

FOURTH CIRCUIT UPDATE
August 17, 2006

***United States v. Leeson*, Docket No. 05-4214 (19 July 2006)**

A panel of the Fourth Circuit affirmed defendant's conviction and sentence for being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(2). The Court analyzed different "occasions" for sentencing purposes under the Armed Career Criminal Act (ACCA).

Defendant unsuccessfully asserted an insanity defense in the district court. He appealed on the basis of a Rule 403 violation from a statement he made as he was handcuffed, the state expert's reliance on statements by inmates about defendant, and the use of prior convictions causing defendant to be sentenced under the ACCA. The court rejected defendant's first two claims.

Defendant's third assignment of error was that two related convictions were incorrectly counted as two "occasions" under the ACCA. Slip Op. at 14. The convictions for aggravated robbery and attempted capital murder of a peace officer resulted from defendant's holding up a grocery store and shooting at a security guard who confronted him outside the store.

The Court used the *United States v. Letterlough*, 63 F.3d 332 (4th Cir. 1995) factors, which define "occasion" for the ACCA as "[arising] out of a *separate and distinct criminal episode*, considering (1) whether the offenses arise in different geographic locations; (2) whether the nature of each offense was substantially different; (3) whether each offense involved different victims; (4) whether each offense involved different criminal objectives; and (5) after the defendant committed the first-in-time offense, did the defendant have the opportunity to make a conscious and knowing decision to engage in the next-in-time offense." *Id.* at 335-337. The Court found these offenses to have been on different occasions based on the second through the fifth of the *Letterlough* factors: the nature of the offenses was "distinctly different," the offenses had different victims, the offenses involved different criminal objectives, and the defendant had the opportunity to make a conscious and knowing decision whether or not to engage in the second offense after the first, upholding the district court's decision on this point as well. Slip Op. at 13-20.

***United States v. Moye*, Docket No. 04-4549 (24 July 2006)**

In a split decision, the Fourth Circuit in an *en banc* rehearing affirmed defendant's convictions for being a felon in possession of firearms, 18 U.S.C. 922(g)(1) and possession of stolen firearms, 18 U.S.C. § 922(j). One judge affirmed, concurring with part of the opinion. Judge Gregory dissented in part. Another judge did not participate in the decision.

The Court held there was "substantial evidence" to support defendant's convictions. Slip Op. at 4. The facts of the case were as follows: the police responded to a store alarm, guns were recovered from an individual and a car that left the scene, and the defendant was picked up after fleeing from the store. The Court found the jury could have reasonably concluded defendant possessed the firearms from circumstantial evidence: the location of the getaway car, how it

appeared defendant broke into the store and gave the guns to another man, how it seemed only one person went into the store, the early hour the defendant was at the store, and defendant's flight from the store. Defendant's challenge of the two § 922 convictions on multiplicity grounds also failed, as the Court found this argument is only available "for different subparts of § 922(g)." Slip Op. at 8.

The defendant challenged the district court's general aiding and abetting instruction on the grounds that "it allowed the jury to convict him based on a finding that he 'aid[ed] and abet[ted] himself'" and it lacked an evidentiary basis as to the felon in possession charge. Slip Op. at 10. The Court rejected defendant's first argument as the instruction explicitly indicated he must have aided and abetted another person. Also, it was not an abuse of the district court's discretion to give a general instruction where there was evidence to support only one of the two counts: "a district court does not commit reversible error when it submits a legally adequate, although factually unsupported, theory of liability to the jury along with a factually supported and legally adequate theory of liability." Slip Op. at 13 (citing *Griffin v. United States*, 502 U.S. 46, 60 (1991)). Judge Gribbon Motz concurred, finding harmless error although the jury instruction lacked an evidentiary basis. Judge Gregory dissented: the aiding and abetting instruction created such confusion that the § 922(g)(1) conviction required vacatur.

***United States v. Bradley*, Docket Nos. 02-4390, 02-4393, 02-4402 (25 July 2006)**

Defendants appealed on the basis that their guilty pleas were not voluntary. A panel of the Fourth Circuit vacated their pleas and remanded for assignment to another district court judge.

Defendants had faced several crack cocaine and firearms charges. Although plea negotiations for one defendant took place before trial, he did not enter a plea. After the first day of trial, the court engaged in a colloquy with the defense and encouraged the parties to reach plea agreements. The court provided a recess for plea negotiations, but no plea agreements were reached. After about two additional weeks of trial, the judge again encouraged plea agreements. The judge engaged in another plea colloquy with one of the defendants, but no plea agreement was reached because of the defendant's pending state case. The court further discussed the failure of the parties to reach guilty pleas.

When one of the defendants then sought to plead guilty, the court indicated at that point in trial, all three defendants must plead guilty. When all three defendants indicated they wanted to plead guilty but one defendant had problems with his state charges, the judge intervened with the state judge on his behalf. There were difficulties agreeing on the precise sentence for one of the defendants, but the court helped the defendant negotiate with the government in the Rule 11 colloquy, and the three pleas were accepted.

The Court held that there was plain error on Rule 11 violations, because of the district court's participation in the plea negotiations. The judge "initiated plea discussions, advised the defendants that they might 'be better off pleading to the indictment,' suggested that they would likely receive life sentences if they went to trial, commented on the amount and weight of the Government's evidence, criticized the Defendants for turning down plea offers from the

Government, urged the Defendants to attempt ‘to dispose of the charges against them on a reasonable basis,’ and explained to the Defendants that even if the prosecution would not recommend the sentence the Defendants desired, this should not prevent a plea because the court—not the prosecution—would determine the sentence.” Slip Op. at 13. The Court found that the error “affected the Defendant’s substantial rights,” the refusal of which to notice would “seriously affect the fairness, integrity, or public reputation of judicial proceedings” as a Rule 11 violation but for which there was a “reasonable probability” the Defendants would not have pled guilty. Slip Op. at 14-15.

***United States v. Fulks*, Docket No. 04-33 (27 July 2006)**

In a split decision, a panel of the Fourth Circuit affirmed the defendant’s convictions in a capital case, with one judge concurring.

The Court rejected Fulks’ argument that the district court committed reversible error by allowing trial testimony of government witnesses not on the pretrial witness list as required by 18 U.S.C. § 3432. The Court held the government must be able to show the exclusion was in “good faith” and “not the result of a lack of diligent investigation.” Slip Op. at 19. Here, the government met this standard and the defendant was not irreparably prejudiced by the exclusion of witnesses from the list.

The Court also rejected Fulks’ arguments regarding jury selection. In addition, the Court rejected Fulks’ argument that the district court erred by allowing the use of particular victim impact evidence, as well as his argument that the Federal Death Penalty Act (FDPA) was unconstitutional, by permitting evidence in the sentencing hearing not in compliance with the Federal Rules of Evidence. Concurring, Judge Williams disagreed about the exception to the rule regarding the government’s pretrial witness list as “entirely judge-made,” but found the resulting error to have been harmless.