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CRIMINAL SENTENCING

Coleman v. Saffle, 869 F.2d 1377

Author: Judge Logan

Plaintiff, Coleman, was convicted by a jury of first degree murder. At a separate sentencing hearing, the jury determined that all five of the statutory aggravating circumstances were present and sentenced Coleman to death. The “especially heinous, atrocious, or cruel” aggravating circumstance was subsequently declared unconstitutional. Coleman filed a petition for a writ of habeas corpus alleging he was sentenced under an unconstitutional jury instruction. The district court denied the petition, and Coleman appealed. The State argued that Coleman’s complaint should not be heard because he failed to bring forth the aggravating circumstance challenge in his first federal habeas action.

The Tenth Circuit held that Coleman acted reasonably in not challenging the aggravating circumstance instruction in his first habeas petition. The court stated that Coleman had no reason to previously raise the claim because the courts had not given any indication the instruction was unconstitutional. The court further held that even though the aggravated circumstance instruction was unconstitutionally applied, it amounted to harmless error beyond a reasonable doubt. The court reasoned that the remaining four aggravating circumstances were strongly supported by the evidence. Consequently, the jury would have convicted Coleman despite the unconstitutional jury instruction. The court also held that an instruction which precluded the jury from considering sympathy in determining its sentence did not impair Coleman’s rights. Furthermore, the State’s discussion of the victim during closing argument at the guilt stage did not render the trial fundamentally unfair. The court, therefore, affirmed the denial of the writ of *habeas corpus*.

United States v. Cook, 880 F.2d 1158

Per Curiam

The United States appealed the denial of its motion brought pursuant to 18 U.S.C. § 3148 to revoke defendant Cook’s release pending his appeal of a drug conviction.

The Tenth Circuit stated that when the government presented evidence to establish probable cause that Cook had committed a felony while on release, a rebuttable presumption arose. The presumption was that no condition or combination of conditions would assure that Cook would not pose a danger to the safety of any other person in the community. Once probable cause is established, it is appropriate that the burden rest on the defendant to come forward with evidence indicating that this conclusion is not warranted in his case. Once the burden of production is met, the presumption does not disappear, but remains as a factor for consideration in the ultimate release determination. Because the dis-

strict court ignored the presumption after the government established probable cause that Cook had committed a felony, the Tenth Circuit held there was error. The case was reversed and remanded.

Fiumara v. O'Brien, 889 F.2d 254

Author: Judge Phillips, sitting by designation

Prior to the sentencing of plaintiff, Fiumara, on tax fraud and other charges, the government prosecutor had properly brought Fiumara's alleged involvement in four murders to the attention of the Probation Department. Fiumara was never charged or tried on these murders, but the Parole Commission ("Commission") based its decision not to grant parole in part on these allegations. The district court denied Fiumara's petition for a writ of *habeas corpus*, finding that the Commission did not abuse its discretion in denying parole. Fiumara appealed, claiming the Commission's finding that he was responsible for four murders was arbitrary and capricious and that the murders should not have been used to determine his eligibility for parole because the murders were unconnected to the charges on which he was convicted.

In upholding the district court's decision, the Tenth Circuit found that the Commission is not limited to the consideration of formally adjudicated crimes and was entitled to consider evidence from prosecutors and other parties when making its determination. The Commission based its findings that Fiumara was responsible for the murders and that there was a nexus between the murders and his conviction on information contained in the sentencing hearing transcript and letters from two prosecutors. The court held that these findings and the Commission's denial of parole were neither arbitrary and capricious nor an abuse of discretion.

United States v. Goldbaum, 879 F.2d 811

Author: Judge Anderson

Defendant, Goldbaum, was sentenced by the district court following a guilty plea to the charge of unlawful escape from custody. Goldbaum's sentence was increased pursuant to the United States Sentencing Commission's Sentencing Guidelines ("Guidelines") because he committed the offense while under a criminal justice sentence. The district court denied Goldbaum's motion declaring the Guidelines invalid on constitutional grounds. On appeal, Goldbaum argued that "confinement" and "imprisonment" are substantive elements of the crime of escape, and should not also be considered as enhancement factors for the purposes of section 4A1.1(d) or (e) of the Guidelines.

The Tenth Circuit affirmed the sentence, ruling that the Guidelines must be interpreted as if they were a statute or a court rule; thus, the court must follow their clear, unambiguous language if there is no manifestation of contrary intent. The Guidelines unambiguously call for the additional time if the offense was committed while under a criminal justice sentence. The court affirmed the sentence.

United States v. Jack, 868 F.2d 1186

Author: Judge Ebel

Defendant, Jack, was convicted of assault by striking, beating, or wounding in violation of 18 U.S.C. § 113(d), for which the penalty is a fine of not more than \$500 or imprisonment for not more than six months or both. The district court sentenced Jack to six months imprisonment, suspended the entire sentence, and imposed a three-year probation under 18 U.S.C. § 3651, conditioned on Jack's residency for the first six months in a community treatment center. On appeal, Jack alleged that the probation was an illegal split sentence, arguing that a split sentence can be imposed only when an offense is punishable by more than six months imprisonment.

Affirming the district court's probation order, the Tenth Circuit ruled that Jack's residency in the community treatment center as a condition of probation was not a split sentence. The court stated that trial courts have wide latitude in establishing conditions for probation and that the legislative history of section 3651 did not preclude imposing a residency requirement as a condition.

United States v. Jordan, 890 F.2d 247

Author: Judge Brorby

Defendant, Jordan, appealed his conviction for knowingly making a false statement to an insured savings and loan to obtain a loan. On appeal, Jordan asserted the following errors: (1) The district court erroneously instructed the jury on the republication of a false statement; (2) the indictment was multiplicitous; (3) the district court abused its discretion in ordering restitution as a condition of probation; and (4) the district court abused its discretion in ordering that Jordan incur no new debts as a condition of probation.

The Tenth Circuit found that Jordan failed to object at trial to the jury instructions and that there was no "plain error" to justify raising the issue for the first time on appeal. Second, the court found Jordan's double jeopardy claim without merit. Jordan presented the fictitious statement on four separate occasions, giving rise to the four separate counts. Third, the court held that actual damages from a crime for which the defendant is convicted may be ordered as restitution when the amount has been judicially determined pursuant to notice and hearing, such as were afforded Jordan. Finally, the court dismissed Jordan's contention that the prohibition of debt was unnecessarily harsh and excessive, stating that federal district courts are accorded broad discretion and this condition served the goals of both rehabilitating the defendant and protecting the public.

Lewis v. Martin, 880 F.2d 288

Author: Judge Seymour

Plaintiff, Lewis, filed a writ of *habeas corpus* under 28 U.S.C. § 2241

(1982), which was denied by the district court. Lewis claimed that the Sentencing Reform Act, U.S.C. § 3551, *et seq.* (Supp. V 1987) ("Act"), which abolished the Parole Commission, required the Commission to set a release date for individuals in its jurisdiction the day before the expiration of five years after the Act's effective date. Lewis argued that his release must be within that guideline range, and that he was entitled to immediate release because he was already incarcerated beyond that range.

The Tenth Circuit held that the Act did not apply to prisoners whose maximum sentence under the old law ran beyond five years from the effective date of the Act, but who would be on parole five years from the effective date. The Act applies only to persons who will be in prison on November 1, 1992 (five years from the effective date of the Act). Because Lewis would be on parole on that date, the Act did not apply to him, and he was not entitled to release within the guideline range.

United States v. Parker, 881 F.2d 945

Author: Judge McKay

Defendant, Parker, pled guilty to a single count of kidnapping. The district court sentenced Parker to a prison term of seventy-five years and ordered, under 18 U.S.C. § 4205(b)(1) (1982), that he would become eligible for parole after serving a minimum term of twenty-five years. Parker moved for correction of the sentence, contending that his sentence is illegal because the term he must serve before becoming eligible for parole exceeds the legal maximum allowed under section 4205(a). Parker appealed the district court's denial of this motion.

The Tenth Circuit noted that section 4205(a) provides that a prisoner automatically becomes eligible for release on parole after serving one-third of his sentence, or ten years, whichever is less. The court then construed section 4205(a) to apply to a prisoner who is serving time but whose parole eligibility date was not set by the sentencing court. Since the district court set Parker's parole eligibility date at the time of sentencing, section 4205(b)(1) applies. That subsection allows the trial judge to avoid the operation of subsection (a)'s automatic eligibility provision by designating a parole eligibility term of not more than one-third of the maximum sentence imposed. The court held that the parole eligibility term ordered by the district court complied with 18 U.S.C. § 4205 and affirmed the sentence.

United States v. Reber, 876 F.2d 81

Author: Judge Seymour

The Tenth Circuit reversed the district court's order revoking defendant Reber's probation finding that the district court had abused its discretion. The district court stated as grounds for its order that Reber had failed provide the court with financial information for purposes of determining restitution to Reber's victims. The Tenth Circuit found no evidence supporting this allegation of failure to cooperate and re-

manded the case with instructions to release Reber under the terms of the original order of probation.

United States v. Shorteeth, 887 F.2d 253

Author: Judge Logan

Prior to her conviction, defendant Shorteeth had entered into a written plea agreement which read in part "no separate federal prosecutions will be instituted against [defendant] . . . for conduct and acts committed by her related to information she provides the Government during . . . debriefings." The district court, when determining her sentence, considered information that Shorteeth disclosed in the course of cooperation with the government. Shorteeth appealed from the sentence.

In a *de novo* review, the Tenth Circuit held that Federal Sentencing Guidelines § 1B1.8 require a plea agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so. The statement in Shorteeth's plea agreement that "[t]here are no agreements whatsoever regarding what sentence your client will or should receive" was an insufficient disclosure. The sentence was vacated and remanded.

United States v. Vance, 868 F.2d 1167

Author: Judge Tacha

Dissent: Judge Logan

Defendant, Vance, pleaded guilty to two of six counts of bank fraud and received a restitution order for the total losses to two banks. On appeal, Vance argued that the restitution should be limited to the amounts directly associated with the two counts of the indictment to which he pleaded guilty.

The Tenth Circuit, affirming the restitution order, found no abuse of discretion by the district court when it ordered restitution for the entire amount Vance obtained in his fraudulent scheme. The court concluded that when the indictment charged a fraudulent scheme, the restitution order may encompass all losses related to the scheme and need not be limited to those associated with the counts to which the defendant pleaded guilty. Therefore, the court held that the scheme furthered by Vance's separate acts of failing to report sales in violation of agreements with the banks could be treated as a unitary offense to determine restitution under the Probation Act, 18 U.S.C. § 3651 (repealed effective November 1, 1987). The court further held that the district court's assumed failure to inform Vance of the possibility of restitution was harmless error because Vance's attorney had informed him of the possibility.

United States v. Woods, 888 F.2d 653

Author: Judge Baldock

Defendant, Woods, appealed the denial of credit on his prison sentence for time spent on bond in a "halfway house." Woods argued that (1) 18 U.S.C. § 3585 entitled him to credit for pre-sentence custody in a conditional release environment, and (2) the denial of credit violated his constitutional right to equal protection.

The Tenth Circuit held that Woods was not entitled to pre-sentence credit because under 18 U.S.C. § 3585 credit is given only when there is full physical incarceration. Although Woods resided in a halfway house, this did not equal the deprivation of liberty experienced by a person detained in jail. The court further held that Woods was not deprived of equal protection because pre-sentence and post-sentence residents at a halfway house are not similarly situated; post-sentence residents are serving their sentences whereas pre-sentence residents are only on conditional release to assure their presence at trial and sentencing. The district court's decision was, therefore, affirmed.