Short Circuit 305: Rare as Hen's Teeth

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SPEAKERS

Anthony Sanders, John Wrench, Betsy Sanz

A **Anthony Sanders** 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, January 3, 2024. Happy New Year, everyone! For me, it is maybe not the happiest New Year because, as you can probably tell, as regular listeners will immediately notice, my voice is not what it always is, so I apologize for that. There will be minimal talking for me today, which I'm sure many listeners will be happy about. And instead, we will hear from our lovely guests, both of whom are colleagues of mine at the Institute for Justice. So I'd like to introduce Betsy Sanz, who's coming back on the show, and also John Wrench. Welcome back, both of you.

B **Betsy Sanz** 01:16

Thanks, Anthony. So nice to be here.

J **John Wrench** 01:18

Thanks, Anthony. It's nice to be back.

A **Anthony Sanders** 01:20

Thank you guys, and happy New Year to you. So I will not waste any more time or my voice. And we're going to start with John who has a case from the 1st Circuit. Later, we'll have Betsy with the case from the 9th Circuit. And John, I'm very impressed that he took this case, partly because it's a very interesting Fourth Amendment case. And also because the 1st Circuit insists on continuing to use Courier font. And for those of you who usually read cases, or non-lawyers, of course, will not get any of this, and that's fine. But us lawyers who are always reading cases, some people usually read it in Westlaw or Lexis, and then it doesn't matter. But if you go to the source, the court's website, the day it comes out, and you read it that way, and it's a 1st Circuit

case, you have to deal with this darn font that we have complained about too many times probably on the show. But I'm going to complain about it again. And if there are any clerks, any administrators, or even judges on the 1st Circuit, I beg you one more time, maybe consider following the lead of your colleagues in other circuits and moving to a new font. Anyway, take it away, John.

B Betsy Sanz 02:40

I will just note that Anthony promised he wouldn't be talking too much because of his sore throat, but that was an important point he needed to make.

A Anthony Sanders 02:49

It just had to be done, and now, I won't talk for the rest of the show.

J John Wrench 02:54

I mean, if we don't get through anything else in this, I think that the cry for help to get away from Courier might have been worth it. It is unpleasant to read. And actually, when I was reading through this decision, I waited for Westlaw because reading through the actual court-issued opinion is pretty tough, but even the 1st Circuit can't stop us from reading their decisions. So like Anthony said, this involves an interesting Fourth Amendment issue. And we'll get into this exception a little bit more. But as people who listen to this podcast regularly may be aware of, normally when you search something protected by the Fourth Amendment, you need to have a warrant based on probable cause. But there are a legion of exceptions to that rule, and one of them is the so-called search incident to arrest exception. So I'll talk about that a little bit more, but that's going to be the issue that's involved in this case. And so, on the evening of August 30, 2019, a Massachusetts state trooper named Conant is patrolling, and he sees a pickup truck with a Maine license plate. The truck stops in a McDonald's parking lot, so the officer observes the driver of the truck, who's named Gilbert Perez, exit the vehicle. Perez puts on a backpack, and he starts walking toward a residential area. The officer finds this suspicious. Just as a note, it's not clear from the opinion what exactly about this was suspicious. Was it parking in McDonald's? Was it having a Maine license plate? It's unclear, but for whatever reason, the officer found this suspicious. And so he alerts some nearby state troopers to be on the lookout for Perez and kind of watch to see what he's doing. And a couple of minutes later, one of those officers, Officer McIntyre, who's also patrolling nearby sees Perez exit a taxi. Perez begins to walk back towards his truck from the taxi, and his truck is still parked in the McDonald's parking lot. And Officer McIntyre stops a taxi after Perez has exited, and he looks down into where the passenger is sitting. He sees just a pile of cash sitting at the passenger's feet, so Officer McIntyre radios Conant, the officer who first observed Perez, informing him of the cash and his suspicion that Perez might have just participated in a drug transaction. So Officer Conant pulls into the McDonald's parking lot, he exits his vehicle, he yells "State police," and Perez makes a run for it. Officer Conant eventually catches him after a short foot chase, and then another, a third officer, Officer Dolan, arrives at the scene. Perez has been handcuffed while he's pinned on the ground. One of the officers removes the backpack that he's wearing and places it on the squad car. That officer then opens the backpack and begins to search it. And just as a note, because this could be relevant later, the backpack was

not within Perez's reach when the officer opened and searched it. Again, Perez is pinned on the ground, already handcuffed. When the officer searches Perez's backpack, they find fentanyl and cocaine. And he's ultimately charged with drug-related offenses. Perez moves to suppress the drugs, and he argues that the officer's search of his backpack violated the Fourth Amendment. So the issue in this case, the main issue, is under the search incident to arrest exception, where the officer is authorized to open and search Perez's backpack without first obtaining a warrant. And so under that exception, the search incident to arrest exception, the lawful arrest of an individual triggers officers' authority to conduct a warrantless search for two purposes. These are the justifications behind the search incident to arrest exception: The first justification is to protect officer safety, and the second one is to preserve evidence that an arrestee might conceal or destroy. So officer safety and preserving evidence. So an easy example of that, let's start with that, is when officers arrest someone, they immediately search their person, and they find drugs in their pocket. That's kind of a stereotypical example of the search incident to arrest exception. And in that scenario, under the Fourth Amendment, the officers would not have needed to obtain a warrant to search the arrestee and find drugs in their pocket or a gun in their waistband or something like that. The issue here is what happens when officers are not searching the arrestee's pockets or waistband, but instead, an item that they're carrying or holding, like a briefcase or a backpack. And there's three Supreme Court decisions, all from the 70s, that are going to kind of help the court answer this question. And the first one is called *United States v. Robinson*. This was decided in 1973, and that's a case where an officer finds a cigarette package while searching the arrestee's person, and the court said that the officer could open that crumpled cigarette package without a warrant because they conducted a lawful arrest and were doing a valid search incident to that arrest. The second case that's going to matter, which was also decided in 1973, is *Gustafson v. Florida*. In that case, the arrestee had a cigarette box in the front pocket of their coat, and the officer had removed that cigarette box and searched it after the arrestee was placed in the squad car. There, the Supreme Court said that is a valid search incident to arrest. And then the third case is decided a year later in 1974. That's *United States v. Edwards*. In that case, the United States Supreme Court said the officers could search an arrestee's clothing the day after the individual's arrest, so that involved a situation where Edwards was in a cell, then it wasn't until the next morning that the officers wanted to search Edwards' clothing that he had been wearing as potential evidence. So the takeaway, or at least one takeaway from those cases, is that the exception allows officers to open or search some items found on the arrestee's person, even when the arrestee is already subdued or when time has passed since the arrest. So it's interesting to keep in mind the original justifications for the exception, with that takeaway, again, it was to protect officers' safety and to preserve evidence. So the issue that this case presents is what happens when the item that officers want to search it's not their clothes, it's not in their pockets, it's not in their waistband. What if it's an item that they're carrying? But back in 1975, the 1st Circuit actually already addressed this question in a case called the *United States v. Eatherton*. And in that case, a suspected bank robber was walking down the street, and he was carrying a briefcase when he was stopped by police, who told him to drop the briefcase. Officers then frisked Eatherton, they handcuffed him, and then they searched the briefcase, which contained a loaded gun and ski masks. So in that case, the 1st Circuit held that the warrantless search of Eatherton's briefcase fell within the search incident to arrest exception based on the cases that we just discussed: *Robinson*, *Gustafson*, and *Edwards*. Back to Perez's backpack here. Everyone involved: Perez, the majority, and the dissent, because there's going to be a dissenting opinion, agree that Perez loses this case if *Eatherton* is still good law. But Perez says that *Eatherton* is no longer good law based on two more recent Supreme Court decisions. The first is *United States v. Chadwick*. That's a 1977 decision where the court held that the warrantless search of an arrestee's locked 200-pound foot locker, which they obviously weren't carrying, was unconstitutional because the locker was beyond the area

from which the arrestee might gain possession of a weapon or destructible evidence. In other words, *Chadwick* is referring back to that original justification for the exception: Is the arrestee in reach of something that could hurt the officers, or are they in reach of evidence that could be destroyed? But the 1st Circuit looks at *Chadwick*, one of these intervening decisions, and says, well, it wasn't about the search of an item that was on the arrestee's person. It wasn't being held. It was a 200-pound foot locker. And the court also notes that *Chadwick* appears to bless warrantless searches of personal property that's immediately associated with the arrestee. So the court just doesn't think that *Chadwick* called its earlier decision in *Eatherton* into question. The second more recent decision is *Arizona v. Gant*. That was in 2009, where the Supreme Court held that officers cannot just categorically search all personal property located in an arrestee's vehicle when there is neither the risk that the arrestee can access the vehicle (again, think officer safety and destruction of evidence, nor is there a likelihood of evidence relevant to the crime in the vehicle. In that case, the driver was arrested for driving with a suspended license. So there was no evidence in the vehicle that would be related to that offense. But here, the 1st Circuit does not believe that *Gant* called *Eatherton* into question because it did not address the issue of personal property that someone was carrying in their hands. The majority does acknowledge that at least two other circuits have come out the other way on this: the 10th Circuit in a 2019 decision and the 3rd Circuit in a 2010 decision. But some circuits have come out the other way: the 4th Circuit in 1997, the 7th Circuit in 1981, and the 8th Circuit in 1998. I do think that it's interesting that the decisions that are in conflict with the majority's view are all decisions from the past decade, some as recent as four years ago, five years ago. And all of the decisions that the majority is relying on that came out the other way are from 1977, '81, and '98. So the decisions that disagree with them are actually a little bit more recent. And then one final comment on the majority opinion here, because the majority looks at *Riley v. California*, it doesn't believe that it's one of the decisions that it really needs to look at, but it says that it wants to kind of discuss it because I think that there's an argument that can be made that this case does actually pose a problem for the majority's view. But it's *Riley v. California*, and in that case, the Supreme Court held that the search incident to arrest exception doesn't authorize officers to search an arrestee's cellphone without a warrant, even though the cellphone was found on the arrestee's person.

A Anthony Sanders 15:13

That's the case, right, where the chief justice just says, if you want to get in the cellphone, get a warrant; full stop?

J John Wrench 15:20

Right. *Riley* certainly stands for the idea that cellphones are different. And since *Riley*, courts have been dealing with what really is the scope of *Riley*: Does it apply to things outside of cellphones? Does it apply to things that are just information-dense? Or is it really a holding unique to cellphones? But the 1st Circuit is looking at *Riley*. And even though *Riley* says, referring back to *Chadwick* (the case with the 200-pound trunk), the court in *Riley* actually says, well, it's not clear that search incident to arrest would apply if someone was lugging the 200-pound chest behind, if they were dragging it behind them. And even though the Supreme Court in *Riley* says that, here, the 1st Circuit just doesn't think that that suggestion is relevant. And the 1st Circuit's reasoning, at least, the majority's reasoning here, is that it's just hard to see the distinction between a container that's in someone's pocket, which would be a valid search

(think of the crumpled cigarette package, or a container that's held in someone's hand. So the majority concludes that there is not clear and convincing evidence that its earlier decision in *Eatherton* is no longer good law. It says that it's bound by *Eatherton*, and it upholds the warrantless search of Perez's backpack. The majority does know that the en banc process "supplies the proper means for our court to reconsider *Eatherton* in light of all that has transpired in its wake." So I just also wanted to comment on the dissenting opinion because while the majority references the en banc process, the dissent does not believe that the panel needs to wait for rehearing en banc to decide that *Eatherton* was wrongly decided in light of intervening decisions. So Judge Lara Montecalvo dissents on the ground that the 1st Circuit's earlier decision in *Eatherton* is no longer law of the circuit. And it's important to kind of start from where the majority and the dissent are thinking of their obligations to circuit precedent. The dissent starts from a fundamentally different view of the panel's authority to disregard circuit precedent. Both the majority and the dissent agree that a panel can disregard circuit precedent if, and this is the standard, authority that postdates the original decision, although not directly controlling, offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind. So in other words, is there a sound reason to think that the earlier panel would have reached a different conclusion if they had the benefit of more recent decisions? And the majority says that cases triggering that standard are hen's teeth rare, while the dissent relies on the sound reason language, which provides "modest flexibility." So we're starting from very different views of how this panel is bound to circuit precedent. And the dissent has a different view of the intervening cases, particularly of the Supreme Court's decision in *Gant*. And that was the case where the court holds that officers can't search the passenger compartment of the arrestee's vehicle because there's no possibility that the arrestee could have reached into the area. And the dissent says, under *Gant*, the question is whether the arrestee had "immediate control" over the item that officers want to search without a warrant. And then the dissent goes on to discuss other circuit court decisions applying Gant's immediate control test outside of vehicles, including situations involving containers and, specifically, backpacks. So, unlike *Eatherton*, which focused on whether the briefcase was of the person, the dissent says we should be looking at whether what police want to search was in the arrestee's immediate control. And the dissent concludes, you know, Perez was secured in handcuffs and under an officer's supervision while another officer searched the backpack on a squad car, and that was a warrantless search that violated the Fourth Amendment. So there's different conclusions on whether there's a Fourth Amendment violation. And then just one final thing on the dissent because the dissent also says that there's a Fourth Amendment violation and that the exclusionary rule should apply. The point the dissent is making here is that the good faith exception, which would mean that the exclusionary rule doesn't apply, should not apply here. And so, in essence, the dissent is arguing that officers should err on the side of constitutional conduct in the face of unclear or eroded precedent. So the dissent is looking at cases like *Chadwick* and *Gant*, the more recent Supreme Court decisions, and saying officers were required to follow the logic of those cases and decline to search Perez's backpack, even though there was no case specifically overruling *Eatherton*. And the majority disagrees with this completely. These different views about the good faith exception reflect this underlying view about what we expect from police officers. The dissent's position is that even when circuit precedent would permit a particular search, officers should be aware of when that decision has become unclear or eroded. This is a bit like the dissent's view of circuit precedent, right? When there's a sound reason to believe that circuit precedent has been undermined, courts and law enforcement should be extremely skeptical of relying on that precedent. And I think that highlights two very different views of law enforcement's obligations. One is that law enforcement should, or at least can, exploit gray areas or loopholes until formally told by a court that its behavior is unconstitutional. And the other view is that law enforcement should avoid even potential constitutional violations as a

way to respect people's rights. Ultimately, I think the dissent has the better argument here on both the Fourth Amendment violation and the application of the good faith exception. I am curious to see whether there will be a petition for rehearing en banc. There's, as I mentioned before, a circuit split on this issue. So it seems like a good situation for there to be a rehearing en banc, but we'll see what happens.

B **Betsy Sanz** 22:31

John, I noticed that the majority and the dissent were pretty respectful and careful toward each other's opinions. I think there's a lot of good faith kind of struggling with where to go from here. The majority seemed to be just very, very careful about doing something different than what it had done before and expressed concern that they were just one panel in the 1st Circuit. And because, you know, it wasn't very, very clear that this form of personal objects on the person, containers on the person, hadn't been explicitly overruled, they really called for an en banc review of this, wouldn't you say, at the end of their opinion? And perhaps that will happen.

J **John Wrench** 23:15

Yeah, and I do think the end of the majority's opinion is essentially something like, look, we clearly disagree about whether this earlier panel decision is clearly overruled, *Eatherton*, and that's going to be up to the entire 1st Circuit to decide that. It is a more cautious approach to deciding this issue. *Eatherton* is clearly on point. And I think that you see this tension pretty often, especially in areas where you're having a lot of developing law, and you can see this even after *Riley*, this question of, okay, this search incident to arrest exception doesn't apply to cellphones. What else doesn't it apply to and having to reason from that decision. And you'll see some courts take a more conservative view that they're going to hold that decision, essentially, to its facts. And I think that you'll have other courts who are taking something closer to the dissent's approach here, which is, if you look at the logic of those opinions, if you look at the rationale, there's no way to square these earlier decisions with the intervening one.

B **Betsy Sanz** 24:34

I was gonna say, say it goes up to the Supreme Court, this exact case. Given *Chadwick*, *Gant*, and *Riley*, do you think that, you know, the Supreme Court is moving toward more of an immediate control analysis? Are you hopeful that way?

J **John Wrench** 24:52

I do think that *Chadwick* and *Gant* and *Riley* and honestly, many of the other ... I would say, last 10 years or so of Fourth Amendment decisions are going back to two things here. One is I think that a lot of the decisions are going back to first principles on what exactly was the justification for this exception in the first place. And so I think that you see the Supreme Court reining in attempts to apply exceptions far beyond its original justification. So here, again, it would be officer safety and the destruction of evidence. And so, just on that ground, if you look at the justifications, I have a hard time seeing why officers could not have taken the backpack and then obtained a warrant. They would have been able to obtain a warrant pretty easily, most

likely. But it would have put a neutral and detached magistrate between law enforcement and Perez, which I think is good, and one of the goals of the of the Fourth Amendment. So on that hand, I think that the court's emphasis on the principles behind these justifications would be good. And then, in general, I think that the court has just seen repeated attempts to expand the exception. So I think that there has become an atmosphere of skepticism for this, and I do think that the court has been moving towards this view that law enforcement is going to exploit gray areas until the court kind of whacks each of them down. It is something like whack a mole, right, that the court announces a new principle, and then law enforcement finds places where that principle doesn't exactly apply. And it probably will take the Supreme Court, especially because of the circuit split.

A Anthony Sanders 26:55

I was very surprised reading this. I didn't realize there have been that few cases about search incident to arrest at the Supreme Court in these types of scenarios. It seems like there were a lot in the early days of incorporation in the late 60s and 70s, and then the court got tired of it until it came to cellphones. But we'll see if this one goes up. One thing I thought was interesting, after the last few shows that we've done, is the circuit precedent angle because, of course, this comes up all the time in the circuit courts. And we've talked about it many times on Short Circuit, but particularly the last few shows, we've been talking about the rule of regularity that circuits follow their own three judge panel precedent until they go en banc, with certain, narrow exceptions. But it's like every circuit has its own kind of approach. So we did the 5th Circuit a week or two ago, and you know, they had a couple standard exceptions, one of which is that the Supreme Court has, you know, announced a new rule. And it's obvious that it's a new rule. The 1st Circuit has this kind of hen's teeth rare second way to do it, which you just explained, John. I like that. Maybe that's the metaphor there. But it's funny that this is something that every circuit has. And so there's a circuit split on how circuits have their own precedent. But it's not a circuit split I think the Supreme Court would ever rule on because when it gets to the Supreme Court, like who cares, you know, whether the circuit didn't follow its own precedent or not. At that point, it's water under the bridge. So it's probably just never going to be addressed. And it's just always that all the circuits just kind of do their own thing and, you know, maybe learn from each other on.

J John Wrench 28:49

Yeah, I think that's right. And the 1st Circuit has the two ways to overcome prior precedent. One is this, you know, it's been specifically overruled. And the other is, I would say, an implied overruling where you look at the logic of the decisions and intervening decisions.

A Anthony Sanders 29:06

Well, but it's even like those judges would have ruled the other way if they knew about these new cases is getting kind of hokey in terms of reading minds, especially minds from the 70s.

J John Wrench 29:19

It is, and I think that another reason that you won't see a clear rule be made about this is, as you can see from the majority and the dissent here, there's a pretty broad spectrum of how this rule is articulated. You see the hen's teeth side of the spectrum, and you also see a more kind of loose interpretation of this. And I have a hard time seeing judges wanting to tie their hands one way or another on that, so I think that's another reason why we might never end up with a clear rule on it.

A Anthony Sanders 29:57

Well, a class of individuals who usually don't have their hands tied, other than judges, are members of Congress. But one particular congressman was handcuffed for some shenanigans that he was involved with, and Betsy is going to tell us whether after his hands were tied, if he should have been brought to California or not. So what's going on with former, we should emphasize former, Congressman Jeffrey Fortenberry.

B Betsy Sanz 30:31

What is going on with him, Anthony? This case is the *United States v. Fortenberry*. As you know, it comes out of the 9th Circuit, but perhaps any appeals regarding this guy should have come out of the 8th Circuit or perhaps the D.C. Circuit, as we'll see. It involved an investigation of illegal contributions by a foreign national, which the FBI was conducting back in 2016. And as we know, a federal election law prohibits foreign nationals from contributing to campaigns for federal office, state office, even local office, and that includes either directly or indirectly. So this investigation was being run by the Los Angeles field office for the FBI, and that is in the Central District of California, which we know is in the 9th Circuit. And the FBI suspected that an illegal contribution was made to Jeffrey Fortenberry, and that was at a fundraiser in Los Angeles. And they were concerned that the foreign national was funneling donor dollars through some strawman donors. So Jeffrey Fortenberry, he was a longtime member of Congress, in the House of Representatives. He represented Nebraska's 1st Congressional District, and he lives in Lincoln, Nebraska. So after that fundraiser in Los Angeles, someone called Fortenberry and told him that that foreign national was probably the source of $30,000 in campaign donations, and that person who called him happened to be a cooperating witness with the FBI. And there happened to be an FBI agent on that phone call, you know, secretly listening to what Congressman Fortenberry had to say about that. And so, after that phone call, agents traveled from Los Angeles to Lincoln, Nebraska, to have a chat with him. And at that time, Congressman Fortenberry said that he was not aware of any foreign or conduit donations. After that, he got a lawyer. And when he was in Washington, D.C., presumably for his congressional duties, he had another meeting with the FBI in Washington, D.C., with his lawyer present. And at that time, he said again that he was not aware of any foreign or conduit donations. But you'll recall that the FBI agent was listening in on that phone call. So he was indicted, but he wasn't indicted for breaking any campaign finance laws. The only thing he was indicted for was making false statements to the FBI those two times. So you'll recall that he made those false statements in Lincoln, Nebraska, and in Washington, D.C., not in Los Angeles, but he was indicted in Los Angeles. And that, you know, is the location of the the local FBI field office. So you can imagine that this case is about, you know, where to try somebody. We're into venue, we're into the Vicinage Clause of the Constitution. And that's all about where it's fair to try, in this case, a criminal. So, you know, we conceive of these rules as being procedural. As lawyers, we study them as procedural. But, you know, a lot of procedural rules are really about our concern for fairness. And for criminals, you know, we say that it's not fair for a criminal or,

you know, a defendant to be tried in some distant location where the crime never happened. Maybe some reasons for that might be that local juries, you know, just are fairer because they maybe are less strangers to the impact of the crime that was committed there, or maybe they're more familiar with the pressures that the defendant might have been facing. My civil procedure professor used to talk about being homered, so you wouldn't want to be, you know, tried somewhere that wasn't your home because it's like an away team, right, playing on the home court. So it's just a fundamental fairness issue. This is an issue that the American Founders were highly aware of, and the 9th Circuit points to this. And actually, the Supreme Court, just in a decision last term, dealt with a venue case where the issue was, you know, somebody had been tried in a venue where it ended up being like an unfair venue. And so his conviction was overturned. And he said, well, that basically means I can't be tried again. You know, it's unfair, it's almost like a Double Jeopardy Clause, which means I can't be tried again. And the Supreme Court said no, you can be retried. Just because you were tried in an unfair venue doesn't mean that you can't be retried. But in that case, they talked about, you know, the Founders' concern about fairness around location of your trial. And they described how, prior to the Revolution, the British Parliament would like circumvent local trials before colonial juries by authorizing trials in England for both British soldiers who had committed murder and also for colonists that were, you know, charged with or accused of treason. Colonists would have to go over to England to be tried. Or, you know, British soldiers could be taken away from the Colonies to be tried, and the Founders found this to be very unfair. And so we have provisions in the Constitution that provide for a fair location for your trial. And those two clauses are the Venue Clause and the Vicinage Clause. So the Venue Clause is concerned with like the specific geographic location of a particular court, so that specifically has to do with where something will be tried. And that's in Article 3 of the Constitution. And it mandates that the trial of all crimes shall be held in the state where the crimes have been committed. Then there's the Vicinage Clause, which is part of the Sixth Amendment, and it's really about juries and about your district. So the Supreme Court explained that Vicinage is really about jury composition and that they need to be sourced from the state and the district where the crime was committed. So the people who will be judging you are local to where the crime was committed, and the Sixth Amendment guarantees the right to an impartial jury of the state and district wherein the crime shall have been committed. So these clauses work together to, you know, enforce fairness as best they can for the accused, especially criminal defendants. Okay, so back to Fortenberry. So he was indicted in Los Angeles, and he moved to dismiss the case for improper venue. And that was denied. So he was saying that his false statements, if made, would have been made in Lincoln, Nebraska, and Washington D.C., not Los Angeles. But that motion was denied, and a Los Angeles jury found a Nebraskan congressman guilty.

A Anthony Sanders 37:39

Of lying in Nebraska.

B Betsy Sanz 37:41

Of lying in Nebraska. So I think it's a pretty ... I mean, if I were him, I'd be like I got homered too, right? Like who knows me in Los Angeles? It's an unfair venue for him, is what he said. So the jury found him guilty, and his sentence was two years of probation, 320 hours of community service, and a $25,000 fine. And he resigned from Congress, right? So he didn't go to jail, but he had some consequences. So the question was, was Fortenberry right that the Los

Angeles venue was just unfair and wrong? And ultimately, the 9th Circuit does say yeah, that was unfair and wrong. But how they got there is, you know, they described how we have to determine venue in these kinds of situations. And generally speaking, the Supreme Court has said that venue is proper at the locus delicti. And the locus delicti is determined from first, the nature of the crime alleged and then the location of the act or acts constituting that crime. And then, to determine the nature of the crime alleged, you have to look at the essential conduct of the elements of the offense. So for Fortenberry, he was indicted under 18 USC Section 1001 about false statements. And that provides that "whoever in any manner within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any materially false, fictitious, or fraudulent statement or representation" is guilty of this crime, guilty of a false statement. So the elements there then would be he had to make a statement that was false and material with specific intent in a matter within the agency's jurisdiction. So those are the elements, and the 9th Circuit says that to discover the nature of the offense, we have to understand what the essential conduct of the offense was. So we need to look those five elements and see which element is the essential conduct of that offense, right? Everything else is just circumstantial. And you need them, you need those elements, to convict. But it's not a factor in deciding where then you should be. So to give you an illustration, and this is a crime that the court used as an illustration, is to be able to discover what element is essential conduct for venue purposes versus circumstantial elements. They talked about money laundering, and I'll give you an example of my hometown in California. There was a restaurant there; it's a sports bar. And it was a pretty busy commercial district where it was in, and I was there almost daily, maybe multiple times a day, driving through there, and there was a sports bar that never had anybody in there.

A Anthony Sanders 40:59

I thought you meant you were in the bar multiple times daily, but okay.

B Betsy Sanz 41:03

No, just driving by. We'll leave it at that. No, I wasn't in there, and nobody else was either. That place was chronically empty, and I couldn't believe that it stayed open. And then it would like go through a rehab. And then it would be open under the same management but like a different, I don't know, theme. And they just never had any customers. And I didn't understand how they could, you know, stay in business. And it occurred to me one day that maybe there might be something else going on. So let's imagine a sports bar that, you know, the owners were actually funding their life and their operations by drug money from San Antonio, New Mexico, okay. And so they're laundering money through this sports bar with money from New Mexico, and they're in Orange, California. So the money laundering elements are an actual or attempted financial transaction involving the proceeds of specified unlawful activity with knowledge that the transaction involves the proceeds from that unlawful activity and with either intent to promote that unlawful activity, or knowledge that the transaction is designed to promote that unlawful activity. So you have a bunch of elements here, but there are only really two elements involving conduct, right? So those are one and two: an actual or attempted financial transaction involving proceeds from specific unlawful activity. But the statute about money laundering is only concerned about the money laundering. It's not concerned about the actions that might have, you know, earned that drug money. And so the element that is

relevant to venue would be just the element where the money laundering took place. So it didn't matter what happened in New Mexico. You wouldn't go try this person in New Mexico. You would try that person in Orange, California, where the money laundering was happening, right? So even though there's conduct, it's not the essential conduct for purposes of venue. So in Fortenberry's case, you have something kind of similar. So you have the essential conduct, with the court describing it as plainly being he was making a false statement. That was the essential conduct for venue purposes that we need to be focusing on. Just as a reminder, the elements for the false statement were he had to make a false statement that was false and material with specific intent in a matter within the agency's jurisdiction. So the only conduct element there is making a statement that was false. The district court in the 9th Circuit said that this materiality element is also an essential conduct element. So again, he had to make a statement that was false and material. So the district court accepted the FBI's argument that materiality necessarily depends on ... It is a conduct element because it necessarily depends on how a listener would perceive the utterance, wherever the listener might be located. So the venue could be any district in which the effects of the false statement were felt under this logic. And the government argued that there was nothing weird about prosecuting a false statement in the location of the government action, that the FBI could be feeling the effects of the materially false statement, and therefore, that translates to conduct of some sort. And you guys can imagine that what that would mean is that like wherever the FBI is, you know, hearing this false statement is an effect to the FBI and potentially influencing to the FBI. And so, wherever the FBI is, then venue is there too, right? That's the logical outcome.

A Anthony Sanders 45:01

Which could be any state. I mean, there's no limit on it.

B Betsy Sanz 45:04

Oh, it could be any state, as the court does go on to inquire about. I'll redo some of their questions. It was good. So they just said no. They just rejected that argument and said that materiality is not conduct because it doesn't require anything to actually happen. So the distinction here, and I think what this ultimately comes down to and what is now the subject of a circuit split, is conduct over effects, right? So we're concerned, and the Venue and Vicinage Clauses are concerned, with conduct and not with effects, like the kind of effects that the conduct might have. So the Supreme Court has said that ... I'm sorry, the 9th Circuit recognizes the Supreme Court really hasn't addressed the broader question of whether and when an effects-based venue might be permissible. There's a circuit split about it. So the 2nd, 4th, and 7th allow for effects-based venue decisions, and then the 10th, 11th, and now, the 9th look at conduct for venue. So I know John's case might go up, you know, and resolve a circuit split and mine too. And you'll have to have us back together. Anyway, the 9th Circuit ultimately decided that the act of uttering a false statement is the conduct that is essential to liability here, and there were no statements that were uttered in Los Angeles. They were uttered in Nebraska, they were uttered in Washington, D.C., but not Los Angeles. So going back to what you were saying, Anthony, about how it could be anywhere. You know, I'm just gonna read you the questions that the 9th Circuit posed because they're great. They said, "What if the investigation had been conducted by federal agents in Los Angeles and Oklahoma? What if the government had transferred the investigation to agents in Massachusetts? What if an investigating agent simply moved from Los Angeles to Hawaii for personal reasons, but maintained the lead role in

prosecuting the case? What if the government chose to base every single Section 1001 investigation in Washington, D.C., where federal agencies are headquartered?". And they just said that result just can't be squared with the Constitution. Venue and Vicinage Clause may not be disregarded simply because it suits the convenience of federal prosecutors. It's a good outcome. There were some other theories that the government introduced, and we can talk about those if you want. But I will say that one of them was that they said that like there are statutes that provide for venues that span different, like some offenses can span venues. Some offenses can be prosecuted in multiple venues. So for instance, the court gave an example that the Supreme Court gave long ago saying that you can shoot a gun in one jurisdiction, and it can hit somebody, the bullet can hit somebody, in another jurisdiction. Either jurisdiction will work for that. And the federal statute for murder or manslaughter explicitly provides that venue, I'll just say it says in all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted or the poison administered or other means employed which caused the death without regard to the place where the death occurs. That's an example of, you know, Congress setting venue for certain crimes. They didn't do that in the false statement statute. And they also didn't include any like effects element in that statute. So we're left with conduct according to the 9th Circuit, which is just about the making of the false statement. We're left with no direction from Congress about what their thoughts are on where it might be tried, and so in the absence of that, we're left with where the conduct took place, and that was not Los Angeles. I will point to this whole issue of Congress setting the venue within the statute. I had read something by a guy named Anthony Sanders from a couple of months, a couple of years ago talking about this question about when a lawmaking body dictates venue within like a criminal statute. And in that case, you were talking about an Illinois statute regarding cyber crime. Do you remember this? And they dictated, the Illinois legislature dictated, that venue was proper where either the offense occurred, the information used to commit the offense was illegally used, or the victim resides, which you can imagine is across the country, right? And your point there was that, you know, criminal statutes are still statutes, and they can't trump the Constitution. And I was trying to imagine, you know, like at what point it becomes so unfair, that it violates one of these constitutional provisions? And I'm not sure.

A Anthony Sanders 50:35

And I think if I remember, there, it was (we can put a link up to it) a blog post I did a couple years ago about the Illinois Constitution, which requires trial in the, I think, the county where the crime is committed, right? And the court basically said that it was just too loosey goosey how that statute was?

B Betsy Sanz 50:56

Yeah, the court was just like, it's not, you know, it's not up to us to question their choices.

A Anthony Sanders 51:03

So they were okay with what the legislature wanted, right?

B Betsy Sanz 51:09

Yes. Yeah, they affirmed it.

J John Wrench 51:11

I was kind of curious during the court's discussion of the effects element because on one hand, it seems like the court is not necessarily skeptical of effects elements, that there are certain crimes that you could constitutionally define in a way where a venue would be appropriate wherever the effects were felt. At the same time, I think that the court did mention that that's an open question that the court hasn't really dug into, is that right? Or was it only like some feature of the effects element?

B Betsy Sanz 51:49

Yeah, I think that ... There are definitely crimes that have effect or kind of like influence as an element. And the 9th Circuit here did deal with those. Some examples are like a false statement influencing Federal Insurance Institution. But it actually says anyone who knowingly makes any false statement for the purpose of influencing. And in this case, you know, the false statement at issue in Fortenberry's case had nothing like that. It basically opened up like you could be guilty of making a false statement, whether it actually influenced the FBI or not. And so because it wasn't actually something you had to show, influence wasn't something they had to show, in order to convict them, then you can't just import effects when it's not there. Some of the circuits that have dealt with this, and the government here, argued that you basically can think of it like the Hobbs Act, which, you know, if you violate the Hobbs Act, one element is you are affecting commerce. And the government was just like, well, it's not like this is weird to think about effects. I mean, look at the Hobbs Act. But the court pointed out that, well, one of the elements of the Hobbs Act violation is you actually have to affect something, and it's the same with obstruction of justice, right? And one element is to influence or obstruct or impede, somehow affect somebody's action. But that's not what you have here. So I think the 9th Circuit got it right. We'll see.

J John Wrench 53:36

Yeah, I guess I'm curious about the effects part of this because some of the practical concerns of the core highlights about allowing the alternative outcome here, like in all the ones that you listed before, many of those seem to be present in any crime that has an effects element. So it doesn't seem like the practical issues are necessarily what's driving this. I mean, it seems to me, at least, that what's driving this is something like the statute needs to have an effects element if you want to pick venue that way. But also, maybe is the offense defined in a way that a defendant would know that they could be sued in those venues? Because if they look at the statute, not that any defendant is looking at the statute and saying, oh, I wonder where my venue will be if, when I get caught eventually. But it does seem to be that that's some of the fairness. The logic that's going on here is, you know, if you looked at the statues as a defendant, like would you know that committing this offense could lead you to being brought into particular venues?

A Anthony Sanders 54:58

Or could the government orchestrate the venue, which is, of course, right. The 9th Circuit pointed out that it absolutely can here. I think this case is yet another reminder, there have been quite a few the last few years, to all Americans to never talk to the FBI. That's basically the bottom line. And the congressman was not cognizant of that. Well, Betsy, thanks so much for that explanation of the Venue and Vicinage Clause, which is one of my favorite little clauses of the Constitution. Never been incorporated against the states, by the way, in the Bill of Rights. One of the very few, but we won't go down that rabbit hole right now. And John, thank you for your story of the backpack. We'll see if that backpack goes any higher where they don't have a certain kind of font so that it won't have to deal with it anymore. I'm gonna go back to my throat lozenges and hopefully sound better next week. But in the meantime, I want all of you to get engaged.