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Not cert

72-439-CFP

Preliminary Memo

Nov. 17, 1972
List 1, Sheet 4

Deny
JStv

ALEXANDER V. — Cert. to CA 9 (Hufstedler, Choy, C.J., Schnacke, D.J.--Per Curiam)

UNITED STATES — Fed. Criminal — Timely

1. In a trial without the intervention of a jury, petr was convicted of 6 counts of possession of controlled drugs without a prescription in violation of 21 U.S.C. § 331(q)(3)(B). In a separate jury trial, he was also convicted of receipt and concealment of stolen goods, in violation of 18 U.S.C. § 2315, and conspiracy. He received concurrent one-year sentences on the illegal possession of drugs charges and concurrent four-year sentences on the stolen goods charges. The appeals were consolidated since the convictions arose out of interrelated transactions. The court of appeals affirmed both convictions

per curiam.

2. FACTS: Petr and another were arrested on a charge of receiving stolen teeth. Petr's car was taken into custody and a search warrant was procured. A search of the car did not reveal any gold teeth, but a paper sack containing 12 bottles was found in the back seat. A subsequent chemical analysis of the contents of the bottles disclosed that they contained 6 types of controlled drugs. At trial, no evidence was offered that petr did not have a prescription for the drugs nor was any offered to prove that he had possession of the drugs other than the fact that they were found in his car.

During the jury trial on the receiving stolen goods charges, a federal agent testified that petr's co-defendant would not talk about the reason for his arrest. Both defendants moved for a mistrial or, in the alternative, to have the testimony stricken and the jury instructed to disregard it because it called for an inference from the exercise of the fifth amendment privilege against self-incrimination. The motion was denied.

Petr was impeached when he took the stand on the basis of a manslaughter abortion conviction. He received a suspended sentence on the conviction and the statute under which he was convicted was subsequently repealed.

Finally, the jury was instructed that possession of property recently stolen, when not explained, justified an inference that the person in possession knew it to be stolen.

3. CONTENTIONS: (a) Petr first asserts that since the search warrant pursuant to which his car was searched did not particularly describe the ~~the~~ twelve bottles, their seizure was illegal and they should have been suppressed, especially

in light of the fact that they were not immediately recognizable as contraband.

He also contends that the burden of proof was improperly shifted to him to prove that he had a prescription for the drugs, and that the government failed to prove possession.

With reference to the jury trial, petr asserts that the jury instruction on the inference to be drawn from the unexplained possession of recently stolen goods was improper and could not logically show knowledge. Further, he argues that the only use which could have been made of the government agent's testimony regarding his co-defendant's refusal to talk about the charge at the time of arrest was the adverse inference from the invocation of the fifth amendment right.

Finally, petr mounts a three-fold attack on the use of his abortion conviction for impeachment purposes. First, he urges that since he received a suspended sentence, there was no judgment which could be so used. Secondly, he argues that abortion is not a crime involving moral turpitude and, therefore, it cannot be used for impeachment. Finally, he asserts the statute under which he was convicted, even though now repealed, was unconstitutional and his conviction cannot be introduced as a result.

(b) The S.G., with one exception, relies entirely on the CA opinion. He does point out, with respect to the impeachment issue, that the practice followed by the Ninth Circuit is in conformity with the Proposed Rules of Evidence for the U.S. Courts. Thus, in view of their impending adoption, there is no need to resolve any possible conflict which might exist among the circuits at this time.

4. DISCUSSION: I have doubts about the seriousness with which petr's propositions are urged since most of the argumentation consists of nothing more than bare case citation, in most instances inapposite cases, and one or two conclusory statements. The court below properly pointed out that the agents were lawfully searching petr's car when they came across the contraband which was in plain view. There was, therefore, no need to suppress the evidence. On this point, petr cited Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). That particular portion of the opinion deals in general with the plain view rules and exceptions. Petr in no way shows how his case falls within or without such rules.

On the shifting of the burden of proof, the court of appeals amply supported its conclusion that the valid physician's prescription exception was an affirmative defense. No cases are cited which conflict with this conclusion. The possession issue was resolved adversely to petr since there was only uncorroborated hearsay to the effect that someone else was in his car on the day of the arrest and it was uncontested that there was sufficient evidence to establish that the car was under petr's exclusive dominion and control.

No cases are cited which conflict with the court's determination that the inference of knowledge may be drawn from the unexplained possession of recently stolen property. On the use of the testimony by the agent to the effect that petr's codefendant refused to talk about the charge, the court of appeals pointed out that there was no overt prosecutorial misconduct as in Griffin v. California, 380 U.S. 609 (1965), since the agent's testimony was not responsive to the question. In any event, the court

held the error, if any, harmless beyond a reasonable doubt. This holding seems especially justified in this case since the challenged testimony was elicited in connection with petr's codefedant.

Finally, on the use of the abortion conviction for impeachment purposes, the court of appeals applied its own rule to hold that any felony, whether or not it involves moral turpitude, may be used to impeach. Petr cites United States v. Griffin, 387 F.2d 445 (6th Cir. 1969), as authority for the proposition that only in those cases involving moral turpitude, a conviction may be used for impeachment purposes. He makes no attempt to show that a conviction for abortion does not involve moral turpitude, nor does he cite any direct conflict. (Griffin involved the use of a conviction for forging a government check, a crime the court held did involve moral turpitude.) In light of the S.G.'s assertion that to the extent there does exist a conflict, it will be obviated by the adoption of the proposed rules of evidence, this issue does not seem to me cert. worthy.

The other two parts to the challenge of the use of the abortion conviction do not involve direct, or even indirect, conflicts with other circuits.

There is a response.

11/7/72 Strain CA op. in pet.app.