

Denver Law Review

Volume 67
Issue 4 *Tenth Circuit Surveys*

Article 24

February 2021

Criminal Law

Denver University Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Denver University Law Review, Criminal Law, 67 Denv. U. L. Rev. 691 (1990).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

CRIMINAL LAW

United States v. Bonnett, 877 F.2d 1450

Author: Judge Brorby

Defendant, Bonnett, was convicted on one count of conspiracy to violate 18 U.S.C. § 371, and fifty-six counts of bank fraud in violation of 18 U.S.C. § 1344. Bonnett appealed, contending that counts two through forty-seven, could not stand because they were based on implied representation of adequate funds. Second, Bonnett argued that the district court erred by admitting into evidence a letter from Moore, who received loans on behalf of Bonnett, to the FDIC. Bonnett also asserted error in admitting evidence of other wrongful acts committed by him. Finally, he contended that the trial court prejudicially denied him the opportunity to impeach two witnesses.

The Tenth Circuit first explained that since Bonnett was charged with violating both subsections of 18 U.S.C. § 1344, the United States, as plaintiff, must prove that Bonnett knowingly executed a scheme or artifice. In particular, the United States must prove that: (1) the scheme defrauded the financial institution; and (2) the scheme enabled the defendant to obtain property by means of false or fraudulent pretenses, representations, or promises. Using these guidelines, the court held that passing a series of worthless checks for the purpose of obtaining illegal loans could constitute a scheme to defraud a financial institution. Immediately crediting a depositor's account while knowing that the checks are drawn on insufficient funds constitutes false representation. Consequently, the court stated that the evidence supported a conviction under either or both subsections. Second, the court upheld the district court's decision to allow into evidence a letter from Moore to the FDIC. The court found that the letter was properly admitted on the terms of a stipulation. Third, the court held that evidence of Bonnett's wrongful conduct was admissible to show that he had an established pattern, practice, and demonstrated his knowledge and intent. Fourth, the court held that Bonnett was not entitled to question an F.B.I. agent regarding an inconsistent statement made by a prosecution witness. The court reasoned that the statement was not given under oath in a prior proceeding in accordance with FED. R. EVID. 801 (D)(1). Furthermore, the witness was not first confronted with the allegedly inconsistent statement as required by FED. R. EVID. 613 (B). The court reviewed the district court's ruling on the admission and exclusion of evidence under the "abuse of discretion" standard. The court found no abuse and, therefore, affirmed the decision of the district court.

United States v. Bouck, 877 F.2d 828

Author: Judge McWilliams

Defendants, Bouck and Day, appealed convictions of conspiracy,

three separate counts of possession of cocaine with an intent to distribute, and one count of unlawful use of the telephone. Bouck and Day contended that: (1) the government alleged one conspiracy but that its evidence established multiple conspiracies, constituting a misjoinder and necessitating a dismissal of the conspiracy count; (2) the government engaged in outrageous conduct, therefore, tainting the conspiracy indictment; and (3) the court improperly admitted hearsay statements.

The Tenth Circuit held that the evidence showed only one conspiracy. The court also held that the government's use of an infiltrator did not constitute outrageous conduct sufficient to fatally taint the conspiracy indictment. Moreover, the court held that in determining whether a conspiracy has been shown by a preponderance of the evidence, hearsay statements may be considered. Finally, the court found that the evidence presented was sufficient to sustain Bouck's conviction of possession of cocaine with intent to distribute.

United States v. Cardenas, 864 F.2d 1528

Author: Judge Brorby

Defendants Cardenas and Rivera-Chacon appealed their convictions for conspiracy to distribute cocaine and carrying a gun.

The Tenth Circuit affirmed their convictions. The court held that in the absence of any evidence of tampering or alteration, the chain of custody of the seized cocaine was sufficiently established to support its admission into evidence, despite the unavailability of a custodial officer to testify. The court further held that the evidence was sufficient to support a conviction for carrying a firearm. The court reasoned that Cardenas had placed the gun in the truck within inches of his hand, and attempted to conceal it. These facts were sufficient to establish power of dominion and control over a firearm.

United States v. DeMasters, 866 F.2d 327

Author: Judge Bright, sitting by designation

The district court dismissed indictments against defendant, DeMasters, for violating provisions of the Lacey Act, 16 U.S.C. § 3372(a) (1982) ("Act"), relating to the unlawful sale of wildlife taken in violation of state law.

Affirming the district court's dismissal of the indictment, the Tenth Circuit held that DeMasters's furnishing of guide services for hunting wildlife did not constitute the "sale of wildlife" within the meaning of the Act. The court reiterated that criminal provisions are to be construed narrowly, and that legislative history may not be used to bring within a criminal statute conduct that is not clearly encompassed within the ordinary meaning of the provision. Although DeMasters, through exclusive lease arrangements with the landowners, controlled the property on which the hunt was conducted, and obtained an additional fee conditioned on the successful killing of wildlife, the wild animals were

not under his control so as to make him their seller. The Act was amended in 1988 to specifically include guide services, but its prospective application does not affect the outcome of this case.

United States v. Harting, 879 F.2d 765

Author: Judge Baldock

Defendant, Harting, sought reversal of his conviction for failing to file federal income tax returns. Harting claimed that the district court erred by incorrectly instructing the jury. First, Harting argued that the jury should have been instructed on the element of willfulness alleging that in good faith he misunderstood his duty to file. Second, Harting claimed that the district court erred in its instructions regarding the privilege against self-incrimination.

The Tenth Circuit held that a defendant is entitled to an instruction as to any recognized defense, and the district court must instruct separately on the defense of good faith. The court reasoned that since the evidence was sufficient to allow a reasonable jury to accept Harting's good faith defense, the failure to separately instruct the jury constituted reversible error. The court, therefore, remanded for a new trial. In addition, the court held that the district court's instruction regarding the privilege against self-incrimination was properly applied. The court reasoned that the privilege did not protect Harting from disclosing the amount of his income.

United States v. Lane, 883 F.2d 1484

Author: Chief Judge Holloway

Defendants ("Lane"), were convicted of interfering with the enjoyment of private employment because of race, color, religion or national origin, under 18 U.S.C. § 245(b)(2)(C). The conviction was based on Lane's involvement in the slaying of Jewish talk show host Alan Berg. Lane appealed, arguing: (1) section 245(b)(2)(C) was unconstitutional in its application to the case; (2) the prosecution and conviction for killing Berg in violation of the RICO statute barred any subsequent prosecution pursuant to 18 U.S.C. § 245; (3) there was insufficient evidence, as required by the due process clause, of certain elements of a section 245(b)(2)(C) violation; and (4) he was prejudiced by a joint trial.

In affirming the district court's finding, the Tenth Circuit held that section 245(b)(2)(C) was sufficiently supported by the commerce power of Congress. Consequently, the court held the statute constitutional, even though it was unclear whether Congress also relied on the fourteenth amendment in its enactment. The court also held that prior convictions of RICO offenses did not bar, under a theory of double jeopardy, prosecution under section 245(b)(2)(C). The court further held that there was sufficient evidence for the jury to conclude beyond a reasonable doubt that the killing was motivated because of Berg's employment. Therefore, the evidence supported the convictions. Finally, the court held that Lane did not establish he was prejudiced by a joint

trial. The court determined that there was no prejudice because the weight of the evidence against Lane and the other defendant was approximately the same. Moreover, the court concluded that the jury properly followed the instructions against one defendant, and not against the other.

United States v. Levario, 877 F.2d 1483

Author: Judge Moore

Defendant, Levario, appealed a conviction for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Levario also appealed an order to serve a term of supervised release following his prison term, claiming the district court lacked statutory authority. The Tenth Circuit held that the government failed to prove beyond a reasonable doubt that a conspiracy existed because the jury was asked to draw a contrary inference from the same evidence supporting the conviction for possession with intent to distribute. Therefore, the conspiracy charge was reversed. With regard to the conviction for possession with intent to distribute, the Tenth Circuit affirmed, holding that the evidence supported the jury's finding that Levario knowingly possessed a controlled substance with intent to distribute. Finally, the court vacated the district court's order to serve a term of supervised release because the legislature intended the statute to become effective on November 1, 1987, and the crime was committed prior to that date.

Lopez v. McCotter, 875 F.2d 273

Author: Judge Seth

Defendant, Lopez, a bail bondsman, was convicted in New Mexico district court of aggravated assault on a police officer, attempted aggravated burglary, and aggravated assault on Antonio Ojinaga. Lopez posted bond for Antonio's son, Rudy Ojinaga, who failed to satisfy the conditions of his release on bond. The New Mexico Court of Appeals affirmed the convictions, and Lopez petitioned the United States District Court for *habeas corpus* relief. The district court granted *habeas corpus* relief and plaintiff, McCotter, representing the Secretary of Corrections for the State of New Mexico, appealed. First, McCotter asserted that New Mexico's adoption of the Uniform Criminal Extradition Act ("UCEA"), eliminated the common-law authority of Lopez, as a bondsman, to retake Ojinaga without following specified procedures. Second, McCotter contended that the bail bondsman's privilege cannot shield Lopez's conduct in assaulting the police officer.

The Tenth Circuit held that the relevant provisions of the UCEA were narrow. Moreover, the UCEA's coverage, in view of the particular statute as to bondsmen and the common law, gave no adequate notice to Lopez of the state court's current construction. The result of the decision of the New Mexico Court of Appeals was to retroactively render

Lopez's conduct criminal by depriving him of his bail bondsman's privilege. The court stated that this was a violation of the due process clause. The court thus affirmed the district court's grant of *habeas corpus* relief regarding Lopez's convictions for attempted aggravated burglary and aggravated assault on Antonio Ojinaga. Second, the court held that the district court's instruction to the jury adequately protected Lopez. The court reasoned that the instruction allowed the jury to decide whether Lopez knew the man was a police officer. Accordingly, the court reversed the district court's grant of *habeas corpus* relief regarding Lopez's conviction for aggravated assault of the police officer. The case was, therefore, remanded for further proceedings.

United States v. Mobile Materials, Inc., 881 F.2d 866
Per Curiam

The defendants were convicted of bid-rigging in violation of 15 U.S.C. § 1 (Sherman Act) and appealed. The Tenth Circuit affirmed. The defendants petitioned for rehearing, arguing that the district court improperly admitted certain co-conspirator statements pertaining to jobs unrelated to the defendants. The defendants also asserted that the evidence was insufficient to support the jury's finding of a single, ongoing conspiracy to rig bids.

The Tenth Circuit held that the district court had not abused its discretion in admitting the statements of co-conspirators conditionally, subject to their being connected up later. The court found that there was ample evidence to prove the existence of a single, ongoing conspiracy and that the defendants were members of the conspiracy. Once the defendants joined the conspiracy, they became criminally liable for all acts done in furtherance of the conspiracy. Therefore, the government was not restricted to asking questions which pertained solely to jobs rigged by the defendants. The statements of co-conspirators regarding jobs unrelated to the defendants were admissible to prove the mechanics and ongoing nature of the conspiracy. The court reaffirmed the defendants' conviction.

United States v. M.W., 890 F.2d 239
Author: Judge Logan

Defendant, an Indian juvenile, appealed his adjudication as a delinquent for committing the crime of arson. Defendant contended on appeal that the *mens rea* required under the federal arson statute, 18 U.S.C. § 81, was intent to burn a building, and that the district court erred in finding that knowing conduct was sufficient.

The Tenth Circuit held that "willfully and maliciously," within the meaning of section 81, includes acts done with knowledge that burning of a building is the practically certain result. Thus, the district court's findings which established knowing conduct were sufficient to support its conclusion that the defendant acted "willfully and maliciously." The court also held that the jury could have found that the evidence estab-

lished beyond a reasonable doubt that the defendant possessed the requisite *mens rea*. The defendant's efforts to stop or ameliorate the damage did not establish that he did not know that the consequences of his actions were practically certain to occur.

United States v. Nichols, 877 F.2d 825

Author: Judge McWilliams

Defendant, Nichols, appealed convictions of conspiracy, continuing criminal enterprise, twenty-one separate counts of possession of cocaine with an intent to distribute, and eight separate counts of interstate travel in aid of an unlawful enterprise. Nichols contended the district court erred in refusing to give an entrapment instruction. Nichols also argued that the informant's conduct was so shocking and outrageous that Nichols' due process rights were violated.

The Tenth Circuit previously held that an entrapment instruction is required when evidence of entrapment creates a factual issue as to "inducement" by the government. The court upheld Nichols' conviction. The court reasoned there was no factual issue because the evidence showed Nichols participated in cocaine distribution before the government informant arrived. The court also held that Nichols' due process rights were not violated and consequently, no dismissal was warranted. The court reasoned that a dismissal is only warranted where the conduct of the informant is shocking, outrageous and has reached an intolerable level. The court held that an intolerable level was not approached.

United States v. Pinelli, 887 F.2d 1461

Author: Judge Phillips

Defendants, ("Pinelli"), appealed their convictions of various gambling and tax statute violations. The Tenth Circuit upheld all the convictions.

First, the court found abundant evidence from which a reasonable jury could convict. Second, the court held that neither 18 U.S.C. § 1995 nor the applicable Colorado gambling statutes were unconstitutionally vague or too broad. Third, the court determined that the inadvertent submission of non-evidentiary materials to the jury was harmless error. Fourth, the court found no abuse of discretion in the district court's admission of the testimony of the government's expert witness. Fifth, the court affirmed the district court's denial of Pinelli's motion to suppress evidence obtained from a court authorized wiretap. Finally, the court found the Pinelli's motion for severance was not timely and thus denial was within the district court's discretion.

United States v. Protex Industries, Inc., 874 F.2d 740

Author: Judge Saffels, sitting by designation

Defendant, Protex Industries, Inc. ("Protex"), appealed its criminal conviction under the "knowing endangerment" provision of the Re-

source Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6928(e). On appeal, Protex contended that the district court: (1) rendered section 6928(e) unconstitutionally vague by allowing the "knowing endangerment" counts to go to the jury even though there was no evidence that the employees were placed in imminent danger of serious bodily injury as specifically defined by 42 U.S.C. § 6928(f)(6); (2) rendered the section unconstitutionally vague by improperly instructing the jury on the meaning of "imminent danger" in the statute; and (3) erred in not giving a requested jury instruction in Protex's defense that the government failed to meet its statutory duty to provide results of on-site inspections to Protex.

The Tenth Circuit held that the district court had not erred and affirmed the verdict. The court concluded that: (1) the employees had incurred severe physical effects from prolonged exposure to toxic chemicals that were sufficient to constitute "serious bodily injury" even though the specific condition was not set forth in the statute; (2) the jury instruction using the term "reasonable expectation" as opposed to "substantial certainty" in defining "imminent danger" was proper and did not prevent Protex from predicting whether its conduct would violate RCRA, a necessary factor for unconstitutional vagueness; and (3) the government's failure to notify Protex of its inspection results indicating violations of RCRA did not provide a defense to the criminal charges.

United States v. Record, 873 F.2d 1363

Author: Judge Baldock

Defendant, Record, was convicted of conspiracy charges involving cocaine and marijuana and sentenced to twenty-five years in prison on each of two counts. Record appealed alleging that: (1) the government's evidence was insufficient to establish one continuous conspiracy and, therefore, venue was improper; (2) the district court unduly emphasized evidence harmful to the defense; and (3) the district court erroneously admitted evidence of prior bad acts and inappropriately allowed the government's closing argument to imply future crimes if acquitted.

In upholding one conspiracy, the Tenth Circuit ruled that venue was proper because at least one overt act occurred in the district. Also, the court held that Record failed to establish appropriate withdrawal from the conspiracy. Moreover, the court ruled that evidence of prior uncharged importation of marijuana was admissible because it was highly probative and was admitted for a limited use, followed by a limiting instruction. In addition, the court found the prosecutor's closing argument harmless because of its limited and indirect nature and because there was ample evidence of guilt. The court, therefore, affirmed the district court's conspiracy conviction.

United States v. Stewart, 872 F.2d 957

Author: Judge Brown, sitting by designation

Defendant, Stewart, was convicted on twenty-nine counts of mail and wire fraud and on one count of conspiracy to defraud. Stewart appealed, arguing that: (1) the mail and wire fraud statutes are unconstitutionally vague; (2) the district court erred by failing to instruct the jury that the mail and wire statutes do not apply to intangible rights; (3) the district court erred in failing to instruct the jury on the elements of common law fraud; (4) the district court erred in failing to instruct the jury on certain provisions of antitrust laws; and (5) the restraining order issued by the district court was so broad it interfered with Stewart's right of access to potential witnesses.

First, the Tenth Circuit stated that the test for impermissible vagueness is whether a person of ordinary intelligence is given fair notice by the statute that his conduct is forbidden. Moreover, the court stated that pursuant to 18 U.S.C. § 1341, specific intent must be shown. The requirement of specific intent does not automatically rule out vagueness, but it does eliminate objection of the accused being unaware of the statute's prohibition. The court found the indictment was sufficiently clear to state an offense under 18 U.S.C. § 1341. Second, the district court did not err in failing to instruct the jury that the mail and wire statutes do not apply to intangible rights. The court reasoned that there were no allegations in the indictment regarding intangible rights; only deprivation of property rights were alleged. Third, the district court did not err in failing to instruct the jury on the elements of common law fraud. The court reasoned that it was not error, because the statute does not require successful completion of the scheme to defraud. Fourth, the district court did not err in failing to instruct the jury on provisions of the antitrust laws. The court reasoned that the provisions relating to nonprofit organizations were not applicable because even though Stewart represented a nonprofit organization, the drugs were not being purchased for the organizations own use. Fifth, the court held that if there was error in the district court's granting of the temporary restraining order, it was harmless error. The judgment and convictions of the district court were, therefore, affirmed.

United States v. Voigt, 877 F.2d 1465

Author: Judge Brorby

Defendant, Voigt, was convicted of one count of conspiracy pursuant to 18 U.S.C. § 371 (1982), and forty-six counts of bank fraud in violation of 18 U.S.C. § 1344 (Supp. II 1984). Voigt appealed her convictions alleging ineffective assistance of counsel, jury disregard of instructions, and admission of improper expert witness opinions.

Voigt asserted that she was inadequately represented by her counsel because he was under the influence of Demerol during most of the six week trial. Voigt argued that her counsel's impairment was demon-

strated by his: (1) failure to argue for severance; (2) inability to communicate with co-counsel; (3) failure to cross-examine a key witness; (4) failure to ask for a limiting instruction with regard to the Fed. R. Evid. 404(b) evidence; and (5) decision not to put on direct evidence or to allow Voigt to testify.

Two elements must be established to demonstrate that counsel's assistance was so defective as to require the reversal of a conviction. First, it must be shown that counsel committed serious error so as to not be functioning as comported by the sixth amendment. Second, it must be established that but for the counsel's unprofessional errors, the result of the proceeding would have been different.

The Tenth Circuit held that Voigt did not establish that her counsel failed to exercise the skill, judgment, and diligence of a reasonable defense attorney. She also did not meet her burden of demonstrating a reasonable probability that but for counsel's constitutionally defective representation the result of the trial would have been different.

The court concluded that Voigt was not entitled to a new trial based on jury misconduct. The court reasoned that Voigt supported her position with only the affidavit of a codefendant's counsel. Moreover, the affidavit stated that according to one juror, Voigt's conviction was due to her failure to testify. Fed. R. Evid. 606(b) provides that a juror may not testify as to any matter occurring during jury deliberations or to the effect of anything upon that or any other juror's mind. The court refused to disregard Rule 606(b) and looked upon this inquiry with disfavor.

Upholding the district court, the Tenth Circuit held that Voigt failed to point out any error committed by the trial court regarding the expert witness testimony. The verdict of the jury and the actions of the district court were, therefore, affirmed.

