachusetts Armed Robbery requires the jury to find the defendant (1) committed a robbery (2) while in possession of a weapon.

The robbery can be committed by (1) force and violence or (2) by assault and putting in fear. After examining Massachusetts case law, both the First and Ninth Circuits have held that the force required by the statute does not satisfy the physical force required by *Johnson*. Massachusetts courts have held that the degree of force is immaterial and that any force, however, slight will satisfy the force prong of the statute. After *Johnson*, a statute requiring only slight force will not fall under the force clause of §4B1.2 or ACCA. *See U.S. v. Starks*, 861 F.3d 306 (1st Cir. 2017) and *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016). Also, even though the statute requires that the defendant possess a weapon, it does not require the use of a dangerous weapon and the victim need not be aware of the weapon's presence. For these reasons, it is unlikely that this statute will qualify as a crime of violence under the force clause at §4B1.2.

---

5. The defendant was convicted of a conspiracy to commit healthcare fraud, conspiracy to distribute controlled substances and conspiracy to receive kickbacks. The defendant, a doctor, and his co-doctors wrote false prescriptions that were filled by pharmacists. The indictment states that the dates of the conspiracy spanned from January 1, 2012 to December 31, 2016. The doctor joined the conspiracy in January 1, 2014.

The court concluded that the total amount of restitution for the entire five-year conspiracy was $1,000,000. The court ordered the defendant to pay the full amount of restitution. The defendant has appealed the restitution amount ordered by the court.

Is the district court's order of restitution correct?

Answer:

No. A defendant cannot be held liable for the entire amount of restitution of a conspiracy if he/she was not in the conspiracy for the entire time. Here, as the defendant joined the conspiracy in 2014, he should not be held liable for any restitution amount prior to this date. *See U.S. v. Fowler*, 819 F.3d 298 (6th Cir. 2016), and *U.S. v. Foley*, 783 F.3d 7 (1st Cir. 2015)

---

6. Defendant was convicted of Failing to Register as a Sex Offender under the Sex Offender Registration Act (SORNA) found at 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Michigan conviction for sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 12-year old niece when she was left in his care. He received a 7-year sentence for that offense. The defendant has no other prior sex offense convictions.

At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during Lopez's supervised release term:

"Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses."

Is this an appropriate condition?

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a computer to commit the offense. Thus, imposing a condition involving computer filtering software does not appear to be related to the purposes listed in § 3553(a). (*See U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015)).
