

FOURTH CIRCUIT UPDATE
September 8, 2006

Whether following appeal waiver, defendant could appeal sentencing bases and restitution order

United States v. Cohen, Docket No. 05-4565 (17 August 2006)

A panel of the Fourth Circuit dismissed defendant's appeal, as the issues appealed fell within the scope of defendant's appeal waiver. The plea agreement contained a provision waiving many of the defendant's rights to appeal, leaving him with the right to appeal only on the grounds of ineffective assistance of counsel or prosecutorial misconduct that he learned of after the plea, or an upward departure from the Guidelines.

The defendant challenged the amount of loss attributed to him by the district court, as well as the amount of restitution determined by that court. The defendant challenged that the waiver was "invalid and unenforceable," or in the alternative, that the restitution was not within the scope of the waiver. Slip op. at 5.

The Court examined "whether the defendant knowingly and intelligently agreed to waive the right to appeal" with a totality of the circumstances analysis. *Id.* The Court rejected all grounds by which defendant indicated his waiver was invalid and unenforceable: his ADHD, his learning disability, the "unequal bargaining position" between he and the government, the lack of reciprocity in the waiver, and his contention the government breached its verbal promise which had induced him to sign the agreement.

After finding the waiver valid, the Court determined the appeal waiver covered the issues defendant appealed. As the waiver was knowing and intelligent, the issue of the calculation of the loss caused by defendant as a basis for his sentence could not be challenged under the waiver that stated he waived "'all rights...to appeal whatever sentence is imposed, including any issues that relate to the establishment of the [applicable and advisory] Guideline range.'" Slip op. at 8. The Court similarly found that restitution was part of defendant's sentence: holding generally that a defendant who waives his right to appeal his imposed sentence waives his right to appeal his restitution order. *Id.* Last, the Court determined defendant waived his appellate rights as to the amount of restitution as this issue also was controlled by his waiver and the court acted properly calculating the restitution under the Mandatory Victims Restitution Act.

Mens rea required for unlicensed money transmitting business statute

United States v. Talebnejad, Docket No. 04-4873 (21 August 2006)

The government appealed and defendants cross-appealed after the district court dismissed the defendants' indictment for conducting an unlicensed money transmitting business under 18 U.S.C.A. § 1960. A panel of the Fourth Circuit reversed the lower court's dismissal, dismissed the defendants' cross-appeal, and remanded the case. One judge concurred and dissented in part with the judgment.

The Fourth Circuit described a money transmitting business as “one that, for a fee, accepts currency for transfer within or outside the United States through foreign currency exchanges and financial institutions,” many of which are run on an informal basis by immigrants. Slip op. at 4. The Section 1960 provisions are in place to prevent people from using these types of businesses to transfer money from “unlawful enterprises.” *Id.* (citations omitted). The defendants were running unlicensed money transmitting businesses out of their home.

The Court considered the level of mens rea required by the federal statute, as the defendants argued “due process require[d] the Government to prove that they knew that their operation of an unlicensed money transmitting business violated state law.” Slip op. at 11. However, the Court agreed with the government, that the defendants only had to “know the facts that make their conduct illegal.” Slip op. at 10. Further, the Fourth Circuit disagreed with the district court’s conclusion that the defendants’ knowledge of the law was improperly left out of the indictment.

The Court also addressed whether a due process problem was created as the state licensing law was amended during the defendants’ alleged conduct, concluding it was not; and determined that Section 1960 was directed at those “in charge” of a money transmitting business, not “mere employees.” Slip op. at 14. Finally, the Court agreed with the district court that the defendants’ forfeiture challenge was not ripe.

Judge Gregory concurred. He did not join with the majority as he found the indictment improperly excluded the scienter needed for the offense and also because of due process concerns with provisions of Section 1960.

Whether evidentiary demonstration conditioned on defendant’s willingness to testify resulted in error

United States v. Williams, Docket No. 05-4381 (21 August 2006)

Defendant was convicted under 18 U.S.C.A. § 922(g)(1) as a felon in possession of a firearm and sentenced as an Armed Career Criminal under 18 U.S.C.A. § 924(e). He challenged his conviction and sentence, although the Court’s opinion focused primarily on the challenge to his conviction.

The defendant, who had stipulated to being a felon, sought to perform an evidentiary demonstration during his trial, although he did not wish to testify. This evidentiary demonstration involved showing whether a fanny pack alleged to be involved in the crime fit around the defendant’s waist. The district court conditioned the evidentiary demonstration on defendant’s being willing to testify, treating the demonstration as testimonial. The defendant elected to perform the evidentiary demonstration and allowed himself to be questioned during the trial, and information on his prior convictions beyond that in the stipulation was introduced into evidence.

The Fourth Circuit agreed with defendant that the evidentiary demonstration was not testimonial. However, the Court found the resulting error to have been harmless on a number bases, including that the scope of defendant's direct opened him up to questions on his specific convictions on cross, that other evidence relating to his prior convictions emerged at trial, and other aspects of the case against him that made it unlikely the jury would have returned a verdict in his favor absent his testimony.

Further, the Court rejected defendant's challenge to his sentence as an Armed Career Criminal where his prior convictions "were not alleged in the indictment or proven to the jury," as *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) controlled, indicating "district court fact-finding at sentencing [is] consistent with the Sixth Amendment." Slip op. at 17.