Ninth Circuit Criminal Law REPORTER

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All Criminal Cases Reported through January 23, 2015

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Supreme Court Cases

Supreme Court says "accompany" in bank robbery statute refers to any movement. (174) Under 18 U.S.C. §2113(e), a person convicted of bank robbery is subject to an enhanced sentence if the government proves that the bank robber "force[d] any person to accompany him without the consent of such person." Defendant, fleeing from a bank robbery, forced a woman to move from one room in a house to another. In a unanimous decision by Justice Scalia, the Supreme Court held that a bank robber "forces [a] person to accompany him," for purposes of §2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance. The Court rejected defendant's argument that §2113(e) requires substantial movement. *Whitfield v. U.S.*, 541 U.S. __, 135 S.Ct. __ (Jan. 13, 2015).

Supreme Court to decide if government must prove knowledge that substance is controlled. (234) Defendant was convicted under 21 U.S.C. §841 of distributing "bath salts," a controlled substance that may produce effects similar to those produced by cocaine, methamphetamine, and methcathinone. After defendant's conviction was affirmed, the Supreme Court granted certiorari to decide whether the government must prove that the defendant knew, had a strong suspicion, or deliberately avoided knowing that the substance that he was intentionally distributing for human consumption possessed the characteristics of a controlled substance analogue. *McFadden v. U.S.*, __ U.S. __. 135 S.Ct. __ (Jan. 16, 2015) (granting certiorari).

Supreme Court requires appointment of new counsel to argue equitable tolling based on ineffective assistance. (616)(626)(936) Defendant was convicted of murder in state court. After his conviction was affirmed, a federal district court appointed counsel for defendant to file a federal habeas petition. Counsel did not meet with defendant until after the one-year statute of limitations for filing a habeas petition had run, and the petition was filed nearly four months late. The petition was dismissed as untimely. Seven years later, new counsel sought to be appointed to argue that the one-year deadline should be

equitably tolled because counsel had "abandoned" defendant. The district court denied that request, and the court of appeals affirmed. The Supreme Court summarily reversed in a per curiam opinion. The Court held that the counsel who had missed the deadline had a conflict of interest and could not be expected to argue for equitable tolling. For that reason, the Court held, the district court should have granted new counsel's request for appointment. Justice Alito, joined by Justice Thomas, dissented. *Christeson v. Roper*, 574 U.S. __, 135 S.Ct. __ (June 20, 2015).

Supreme Court says habeas petitioner need not file cross-appeal to raise claim in support of judgment. (876)(932) Defendant sought federal habeas relief on three theories of ineffective assistance of counsel at the penalty phase of his capital murder trial. The district court granted relief on two theories, but rejected the third theory. The district court granted a conditional writ of habeas corpus, requiring the state to retry the defendant or commute defendant's sentence to imprisonment. The state appealed, arguing that the district court had erred in granting relief on two ineffective assistance theories. Defendant argued that he was entitled to relief under all three theories. The court of appeals held that it lacked jurisdiction over the third theory—on which the district court had not granted relief—because defendant had not filed a notice of cross-appeal. In a 6-3 decision written by Justice Scalia, the Supreme Court held that the third theory was a defense of the judgment on alternative grounds, and thus defendant was not required to take a cross-appeal or obtain a certificate of appealability to argue it on appeal. Justice Thomas wrote a dissent, which was joined by Justices Kennedy and Alito. *Jennings v. Stephens*, 574 U.S. __, 135 S.Ct. __ (Jan. 14, 2015).

Supreme Court allows short beards in prison. (948) Rules in Arkansas prisons bar a defendant from having a beard. Arkansas justifies this ban as necessary to prevent inmates from hiding contraband. Plaintiff, a Muslim, sought to grow a one-half inch beard on the ground that his religion required it. The Supreme Court, in a unanimous decision written by Justice Alito, held that the ban on prison beards violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc, as applied to this case. Justices Ginsburg and Sotomayor wrote concurring opinions. *Holt v. Hobbs*, 574 U.S. __, 135 S.Ct. __ (Jan. 20, 2015).

Ninth Circuit Cases

Sufficient evidence showed false liens against government employees. (190)(250) Defendant, who was incarcerated in a federal prison, sought to file liens against 14 prison employees. The liens purported to require the prison employees to compensate defendant. Based on that conduct, defendant was convicted of violating 18 U.S.C. §1521, which makes it a crime to file or attempt to file a false lien or encumbrance against the real or personal property of a U.S. employee on account of the employee's official duties. Judge N.R. Smith, joined by Judges Ikuta and Murguia, held that the evidence was sufficient to show a violation of Section 1521. The court held that a false lien did not have to identify the collateral that purportedly supported the false lien; instead, a false lien violated the statute if was a document that could create an encumbrance against a federal employee. *U.S. v. Neal*, __ F.3d __ (Ninth Cir. Jan. 12, 2015) No. 12-10454.

Illegal reentry conviction not invalid because prior deportation was valid. (270) Defendant was charged with illegal reentry after deportation, in violation of 8 U.S.C. §1326. He sought dismissal of the indictment on the ground that he was improperly deported because he was not removable based on his prior convictions for

kidnapping and possession of methamphetamine. The district court denied the motion, and Judge Wallace, joined by Judges Schroeder and Owens, affirmed. The court of appeals held that kidnapping is categorically a crime of violence for which defendant was deportable and that his counsel's concession at the deportation hearing that he was deportable based on his methamphetamine conviction relieved the government of the obligation to prove that he was deportable on that basis. *U.S. v. Zamudio*, __ F.3d __ (Ninth Cir. Jan. 13, 2015) No. 13-10322.

Failure to make new arguments at immigration hearing was not ineffective assistance. (270)(624) Defendant, charged with illegal reentry after deportation in violation of 8 U.S.C. §1326, argued that his prior deportation was invalid, in part because his counsel had rendered ineffective assistance at the hearing. Judge Wallace, joined by Judges Schroeder and Owens, held that defendant's counsel had not been ineffective at the deportation hearing by failing to make arguments based on cases that had not yet been decided. The court noted that the law in effect at the time of defendant's deportation hearing gave defendant "no hope of avoiding deportation." *U.S. v. Zamudio*, __ F.3d __ (Ninth Cir. Jan. 13, 2015) No. 13-10322.

Immigration officials do not acquire knowledge of illegal reentry based on invalid document. (270)(596) Defendant, an illegal alien, reentered the U.S. by presenting an expired green card. About 12 years later, immigration officials found him in jail, and defendant was charged with being found in in the U.S. after deportation, in violation of 8 U.S.C. §1326. Judge Wallace, joined by Judges Schroeder and Owens, held that the statute of limitations had not run when defendant was charged because the statute on the offense of being found in the U.S. does not begin to run until an alien is discovered in the U.S. The court held that the government does not acquire actual or constructive knowledge of the defendant's presence in the U.S. upon being presented with an invalid travel document. *U.S. v. Zamudia*, __ F.3d __ (Ninth Cir. Jan. 13, 2015) No. 13-10322.

No error in failing to order competency hearing without evidence of incompetency. (536) After being convicted of various federal crimes, defendant argued on appeal that the district court, on its own motion, should have ordered a competency hearing. In support of that argument, defendant noted that his presentence report stated that he had attempted to commit suicide 22 years before trial, that he had requested therapy to help him deal with what he perceived as a biased criminal justice system, and that in representing himself he had filed many "nonsensical" pleadings. Judge N.R. Smith, joined by Judges Ikuta and Murguia, held that defendant had not produced sufficient evidence of incompetency to require the district court to hold a hearing without a motion from defendant. *U.S. v. Neal*, __ F.3d __ (Ninth Cir. Jan. 12, 2015) No. 12-10454.

Waiver sufficient to support self-representation. (616) Before his trial for attempting to file false liens against federal authorities, defendant sought to represent himself. The district court held a *Faretta* hearing, at which the court informed defendant of the charges against him, the allegations against him, the possible penalties and the applicable Sentencing Guidelines, and the dangers and disadvantages of self-representation. Defendant said that he understood the charges and that he disagreed with the court's view that defendant would be better off represented by counsel. At the conclusion of the hearing, the court found that defendant had knowingly and voluntarily waived his right to counsel. Judge N.R. Smith, joined by Judges Ikuta and Murguia, held that defendant validly waived his right to counsel. *U.S. v. Neal*, __ F.3d __ (Ninth Cir. Jan. 12, 2015) No. 12-10454.

Delay in allowing defendant to represent himself did not violate right of self-representation. (616) At defendant's initial appearance, defendant stated that he wished to represent himself, but he consented to having "standby counsel" appointed. The magistrate judge told defendant that his request would be taken up later and appointed an attorney to represent him. After the hearing, defendant filed 12 pro se pretrial motions, all of which were stricken by the district court because defendant had counsel. About four months after the initial hearing, a magistrate judge granted defendant's motion to represent himself, and the parties stipulated that defendant could refile all of his pretrial motions. Defendant represented himself through the balance of proceedings. Judge Hurwitz, joined by Judges Bea and Ikuta, held that the delay in allowing defendant to represent himself had not violated his right of self-representation. *U.S. v. Rice*, __ F.3d __ (Ninth Cir. Jan. 22, 2015) No. 13-10152.

Probation officer properly authenticated voice on tape recording. (698)(717) At defendant's drug-trafficking trial, his probation officer identified defendant's voice on tape recordings. On the recordings, defendant spoke primarily in Spanish; the probation officer does not speak Spanish and heard defendant speak only English. Before the probation officer authenticated the recordings, she testified that she had spoken with defendant about six to

10 times on the telephone and about 10 to 15 times in person and that defendant had a distinctive voice. Judge Tallman, joined by Judges McKeown and Owens, held that the probation officer's identification was sufficient to authenticate defendant's voice under Federal Rule of Evidence 901(a), which requires the government to make a prima facie case that the voice on the tape recording belonged to defendant. *U.S. v. Ortiz*, __ F.3d __ (Ninth Cir. Jan. 23, 2015) No. 13-30361.

Court of appeals may grant or deny second or successive petition more than 30 days after filing. (938) Under 28 U.S.C. §2244(b)(3)(D), a court of appeals must grant or deny a request to file a second or successive habeas petition or petition under 28 U.S.C. §2255 within 30 days of filing the petition. Judge Tallman, joined by Judges McKeown and Owens, held that when a habeas petition or §2255 petition presents "a complex issue," the court may exceed the 30-day limit. *Ezell v. U.S.*, __ F.3d __ (Ninth Cir. Jan. 23, 2015) No. 14-71696.

State authorities must provide pre-deprivation hearing before seizing large sum from inmate. (948) Plaintiff, a state prisoner, received a $107,000 cash settlement from a drug manufacturer based on his use of the manufacturer's products before he was incarcerated. While plaintiff was incarcerated, the state department of corrections seized almost two-thirds of the amount plaintiff had received to cover the costs of his incarceration. Judge Hawkins, joined by Judges McKeown and Tallman, held that a state must provide a pre-deprivation hearing before seizing a substantial amount of funds from an inmate's account. *Shinault v. Hawks*, __ F.3d __ (Ninth Cir. Jan. 22, 2105) No. 13-35290.

Amended Opinion

(456) *Sessom v. Grounds*, __ F.3d __ (Ninth Cir. Sept. 22, 2014), *amended without changing the summary*, __ F.3d __ (Ninth Cir. Jan. 23, 2015) No. 08-17790.

Topic Numbers

174, 190
234, 250
596
616, 624, 626, 698
717
932, 936, 938, 948

District Judges and Counsel on Appeal

Ezell v. U.S. For the petitioner: Howard Lee Phillips, Seattle; Jonathan D. Libby, Deputy Federal Public Defender, Los Angeles. For the government: Carl Andrew Calasurdo, Assistant United States Attorney, Seattle.

Shinault v. Hawks. District Judge: Anna J. Brown (D. OR). For the plaintiff: Daniel H. Bookin, Anna-Rose Mathieso, O'Melveny & Myers, San Francisco. For the State: Peenesh H. Shah, Assistant Attorney General, Salem.

U.S. v. Neal. District Judge: Lawrence J. O'Neill (E.D. CA). For the defendant: John Paul Balazs, Sacramento. For the government: Michael Gordon Tierney, Assistant United States Attorney, Fresno.

U.S. v. Ortiz. District Judge: Robert S. Lasnik (W.D. WA). For the defendant: Peter A. Camiel, Mair & Camiel, Seattle. For the government: Michael S. Morgan, Assistant United States Attorney, Seattle.

U.S. v. Rice. District Judge: James C. Mahan (D. NV). For the defendant: William H. Gamage, Gamage & Gamage, Las Vegas. For the government: Adam Flake, Assistant United States Attorney, Las Vegas.

U.S. v. Zamudio. District Judge: William H. Alsup (N.D. CA). For the defendant: Erick L. Guzman, Santa Rosa, CA. For the government: Susan B. Gray, Assistant United States Attorney, San Francisco.