IN THE SUPREME COURT OF FLORIDA

MARK D. SIEVERS,	:	
Appellant,	:	
vs.	:	Case No. SC20-225
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, MARK D. SIEVERS, submits as supplemental authority the following four cases and one statute, copies of which are attached to this notice. The supplemental authority is pertinent to Issue I on appeal, and cases relate to the discussion on pages 9 and 10 of the Reply Brief.

(1) Adams v. United States, No. 19-1563, 2021 WL 1984896 (6th Cir. Mar. 10, 2021) (defendant breached proffer agreement where results of polygraph indicated deception in response to questions concerning murder).

(2) United States v. Adams, 655 Fed. Appx. 312, 316 (6th Cir. 2016) (same).

(3) United States v. Daniels, 189 Fed. Appx. 199, 201 (4th Cir. 2006)(defendant breached agreement by failing to pass polygraph test, which rendered Government's obligations null and void).

(4) Harris v. State, 841 P.2d 597, 602 (Okla. Crim. App. 1992) ("the court properly found that Appellant had not truthfully answered the questions posed to him at the polygraph examination, and that he had therefore breached the agreement under which he was granted limited immunity").

(5) Section 948.30(2)(a), Florida Statute (2021) (requiring as standard condition of probation and community control for certain sexual offenses that the offender participate in "polygraph examinations to obtain information necessary for risk management and treatment and to reduce the sex offender's denial mechanisms").

CERTIFICATE OF SERVICE

I certify that a copy has been served on Christina Z. Pacheco at the Office of the Attorney General at capapp@myfloridalegal.com, on this 23 day of September, 2021.

Respectfully submitted,

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United States Court of Appeals, Sixth Circuit.

Erie ADAMS, aka Michael Johnson,
Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 19-1563
|
FILED March 10, 2021

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms
Erie Adams, Florence, CO, Pro Se.

Steven P. Cares, Assistant U.S. Attorney, United States Attorney's Office, Detroit, MI, for Respondent-Appellee.

Before: SUTTON, COOK, and READLER, Circuit Judges.

ORDER

***1** Erie Adams, a federal prisoner proceeding pro se, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. Both parties have filed motions to dismiss this appeal for lack of jurisdiction. Adams has also filed a motion for the appointment of counsel. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2013, Adams was indicted on one count of possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1), after which he entered into a proffer agreement with the government. That agreement provided that Adams would share his knowledge of the matters under investigation in exchange for the government's promise not to use his statements against him in its case-in-chief. But the agreement also provided that Adams would be subject to a polygraph examination. If the results of the polygraph examination indicated that Adams had been untruthful, the agreement provided that the government's use of any information provided during the proffer session would be unrestricted.

Adams's polygraph examination indicated deception in his responses to questions concerning the murder of Tyrone Conyers, "a self-described middleman." *United States v. Adams*, 655 F. App'x 312, 314 (6th Cir. 2016) (per curiam). In March 2014, a superseding indictment charged Adams with conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1); possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The following day, the government notified Adams of its intent to make unrestricted use of the statements that he gave during his polygraph examination. The district court later ruled these statements admissible. Meanwhile, the government filed a second superseding indictment, adding charges for possession with intent to distribute oxycodone and possession with intent to distribute hydrocodone, in violation of 18 U.S.C. § 841(a)(1). A jury convicted Adams on the six counts in the second superseding indictment, and the district court sentenced Adams to an aggregate term of 540 months' imprisonment. We affirmed Adams's convictions and sentence on direct appeal. *Adams*, 655 F. App'x at 322.

Adams subsequently filed a § 2255 motion, which he later amended with leave of court. In his amended motion, Adams advanced fifteen ineffective-assistance-of-counsel claims. The district court denied the § 2255 motion on the merits and declined to issue a certificate of appealability ("COA"). Adams then filed an application in this court seeking a COA, which this court granted in part and denied in part. *Adams v. United States*, No. 19-1563, slip op. 8-9 (6th Cir. Nov. 15, 2019) (order). Specifically, this court granted Adams a COA as to his claims that trial counsel was ineffective for: (a) advising him to enter the proffer agreement (Claim 1); (b) failing to move for a judgment of acquittal on the § 924(c) charge (Claims 3 & 13); (c) failing to file a petition for a writ of error coram nobis challenging his prior § 924(c) conviction under

Bailey v. United States, 516 U.S. 137 (1995) (Claim 12); and (d) failing to request an informant jury instruction (Claim 14). *Id.* As relevant here, this court granted Adams a COA on Claim 3 and Claims 12-14 because the district court ostensibly overlooked those claims when ruling on the § 2255 motion. *Id.*, slip op. at 4-5, 8-9. This court denied Adams's COA application in all other respects. *Id.*, slip op. at 9.

***2** On appeal, Adams argues, and the government agrees, that this appeal should be dismissed for lack of jurisdiction because the order being appealed—the district court's denial of Adams's § 2255 motion—is neither a final order nor an appealable interlocutory or collateral order.

The parties' jurisdictional argument is well-taken. Appellate courts are vested with jurisdiction over only final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949); *see also Anderson v. Roberson*, 249 F.3d 539, 542-43 (6th Cir. 2001). An order is final and appealable when it "ends the litigation ... and leaves nothing for the court to do but execute the judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 920 F.3d 1103, 1105 (6th Cir. 2019). An order disposing of fewer than all claims in a civil action is not immediately appealable absent proper certification for an interlocutory appeal under Federal Rule of Civil Procedure 54(b). *Bonner v. Perry*, 564 F.3d 424, 427 (6th Cir. 2009).

As previously noted, the district court's order denying Adams's § 2255 motion left pending several ineffective-assistance-of-counsel claims, thus making it an interlocutory order. *See United States v. Fazel*, 808 F. App'x 209, 210 (4th Cir. 2020) (per curiam) (holding that the district court "never issued a final decision" where it overlooked some of the movant's § 2255 claims) (quoting *Porter v. Zook*, 803 F.3d 694, 699 (4th Cir. 2015)). That interlocutory order was not accompanied by a Rule 54(b) certification and is not immediately appealable under § 1292. Nor was it an immediately appealable "collateral order" under the doctrine announced in *Cohen*. *See Cohen*, 337 U.S. at 546-47.

Accordingly, we **GRANT** the parties' respective dismissal motions, thereby dismissing this appeal as interlocutory and remanding the matter to the district court for consideration of Adams's unresolved claims. In so doing, we express no opinion regarding the merits of Adams's claims. We **DENY** Adams's motion for the appointment of counsel.

All Citations

Not Reported in Fed. Rptr., 2021 WL 1984896

655 Fed.Appx. 312
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Erie ADAMS, Defendant–Appellant.

No. 15–1175
|
July 05, 2016

Synopsis

Background: Defendant who was charged with drug trafficking and firearms offenses moved to suppress evidence. The United States District Court for the Eastern District of Michigan, Sean F. Cox, J., 2014 WL 1509574, denied motion to suppress and later denied defendant's motion for mistrial at jury trial, 2014 WL 2815697. Defendant appealed.

Holdings: The Court of Appeals held that:

search warrant affidavit satisfied nexus requirement for probable cause to search defendant's home, and

defendant materially breached immunity agreement with respect to providing truthful information about suspected middleman's murder.

Affirmed.

***314** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

Stephanie M. Gorgon, Andrew Goetz, Office of the U.S. Attorney, Detroit, MI, for Plaintiff–Appellee.

Katie N. Steffes, Smietanka, Buckleitner, Steffes & Gezon, Grandville, MI, Erie Adams, Bruceton Mills, WV, for Defendant–Appellant.

BEFORE: McKEAGUE and GRIFFIN, Circuit Judges; and BERTELSMAN, District Judge.[*]

Opinion

PER CURIAM.

Defendant Erie Adams appeals his convictions and sentence for drug trafficking and firearms offenses. Finding no error requiring reversal, we affirm.

I.

This case concerns a conspiracy to distribute heroin. It begins in Winston-Salem, North Carolina, where DEA agents observed and recorded Rudolph Coles and Terrance Poindexter as part of a Title III wiretap investigation. In October 2013, Coles and Poindexter arranged to purchase heroin in Detroit from their contact, Tyrone Conyers. Conyers, a self-described middleman, called his supplier, "Dog," and arranged to purchase 300 grams of heroin for re-sale to the North Carolina pair.

On October 28, 2013, a tracking device traced Coles' and Poindexter's vehicle to Detroit, where local DEA agents observed Poindexter meet with another vehicle in a parking lot. The second vehicle then drove through a neighborhood and parked at a residence belonging to Conyers. Later that day, Conyers met Poindexter at an apartment ***315** complex in Southfield, Michigan. Conyers called Poindexter and invited him inside. After about a minute, Poindexter left the complex and returned to his vehicle. Poindexter and Coles then returned to North Carolina, where local police intercepted them. Police recovered 357 grams of heroin hidden in their vehicle.

Detroit agents later searched Conyers' home, with Conyers present. Conyers waived his *Miranda* rights, and admitted to facilitating the heroin deal. He explained that Poindexter gave him $20,000 at their first meeting, approximately $4,000 of which Conyers kept as his cut. He gave the rest of the money to "Dog" in exchange for the heroin he later provided to Coles and Poindexter at the apartment complex.

Agents located a phone number for "Dog" in Conyers' cell phone. Review of the phone's records led agents to a residence on Ten Mile Road in Roseville, Michigan. The phone's "toll records" confirmed that Conyers used the phone to call "Dog" on the morning of the deal, and received a return call from "Dog" later that day. Subscriber information for the phone number connected it to "John Johnson," at an address in Detroit. An internal DEA database revealed Adams' association with the Detroit address, his former use of the similar alias

"Michael Johnson," his involvement in previous DEA investigations, and a prior conviction for conspiracy to distribute cocaine. On November 5, 2013, agents obtained a search warrant for GPS location information from "Dog's" phone number, which showed multiple "pings" at the Ten Mile Road address over several days. Agents also observed a mini-van registered to Adams parked in the driveway of the house.

Based on these representations, a state court magistrate issued a search warrant for the Ten Mile Road address. DEA agents executed the warrant with a SWAT team the same day. Officers identified and patted Adams down immediately upon entering. They found four cell phones on his person—including one that corresponded to "Dog's" phone number, and listed Conyers' phone number under the name "Ty" in the stored contacts. Defendant disclosed that he kept a gun under a nearby couch, which the agents recovered, along with two other weapons in the master bedroom. Agents also discovered a block of heroin weighing approximately 1.5 kilograms; more heroin divided for distribution; a triple-beam scale; rubber-banded bundles of cash; a hydraulic-operated press; drug cutting agents; an electronic money counter; a counterfeit detection pen; lottery tickets; a ledger containing phone numbers, names, aliases, and dollar amounts; and hydrocodone and oxycodone pills. Following the search, the agents arrested Adams.

While in jail, defendant called an unidentified friend. During the recorded call, defendant referred to Conyers as a "snitch" who "just gave [his] name up" to authorities. He lamented the prospect of serving a lengthy sentence for his "second drug charge," while Conyers was "still out there." Seven days after the phone call, Detroit Police found Conyers dead of gunshot wounds in his still-running vehicle.

Although the government never charged defendant for Conyers' death, law enforcement questioned his involvement. In particular, Adams entered a proffer agreement, promising to divulge what he knew about the narcotics investigation and Conyers' death in exchange for the government's promise not to use his statements as part of its case-in-chief against him at trial. During his proffer interview, Adams admitted his involvement in heroin and pill distribution, and that he had known Conyers for approximately 30 years, and had ***316** helped Conyers sell heroin, including on October 28, 2013. Defendant denied any knowledge of or involvement with Conyers' death.

One significant condition of the proffer agreement, however, was that Adams tell agents the "complete" truth about "matters under the investigation," and pass a polygraph examination; otherwise, there would be "no restrictions" on the government's use of his proffer statements, including use against him at trial. Accordingly, agents again questioned defendant Adams regarding Conyers' murder during a polygraph examination. Adams failed the polygraph. Because of his failure to pass the polygraph, the government notified Adams of its intent to use his statements at trial. Thereafter, the district court denied Adams' motion to exclude the statements.

The government charged and tried defendant on a Second Superseding Indictment including six offenses: (1) conspiracy to distribute heroin; (2)-(4) possession with intent to distribute heroin, oxycodone, and hydrocodone; (5) possession of a firearm in furtherance of drug trafficking; and (6) being a felon in possession of a firearm. After a three-day trial, the jury convicted Adams on all six counts.

Before sentencing, the government filed a motion for an upward departure and upward variance, as well as an information to establish Adams' prior conviction pursuant to 21 U.S.C. § 851. The court's sentence ultimately hewed close to the recommendations in the presentence investigation report ("PSR"): 240 months for Counts 1 and 2, the mandatory minimum, to run concurrently; 120 months for Counts 3, 4, and 6, concurrent to all other counts; and the mandatory 300 months for Count 5, which must run consecutive to all other counts.

II.

On appeal, Adams raises six issues. The first five relate to the evidence admitted at trial: (1) the district court's denial of his motion to suppress evidence seized from the Ten Mile Road location, and his request for a *Franks* hearing; (2) Adams' alleged breach of the proffer agreement and the introduction of his proffer statements; (3) the admission of wiretapped coconspirator statements; (4) the denial of his motion for a mistrial; and (5) the re-opening of proofs after the government rested. For his sixth claim of error, (6), defendant challenges the calculation and enhancement of his sentence. We address each in turn.

A.

"When reviewing the denial of a motion to suppress, we defer to a district court's findings of fact unless they are clearly erroneous, and we review the court's conclusions of law de novo." *United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005). "The standard of review for determining the sufficiency of the affidavit," however, "is whether the magistrate had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited." *United States v. Rodriguez–Suazo*, 346 F.3d 637, 643 (6th Cir.

2003) (internal quotation marks omitted). The circumstances detailed in the affidavit must indicate why proof of illegal activity will likely be found "in a particular place." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) (citation omitted). They should demonstrate, in other words, a "nexus between the place to be searched and the evidence sought." *Id.* (citation omitted).

Adams argues that the required nexus was absent in this case. He contends ***317** the affidavit did not contain sufficient evidence of probable cause to search the Ten Mile Road location, and instead only described the North Carolina individuals and their connection to Conyers in broad terms, without linking Adams himself to the conspiracy. Defendant is incorrect. The affidavit included significant evidence of illegal activity at the Ten Mile Road property. Wiretaps, surveillance, and the arrest of the North Carolina men confirmed Conyers' involvement; the search of Conyers' home, and Conyers' own statements, pointed directly to "Dog," and the phone number associated with that alias. Agents corroborated Conyers' tip by verifying that "Dog" was the first person Conyers called after talking to the North Carolina men; that "Dog" had called Conyers back later that day; that "Dog's" phone was subscribed to "John Johnson," a similar name to Adams' prior alias, at a Detroit address associated directly with Adams; that GPS pings of "Dog's" phone number showed the phone located at the house over several days, at all times of day; that Adams was involved in multiple previous DEA investigations, and had a prior conviction for conspiring to distribute cocaine. The magistrate had a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found at the Ten Mile Road location.

To the extent defendant suggests the affidavit was insufficient to connect *him* to the conspiracy, he misunderstands the nexus requirement. A magistrate need not find probable cause that a particular *person* is likely involved in illicit activities; only that a particular *place* is likely to yield contraband. Search warrants "are not directed at persons; they authorize the search of 'places' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized." *Zurcher v. Stanford Daily*, 436 U.S. 547, 555, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (citation and alteration omitted). "The critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Id.* at 556, 98 S.Ct. 1970; *see also United States v. Pinson*, 321 F.3d 558, 564–65 (6th Cir. 2003). Here, the affidavit more than adequately demonstrated the "nexus between the place to be searched" (the Ten Mile Road location) and "the evidence sought" (proof of a drug conspiracy). *Carpenter*, 360 F.3d at 594.

Adams' demand for a *Franks* hearing is similarly deficient. "A defendant is entitled to a hearing to challenge the validity of a search warrant if he 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and the allegedly false statement is necessary to the finding of probable cause.' " *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008) (quoting *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (alteration omitted)). Adams makes no effort to explain how any statement included in the affidavit was false, let alone that such a statement was made knowingly, intentionally, or with reckless disregard for the truth. He has not made the preliminary showing necessary to justify a *Franks* hearing, and therefore the district court did not err in denying him one. *Id.* at 545–46.

B.

Next, Adams challenges the district court's finding that he breached the proffer agreement. "An agreement not to prosecute is contractual in nature, and subject ***318** to contract law standards." *United States v. Fitch*, 964 F.2d 571, 574 (6th Cir. 1992). Interpretation of the agreement is therefore reviewed de novo. *See United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000) (addressing plea agreements). The government bears the burden of proving the defendant breached the agreement, and that the breach was "material and substantial," as opposed to "an inadvertent omission or oversight." *United States v. Darwich*, 574 Fed.Appx. 582, 592 (6th Cir. 2014) (quoting *Fitch*, 964 F.2d at 574). We review the district court's finding of a material breach for clear error. *Fitch*, 964 F.2d at 574.

The proffer agreement in this case is a letter signed by Adams and his counsel, "set[ting] forth all of the terms of th[e] proffer discussion," during which Adams promised to "make a complete and truthful statement of his knowledge of (and role in) the matters under investigation, and to fully and truthfully answer all questions." The letter explains that "omit[ting] facts about crimes, other participants, or his ... involvement in the offenses" would constitute a breach, and that defendant must "volunteer all information that is reasonably related to the subjects discussed in the debriefing." It further warns that if Adams "fail[ed] to provide truthful and complete information (such as by making a false statement, providing false information, omitting facts or otherwise misleading the government)," or if "the results of the polygraph

examination ... indicate[d] that [he] ha[d] not been truthful," there would be "no restrictions on the government's use of any information provided or statements made" by defendant.

Defendant does not dispute that he failed the polygraph test, or even that he made false statements. Rather, he argues that failing the test in response to questions about Conyers' murder was not a material breach because the homicide "had nothing to do with the narcotics investigation or charges."

"The conditions that will constitute a breach of the immunity agreement are governed by the agreement itself." *Fitch*, 964 F.2d at 574. The agreement here required defendant to provide a complete, "truthful statement of his knowledge of (and role in) the matters under investigation"—not just those with which he was charged. And Conyers' death was a significant "matter[ ] under investigation." Conyers was a critical part of the alleged conspiracy, acting as a long-time "middleman" and point of contact with out-of-state dealers, and the key witness implicating Adams. His death also appears to have been investigated as a murder from the start. We have drawn a distinction between defendants who, despite misstatements, still "suppl[y] the government with enough information to ... secure a multicount indictment against numerous individuals," *id.* at 575, and those whose misrepresentations "hinder the prosecution of other individuals," thereby materially breaching their agreements. *McKissic v. Birkett*, 200 Fed.Appx. 463, 469 (6th Cir. 2006) (following *United States v. Reed*, 272 F.3d 950 (7th Cir. 2001)). As the district court found, this case involves the latter: "Tyrone Conyers'[ ] homicide ... was central to the Government's investigation because it related to a larger drug trafficking scheme and investigation. Because Defendant lied, he cannot be summoned as a potential witness in other cases, and the Government has garnered no leads from Defendant in furtherance of their investigation." Thus, the district court did not err in finding Adams breached the proffer agreement.

C.

In addition to the proffer interview statements, the government introduced—over ***319** Adams' objection—wiretap recordings between Coles and Poindexter and Conyers setting up the drug exchange and referring to the heroin seized in North Carolina. Defendant contends the district court abused its discretion in admitting this evidence.

To admit an out-of-court statement under Federal Rule of Evidence 801(d)(2)(E), the offering party "must establish by a preponderance of the evidence that a conspiracy existed, that the defendant was a member of the conspiracy, and that the coconspirator's statement was made during the course and in furtherance of the conspiracy." *United States v. Kelsor*, 665 F.3d 684, 693 (6th Cir. 2011). The trial court may admit the statements conditionally, but if the government ultimately fails to establish the proper foundation, the court should issue cautionary instructions or, if necessary, grant a mistrial. *Id.*

Defendant dismisses the government's evidence of his involvement in the conspiracy as "very bare bones." We disagree. Defendant's own proffer statements established his connection to Conyers, their plan to distribute and re-sell the drugs in order to increase their profits, including the planned sale to the North Carolina individuals. Conyers' calls to Coles and Poindexter, exchanging phone numbers, explaining where to meet, and when Poindexter should come to the door to pick up the heroin, were made in furtherance of the drug purchase. Trial testimony and call records demonstrated that Adams and Conyers had each other's phone numbers, and called one another on the day of the narcotics deal.

Adams is incorrect in his assertion that he could not have conspired with Coles and Poindexter because he did not know them. "Drug conspiracies are often 'chain' conspiracies which normally involve numerous sales and resales of drugs until they reach the ultimate consumers." *United States v. Robinson*, 547 F.3d 632, 642 (6th Cir. 2008) (citation omitted). "[E]ach member of the conspiracy must realize that he is participating in a joint enterprise," but he need "not know the identities of many of the participants." *Id.* (quotation omitted). "A single conspiracy is not converted to multiple conspiracies ... simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." *United States v. Beals*, 698 F.3d 248, 259 (6th Cir. 2012) (internal quotations omitted).

Here, the record includes significant evidence tying defendant to the conspiracy. For this reason, the district court did not abuse its discretion in admitting the wiretap statements.

D.

Next, defendant claims that the district court committed reversible error by denying his motion for a mistrial after homicide detective Moises Jiminez referred to Conyers' death during his trial testimony. This court reviews the denial of a motion for a mistrial for abuse of discretion.

United States v. Fields, 763 F.3d 443, 462 (6th Cir. 2014).

Before trial, the government agreed not to present evidence "that Tyrone Conyers was shot and killed or that defendant may be a suspect." It called homicide detective Jiminez to testify about Adams' admission to selling Conyers heroin during the proffer interview. On cross-examination, however, the following exchange between Jiminez and defense counsel occurred in the presence of the jury:

> Q: Okay. Now, in reviewing [your] notes, does it refresh your recollection as to whether or not Mr. Adams allegedly ***320** said during the debriefing that he didn't have any customers?
>
> A: It still doesn't, because I wasn't there for the dope thing. I'm there for the homicide thing. Mr. Tyrone Conyers is dead.

Defendant's counsel immediately moved for a mistrial. The trial court denied the motion, and instead issued a curative instruction. Adams claims this instruction was insufficient to curb potential prejudice and reversal is required. We disagree.

In the case of an improper witness statement, we consider five factors to determine whether a mistrial is warranted:

> (1) whether the remark was unsolicited, (2) whether the government's line of questioning was reasonable, (3) whether a limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence against the defendant.

Zuern v. Tate, 336 F.3d 478, 485 (6th Cir. 2003). The "primary concern" of the inquiry "is fairness to the defendant." *United States v. Forrest*, 17 F.3d 916, 919 (6th Cir. 1994) (per curiam).

In the present case, none of the five factors weighs in favor of a mistrial. Detective Jimenez's remark was both (1) unsolicited and (2) not a part of the government's questioning at all, as it occurred during cross-examination. The remark was (3) followed by an immediate, clear, and forceful limiting instruction. It was (4) unaccompanied by any evidence of bad faith on the government's part, and (5) comprised only one short sentence in the midst of three days' worth of evidence against Adams. *See United States v. Hayes*, 399 Fed.Appx. 57, 59–60 (6th Cir. 2010) (unsolicited statement by witness that she was afraid of the defendant's family waiting outside the courtroom did not merit mistrial, since it was unrelated to any government questioning, a minor part of the testimony at trial, and was followed by an immediate, clear, and forceful curative instruction); *United States v. Ramseur*, 378 Fed.Appx. 260, 264 (4th Cir. 2010) (no prejudice caused by mention of a "murder charge," since it did "not provide any insight into who was charged with a murder").

In particular, the trial court's limiting instruction, given shortly after Jimenez's statement, made clear that the jury was not to consider the fact of Conyers' death, while still taking pains to avoid any implication that Adams was himself involved:

> Members of the jury, you have heard testimony that Mr. Conyers is dead. You are not to consider the fact that he is dead at all in your consideration of the evidence received in this case. It cannot factor at all in your deliberations.

The district court further required each juror individually to verbally "commit to following [its] instruction."

Defendant makes much of the fact that the government presented "a homicide detective to testify against" him, which he believes "demonstrates bad faith." Adams forgets that the government disclosed its intent to call a homicide detective before trial, and that his counsel confirmed this was "agreeable" to the defense. Moreover, defendant cites no evidence to dispute the government's representation at trial that it instructed its witnesses to refrain from mentioning Conyers' death. And defendant has no proof of bad faith. For these reasons, we conclude that the district court did not abuse its discretion in denying defendant's motion for a mistrial.

E.

At the close of its case-in-chief, the government failed to read to the jury the joint stipulation reached with defendant regarding his status as a convicted felon. ***321** Count Six charged Adams with being a felon in possession of a firearm, and Adams agreed to stipulate to the jury that he had been "convicted of a felony offense, that is, an offense punishable by one year or more." *See* 18 U.S.C. § 922(g)(1). The government rested without reading the stipulation. Defendant moved for a directed verdict, but the court was concerned that the failure was "inadvertent," and, after argument, agreed to the government's request to re-open its proofs to read the stipulation to the jury. Defendant claims this was an error requiring reversal.

In order to secure a reopening, the moving party must show that the evidence to be presented is "relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused." *United States v. Reid*, 357 F.3d 574, 581 n.7 (6th Cir. 2004) (citation omitted). The district court "must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion," but "[t]he most important consideration is whether the opposing party is prejudiced by reopening." *United States v.*

Blankenship, 775 F.2d 735, 741 (6th Cir. 1985) (quotation omitted). We review the decision to reopen proofs for abuse of discretion. *Id.*

We find no abuse here. All three factors of the *Blankenship* test weigh in favor of reopening proofs: the motion to reopen was timely and prior to submission of the case to the jury; the evidence, presented in the sterile form of a stipulation, was as non-prejudicial as is possible, and was the uncontested "truth"; and although the effect of granting the motion surely hurt Adams, it cannot be deemed "undu[ly] "prejudic[ial]." *Fields*, 763 F.3d at 465. As the district court recognized, admission of the stipulation here "comport[ed] with the parties' intentions and expectations." "Reopening is often permitted to supply some technical requirement ... or to supply some detail overlooked by inadvertence." *Blankenship*, 775 F.2d at 740. "Where ... reopening is permitted after the government has rested its case in chief, but before the defendant has presented any evidence, it is unlikely that prejudice sufficient to establish an abuse of discretion can be established." *Id.* at 741. Adams has failed to make that showing.

F.

Finally, defendant raises several sentencing issues. This court reviews legal decisions and "mixed questions of law and fact" involving application of the Sentencing Guidelines de novo, and the district court's factual determinations in connection with sentencing for clear error. *United States v. Stafford*, 721 F.3d 380, 400 (6th Cir. 2013) (quotation omitted).

Defendant first contends that the PSR improperly calculated the quantity of heroin involved in the conspiracy. The government concedes as much: Adams should have been cited for possessing between 1 and 3 kilograms of heroin, not 3.8 kilograms, and his base offense level accordingly should have been calculated to be 30, with a total offense level of 32, not 32 adjusted to 34. This court need not remand for resentencing, however, where an error in calculating the Guidelines range "had no effect," since the defendant was sentenced to the statutory mandatory minimum. *United States v. Barnes*, 49 F.3d 1144, 1150 (6th Cir. 1995) ("When the maximum Guideline sentence is less than the statutorily required mandatory minimum, the latter is the effective sentence."); *see also United States v. Mitchell*, 398 Fed.Appx. 159, 164 (6th Cir. 2010) (concluding that remand was unwarranted, since the mandatory minimum sentence was imposed, and thus "remand for resentencing would not result in a shorter sentence."). Remand ***322** is likewise not warranted in this case because the error "had no effect" on Adams' mandatory sentence. *Barnes*, 49 F.3d at 1150.

Defendant also claims that the government should not have been permitted to file an information enhancing his minimum sentence under 21 U.S.C. § 851. The government filed its information roughly two weeks ahead of trial. As a result, Adams faced an enhanced, twenty-year minimum penalty on Counts One and Two of the Second Superseding Indictment. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(i); 21 U.S.C. § 846. At sentencing, the district court recognized this enhanced minimum sentence and imposed it as required.

"Section 851 provides that increases in sentences based upon prior felony drug convictions may not be imposed unless the United States Attorney has filed an information stating the previous convictions to be relied upon." *United States v. Crayton*, 357 F.3d 560, 571 (6th Cir. 2004) (citing 21 U.S.C. § 851(a)). While the government here recited Adams' past conviction for conspiring to distribute cocaine as the basis for an enhanced sentence, defendant counters that it unfairly relied on prior uncharged crimes, including the murder of Conyers, to justify the increased punishment.

In *Crayton*, this court considered, and rejected, a similar claim regarding the alleged "punitive[ ]" use of § 851. *Id.* at 571–72; *see also United States v. Neal*, 577 Fed.Appx. 434, 451 (6th Cir. 2014). *Crayton* explained that "[t]he discretion a prosecutor exercises in determining whether an enhanced statutory maximum applies under § 851 is similar to the initial discretion the prosecutor has in deciding which charges to bring against a defendant, discretion that is obviously constitutional." 357 F.3d at 572. "Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors." *United States v. LaBonte*, 520 U.S. 751, 762, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997). Improper factors may include "race, religion, or other arbitrary classification," *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (quotation omitted), or the "exercise of protected statutory and constitutional rights," *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

Defendant identifies no improper considerations here. His suggestion that the district court sentenced him as "a de facto career criminal" is also belied by the record. The district court specifically *denied* the government's request to vary upward to the career-offender Guidelines range. Adams' sentencing challenges are without merit.

III.

For the foregoing reasons, we affirm defendant's convictions and sentence.

All Citations
655 Fed.Appx. 312, 100 Fed. R. Evid. Serv. 968

Footnotes

[*] The Honorable William O. Bertelsman, Senior Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

189 Fed.Appx. 199
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff—Appellee,
v.
Randall Lee DANIELS, Defendant—Appellant.

No. 05–5016.
|
Submitted: June 23, 2006.
|
Decided: July 10, 2006.

Synopsis
Background: Defendant was convicted, on plea of guilty before the United States District Court for the District of South Carolina, Margaret B. Seymour, J., of being a member of a drug conspiracy and a money laundering conspiracy, and received concurrent 360-month and 240-month sentences, respectively. Defendant appealed from sentence.

Holdings: The Court of Appeals held that:

defendant's failure to pass government-administered polygraph exam amounted to breach of proffer agreement;

such breach authorized use of defendant's statements to establish factual predicates for enhancements of his sentences; and

defendant's sentences were reasonable.

Affirmed.

***200** Appeal from the United States District Court for the District of South Carolina, at Columbia. Margaret B. Seymour, District Judge. (CR–04–132–MBS).

Attorneys and Law Firms
James T. McBratney, Jr., Florence, South Carolina, for Appellant. Reginald I. Lloyd, United States Attorney, Jane B. Taylor, Assistant United States Attorney, Office of the United States Attorney, Columbia, South Carolina, for Appellee.

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Opinion

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

**1 Randall Lee Daniels pled guilty to being a member of a drug conspiracy and a money laundering conspiracy, in violation of 21 U.S.C.A. § 846 (West 1999), 18 U.S.C.A. § 1956(h) (West 2000 & Supp.2006), and 18 U.S.C.A. § 2 (West 2000). The district court sentenced Daniels to a term of 360 months imprisonment for the drug conspiracy count, and 240 months for the money laundering count, to run concurrently. On appeal, Daniels challenges only his sentence. He contends that the district court impermissibly relied on statements he gave pursuant to a valid proffer agreement. We affirm.

On March 17, 2004, Daniels executed a proffer agreement* with the Government *201 in which he agreed "to be fully truthful and forthright" concerning the investigation into his offense, and "to submit to polygraph examination(s)" if requested. In turn, the Government agreed that it would not use any "statements made or other information" Daniels provided against him. The agreement specified that Daniels's "failure to be fully truthful and forthright at any stage will, at the sole election to the Government, cause the obligations of the Government within this Agreement to become null and void." A failure to pass a requested polygraph exam "to the satisfaction of the Government" would similarly constitute a breach of the agreement, negating the Government's obligations. If Daniels breached his obligations under the agreement, the proffer agreement expressly authorized the Government to "use for any purpose any and all statements made and other information provided by [Daniels] in the prosecution of [Daniels] on any charge."

Daniels argues that the district court erred in concluding that he breached the proffer agreement by failing the government administered polygraph exam. We disagree. A proffer agreement operates like a contract; accordingly, to discern whether Daniels breached the agreement, we must examine its express terms. *United States v. Lopez*, 219 F.3d 343, 346 (4th Cir.2000) (citing *United States v. Cobblah*, 118 F.3d 549, 551 (7th Cir.1997)). Here, the contract terms explicitly require that Daniels be truthful and that he pass a polygraph test "to the satisfaction of the Government" if requested to undergo such a test. Indisputably, he failed to pass the given polygraph test, thereby clearly breaching the terms of the agreement.

Accordingly, because Daniels breached the proffer agreement, we conclude that Daniels's other contentions—namely, that the district court impermissibly enhanced his sentenced based on statements he made during the proffer interview—lack merit. Under the precise terms of the proffer agreement itself—which Daniels signed—any breach by Daniels renders the Government's obligations null and void, and permits the Government to use Daniels's statements to prosecute him. The district court thus did not err in relying on Daniels's own statements and admissions to establish the factual predicates necessary to enhance his sentence under the Guidelines.

**2 We further find that the district court did not violate *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) in sentencing Daniels. Rather, the court properly calculated the advisory Guidelines range, considered the § 3553(a) factors, made appropriate enhancements based on Daniels's own admissions, and imposed a reasonable sentence within the Guidelines range. *See United States v. Green*, 436 F.3d 449, 457 (4th Cir.2006).

We therefore affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

All Citations
189 Fed.Appx. 199, 2006 WL 1888823

Footnotes

* A "proffer agreement" is an agreement between the Government and a defendant in a criminal case "that sets forth the terms under which the defendant will provide information to the government"; it "defines the obligations of the parties and is intended to protect the defendant against the use of his or her statements." *United States v. Lopez,* 219 F.3d 343, 345 n. 1 (4th Cir.2000). On January 28, 2005, ten months after executing the proffer agreement, Daniels signed a written plea agreement.

841 P.2d 597
Court of Criminal Appeals of Oklahoma.

Floyd C. HARRIS, Appellant,
v.
STATE of Oklahoma, Appellee.

No. F–91–123.
|
Nov. 6, 1992.

Synopsis
Defendant was convicted in the District Court, Comanche County, Jack Brock, J., of first-degree murder, and he appealed. The Court of Criminal Appeals, Lumpkin, V.P.J., held that: (1) special judge sitting as magistrate has authority to rule on question of immunity as complete defense to charge, when making statutory determination of whether there is sufficient cause to believe that defendant is person that committed crime; (2) detailed procedures for granting conditional immunity pursuant to agreement and for revoking such grants of immunity are adopted; and (3) it is not improper for grant of limited immunity to be based in part on successful taking of polygraph examination.

Affirmed.

***598** An Appeal from the District Court of Comanche County; Jack Brock, District Judge.

Floyd C. Harris, Appellant was tried by jury and convicted of First Degree Murder in violation of 21 O.S.1981, § 701.7, in the District Court of Comanche County, Case No. CRF 84–128. The jury recommended punishment of life imprisonment and the trial court sentenced accordingly. From this judgment and sentence, this appeal has been perfected. AFFIRMED.

Attorneys and Law Firms
Ralph Saenz, Lawton, Trial Counsel, for appellant.

J. Blake Dutcher, Jr., Lawton, Appellate Counsel, for appellant.

Dick W. Tannery, Dist. Atty., Lawton, Trial Counsel, for appellee.

Robert H. Henry, Atty. Gen., Diane L. Slayton, Asst. Atty. Gen., Oklahoma City, Appellate Counsel, for appellee.

OPINION

LUMPKIN, Vice–Presiding Judge:
Appellant Floyd C. Harris was tried by jury and convicted of First Degree Murder in violation of 21 O.S.1981, § 701.7, in the District Court of Comanche County, Case No. CRF–84–130. The jury recommended punishment at life imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. We affirm.

On March 13, 1984, Appellant and Robert Wilson robbed Brittain's Catalog Showroom in Lawton, Oklahoma. During the robbery, Don Thomas, area manager, was shot and killed. See *Wilson v. State*, 756 P.2d 1240 (Okl.Cr.1988), for details of the offense. In this appeal, Appellant has not challenged the sufficiency of the evidence, but objects to certain procedural matters which occurred in bringing his case to trial.

Appellant was arrested on March 13, 1984, and charged with the offense of robbery with a dangerous weapon. An agreement was reached between Appellant and the District Attorney that in exchange for ***599** Appellant's information concerning Robert Wilson's participation in the robbery and murder, he would receive conditional limited immunity from prosecution. This limited immunity was based upon Appellant's successful fulfillment of four (4) conditions: 1) that Appellant tell who actually fired the gun and committed the homicide at Brittain's; 2) that Appellant give a sworn statement in regards to all events that occurred at the time of the robbery; 3) that he successfully take a polygraph examination; and 4) that he testify in all proceedings against the person who fired the weapon during the robbery.

At a hearing before the Honorable Winston Raburn, District Judge, on March 14, 1984, all parties agreed to the above and Appellant was granted conditional limited immunity from prosecution. Judge Raburn reminded Appellant that if he breached the agreement in any way, the grant of immunity would be null and void and the State could proceed with criminal charges. The State informed Appellant that if he did breach the agreement, first degree murder charges would be filed. On April 16, 1984, a polygraph test was conducted on Appellant. The results of that examination showed that Appellant did not answer the questions posed to him truthfully. Upon receiving this information, the State filed first degree murder charges against Appellant.

On April 25, 1984, the preliminary hearing was held before the Honorable Allen McCall, Special Judge, and Appellant was bound over for trial on charges of first degree murder. Appellant's challenge to the revocation of the limited immunity and re-instatement of criminal charges against him was heard by the Honorable Jack Brock, District Judge, in a pre-trial motion hearing on May 24, 1984. After hearing testimony from the polygraph examiner and the State's investigator, Judge Brock ruled that the immunity which was granted was based upon certain conditions, those conditions were breached, and therefore, Appellant was not entitled to immunity from prosecution. On September 20, 1984, three (3) months after the trial of Robert Wilson, Appellant was tried and convicted of first degree murder.

In his first assignment of error, Appellant contends that the magistrate erred in failing to grant his request for a continuance of the preliminary hearing. Appellant argues that forcing him to proceed with the preliminary hearing, only one day after the appointment of counsel to the case, deprived him of his constitutional right to effective assistance of counsel.

The record reflects that Ralph Saenz was appointed on April 24, 1984, to represent Appellant. On the day set for the preliminary hearing, April 25, 1984, Mr. Saenz verbally requested the continuance. The magistrate overruled the motion stating in part:

> I understand and appreciate the fact that you were appointed yesterday. However, it's the Court's opinion that preliminary hearing for the defendants is a time to discover the State's case. That is the main purpose in my eyes. And that's exactly what we're here for today. If for some reason there are witnesses which you were unable to subpoena, some other reason why you can't get a witness here, newly discovered evidence and so forth, I will allow you an additional day, somewhere in a couple weeks, to have those witnesses brought into the courtroom. However, I do not see any of the reasons shown as a justification for a continuance of the hearing today and tomorrow. We're going to proceed to examine the witnesses.

A motion for a continuance must be accompanied by an affidavit in compliance with 22 O.S.1981, § 584 and 12 O.S.1981, § 668. *West v. State*, 798 P.2d 1083, 1086 (Okl.Cr.1990). The decision to grant a continuance of a preliminary hearing is within the sound discretion of the examining magistrate. *Harper v. District Court of Oklahoma County*, 484 P.2d 891, 897 (Okl.Cr.1971). See also *Fisher v. State*, 668 P.2d 1152, 1155 (Okl.Cr.1983). A preliminary hearing is conducted for the benefit of the accused. *Beaird v. Ramey*, 456 P.2d 587, 589

(Okl.Cr.1969). It is to serve as a means of discovery for the defendant ***600** and not as a substitute for trial. *Hampton v. State*, 501 P.2d 523, 527 (Okl.Cr.1972).

Here, Appellant neither set forth his request for a continuance in writing nor supported it with an affidavit. This omission in itself is fatal. *West*, 798 P.2d at 1086. Further, he has offered no evidence of prejudice resulting from the denial of the continuance. He has produced neither additional witnesses nor newly discovered evidence. In light of the magistrate's grant of additional time, if necessary, and in consideration that the preparation necessary for preliminary hearing is not as great as that required for trial, we find no abuse of discretion in the denial of the continuance.

Combined with his request for a continuance of the preliminary hearing, Appellant also requested a hearing on the revocation of the grant of immunity. The magistrate overruled the motion, finding that the preliminary hearing could continue even with that issue unresolved. In his second assignment of error on appeal, Appellant alleges that the magistrate erred in failing to rule on his motion and that this failure to rule on questions of law properly before him was a failure to fulfill the duties of his office, resulting in material prejudice to Appellant.

In *Nuckols v. VanWagner*, 511 P.2d 1110, 1112 (Okl.Cr.1973), this Court held that a special judge sitting as a magistrate did not have the jurisdiction to grant immunity from prosecution in a felony case. This holding was based upon the limited jurisdiction of special judges at that time as set forth in 20 O.S.1971, § 123. The Court in *Nuckols* discussed the effect of judicial reorganization which created one district court with general jurisdiction. *Id.* As a result of that reorganization, Oklahoma has two categories of judges of the district court: (1) judges with general jurisdiction, District Judges and Associate District Judges; and (2) judges with limited jurisdiction set forth by statute, Special Judges. Since its inception, Section 123 has been amended eleven (11) times and the jurisdictional authority of special judges expanded. See 20 O.S.1991, § 123. Specifically, Section 123, Subdivision A(6) provides that special judges shall perform the duties of magistrates in criminal cases. See 22 O.S.1981, § 258 *et seq.* This includes examining all evidence material and relevant to making the statutory determination of whether a crime has been committed, and if so, whether there is sufficient cause to believe that the defendant is the person that committed the crime. 22 O.S.1981, § 264. See also *Wyrick and Hutchinson v. District Court of Mayes County*, 839 P.2d 1376 (Okl.Cr.1992).

As addressed in the next proposition, immunity from prosecution is a complete defense to a criminal charge, and not merely a pre-trial motion. Therefore, a special judge sitting as a magistrate has the authority to rule on the question of immunity, as a complete defense to the charge, when making the determination required by 22 O.S.1981, § 264, whether "there is sufficient cause to believe the defendant guilty thereof". To the extent that *Nuckols* is inconsistent with this opinion, it is hereby overruled. In the present case, the ruling of the special judge to proceed to preliminary hearing without ruling on Appellant's motion did not constitute an abdication of judicial responsibilities. Any error in holding a separate hearing on the motion was harmless at best as the statute merely empowers the special judge to hear such matters as a part of the jurisdiction of the office; it does not require that such matters be heard at once. Therefore, we find that Appellant was not prejudiced by the court's ruling and this assignment of error is denied.

In his third assignment of error Appellant contends that 1) the grant of limited immunity was improperly revoked by a unilateral decision of the District Attorney; and 2) the order of the District Court denying the limited immunity was erroneous as it failed to apply the correct evidentiary standard to determine whether or not the agreement had been breached by the Appellant.

Appellant correctly notes that our state statutes and case law provide little guidance regarding the procedural manner in ***601** which a grant of immunity, once made, is revoked. In addition, the perceived procedure for the grant of immunity is generally based on cases decided prior to court reorganization which were determined based on the limited jurisdiction of inferior courts. Most of the jurisdictional issues, as regards the ability of different types of judges to grant immunity, have been resolved through the establishment of a single district court with general jurisdiction and judicial officers empowered with general jurisdiction authority.

The Texas Court of Criminal Appeals has also been required to address this type of issue. As is the case in Oklahoma, the statutes in Texas are void of an enacted procedure for either the grant or revocation of immunity. In *Zani v. State*, 701 S.W.2d 249 (Tex.Cr.App.1985), the Texas Court of Criminal Appeals addressed the revocation of a grant of immunity. That court noted "[s]ince immunity agreements seek not only to avoid convictions but to avoid prosecutions as well, it is necessary to challenge indictments in such a way as to avoid the trial itself." *Id.* at 253. Therefore, a motion to dismiss the information due to a grant of immunity is an appropriate

means of challenging a prosecution prior to trial.

In the present case, Appellant properly challenged the prosecution. However, contrary to his initial argument, the record shows that the grant of immunity was revoked by the District Court which granted it. Although it is preferable to hold the hearing on the District Attorney's motion to revoke the agreement prior to the preliminary hearing, the hearing was held prior to trial and we find no fundamental error.

The court in *Zani* further addressed the determination of the level of proof which must be met in dealing with the enforcement of immunity agreements and upon whom the burden of meeting that level of proof must be placed, stating:

> The initial burden is on the defendant to show the existence of an agreement by a preponderance of the evidence. (cite omitted) In this respect it differs from ordinary defenses where the defendant is only required to raise his defense by producing some evidence. However, once the initial burden is met and the existence of an immunity agreement is shown by a preponderance of the evidence, we hold that, procedurally, immunity should be treated just like a defense under the Code. Thus, the burden then shifts to the State to show beyond a reasonable doubt why the agreement is invalid or why prosecution should be allowed despite the agreement. 701 S.W.2d at 254.

While we find the court's reasoning and disposition of the issue illuminating, we hereby adopt the following, more detailed, procedures for use in this State:

> 1. When a judge of the district court is requested by the State to grant conditional immunity to an individual, the State shall present to the judge a written agreement setting forth the conditions upon which the grant of immunity will be based.
>
> 2. The judge shall conduct a hearing, with a certified court reporter present and preserving a record of the proceedings; wherein the judge reviews the agreement and conditions for the requested grant of conditional immunity and inquires of the State and the person for whom immunity is requested as to their understanding of the terms of the agreement. If the judge determines the evidence and law supports the acceptance of the agreement, the judge may approve the request and grant the conditional immunity.
>
> 3. The judge shall reduce the grant of conditional immunity to a written order, which may be filed under seal upon the order of the court, and file it in the case.
>
> 4. Upon the acceptance and granting of the conditional grant of immunity, the agreement is in effect, subject only to an application to revoke the agreement being filed by the State. Subsequent to the grant of immunity, the ability of the State to proceed with prosecution on the charges to which immunity is granted is stayed.
>
> ***602** 5. If the State seeks to vacate the conditional grant of immunity, an application to revoke shall be filed setting forth sufficient facts to give notice to the court and the person receiving the conditional immunity as to the conditions of the agreement which have not been met or breached.
>
> 6. Upon receipt of the application to revoke, the court shall set a date for hearing on the application and order notice of the hearing be served upon the State and the person receiving the conditional immunity.
>
> 7. At the hearing, the agreement approved by the court, together with the record of the hearing granting immunity, is deemed admitted by the parties and the State has the burden of proving by clear and convincing evidence why the agreement should be invalidated and prosecution should be allowed. The person receiving the conditional grant of immunity shall be afforded the opportunity to present evidence in contravention of the State's application to revoke.
>
> 8. At the conclusion of the hearing, the court shall enter an order setting forth findings of fact and conclusions of law as to whether the State has met its burden of proof and whether the agreement is vacated or remains in force. If the agreement is vacated, the State may commence criminal prosecution. If the court finds the State has not met its burden of proof, the agreement remains in full force and effect.

In the present case, the existence of the agreement was not an issue as both parties admitted that the agreement not to prosecute existed. The State was then required to prove that the agreement was unenforceable and should be vacated.

As the grant of immunity was based upon Appellant's successful completion of four (4) conditions, the failure to comply with any one of the conditions was sufficient to warrant revocation of the grant of immunity. The State presented the testimony of Robert Hanks, a certified polygraph examiner, who stated that he had given approximately eighteen hundred (1800) polygraph

examinations and in his opinion, the results of Appellant's polygraph showed that Appellant did not truthfully answer the questions posed to him. On cross-examination, the specific questions and answers comprising the polygraph examination were reviewed. Based upon our review of the record, we find that the court properly found that Appellant had not truthfully answered the questions posed to him at the polygraph examination, and that he had therefore breached the agreement under which he was granted limited immunity.

In his final assignment of error, Appellant contends that it was improper to base the grant of immunity upon a condition, namely the successful taking of a polygraph examination, which has been found inherently unreliable and not admissible evidence at trial. Appellant is correct in stating that the results of polygraph examinations are not admissible at trial as the results have been found to be potentially unreliable. *Weatherly v. State*, 733 P.2d 1331 (Okl.Cr.1987); *Young v. State*, 670 P.2d 591 (Okl.Cr.1983) citing to *Leeks v. State*, 95 Okl.Cr. 326, 245 P.2d 764 (1952). However, the State did not seek to have the results of the polygraph admitted at trial. Appellant was required to undergo such an examination merely for purposes of discovery and investigation. The value and usefulness of the polygraph examination as an instrument of investigation, albeit excluding the test results from admission at trial, has been recognized by this Court. *Leeks* 245 P.2d at 771; *Henderson v. State*, 94 Okl.Cr. 45, 230 P.2d 495, 504 (1951). We do not find it improper for the grant of limited immunity to have been based in part on the successful taking of a polygraph examination.

Further, the Appellant cannot now be heard to complain that the grant of immunity was improperly based upon a condition to which he agreed. It is well established that a party may not complain of error which he himself invited or waived. *Staggs v. State*, 719 P.2d 1297, 1299 (Okl.Cr.1986); ***603** *Maynard v. State*, 625 P.2d 111, 113 (Okl.Cr.1981). Accordingly, this assignment of error is denied.

Accordingly, for the foregoing reasons, the judgment and sentence of the trial court is AFFIRMED.

LANE, P.J., and BRETT, PARKS and JOHNSON, JJ., concur.

All Citations

841 P.2d 597, 1992 OK CR 74

West's Florida Statutes Annotated
Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) (Refs & Annos)
Chapter 948. Probation and Community Control (Refs & Annos)

West's F.S.A. § 948.30

948.30. Additional terms and conditions of probation or community control for certain sex offenses

Effective: July 1, 2021
Currentness

Conditions imposed pursuant to this section do not require oral pronouncement at the time of sentencing and shall be considered standard conditions of probation or community control for offenders specified in this section.

(1) Effective for probationers or community controllees whose crime was committed on or after October 1, 1995, and who are placed under supervision for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, or whose crime was committed on or after July 1, 2021, and who are placed under supervision for a violation of s. 787.06(3)(b), (d), (f), or (g), the court must impose the following conditions in addition to all other standard and special conditions imposed:

(a) A mandatory curfew from 10 p.m. to 6 a.m. The court may designate another 8-hour period if the offender's employment precludes the above specified time, and the alternative is recommended by the Department of Corrections. If the court determines that imposing a curfew would endanger the victim, the court may consider alternative sanctions.

(b) If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, child care facility, park, playground, or other place where children regularly congregate, as prescribed by the court. The 1,000-foot distance shall be measured in a straight line from the offender's place of residence to the nearest boundary line of the school, child care facility, park, playground, or other place where children congregate. The distance may not be measured by a pedestrian route or automobile route. A probationer or community controllee who is subject to this paragraph may not be forced to relocate and does not violate his or her probation or community control if he or she is living in a residence that meets the requirements of this paragraph and a school, child care facility, park, playground, or other place where children regularly congregate is subsequently established within 1,000 feet of his or her residence.

(c) Active participation in and successful completion of a sex offender treatment program with qualified practitioners specifically trained to treat sex offenders, at the probationer's or community controllee's own expense. If a qualified practitioner is not available within a 50-mile radius of the probationer's or community controllee's residence, the offender shall participate in other appropriate therapy.

(d) A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the victim, a qualified practitioner in the sexual offender treatment program, and the sentencing court.

(e) If the victim was under the age of 18, a prohibition on contact with a child under the age of 18 except as provided in this paragraph. The court may approve supervised contact with a child under the age of 18 if the approval is based upon a recommendation for contact issued by a qualified practitioner who is basing the recommendation on a risk assessment. Further, the sex offender must be currently enrolled in or have successfully completed a sex offender therapy program. The court may not grant supervised contact with a child if the contact is not recommended by a qualified practitioner and may deny supervised contact with a child at any time. When considering whether to approve supervised contact with a child, the court must review and consider the following:

1. A risk assessment completed by a qualified practitioner. The qualified practitioner must prepare a written report that must include the findings of the assessment and address each of the following components:

a. The sex offender's current legal status;

b. The sex offender's history of adult charges with apparent sexual motivation;

c. The sex offender's history of adult charges without apparent sexual motivation;

d. The sex offender's history of juvenile charges, whenever available;

e. The sex offender's offender treatment history, including consultations with the sex offender's treating, or most recent treating, therapist;

f. The sex offender's current mental status;

g. The sex offender's mental health and substance abuse treatment history as provided by the Department of Corrections;

h. The sex offender's personal, social, educational, and work history;

i. The results of current psychological testing of the sex offender if determined necessary by the qualified practitioner;

j. A description of the proposed contact, including the location, frequency, duration, and supervisory arrangement;

k. The child's preference and relative comfort level with the proposed contact, when age appropriate;

l. The parent's or legal guardian's preference regarding the proposed contact; and

m. The qualified practitioner's opinion, along with the basis for that opinion, as to whether the proposed contact would likely pose significant risk of emotional or physical harm to the child.

The written report of the assessment must be given to the court;

2. A recommendation made as a part of the risk assessment report as to whether supervised contact with the child should be approved;

3. A written consent signed by the child's parent or legal guardian, if the parent or legal guardian is not the sex offender, agreeing to the sex offender having supervised contact with the child after receiving full disclosure of the

sex offender's present legal status, past criminal history, and the results of the risk assessment. The court may not approve contact with the child if the parent or legal guardian refuses to give written consent for supervised contact;

4. A safety plan prepared by the qualified practitioner, who provides treatment to the offender, in collaboration with the sex offender, the child's parent or legal guardian, if the parent or legal guardian is not the sex offender, and the child, when age appropriate, which details the acceptable conditions of contact between the sex offender and the child. The safety plan must be reviewed and approved by the court; and

5. Evidence that the child's parent or legal guardian understands the need for and agrees to the safety plan and has agreed to provide, or to designate another adult to provide, constant supervision any time the child is in contact with the offender.

The court may not appoint a person to conduct a risk assessment and may not accept a risk assessment from a person who has not demonstrated to the court that he or she has met the requirements of a qualified practitioner as defined in this section.

(f) If the victim was under age 18, a prohibition on working for pay or as a volunteer at any place where children regularly congregate, including, but not limited to, schools, child care facilities, parks, playgrounds, pet stores, libraries, zoos, theme parks, and malls.

(g) Unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program, a prohibition on viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

(h) Effective for probationers and community controllees whose crime is committed on or after July 1, 2005, a prohibition on accessing the Internet or other computer services until a qualified practitioner in the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.

(i) A requirement that the probationer or community controllee must submit a specimen of blood or other approved biological specimen to the Department of Law Enforcement to be registered with the DNA data bank.

(j) A requirement that the probationer or community controllee make restitution to the victim, as ordered by the court under s. 775.089, for all necessary medical and related professional services relating to physical, psychiatric, and psychological care.

(k) Submission to a warrantless search by the community control or probation officer of the probationer's or community controllee's person, residence, or vehicle.

(2) Effective for a probationer or community controllee whose crime was committed on or after October 1, 1997, and who is placed on community control or sex offender probation for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, or whose crime was committed on or after July 1, 2021, and who is placed on community control or sex offender probation for a violation of s. 787.06(3)(b), (d), (f), or (g), in addition to any other provision of this section, the court must impose the following conditions of probation or community control:

(a) As part of a treatment program, participation at least annually in polygraph examinations to obtain information necessary for risk management and treatment and to reduce the sex offender's denial mechanisms. A polygraph examination must be conducted by a polygrapher who is a member of a national or state polygraph association and who is certified as a postconviction sex offender polygrapher, where available, and shall be paid for by the probationer or community controllee. The results of the polygraph examination shall be provided to the probationer's or community controllee's probation officer and qualified practitioner and shall not be used as evidence in court to prove that a violation of community supervision has occurred.

(b) Maintenance of a driving log and a prohibition against driving a motor vehicle alone without the prior approval of the supervising officer.

(c) A prohibition against obtaining or using a post office box without the prior approval of the supervising officer.

(d) If there was sexual contact, a submission to, at the probationer's or community controllee's expense, an HIV test with the results to be released to the victim or the victim's parent or guardian.

(e) Electronic monitoring when deemed necessary by the community control or probation officer and his or her supervisor, and ordered by the court at the recommendation of the Department of Corrections.

(3) Effective for a probationer or community controllee whose crime was committed on or after September 1, 2005, and who:

(a) Is placed on probation or community control for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older;

(b) Is designated a sexual predator pursuant to s. 775.21; or

(c) Has previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older,

the court must order, in addition to any other provision of this section, mandatory electronic monitoring as a condition of the probation or community control supervision.

(4) In addition to all other conditions imposed, for a probationer or community controllee who is subject to supervision for a crime that was committed on or after May 26, 2010, and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s. 943.0435(1)(h)1.a.(I), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense; if the offender has not received a pardon for any felony or similar law of another jurisdiction necessary for the operation of this subsection, if a conviction of a felony or similar law of another jurisdiction necessary for the operation of this subsection has not been set aside in any postconviction proceeding, or if the offender has not been removed from the requirement to register as a sexual offender or sexual predator pursuant to s. 943.04354, the court must impose the following conditions:

(a) A prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional locations to protect a victim. The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school.

(b) A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume

to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

(5) Effective for a probationer or community controllee whose crime was committed on or after October 1, 2014, and who is placed on probation or community control for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, in addition to all other conditions imposed, the court must impose a condition prohibiting the probationer or community controllee from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program. Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

Credits

Laws 1995, c. 95-283, § 59; Laws 1996, c. 96-409, § 6; Laws 1997, c. 97-308, § 3; Laws 1998, c. 98-81, § 81; Laws 1999, c. 99-201, § 13; Laws 2000, c. 2000-246, § 3; Laws 2003, c. 2003-18, § 1; Laws 2003, c. 2003-63, § 1. Renumbered from 948.03(5) and amended by Laws 2004, c. 2004-373, § 18, eff. July 1, 2004. Amended by Laws 2005, c. 2005-2, § 151, eff. July 5, 2005; Laws 2005, c. 2005-28, § 20, eff. Sept. 1, 2005; Laws 2005, c. 2005-67, § 4, eff. Jan. 1, 2006; Laws 2008, c. 2008-172, § 31, eff. Oct. 1, 2008; Laws 2010, c. 2010-92, § 12, eff. May 26, 2010; Laws 2014, c. 2014-4, § 15, eff. Oct. 1, 2014; Laws 2016, c. 2016-24, § 60, eff. Oct. 1, 2016; Laws 2016, c. 2016-104, § 13, eff. Oct. 1, 2016; Laws 2021, c. 2021-189, § 4, eff. July 1, 2021.

Notes of Decisions (51)

West's F. S. A. § 948.30, FL ST § 948.30
Current with laws and joint resolutions in effect from the 2021 First Regular Session and Special "A" Session of the Twenty-Seventh Legislature. Some statute sections may be more current, see credits for details.

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