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SUPREME COURT CASES

No General Murder Scene Exception To Warrant Requirement

In *Flippo v. West Virginia*, 120 S.Ct. 7 (1999), Flippo called the police to report he and his wife had been attacked. The police arrived at the scene and found Flippo wounded and his wife dead. They conducted a 16 hour search resulting in the discovery of photographs and negatives tending to implicate Flippo. Flippo was indicted for murder and his motion to suppress the photos was denied. The West Virginia Supreme Court of Appeals denied discretionary review. The United States Supreme Court granted certiorari, reversed the judgement of the West Virginia Supreme Court of Appeals and remanded the matter to the trial court.

Supporting the denial of Flippo's motion to suppress, the state cited exceptions to the warrant requirement, including immediate investigation to preserve evidence, plain view and implied consent. The trial court did not rely on these exceptions. Rather, the trial court held once a homicide scene is secured, a warrantless general search of the scene is permissible.

The Court rejected the trial court's proposition that warrantless general searches are permissible at homicide scenes. Relying on *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court held there is no homicide scene exception to the warrant requirement. One of the recognized exceptions to the warrant requirement, such as a reasonable belief a person is in need of aid, the possibility of other victims, or a killer on the premises is required for a warrantless search of a homicide scene. The Court did not address the state's

argument that one of these recognized exceptions to the warrant requirement applied.

TITLE 26 AND TITLE 26 RELATED CASES

A Clear Indication Of Fraud Requires A Referral

In *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999), McKee was audited by a revenue agent investigating reports of two informants who alleged McKee was diverting corporate income to pay personal expenses. Between September 2, 1992 and the May 5, 1993 referral of the civil investigation to Criminal Investigation ("CI"), the revenue agent met with McKee several times, requested documents and interviewed employees. Ultimately, the case was referred for prosecution and McKee was indicted for violating 26 U.S.C. § 7206(1). McKee's motions to suppress and to dismiss were denied. McKee subsequently pled guilty reserving the right to appeal the denial of her motions.

On appeal, McKee argued the revenue agent failed to comply with provisions of the Internal Revenue Manual ("IRM") by not referring her investigation to CI earlier and by not completing a Form 2797 pertaining to McKee. The Sixth Circuit began its analysis with the premise that violations of IRM provisions are not due process violations unless the provisions violated are designed to protect the constitutional rights of taxpayers. The court determined failure to fill out a Form 2797 was not a violation of due process since the relevant IRM provision was designed to promote administrative ease and did not protect the

Constitutional rights of taxpayers.

The Sixth Circuit also rejected McKee's argument which alleged the revenue agent violated the IRM provision requiring referral to CI upon a "firm indication of fraud." At the inception of the civil investigation the allegations against McKee were not substantiated by documentary evidence. The court, therefore, considered the allegations to be "first indications of fraud" not amounting to firm indications of fraud. Moreover, the purpose of the civil audit is to allow a taxpayer to explain discrepancies before a revenue agent takes action such as referring the case to CI. As for the revenue agent's decision not to refer the case sooner, the court deferred to the discretion of the revenue agent. The court, however, stated its conclusion with reluctance since "almost all of the government's evidence against the McKees was practically handed to CI on a silver platter as a result of the civil investigation."

SEARCH AND SEIZURE

Thermal Scan Of Home Is Not A Search Within Meaning Of The Fourth Amendment

In *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), the Ninth Circuit held the warrantless use of a thermal imaging device to perform a thermal scan of Kyllo's residence was not a search within the meaning of the Fourth Amendment. Federal and state narcotics agents suspected Kyllo was conducting an indoor marijuana growing operation from the unit of a triplex where he resided. The agents subpoenaed Kyllo's utility records and compared them to a spreadsheet for average electrical use. Concluding Kyllo's electrical usage was abnormally high, agents then employed an Agema Thermovision 210 thermal imaging device to scan the outside surface of Kyllo's residence.

The Agema 210 detected high heat loss emanating from the roof of Kyllo's home and from one wall. Additionally, Kyllo's unit "showed much warmer" than the other units in the triplex. The agents concluded these high heat levels indicated the presence of high intensity lights used to grow marijuana indoors. This information was placed in an affidavit and presented to a magistrate who issued a search warrant for Kyllo's home. As suspected, an indoor growing operation was found, resulting in the seizure of over one hundred marijuana plants. Kyllo's motion to suppress the evidence seized during the search was denied and he was subsequently convicted of one count of

manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1).

On appeal, Kyllo argued the thermal scan was a government intrusion into the activities within his home, in which he had a reasonable expectation of privacy, and its warrantless use violated the Fourth Amendment. The government contended use of the thermal imaging device to innocuously measure heat emissions from Kyllo's residence was non-intrusive and not a search within the meaning of the Fourth Amendment.

The Ninth Circuit applied a two part test to determine whether the Fourth Amendment had been violated. The court stated it must first determine whether the individual has made a showing of an actual subjective expectation of privacy and then evaluate whether society recognizes this expectation as objectively reasonable. The court stressed the fact the Agema 210 did not "literally or figuratively" penetrate the walls of Kyllo's residence to expose his marijuana growing operation. All the scanner did was to passively record thermal emissions rather than send out intrusive beams or rays. Moreover, Kyllo took no "affirmative action to conceal the waste heat emissions created by the heat lamps needed for a successful indoor grow." The court concluded failing to conceal these heat emissions demonstrated a lack of concern with the heat emitted and, therefore, a lack of a subjective privacy expectation. Even if Kyllo had demonstrated a subjective expectation of privacy in the heat emissions from his residence, he failed to establish that this privacy expectation would be accepted by society as "objectively reasonable."

The court acknowledged "[w]hile a heightened privacy expectation in the home has been recognized for purposes of Fourth Amendment analysis . . . activities within a residence are not protected from outside, non-intrusive, government observation, simply because they are within the home or its curtilage." Here, in evaluating "whether technology [had] been used to aid in permissible observation or to perform a warrantless search, the crucial inquiry . . . is whether the technology reveals intimate details." Because the thermal scan exposed no intimate or sensitive details of Kyllo's life, the court stated its use did not "step over the edge from permissible non-intrusive observation into [an] impermissible warrantless search." Accordingly, the court found no violation of the Fourth Amendment.

OTHER CONSTITUTIONAL ISSUES

Defense Counsel May Waive Client's Sixth Amendment Right To Confrontation Based On Sound Trial Strategy

In *United States v. Plitman*, No. 99-1177, 1999 U.S. App. LEXIS 24289 (2nd Cir. Sept. 30, 1999), the Second Circuit joined the majority of circuit courts in holding a defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of sound trial tactics or strategy. Plitman was convicted on two counts of tax evasion for the tax years 1991 and 1992, in violation of 26 U.S.C. § 7201. During these years, Plitman worked for Silatex, USA Ltd., the New York affiliate of a Venezuela based company that manufactured women's clothing. Plitman directed Silatex to pay approximately 75 percent of his salary to FMP Investments, a British Virgin Islands corporation, owned by Plitman's cousins. In turn, Plitman's cousins caused FMP to transfer the majority of this money into their accounts at the Israel Discount Bank. The money was then transferred to Plitman's personal bank accounts and never reported as income.

During the course of the investigation, a special agent conducted a telephonic interview with the president of Silatex, in which the president stated it was Plitman's idea to have 75 percent of his compensation sent to FMP. At a pre-trial conference, Plitman's attorney stipulated to the admission of the special agent's hearsay account of his conversation with the Silatex president. This stipulation was made based upon a strategical decision by Plitman's attorney to gain an earlier trial date and to prevent the prosecutor from deposing the Silatex president or from obtaining his presence as a live witness at trial. Plitman was subsequently convicted on both counts.

On appeal, Plitman claimed his Sixth Amendment right to confront the witnesses against him was violated when the district court allowed the special agent to testify about his conversation with the Silatex president. Plitman argued this was inadmissible hearsay and, therefore, his defense counsel could not stipulate to its admission into evidence. Moreover, he asserted the stipulation was invalid for he never made

a knowing waiver of his right to confrontation and matters of trial strategy did not justify his attorney's action. The government contended Plitman's stipulation through counsel was a valid waiver similar to any other ordinary evidentiary stipulation in a trial.

In weighing Plitman's arguments, the Second Circuit identified two types of constitutional rights possessed by criminal defendants, each with a different standard of waiver. The first category "involves rights that defense counsel may waive on behalf of [a] defendant because they concern strategic and tactical matters such as selective introduction of evidence, stipulations, objections,...and pre-trial motions." The second category involves rights "that only [a] defendant himself may waive because they are 'personal' and include matters like pleading guilty, waiving a jury trial,...and deciding to testify." Upon reviewing the decisions of other circuit courts, the Second Circuit concluded counsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence, "so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." Here, Plitman achieved several significant tactical advantages by stipulating to allow the hearsay testimony of the special agent. These advantages included a quicker trial date, which the government opposed, limitations on the Silatex president's testimony and an opportunity to cross-examine the special agent with respect to the accuracy of his recollection. Moreover, Plitman was present when his attorney agreed to the stipulation and raised no objections or questions. Accordingly, the Second Circuit affirmed Plitman's tax evasion convictions.

Prosecutorial Misconduct Must Be Intentional To Warrant Reversal Of Conviction

In *United States v. Albanese*, 99-1078, 1999 U.S. App. LEXIS 24652 (8th Cir. Oct. 5, 1999), Albanese's first trial ended in a mistrial and on retrial he was convicted of conspiracy to distribute cocaine. During trial, a government witness who was paid in excess of \$60,000 for his testimony, testified against Albanese and made inconsistent statements.

On appeal, Albanese argued, *inter alia*, his retrial following the mistrial violated his rights under the Double Jeopardy Clause because of prosecutorial misconduct. Citing *Oregon v. Kennedy*, 456 U.S. 667 (1982), Albanese claimed government misconduct regarding inconsistent testimony by a paid government

witness caused his trial to end in a mistrial and, therefore, *Kennedy* barred his retrial and consequent conviction. The court disagreed finding *Kennedy* applicable only to situations where prosecutorial misconduct is intentional and causes a defendant to have to choose between requesting a mistrial or waiting and chancing reversal on appeal. Specifically, the court found the prosecution's failure to inform the defense of the witness's inconsistent statement was not intentional (Albanese had not argued that it was), therefore, the prosecutor's omission did not rise to the level of misconduct required for application of *Kennedy*. Finding no *Kennedy* violation, the court held retrial was permissible as jeopardy had not attached following the prior mistrial.

PROCEDURE

McDade Act Requires Federal Prosecutors To Follow State Rule Restricting Lawyer Subpoenas

In *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), the court held the Colorado rule limiting a prosecutor's ability in a criminal case to subpoena lawyers for evidence about past and present clients is covered by 28 U.S.C. § 530B, originally entitled the McDade Act. The McDade Act requires attorneys for the federal government to comply with state laws and rules, as well as local federal court rules, governing attorneys in the states where the lawyers perform their duties.

The court determined the Colorado rule of professional conduct 3.8(f) which declares ". . . a prosecutor in a criminal case shall not subpoena a lawyer to provide client information in a criminal proceeding unless the prosecutor reasonably believes that the information is essential to the successful completion of an ongoing investigation or prosecution, is not otherwise available, privileged," to be an ethics rule pursuant to the McDade Act as opposed to a procedural or substantive rule. The court held the McDade Act, enacted while this case was on appeal, conclusively established a state rule governing attorney conduct applied to federal attorneys practicing in the state.

Court Disallows Offensive Collateral

Estoppel Based On Criminal Sentence

In *Securities and Exchange Commission v. Monarch Funding Corp.*, 192 F.3d 295 (2nd Cir. 1999), the court held the giving of preclusive effect in a civil action to findings made in a criminal sentencing proceeding "should be presumed improper." The court further concluded applying collateral estoppel in this context is reversible error when, as in this case, the pertinent findings were not necessary to the final sentence, were not actually litigated and decided at sentencing and did not promote judicial economy in the civil suit.

In a federal criminal case in which the SEC consulted with the prosecution, a jury acquitted Monarch of RICO charges from which predicate acts of securities fraud were alleged. Monarch was convicted of conspiracy to obstruct justice on the basis of its attempts to obstruct civil, grand jury and criminal proceedings arising from its alleged fraud and on moving the proceeds of the alleged racketeering activities from the Cayman Islands to Andorra.

While the criminal case was pending, the SEC brought a civil suit seeking disgorgement and injunctive relief. The suit was stayed while the criminal case was pending, but once Monarch was sentenced, the SEC moved for summary judgment, arguing Monarch should be collaterally estopped by the criminal sentencing findings from denying it had violated federal securities laws. The district court granted the motion, saying the "protracted" sentencing proceedings had afforded Monarch ample opportunity to challenge the government's evidence supporting the sentencing findings and the findings of securities fraud were necessary to the sentence.

The Second Circuit disagreed with the district court's finding. The court vacated the judgment which allowed the SEC to invoke offensive collateral estoppel in the civil case to bar Monarch from relitigating issues the SEC asserted were resolved in the an earlier criminal sentencing. To strike an appropriate balance between efficiency and fairness, the court identified four conditions that must be met before applying offensive collateral estoppel: 1) the issues in both proceedings must be identical, 2) the issues in the prior proceeding must have been actually litigated and actually decided, 3) there must have been a full and fair opportunity for litigation in the prior proceeding, and 4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.

In finding the SEC had not met the burden, the court noted a defendant's opportunities to take discovery

and present evidence are more limited in sentencing proceedings than in a civil proceeding. In addition, a criminal defendant may be less likely to challenge sensitive issues in a sentencing proceeding than in a full blown civil trial, either out of hope for a prosecutorial downward departure motion, or out of fear that the judge may disbelieve his testimony and enhance his sentence accordingly.

Evidence

Inconsistency Between Informant's Testimony And A Proffer By His Lawyer Is *Brady* Material

In *Spicer v. Roxbury Correctional Institute*, No. 99-61197, 1999 U.S. App. LEXIS 25826 (4th Cir. Oct. 18, 1999), the Fourth Circuit affirmed a district court order granting Spicer's petition for a writ of *habeas corpus* on the ground state prosecutors suppressed exculpatory, material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Spicer was identified as the perpetrator of a brutal assault of a restaurant manager. He was tried and convicted of the offense principally on the testimony of three purported eyewitnesses. Although the state court rejected Spicer's *Brady* claim on post-conviction review, a federal district court granted a writ of *habeas corpus* and the State of Maryland appealed.

The *Brady* issue concerned the testimony of Larry Brown, one of the eyewitnesses. Brown was an acquaintance of Spicer's and testified in the case in exchange for sentencing leniency on an unrelated drug charge. At issue was whether the prosecution violated *Brady* when it failed to disclose to Spicer's attorney information Brown -- who told the prosecutor, the grand jury, and the trial jury he witnessed Spicer fleeing the restaurant on the day of the assault -- had previously told his attorney on multiple occasions he had not seen Spicer at all on that day.

The Fourth Circuit evaluated the challenge in light of the three "essential components" of a *Brady* violation which circumscribe the prosecutor's disclosure duty: (1) the evidence at issue must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material. A majority of the court held Brown's prior inconsistent statement about whether he was an eyewitness clearly satisfied the first requirement of a *Brady* violation. In so holding, the majority found the

state court misunderstood the scope of *Brady* by failing to appreciate impeachment evidence is unequivocally subject to disclosure and also failing to appreciate the impeachment value of Brown's inconsistent statements to his attorney.

Clearly the evidence was suppressed by the state but the court found the prosecutor acted in good faith and simply misunderstood the scope of his *Brady* obligation. The court explained constitutional error in this instance occurs only if the exculpatory evidence was material. Evidence is material if it might have affected the outcome. Here, the majority decided the evidence was material because Brown, as opposed to the other witnesses, was an acquaintance of Spicer. Brown knew Spicer and could correctly identify him. According to the majority, if the jury doubted Brown was an eyewitness, it would have been left without any conclusive, or perhaps even persuasive, identification evidence. Based on these findings, the majority affirmed the district court's order that Spicer be released from custody unconditionally unless he is retried within four months.

Police Officers Not Immune From Civil Rights Suit Based on Questioning "Outside Miranda"

In *California Attorneys for Criminal Justice v. Butts*, Nos. 97-56499, 97-56510, 1999 U.S. App. LEXIS 29309 (9th Cir. Nov. 8, 1999), the Ninth Circuit held police officers who, in accordance with their training, intentionally violated the suspects' rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), in order to obtain statements which could be used for impeachment purposes are not immune from a civil rights suit under 42 U.S.C. § 1983.

Two of the plaintiffs, who were California state prisoners, brought a civil rights action against officers of the Los Angeles and Santa Monica police departments for violating their right to counsel by employing a policy which defies the requirements of *Miranda*. The police officers/defendants brought an interlocutory appeal challenging the district court's denial of their motions to dismiss the suit and, in the alternative, summary judgment. Both motions were based on the defendants' claim of qualified immunity.

The defendants employed an interrogation technique known as questioning "outside Miranda." Under this policy, the defendant officers continue to interrogate suspects "outside Miranda" despite the suspects'

invocation of their right to remain silent and their requests for an attorney. The purpose of such questioning is to take advantage of the rule of *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Hass*, 420 U.S. 714 (1975), that statements obtained in violation of *Miranda* may be used to impeach a defendant if he takes the stand at trial. In rejecting the applicability of these cases, the Ninth Circuit pointed out the Supreme Court had never suggested these decisions, which deal with “the peripheral use of statements obtained in violation of *Miranda*,” somehow overcame *Miranda*’s imperatives concerning proper police procedure.

The Ninth Circuit followed the ruling of *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) that questioning “outside *Miranda*” is cognizable as a basis for a §1983 action. The rule that interrogation must cease upon a suspect’s invocation of his right to counsel was clearly established in *Miranda* thus a reasonable police officer conducting post *Miranda* interrogation should have known he was violating a suspect’s rights by continuing an interrogation after the suspect asserted his right to speak to an attorney.

The defendants ultimately asserted their reliance on their training about questioning “outside *Miranda*” entitles them to qualified immunity. The court followed past decisions which held the fact officers were following orders will not provide them with immunity if the unlawfulness of the order was clearly established. Furthermore, the court concluded the fact the Los Angeles and Santa Monica police departments may have trained their officers to violate the rights of individuals does not provide any defense for these officers. The district court held, and the Ninth Circuit concurred, “‘following orders’ will only insulate officers from liability when ‘reliance is objectively reasonable.’” Here, it was not.

INVESTIGATIVE TECHNIQUES

Anti-Gratuity Statute Not Applicable To Prosecutor’s Payment Of Cash To

Cooperating Witness

In *United States v. Albanese*, 99-1078, 1999 U.S. App. LEXIS 24652 (8th Cir. Oct. 5, 1999), Albanese was tried and convicted of conspiring to distribute cocaine. During trial, a government witness who was paid in excess of \$60,000 for his testimony, testified against Albanese and made inconsistent statements. On appeal, Albanese argued, *inter alia*, the government violated the anti-gratuity statute by paying a witness for his testimony.

The court held the government’s payments of cash to witnesses in exchange for their assistance and testimony in a prosecution does not violate the federal anti-gratuity statute, 18 U.S.C. § 201(c)(2). Specifically the court, following Eighth Circuit precedent and the approach and holding in *Singleton v. United States*, 165 F.3d 1297 (10th Cir. (en banc) 1999), found the statute did not apply to the government. The court viewed monetary payments comparable to other forms of benefits (e.g., leniency). As such, the payment made to the witness in exchange for his testimony against Albanese was not improper nor did it violate the anti-gratuity statute. Upon rejecting all Albanese’s arguments, the court affirmed his conviction.

SENTENCING

Sentencing Enhancement For Obstruction Of Justice Applicable Even If Obstruction Not Successful

In *United States v. Buckley*, 192 F.3d 708 (7th Cir 1999), Buckley, carrying a BB gun and a brief case, robbed a bank by handing a bank teller a note stating he had a gun and a bomb. Buckley initially confessed to possession of the BB gun and pled guilty to bank robbery but at his sentencing hearing, he denied possession of the BB gun. The government requested sentencing enhancements for possession of an object appearing to be a dangerous weapon pursuant to U.S.S.G. § 2B3.1(b)(2)(E) and because of Buckley’s lie, for obstruction of justice pursuant to § 3C1.1. The district court accepted the enhancement request for possession but rejected the request for the obstruction of justice.

In accepting the request for an enhancement for possession, the district court reasoned Buckley’s briefcase appeared to be the bomb mentioned in his note. Also, the district court did not believe Buckley’s denial of possession of the BB gun. In rejecting the request for an enhancement for obstruction of justice,

the district court reasoned Buckley's lie was immaterial since the enhancement for possession had been accepted on alternative grounds (i.e., the briefcase). Moreover, the district court applied a sentencing reduction for acceptance of responsibility since Buckley had pled guilty and the district court found no obstruction of justice.

On appeal, the Seventh Circuit held, when a violation charged as obstruction consists of a lie, the materiality of the lie is key since immaterial lies do not impede the justice process. Materiality means a reasonable probability the lie could have affected the outcome of the process. The court reasoned, since the district court could have believed Buckley's lie and could also have found the briefcase did not resemble a dangerous weapon, the outcome of the process could have been affected in Buckley's favor and the enhancement for possession could have been avoided. Buckley's denial of possession, therefore, was a material lie constituting obstruction and the enhancement for obstruction should have been applied. Further, since Buckley did attempt to obstruct justice, he did not exhibit acceptance of responsibility and the district court should not have applied the acceptance of responsibility reduction.

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