Appellate Court Decisions - Week of 1/7/13

Note: Anything that has "OVERVIEW" in front of it is the Lexis summary of a case.

First Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

***United States v. Perry*, No. 11-5925 (Filed January 9, 2013)**

4th Amendment: Search and Seizure: Motion to Suppress

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0008p-06.pdf

Consent to search made while drunk, handcuffed and after the police pointed guns at a defendant in a boarding house did not make the consent involuntary.

Perry was a tenant in a boarding house. She was harassing another tenant by knocking on his door repeatedly in the morning. After the other tenant opened the door for Perry for the fourth time, Perry pointed a revolver at the other tenant's head. The other tenant shut the door and called the police, but Perry fled the house until 9 p.m. that evening.

When Perry returned the boarding house the landlord confronted her. Perry denied the incident where she pointed the gun, but then threatened to do exactly that as she walked upstairs. Soon after, she pointed her gun at yet another resident, demanding to know what he told the police. Perry forced herself into the other tenant's room and threatened to kill him. She eventually left the room without incident, but the police were on their way.

When the police arrived, they spoke to the landlord and victims, then headed upstairs for Perry with their guns drawn and loaded. They found Perry in the hallway, she complied with putting her hands up, and the officers put their guns away. The officers then ordered Perry against the wall, patted her down, and handcuffed her. The officers asked if she had a gun and Perry said no, but she offered that she had been drinking.

Perry's door was open nearby. The officers asked Perry for consent to search her room. According to several witnesses, she gave consent. The officers quickly found Perry's revolver.

One officer made a report for the arrest, but said the gun was found during a "protective sweep" of the room and did not mention Perry giving consent. Perry entered a guilty plea but reserved her right to appeal the denial of her motion to suppress the gun.

Perry argued on appeal that the government's evidence was insufficient to show she consented to the search of her room, and in the alternative that her consent was involuntary. Regarding the insufficient evidence of consent, Perry argued that she never signed a consent-to-search form, that the police officer never mentioned her consent in the post-arrest report, and that the various witnesses gave inconsistent accounts of the circumstances surrounding her consent. The Sixth Circuit held that the inconsistencies, such as the color of the gun and the number of people upstairs were immaterial. The court credited the testimony that Perry voluntarily gave consent to search her room and held that the district court did not err in doing so as well.

Regarding the voluntariness of her consent, Perry pointed out that she was handcuffed when she gave consent, that the police were armed, that the police never told her that she could decline to consent, and that she was drunk at the time. The Sixth Circuit, however, pointed out that Perry was "no stranger to the police or the criminal justice system," *United States v. Canipe*, 569 F.3d 597, 604 (6th Cir. 2009), because she had been arrested at least 57 times before, that her encounter with the police was short, and that she was not subject to repeated questioning or physical abuse. Therefore, the Sixth Circuit held that the district court did not err in ruling that the consent was voluntary.

Supreme Court of the United States

***Smith v. United States*, No. 11-8976, 2013 U.S. LEXIS 601**

Conspiracy: Withdrawal: Statute of Limitations

Full Decision: http://www.supremecourt.gov/opinions/12pdf/10-930_7k47.pdf

If the defense provides evidence of withdrawal from a conspiracy, the burden does not shift to the government to prove that the defendant's participation in the conspiracy continued within the applicable statute of limitations.

The Supreme Court presented the issue in this case as follows: "Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution. We consider whether, when the defendant produces some evidence supporting such a defense, the Government must prove beyond a reasonable doubt that he did not withdraw outside the statute-of-limitations period.

Smith was indicted for crimes in connection with his role in a drug distribution ring in Washington, D.C., over the course of a decade. The relevant convictions for the purposes of this appeal are conspiracy to distribute narcotics and to possess narcotics with the intent to distribute them, in violation of 21 U.S.C. §846 and Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. §1962(d).

Prior to trial, Smith moved to dismiss the conspiracy counts as time-barred by the 5-year statute of limitations in 18 U.S.C. §3282 because he had spent the 6 years prior to the indictment in prison. The court denied his motion and he renewed the statute-of-limitations defense at trial. When instructing the jury, the court told the jurors to convict Smith if the Government had proven beyond a reasonable doubt the conspiracies existed, that Smith was a member of the conspiracies, and that the conspiracies "continued in existence within five years" before the indictment.

The jury, while in deliberations, asked the court what to do with a defendant that withdrew from the conspiracies outside the relevant limitations period. Smith had not raised the affirmative defense of withdrawal, so the court gave the jury its first instruction on the defense. It explained: "The relevant date for the purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from the conspiracy." The defense object to the later instruction: "Once the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence." The jury then convicted Smith of the conspiracies.

On appeal, Smith argued that once he presented evidence that he withdrew from the conspiracy prior to the statute-of-limitations period, the burden shifted to the Government to prove that his participation in the conspiracy continued within the applicable five-year period. The Supreme Court, however, said that Smith's position is not supported by the Constitution or the statute, and that establishing individual withdrawal "was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place." Justice Scalia continued, "Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause. While the Government must prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant] is charged,' *In re Winship,* 397 U.S. 358, 364 (1970), "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required,' *Patterson v. New York*, 432 U.S. 197, 210 (1977)."

In summation, Justice Scalia wrote, "although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on him."