

MEMORANDUM

TO: ANYONE INTERESTED

FROM: JA

RE: CASE UPDATE - 2009

Supreme Court Cases

Civil Rights - Qualified Immunity

Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565 (January 2009) -

Police officers could reasonably rely on the principle of “consent-once-removed” to authorize their warrantless entry into the home of a suspected drug dealer even though the court of appeals in their circuit had yet to officially recognize the doctrine. Because their actions did not violate clearly established law, the officers were entitled to qualified immunity from the suspect’s civil rights claims. The officers entered the residence immediately following the execution of a controlled narcotics buy on the signal of the confidential informant inside the residence. Three Federal Courts of Appeals, including the Sixth Circuit, and two State Supreme Courts, have approved and accepted the validity of the doctrine’s application.

Drugs and Narcotics - Facilitation

Abuelhawa v. United States, ___ U.S. ___, 129 S.Ct. 2102, 173 L.Ed.2d 982 (May 2009) -

Petitioner’s phone calls to a drug trafficker to make two misdemeanor purchases of cocaine, did not constitute use of a communication facility in causing or “facilitating” another felony drug distribution offense under the federal drug statute. Writing for the unanimous Court, Justice Souter noted that Congress clearly intended to limit liability under 21 U.S.C. § 843(b) to the facilitation of a felony and to punish the purchase of drugs for personal use more leniently than the felony of distributing drugs.

Firearms -

United States v. Hayes, ___ U.S. ___, 129 S.Ct. 1079, 172 L.Ed.2d 816 (February 2009) -

To convict an individual for a violation of 18 U.S.C. § 922(g)(9), possession of a firearm by an individual previously convicted of a “misdemeanor crime of domestic violence,” the government must prove that the predicate misdemeanor offense involved an individual with whom the defendant had a domestic relationship. However, a domestic relationship need not be an essential element of the statute under which the defendant was previously convicted.

Firearms - Statutory Enhancement for Discharge

Dean v. United States, ___ U.S. ___, 129 S.Ct. 1849, 173 L.Ed.2d 785 (April 2009) -

A 10-year mandatory minimum sentence for the discharge of a gun in the course of a violent crime or drug trafficking crime applies whether the discharge is intentional or accidental. A majority of the Court concluded that, in the absence of an express requirement of intent in the language of the

statute, the Court would not presume that the discharge of a firearm be intentional in order for the statutory enhancement to apply. “The sentencing enhancement accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible.” The majority explained that the defendant could have prevented the discharge by locking or unloading the firearm, handling it with care during the offense, leaving the firearm at home, or better yet, not committing the offense at all. Justice Stevens opined in dissent that in the absence of evidence to the contrary, the Court should not presume that Congress intended to create a strict-liability enhancement through § 924(c)(1)(A)(iii). In his own dissenting opinion, Justice Breyer concluded that the statutory provision in this case was “sufficiently ambiguous” to warrant application of the rule of lenity.

Fourth Amendment - Good Faith Exception to Exclusionary Rule

Herring v. United States, ___ U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d 496 (January 2009), reh. denied -

The good faith exception to the warrant requirement of the Fourth Amendment applied to evidence seized pursuant to the defendant’s unconstitutional arrest based on an outstanding warrant which had, in fact, been recalled. The Court concluded that the “bookkeeping” error in this case was the result of “isolated negligence attenuated from the arrest,” and not the sort of mistake the exclusionary rule was designed to deter. The fact that the error was not systematic or reckless was an important factor in the Court’s decision.

Fourth Amendment - Investigatory Stop - Terry frisk

Arizona v. Johnson, ___ U.S. ___, 129 S.Ct. 781, 172 L.Ed.2d 694 (January 2009) -

A reason to believe that the occupant of a validly stopped vehicle may be armed and dangerous is sufficient to warrant a patdown of that individual for weapons. Reasonable suspicion to believe that the individual is involved in criminal activity is not required to validate the search. An officer’s inquiry into matters not related to the purpose of a valid traffic stop does not exceed the limits of the stop under the Fourth Amendment so long as the questioning does not extend the duration of the stop beyond the time necessary to effect the purpose of the detention.

Fourth Amendment - Search of Vehicle Incident to Arrest

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (April 2009) -

In a 6-4 decision, a majority of the Court rejected a broad application of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), to searches of the interior of a vehicle made incident to the arrest of a recent occupant of the vehicle. A search under those circumstances is justified only if the arrestee is within the reach or grab area of the passenger compartment of the vehicle at the time of the search or the officers have a reasonable belief that evidence of the offense may be found within. Petitioner Gant had been handcuffed and placed in the back of the police cruiser at the time of the search in this case and there was no reason to believe that he could access the interior of the vehicle or that evidence related to his arrest for reckless driving would be found inside. The Court observed “[t]he safety and evidentiary interests that supported the search in Belton simply are not present in this case,” and the evidence was obtained in violation of Petitioner’s constitutional rights.

Identity Theft

Flores-Figueroa v. United States, ___ U.S. ___, 129 S.Ct. 1886, 173 L.Ed.2d 853 (May 2009) -

A conviction under 18 U.S.C. § 1028A(a)(1) for aggravated identity theft requires the government to prove that the “means of identification” the defendant “knowingly transfer[ed], possess[ed], or us[ed], without lawful authority” actually belonged to another person.

Presentment

Corley v. United States, ___ U.S. ___, 129 S.Ct. 1558, 173 L.Ed.2d 443 (April 2009) -

Congress meant to limit, not to discard, the McNabb-Mallory presentment exclusionary rule, when it enacted 18 U.S.C. § 3501 providing that a confession shall not be inadmissible where there has been an unreasonable delay in bringing a suspect before a judge if the confession was made voluntarily and within six hours of arrest. The presentment clause had its origins in common law and was designed to prevent the secret detention of individuals and to inform them of the charges against them as required by the Sixth Amendment. The purpose of the timely presentment rule was to deter officers from secretly interrogating individuals accused of a crime.

Sentencing - Armed Career Criminal Act - prior conviction

Chambers v. United States, ___ U.S. ___, 129 S.Ct. 687, 172 L.Ed.2d 484 (January 2009) -

Petitioner’s prior conviction under Illinois state law for failing to report did not qualify as a “violent felony” for purposes of sentencing him as an Armed Career Criminal. The failure to report conviction, unlike some other forms of escape, did not involve conduct which presented a serious risk of physical injury to another and, like the offense at issue in Begay, did not involve the same type of purposeful, violent, and aggressive conduct as other offenses which fall within the definition of “violent felony” under 18 U.S.C. § 924(e).

Sentencing - Consecutive or Concurrent Sentencing

Oregon v. Ice, ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517 (January 2009) -

A sentencing court’s determination of facts necessary to support the imposition of consecutive, rather than concurrent, sentences for a defendant convicted of multiple offenses does not violate a defendant’s Sixth Amendment right to a jury trial.

Sentencing - Crack Cocaine Guidelines

Spears v. United States, ___ U.S. ___, 129 S.Ct. 840, 172 L.Ed.2d 596 (January 2009) -

Federal district courts have authority to reject the 100:1 ratio for crack cocaine offenses under the Sentencing Guidelines based on policy considerations and may adopt their own cocaine/crack ratios for purposes of sentencing even in cases with no extraordinary circumstances.

Sentencing - Post-Booker - presumption of reasonableness

Nelson v. United States, ___ U.S. ___, 129 S.Ct. 890, 172 L.Ed.2d 719 (January 2009) -

The district court’s application of a presumption of reasonableness to the defendant’s guideline sentence was reversible error.

Sentencing

Puckett v. United States, ___ U.S. ___, 129 S.Ct. 1423, 173 L.Ed.2d 266 (March 2009) -

Petitioner's failure to preserve for appeal the issue of the government's breach of the terms of his plea agreement during sentencing rendered his claim for relief forfeit. Pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, courts of appeal should review a forfeited claim for plain error.

Sixth Amendment - Confrontation Clause

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (June 2009) -

Sworn certificates of analysis by state lab analysts which identified the substance the defendant possessed as cocaine, were clearly testimonial and their admission at the defendant's trial violated his Sixth Amendment rights under the Confrontation Clause. In so deciding, a majority of the Court observed that such records are not official business records exempted by the hearsay exception to the Federal Rules of Evidence, Rule 803(6), but are instead documents specifically prepared for litigation purposes. and the defense has a constitutional right to cross-exam the analysts.

Sixth Amendment - Right to Counsel

Kansas v. Ventris, ___ U.S. ___, 129 S.Ct. 1841, 173 L.Ed.2d 801 (April 2009) -

Although the defendant's post-arrest statements to a jail-house informant were clearly obtained in violation of his Sixth Amendment right to counsel, the statements were admissible to impeach the defendant's inconsistent testimony at trial. Justices Stevens and Ginsburg dissented from the majority concluding that the "prosecution should not be allowed to exploit its pretrial constitutional violation." Justice Stevens assessed that "[t]he use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process – the fairness of which the Sixth Amendment was designed to protect," and opined that "such shabby tactics are intolerable in all cases."

Speedy Trial Act

Vermont v. Brillon, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231(March 2009) -

Time extensions and continuations requested by several state-appointed counsel which delayed the State's case against the defendant on charges of felony domestic assault and habitual offender charges, were attributable to the defense for speedy trial purposes. The defendant's own disruptive and contentious behavior also weighed heavily against him in the Court's determination that his speedy trial rights had not been violated.

Sixth Circuit Cases

Firearms - Sufficiency of Evidence

United States v. Bailey, 553 F.3d 940 (6th Cir. 2009) -

On rehearing, a panel of the Sixth Circuit affirmed the defendant's convictions for possession with intent to distribute, but held that the evidence did not support the defendant's convictions for possession of a firearm in furtherance of drug trafficking and for being a convicted felon in possession of a firearm. The government's failure to establish a nexus between the defendant and the gun found in the stolen car he was driving proved fatal to convictions on the gun charges since additional evidence beyond proximity is required to demonstrate possession. In this case, there was

no evidence that the defendant had knowledge of, access to, or an intent to exercise control over the weapon, and his attempts to evade police could be explained by the presence of the drugs in his pants. The defendant also presented evidence that other individuals had used the car the same night he was arrested.

Fourth Amendment - Expectation of Privacy and Exigent Circumstances
United States v. Washington, 573 F.3d 279 (6th Cir. 2009) -

No exigent circumstances justified the warrantless entry of police officers into an apartment rented by the defendant's uncle despite the officers' suspicions that the defendant and his companions were trespassing. Although Defendant Washington had previously been arrested for trespassing in another unit in same building, he had been residing with his uncle for several months and had a reasonable expectation of privacy in the apartment. The fact that Washington might be conducting illegal activities inside the apartment did not negate his privacy rights under the Fourth Amendment.

Fourth Amendment - Investigative Stop
United States v. See, 574 F.3d 309 (6th Cir. 2009) -

A police officer illegally detained the defendant and his companions when he parked his patrol car directly in front of the defendant's vehicle. Although the hour was late, the vehicle was parked in a high-crime area, and there had been some recent robberies in the area, the officer did not have any specific evidence pointing to criminal activity on the part of the suspects to support a Terry investigation detention.

Fourth Amendment - Search Incident to Arrest
United States v. Lopez, 567 F.3d 755 (6th Cir. 2009) -

Reversing and remanding for further proceedings in light of the recent Supreme Court decision in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the Court of Appeals determined that the search of the defendant's vehicle following his arrest for reckless driving violated his constitutional rights under the Fourth Amendment. The search was neither necessary to protect the officers nor to prevent the destruction of evidence as required by Gant where the defendant had been handcuffed and placed in the back of the police cruiser at the time of the search.

Fourth Amendment - Terry Investigative Stop
United States v. Keith, 559 F.3d 499 (6th Cir. 2009) -

Although the defendant's presence in a high crime area late at night was a factor to be considered by the court under the totality of circumstances, it would not, on its own, create a reasonable suspicion of criminal activity to support an investigatory stop. The officers observed the defendant lean his head inside the vehicle in the drive-through at a liquor store but could not tell whether he exchanged anything with the occupant of the car. The officers' belief that the defendant and the other individual might have engaged in drug trafficking activity was merely a hunch and would not support a stop of the defendant's vehicle. The panel relied on long-standing precedent in Brown v. Texas, 443 U.S. 47, 49, 99 S.Ct. 2637, 61 L.Ed.2d (1979), which held that "[r]easonable suspicion does not materialize merely because a person "looked suspicious" and was in a "high drug problem area."

Fourth Amendment - Traffic Stop

United States v. Gross, 550 F.3d 578 (6th Cir. 2008) -

The district court's denial of the defendants' motion to suppress evidence seized pursuant to a traffic stop which led to their conviction for conspiracy to distribute cocaine, was reversible error. The police officer's testimony would not supporting a finding of probable cause to believe that the vehicle in which the defendants were riding had violated a Tennessee motor vehicle statute requiring vehicles "to be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety ..." T.C.A. § 55-8-123. Although the driver of the vehicle changed lanes rather slowly and the vehicle straddled the center line for approximately 100 yards, the lane change occurred while the vehicle was rounding a curve and traveling up a steep incline. Both Sixth Circuit and Tennessee court precedent have found no probable cause for a violation of § 55-8-123, when a vehicle has "veered from its lane but is not otherwise driving erratically."

Sentencing - Armed Career Criminal Act - prior conviction

United States v. Oaks, 554 F.3d 1087 (6th Cir. 2009) -

In light of recent Supreme Court ruling in Chambers v. United States, ___ U.S. ___, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009), remand was necessary for the district court to determine whether the defendant was in "secure custody," "law enforcement custody," or "nonsecure custody" at the time of his escape and whether the prior conviction qualified as a violent felony for purposes of the Armed Career Criminal Act.

Sentencing - Crack Cocaine Guidelines

United States v. Johnson (Kenneth James), 553 F.3d 990 (6th Cir. 2009) -

A remand for resentencing was required for the district court to consider whether to vary from the guidelines for crack-cocaine in light of the Supreme Court's recent decision in Spears v. United States, ___ U.S. ___, 129 S.Ct. 840, 173 L.Ed.2d. 596 (January 2009). In Spears, the Court held that a district court had discretion to sentence a defendant under a crack/powder cocaine ratio of 20:1 rather than the 100:1 ratio used in the Guidelines. Although the Sixth Circuit would not review the district court's refusal to depart downward based upon the defendant's challenge to his criminal history category, the lower court should consider whether it adequately considered the guidelines when it ordered the federal sentence to be served consecutive to the undischarged state sentence.

Sentencing - Booker - Post-Conviction Relief

Duncan v. United States, 552 F.3d 442 (6th Cir. 2009) -

The Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), announced a "new rule" which does not apply retroactively on collateral review to sentences imposed before Booker but after the Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Sentencing - Career Offender - predicate offense

United States v. Baker, 559 F.3d 443 (6th Cir. 2009) -

Remand for resentencing was required for the district court to determine whether, in light of the Supreme Court decision in Begay v. United States, ___ U.S. ___, 128 S.Ct. 1581, 170 L.Ed.2d 490

(2008), the defendant's prior Tennessee conviction for reckless endangerment constitutes a "crime of violence" for purposes of sentencing him as a career offender. Like the statute at issue in Begay, the Tennessee statute criminalizes only reckless conduct and does not encompass the purposeful, violent and aggressive conduct contemplated by the guideline enhancement.

Sentencing - Career Offender - predicate offense

United States v. Hawkins, 554 F.3d 615 (6th Cir. 2009), cert. denied, 129 S.Ct. 2817, 174 L.Ed.2d 310 (June 15, 2009) -

Although circuit precedent holds that possession of a sawed-off shotgun is not a violent felony for purposes of sentencing under the Armed Career Criminal Act, the defendant's prior conviction for possession of a sawed-off shotgun is a "crime of violence" under the career offender provisions of the Sentencing Guidelines. U.S.S.G. § 4B1.2, cmt. N. 1 (2007) specifically includes the unlawful possession of a sawed-off shotgun as a "crime of violence," and the court's decision is consistent with other circuits.

Sentencing - Career Offender - predicate offense

United States v. Ford, 560 F.3d 420 (6th Cir. 2009) -

The defendant's prior Kentucky conviction for second-degree escape did not constitute a crime of violence for purposes of the career offender sentencing enhancement. The prior conviction was for a "walkaway" escape which, in the aftermath of recent decisions in Begay v. United States, ___ U.S. ___, 128 S.Ct. 1581, 1586, 170 L.Ed.2d 490 (2008), and Chambers v. United States, ___ U.S. ___, 129 S.Ct. 687, 692, 172 L.Ed.2d 484 (2009), does not involve the same type of "purposeful, violent, and aggressive" conduct the enhancement was intended to address. The rule of lenity would apply in this instance because a "walkaway" escape is not unambiguously a crime of violence.

Sentencing - Child Pornography

United States v. Groenendal, 557 F.3d 419 (6th Cir. 2009) -

The defendant's conduct in sending three pornographic pictures over the Internet was more than mere possession and warranted an additional guideline enhancement for trafficking. The inherently sadistic nature of the pictures warranted a further enhancement under U.S.S.G. § 2G2.2(b)(3). The district court's failure to consider the defendant's argument for a downward adjustment based upon his mitigating role in the offense was reversible error. Although Groenendal was the sole participant in the charged offense, he was convicted of trafficking which necessarily involves more than one participant.

Sentencing - Crack Cocaine -

United States v. Vandewege, 561 F.3d 608 (?) (6th Cir. 2009) -

The defendant's request for resentencing was granted pursuant to 18 U.S.C. § 3582(c)(2) because the sentencing range of "his term of imprisonment ... has subsequently been lowered by the Sentencing Commission." Id. On remand for resentencing the district court could consider whether to reject the 100:1 ratio for crack cocaine under the guidelines and use its discretion after Spears v. United States, ___ U.S. ___, 129 S.Ct. 840, 172 L.Ed.2d 596 (2009), to vary the defendant's sentence based on the court's disagreement with the crack guidelines.

Sentencing - Drug Quantity

United States v. Cox, 565 F.3d 1013 (6th Cir. 2009) -

Although the evidence was sufficient to demonstrate the defendant's participation in a conspiracy to distribute cocaine based upon uncontroverted testimony that he agreed to collect funds from a coconspirator for the sale of two kilograms of cocaine, the district court erroneously sentenced the defendant based on the five kilogram quantity specified in the indictment. The defendant's "known offense conduct" involved only two kilograms and the mandatory minimum sentence imposed increased the defendant's sentence by approximately ten years.

Sentencing - Illegal Re-entry - prior drug trafficking offense

United States v. Medina-Almaguer, 559 F.3d 420 (6th Cir. 2009) -

The district court's imposition of a 16-level enhancement to the defendant's sentence for illegal reentry following deportation pursuant to U.S.S.G. § 2L1.2(b)(1)(a), was reversible error where the record failed to establish that the defendant pleaded guilty to a state drug trafficking offense. Although the officer testified in the state preliminary examination that the defendant had sold heroin to him, the defendant did not admit to that conduct. The statute to which the defendant pled also involves transporting drugs or making an offer to "transport, import into [the] state, sell, furnish, administer, or to give away" a controlled substance. On remand to the district court, the government was required to demonstrate that the conduct to which the defendant actually pled was drug trafficking.

Sentencing - Insufficient Record

United States v. Grams, 566 F.3d 683 (6th Cir. 2009) -

The district court's failure to sufficiently explain its reasons for imposing a sentence above the advisory guidelines range for a defendant convicted of robbing a credit union was error requiring remand for resentencing.

Sentencing - Procedural Reasonableness

United States v. Recla, 560 F.3d 539 (6th Cir. 2009) -

The district court impermissibly considered the possibility of a postsentencing motion for a downward variance based on the defendant's future cooperation when it imposed a sentence of 70 months imprisonment, and warranted a remand.

Sentencing - Procedural Reasonableness

United States v. Gapinski, 561 F.3d 467 (6th Cir. 2009) -

On remand for resentencing in light of Booker, the district court erred by failing to ask the parties whether they had any objections to the sentence pronounced that had not previously been raised before the court. The lower court record did not evidence "that the district court had considered and explained its reasons for rejecting the defendant's argument for a lower sentence based upon substantial assistance to the government." Additionally, the district court improperly considered the possibility of a further sentence reduction pursuant to Rule 35(b) when sentencing the defendant. See United States v. Bureau, 52 F.3d 584, 595 (6th Cir. 1995) ("[T]he prospect of Rule 35(b) relief in the future cannot be allowed to alter or influence the decisions of the prosecution, or the deliberations of the court, at sentencing."). The court's errors rendered the defendant's sentence

procedurally unreasonable necessitating remand.

Sentencing - Procedural Reasonableness

United States v. Barahona-Montenegro, 565 F.3d 980 (6th Cir. 2009) -

The district court's failure to explain why the defendant's criminal history category underrepresented his criminal history and why it departed upwardly from a range of 30-37 months to a sentence of 48 months imprisonment, was reversible error.

Sentencing - Weapons - enhancement for prior crime of violence

United States v. Mosley, ___ F.3d ___, 2009 WL 2176634 (6th Cir. 2009) -

The defendant's prior Michigan conviction for resisting and obstructing a police officer did not constitute a crime of violence for purposes of an offense level increase under the Sentencing Guidelines for possession of a firearm by a felon. The offense did not involve "purposeful, violent, and aggressive" conduct contemplated by the examples set forth in the Guidelines and was not "similar, in kind as well as in degree of risk imposed," to the those offenses. *See Begay v. United States*, ___ U.S. ___, 128 S.Ct. 1581, 1585, 170 L.Ed.2d 490 (2008). Although the statute did not categorically qualify as a crime of violence, on remand the government could introduce additional records authorized under *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), for the sentencing court to determine the exact nature of the offense for which the defendant had been convicted.

Sentencing - Remand for Resentencing

United States v. Grant, 567 F.3d 776 (6th Cir. 2009) -

In an issue of first impression, the Sixth Circuit held that once the government has moved for a reduction of the defendant's sentence under Rule 35 of the Federal Rules of Criminal Procedure, the sentencing court can consider factors other than the defendant's substantial assistance at resentencing, including the factors set forth in 18 U.S.C. § 3553(a) and post-conviction rehabilitation.

Sentencing - Illegal Reentry

United States v. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009) -

Affirming the defendant's 48-month sentence for illegal reentry following a prior felony conviction, the Sixth Circuit held, in a matter of first impression, that the district court can reject on policy grounds any aspect of the applicable guidelines in a given case and that this authority is not limited to the crack cocaine guidelines.