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CASE DIGEST

I. ADMIRALTY

Bailey v. Dolphin International, Inc.
697 F.2d 1268 (5th Cir. 1983)

On September 16, 1977, the Bali Dolphin, a non-self-propelled jack-up drilling rig, capsized and sank while being towed a short distance to a new drilling site in Indonesian territorial waters. Joseph Buenaflor, a citizen and permanent resident of the Philippines, who had been hired in Singapore, was on board at the time of the accident and perished when the rig sank. On September 14, 1978, a special administrator of Buenaflor's estate brought a wrongful death action in the federal district court for the Northern District of California. The action was brought under the Jones Act, 46 U.S.C. § 688, and, alternatively, under the Death on the High Seas Act, 46 U.S.C. § 761, against Dolphin, Inc., Union-Indonesia, Pertamina, the three tugboats involved in the accident, and an insurance company.

The court determined that it lacked personal jurisdiction over Dolphin, Inc., and transferred the entire case to the Southern District of Texas pursuant to 28 U.S.C. § 1406(a). The Texas court concluded that American law did not apply to the claim presented and decided that, under the doctrine of *forum non conveniens*, the claim could be adjudicated more conveniently in another forum.

The central issue presented to the Fifth Circuit Court of Appeals was; whether American law applies, and, if not, whether the district court abused its discretion in dismissing the case. The court relied on *Chiazor v. Transworld Drilling Company*, 648 F.2d 1015, which held that the domicile of the injured party, the location where the wrongful act occurred, and the place where contractual relations were entered are the crucial factors to be considered when determining which law to apply in stationary drilling vessel situations. The court found the contacts with Indonesia, Singapore, and the Philippines to be more substantial than those with the United States and, therefore, held that the district court did not abuse its discretion in conditionally dismissing the case. In addition, the court held that the district court was not required to

specify which forum appellants should file suit in. Although the court found no abuse of discretion, the case was reversed and remanded to the district court to obtain a more carefully drafted order of dismissal.

II. ALIENS

Artukovic v. Immigration and Naturalization Service

693 F.2d 894 (9th Cir. 1982)

In 1948, Andria Artukovic came to the United States and, under a false name, was issued a visitor's visa which he subsequently overstayed. The Board of Immigration Appeals ordered him deported in 1953, but this order was not executed because the government of Yugoslavia had commenced proceedings to extradite him for trial on murder charges. The U.S. denied extradition and, in 1958, granted a stay of deportation pursuant to § 253(h) of the Immigration and Nationality Act of 1952 which forbids deportation of aliens who would be subject to persecution upon return to their home country.

In 1978, the Immigration and Naturalization Act was amended to provide that any alien who had been a member of the Nazi government of Germany or who had been affiliated therewith, and who had persecuted people because of their race, religion, national origin or political opinion was deportable and was not eligible for a stay of deportation under § 253(h). As a result, the Immigration Board of Appeals, without a hearing, revoked Artukovic's stay of deportation.

Artukovic appealed directly to the United States Court of Appeals and argued that the 1978 amendment was not applicable since the deportation proceedings against him began in 1952, prior to the enactment of the amendment. The court held that Congress intended the amendment to apply retroactively and it was therefore applicable to Artukovic's case. However, the court still vacated the revocation of the stay, holding that the process requires that there be a new hearing in which the government must prove by "clear and convincing evidence" that Artukovic was a member of the described class of deportable aliens.

U.S. v. Moreno-Pulido

695 F.2d 1141 (11th Cir. 1983)

On July 8, 1981, defendant Moreno-Pulido sold a counterfeit 'green card' to a government informant. On two subsequent occasions, he had sold sheets of blank 'green card' forms to the same informant. Moreno-Pulido was later convicted on four counts; selling a counterfeit 'green card' in violation of 18 U.S.C. § 1426(b); manufacturing the card in violation of 18 U.S.C. § 1426(a); and selling the blank sheets also in violation of 18 U.S.C. § 1426(b).

The first issue which the Circuit Court of Appeals for the Ninth Circuit addressed, was whether Moreno-Pulido's contention; that uncut, blank 'green card' forms do not come within the purview of § 1426(b) (which prohibits the sale of counterfeit papers relating to the registry of aliens) was viable. Moreno-Pulido contended that the forms, for which he was convicted of duplicating and selling, were not proscribed by the statute because further steps were necessary before they could serve their ultimate purpose. The court, however, relied on the quality of the forms, rather than on their incompleteness, in holding that its duplication and sale was violative of the statute. The test which the court applied was; whether the form bore such a similarity to the genuine 'green card' as was "calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest."

The second issue facing the court was whether there was sufficient evidence to convict the defendant on the manufacturing count. The court, after viewing the entire record, concluded that there was.

III. ANTITRUST

El Cid Ltd. v. New Jersey Zinc Co.

551 F. Supp. 622 (S.D.N.Y. 1982)

El Cid Ltd. brought suit against the New Jersey Zinc Co., and others, for an alleged violation of the Sherman Antitrust Act (Act). The plaintiff claimed that the defendants had used "unfair means" to prevent them from obtaining the necessary funds from their American backers to purchase eight gold mining concessions in Bolivia. The plaintiffs alleged that a large portion of both the revenue and the gold from the mines would have entered the United States

stream of commerce if they had been allowed to purchase and mine the concessions. Moreover, they contended that they would have purchased several million dollars worth of mining equipment in the United States to mine the concession.

The District Court for the Southern District of New York granted the defendants motion for summary judgment after applying the *Alcoa*¹ rule which allows for the operation of the Sherman Act as long as the effect on United States commerce is not *de minimus*. The court found that even if the defendants had used "unfair means" to prevent the plaintiff from obtaining the necessary funds, the effect of such an activity did not have a sufficient impact on the commerce of the United States to warrant application of the Sherman Act because the plaintiff had never sold any gold in the United States, nor did it have plans to do so. Moreover, the Act was designed by Congress to protect competition, not competitors.

IV. CONSTITUTIONAL LAW

Trane Co. v. Baldrige

552 F. Supp 1378 (W.D. Wisc. 1983)

Plaintiffs, several American companies who engage in business with members of the League of Arab States, brought this action challenging the part of the Export Administration Act ("Act") which prohibits American businesses from providing information to a boycotting country about that company's past or present business relationship with a boycotted country. The plaintiffs argued that the challenged prohibitions infringed upon their first amendment right of free speech, their fifth amendment substantive and procedural due process rights, and their fundamental rights of privacy under the ninth amendment. The action arose as a result of Kuwait, a member of the League of Arab States, requesting information from the plaintiffs concerning their dealings with Israel. Israel, at that time, was being boycotted by the League. The plaintiffs' failure to furnish this information was considered to be sufficient grounds for the participating Arab states to blacklist the companies. On the other hand, furnishing the requested information would expose the plaintiffs to criminal sanctions for violating

1. *Conservative Council of Western Austreliz v. Alcoa*, 518 F. Supp. 270, 275 (W.D. Pa. 1981).

the Export Act.

The United States District Court for the Western District of Wisconsin, on a cross-motion for summary judgment, initially found that the information which was requested by Kuwait was intended to further business interests, and therefore, the Act's proscription must be measured under the first amendment standards for commercial speech. The Supreme Court developed a four part test to determine whether such speech is protected under the first amendment.

The threshold question under the test is whether the prohibited speech is lawful. If so, then the prohibition must fail unless all of the other prongs of the test are met. Those prongs include: (1) whether there is a substantial government interest, (2) whether that interest is directly advanced by the regulation, and (3) whether the regulation is narrowly drawn.

As to the threshold question, the court found that businesses giving information about their past business dealings with a boycotted country was lawful speech. The court then found that the government did indeed have a substantial interest in not allowing American business to further the Arab boycott of Israel. This interest was directly advanced by the Act, which the court found to be sufficiently narrowly drawn. Thus, the prohibition was valid.

Using a similar analysis, the court found that the plaintiffs' substantive due process rights were not violated because the governmental interests furthered by the Act were much greater than the plaintiff's interests, upon which the Act allegedly infringed. Moreover, the plaintiffs' procedural due process rights were held not to be violated because the government would not be recognizing or enforcing unlawful conduct with this regulation.

Finally, the court held that the fundamental personal rights protected by the ninth amendment (i.e., the penumbras of the specific guarantees of the Bill of Rights) does not protect the plaintiffs' desired communication.

V. EXPROPRIATION

Cruz v. Zapata Ocean Resources, Inc.
695 F.2d 428 (9th Cir. 1982)

In 1975, the Republic of Ecuador seized four American fishing vessels which were located approximately 100 miles off the Ecu-

dorian coast. Ecuador claimed a 200 mile fishing limit which the United States did not recognize. The owners and crews of the ships incurred substantial losses resulting from the seizure. Subsequently, fifteen non-resident aliens brought suit against Zapata Ocean Resources, Inc., the parent corporation which owned the vessels, to recover their losses. Zapata and the vessel owners then filed third party claims against the United States government for reimbursements based on several guarantee agreements entered into with the Secretary of State pursuant to section 3 of 22 U.S.C. § 1973 (Fisherman's Protective Act). The United States District Court for the Southern District of California granted summary judgment for the United States on the reimbursement claims.

The issue presented to the Circuit Court of Appeals for the Ninth Circuit, was; whether the Secretary of Commerce exceeded his authority in issuing regulation 50 C.F.R. § 258.8(g) which barred consideration of claims made by non-resident alien crew members pursuant to section 7 of 22 U.S.C. § 1977 (Fisherman's Protective Act) for losses resulting from the seizure of a fishing vessel by a foreign nation. The court found that the intent behind the Act was to encourage the operators of American fishing vessels to continue to fish in disputed waters. Thus, the Secretary of Commerce had exceeded his authority in issuing a regulation which was inconsistent with the act's purpose.

The court also held that, while customary international law prevents a state from presenting a claim on behalf of a national of another state, alien seamen serving on the vessels of a nation constitute an exception to this general rule.

VI. EXTRADITION

Kear v. Hilton

51 U.S.L.W. 2469 (4th Cir. 1983)

Kear, a professional bondsman, sought a writ of habeas corpus to avoid being extradited to Canada to face kidnapping charges. The charges resulted from Kear's seizure of someone who had jumped bail and escaped to Toronto, Canada and forcing him to return to Florida.

Kear contended that he could not be extradited pursuant to the United States-Canada Extradition Treaty because it only applies to crimes punishable by the laws of both countries, and because it would not be a crime under American law for a Canadian

bondsman to seize a bail jumper in this country and return him to Canada. The court conceded that it would not be a crime for an American bondsman to capture and return a bail jumper to a court within the United States, but it did not agree that there is no criminal liability for a foreign bounty hunter to cross the U.S. border to make a preemptory capture and return. The court then held that the American and Canadian kidnapping statutes were sufficiently similar to cause the treaty to operate.

Kear also contended that he did not violate Canadian law because Canada permits preemptory capture and return of bail jumpers. The court, however, held that it was not in a position to question the Canadian authorities' belief that a law had been broken, as manifested by the kidnapping charges and extradition proceedings. Moreover, Canada does not permit bonding for compensation. Thus, Kear's activities violated Canadian public policy.

Finally, the court held that Kear's contention that the bail jumper had consented to a preemptory seizure when he was admitted on bail is a defense that should have been raised during the criminal proceedings against him, not in the extradition proceedings. Thus, the court denied the writ of habeas corpus.

VII. SEARCH AND SEIZURE

United States v. Gollwitzer,
697 F.2d 1357 (7th Cir. 1983)

Two individuals who had been convicted of conspiracy to import, and of possession with intent to distribute, marijuana, moved to suppress the evidence (i.e., bales of marijuana) which had been used to convict them, on the ground that it had been obtained by an unreasonable search and seizure violative of the fourth amendment. The defendants were on board the "Lanaya", a 42-foot ship capable of ocean travel, near Port Everglades, Florida when they were spotted by customs agents. The agents noticed that the boat was riding low in the water, that all the cabin windows were curtained and that the cabin door was closed. The agents then approached and pulled alongside of the Lanaya and identified themselves. In response to questions posed by the agents, the defendants stated that they did not know who owned the boat and that the ship's papers were in the unlocked cabin. Following the dialogue, the agents boarded the Lanaya and immediately detected the odor of marijuana. One of the agents approached the cabin

door and observed numerous bales of marijuana through an uncovered portion of the window. The district court denied the defendants' motion to suppress the evidence.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that the government's interest in regulating foreign commerce and preventing drug smuggling outweighs the reasonable expectation of privacy of sailors on large ocean traveling boats which were found in an area where illicit cargo is commonly carried. The court concluded that, in determining the reasonableness of a stop and inquiry without reasonable suspicion, the degree of privacy reasonably expected varies with the type of craft involved, (i.e., there is a greater expectation of privacy on a houseboat than on a fishing boat), the particular area of the vessel involved and the location of the ship.

VIII. TAXATION

Xerox Corp. v. Harris County, Texas
103 S. Ct. 523 (1982)

Xerox corporation manufactured parts for copying machines in the United States which were shipped to Mexico City, Mexico for assembly by an affiliate there. After being assembled, the machines were sent to Houston, Texas to await shipment to Latin America. While in Houston, they were stored in a bonded warehouse which was under the control of the United States customs service.

In 1977, the City of Houston assessed an ad valorem personal property tax on the copiers. Harris County then followed suit, assessing a similar tax. Xerox contested the assessments as being an unconstitutional violation of both the Commerce and Import-Export Clauses. The trial court agreed, but, was reversed on appeal. The Texas Supreme Court then denied Xerox's application for a writ of error. The United States Supreme Court found that it had jurisdiction over the case and then declared the tax unconstitutional.

When Congress created the customs system pursuant to its powers under the Commerce Clause, it provided for government-supervised bonded warehouses in which imports might be stored and re-exported without payment of duty. Waiving these duties benefitted American industry by encouraging shippers to use American ports as transshipment centers. In the instant case, the

taxes in question were large enough to offset the benefits which would have been gained by waiving the duties. Therefore, in light of the pervasiveness of the systems of customs regulation, the Supreme Court held that state property taxes on goods stored in bonded warehouses are preempted by the Congressional regulation of customs duties.

IX. TREATIES

Powell v. United States Bureau of Prisoners
695 F.2d 868 (5th Cir. 1983)

In 1976, Thomas Powell was convicted of a drug offense by a Mexican court and was sentenced to a term of six years and three months. While serving time in a Mexican jail, he earned 366 days of work credit. In 1978, he was transferred to the United States pursuant to the United States-Mexico treaty governing the transfer of prisoners, and was allowed to complete his sentence in this country. Five months later, Powell was paroled by the United States Parole Commission. While on parole, Powell was convicted of another drug offense and was sentenced to a term of two years. As a result of this conviction, the Parole Commission revoked his parole, ordered that he fully serve his original sentence, and revoked the work credit that he had earned.

Powell filed a petition for a writ of habeas corpus, claiming that the order which provided for the forfeiture of his work credit was a violation of the U.S.-Mexico treaty governing the transfer of prisoners. The District Court granted the writ and ordered the work credit restored.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed; holding that the Treaty does not provide for the treatment of work credits and, therefore, the laws of the receiving state (the United States in this case) control. Under the laws of the United States, work credits are to be treated as "good time" which may be forfeited upon violation of any conditions of the prisoner's release.