Volume 108 - Number 237 - Page 2297 Monday, December 8, 1980

THE DAILY WASHINGTON
Law Reporter

Established 1874

U.S. Court of Appeals

CIVIL PROCEDURE

SUMMARY JUDGMENT

Appeal from grant of summary judgment remanded where moving party's inadequate Statement of Material Facts makes it impossible to determine if genuine issues of fact existed.

GARDELS v. CENTRAL INTELLIGENCE AGENCY, U.S.App.D.C. No. 80-1253, October 30, 1980. *Reversed and Remanded* per Robb, J. (Wald and Mikva, JJ. concur). *Susan W. Shaffer* with *Mark H. Lynch* for appellant. *Frank Rosenfeld, Alice Daniel, Charles F. C. Ruff* and *Leonard Schaitman* for appellee. Trial Court? June Green, J.

ROBB, J.: This is an appeal from a summary judgment for the Central Intelligence Agency (CIA) in a Freedom of Information Act (FOIA), 5 U.S.C. §552(1976), suit brought by Nathan Gardels, a student at the University of California (Los Angeles). As required by Local Rule 1-9(h) of the United States District Court for the District of Columbia, the government accompanied its motion for summary judgment with a Statement Of Material Facts As To Which There Is No Genuine Issue. However, because we believe the government's Rule 1-9(h) Statement was insufficient, we reverse the summary judgment on procedural grounds and express no opinion on the merits. A review of the procedural history demonstrates the need for full compliance with the local rule before the District Court may consider disposition of the case by summary judgment.

* * *

Local Rule 1-9(h) of the United States District Court for the District of Columbia provides in pertinent part:

> With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure there shall be served and filed . . . a statement of the material facts as to which the moving party contends there is no genuine issue, and shall include therein references to the parts of the record relied on to support such statement.

The Rule 1-9(h) Statement filed by the CIA with its motion for summary judgment reads in its entirety:

> Defendant adopts and incorporates by reference as its Statement Of Material Facts As To Which There Is No Genuine Issue the affidavits of John F. Blake and F.W.M. Janney, filed with the Court on June 7, 1978; Defendant's Answer To Plaintiff's First Set Of Interrogatories, filed on August 16, 1978; and the affidavits of Gene F. Wilson and Michel Oksenberg, filed on this date.

The courts of this circuit have held that failure to file a proper Rule 1-9(h) Statement in making or opposing a motion for summary

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D.C. Court of Appeals

STATUTES

MOPED

Mopeds are included in "motor vehicle" for purposes of unauthorized use of vehicle statute.

UNITED STATES v. STANCIL, D.C.App. No. 80-150, November 3, 1980. *Reversed and remanded* per Kelly, J. (Nebeker and Mack, JJ. concur). *Thomas C. Hill* with *Charles F. C. Ruff, John A. Terry* and *Jay B. Stephens* for appellant. *Randy I. Bellows* with *Silas J. Wasserstrom* for appellee. Trial Court—Kessler, J.

KELLY, J.: Appellee Ruben A. Stancil was charged in a four-count indictment with grand larceny (D.C. Code 1973, §22-2201), receiving stolen property (D.C. Code 1973, §22-2205), unauthorized use of a vehicle (UUV) D.C. Code 1977 Supp., §22-2204), and destruction of property (D.C. Code 1973, §22-403). The vehicle which was the subject of the unauthorized use charge was a 1979 Tomas Moped. Appellee filed a pretrial motion to dismiss the UUV count, asserting that a moped is not a "motor vehicle" as the term is defined by D.C. Code 1977 Supp., §22-2204(c). The motion was granted, and the United States appealed, presenting to us an issue of first impression. After considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a "motor vehicle" for purposes of D.C. Code 1977 Supp., §22-2204; consequently, we reverse the trial court ruling and direct reinstatement of count III of the indictment.

In 1913, Congress first enacted the UUV statute for the District of Columbia, making it a crime to operate "an automobile or motor vehicle" without the consent of the owner. 37 Stat. 656 (1913). The legislative history of the statute demonstrates that the section was added to the Code to punish "joyriding." * * * As originally enacted, the statute contained no definition for the term "motor vehicle."

Although in 1937 Congress adopted a definition of "motor vehicle" for purposes of the District of Columbia Titling and Registration Statute (D.C. Code 1973, §40-101 (a)), it was not until 1976 that the term "motor vehicle" was defined in the Criminal Code of the District of Columbia. In order to deal with a deficiency in the UUV law, Congress in that year amended the statute to facilitate proper prosecution of persons who failed to return rented motor vehicles at the end of the contract period for which they were rented. Act of Oct. 17, 1976, Pub.L. No. 94-526, 90 Stat. 2479. The singular purpose of the revision process which culminated in the 1976 amendment, was to "fill the gap in existing law in the District of Columbia . . . so as to permit more effective prosecution for unlawful use of rented vehicles." 112 Cong.Rec. 10548 (daily ed. April 12, 1976) (remarks of

(Cont'd. on p. 2301 - Moped)

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE

APPEAL

Government may not appeal denial of motion for reconsideration of order dismissing indictment based on Interstate Agreement of Detainer violations.

UNITED STATES v. JONES, D.C.App. No. 79-927, November 3, 1980. *Appeal dismissed* per Nebeker, J. (Kelly and Bowers, J. (D.C. Sup. Ct.), concur). *Christopher A. Myers* with *Charles F. C. Ruff, John A. Terry* and *James M. Hanny* for appellant. *Randy I. Bellows* with *Silas J. Wasserstrom* for appellee. Trial Court—Doyle, J.

NEBEKER, J.: The United States has filed an appeal from the trial court's refusal to reconsider its order vacating appellee's conviction and dismissing the indictment. On the merits, the government argued that the trial court erred in dismissing the indictment based on a technical, unintentional violation of the Interstate Agreement on Detainers Act (IAD), D.C. Code 1973, §23-701. We dismiss the appeal for lack of jurisdiction.

On April 4, 1977, a complaint and arrest warrant were issued in Superior Court charging appellee with rape and related offenses. The following day, the appellee was arrested in Maryland on an unrelated homicide charge. On April 26, 1977, a detainer was lodged against him with the Montgomery County Detention Center where he was being held.

On July 21, 1977, the appellee was taken into custody by the District of Columbia Police and presented in Superior Court on the following day. A grand jury indicted appellee on August 10, 1977, and he was arraigned on those charges on September 2, 1977. Sometime later, appellee was returned to Montgomery County where he was convicted of murder and sentenced to life imprisonment on December 29, 1977.

Appellee immediately began serving his sentence at the Maryland State Penitentiary until he was returned to District of Columbia custody on June 21, 1978, pursuant to a writ of *habeas corpus ad prosequendum* issued on May 24, 1978, by the District of Columbia Superior Court. Trial was set but appellee, rather inexplicably, was sent back to Maryland on August 10, 1978, before trial. A second writ of *habeas corpus ad prosequen-*

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MOPED

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Rep. Diggs).

Appellee urges this court to hold that while voting to expand the coverage of the UUV statute to facilitate prosecution for failure to return rental vehicles, Congress at the same time intended to narrow the definition of "motor vehicles" to which the Act applies. Nothing in the legislative history of Pub.L. No. 94-526, however, persuades us that Congress had that intention.

* * * Our decision is in accordance with the fundamental canon of statutory construction that unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 100 S.Ct. 311(1979).

The trial court's ruling is based on the premise that a moped, or motorbike, is of such a unique and distinct character when compared with other vehicles commonly known as motorcycles that, for purposes of the UUV statute, it cannot be presumed Congress intended that mopeds be included within the term "motorcycle." Our examination of the characteristics of mopeds, and the nature of their use, convinces us that, within the context of a statute punishing those who make unauthorized use of the vehicle, as opposed to a statutory scheme concerning titling and registration, there is not sufficient difference between a moped and other vehicles known as motorcycles, to warrant disparate treatment for offenders, and diminished legal protection for the legitimate owners of the vehicles.

The primary feature which distinguishes a moped from other two-wheeled, motor-driven vehicles is that the moped is equipped with operable pedals, and can therefore be propelled forward without the use of its motor. Nonetheless, "a moped, because of its weight (60-120 lbs.), [will] be used primarily as a motor vehicle and not as a bicycle." *Transportation and Environmental Affairs Committee Report No. One on Bill No.* 1-255 (Council of the District of Columbia) (July 23, 1976) at 27. Mopeds are generally smaller and of lighter construction than most other motorcycles not equipped with pedals, mopeds do not ordinarily travel at speeds over 40 miles per hour, and mopeds have a lower rate of fuel consumption than other motorcycles. We conclude these special characteristics of the moped demonstrate that it is merely a subspecies of that category of motor vehicles generally known as motorcycles.

Courts in both New York and California have reached the same conclusion when faced with this issue in slightly different contexts. * * *

* * * In Justice Holmes' words, "in everyday speech 'vehicle' calls up the picture of a thing moving on land . . . the phrase under discussion calls up the proper picture." *McBoyle v. United States*, [283 U.S. 25 (1931)] at 26. As used in "everyday speech," the word motorcycle "calls up a popular picture" which encompasses the moped which appellee was charged with unlawfully appropriating. When the legislature determines that a distinction is to be made among classes of motorcycles, as has been done for purposes of traffic and safety regulations, titling and registration, the legislature will espressly make such a distinction.

Accordingly, we reverse the ruling on appeal and remand with directions to reinstate count III of the indictment.

So ordered.

JUDGMENT

(Cont'd. from p. 2297)

judgment may be fatal to the delinquent party's position. *Thompson v. Evening Star Newspaper Co.*, 129 U.S.App.D.C. 299, 301-02, 394 F.2d 774, 776-77, *cert. denied*, 393 U.S. 884 (1968); *Peroff v. Manuel*, 421 F.Supp. 570, 576 n.15 (D.D.C. 1976); *see Johnson v. American General Insurance Co.*, 296 F.Supp. 802, 804 n.4 (D.D.C. 1969). Requiring strict compliance with the local rule is justified both by the nature of summary judgment and by the rule's purposes. The moving party's statement specifies the material facts and directs the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his statement. The opponent then has the opportunity to respond by filing a counter-statement and affidavits showing genuine factual issues. The procedure contemplated by this rule thus isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record. These purposes clearly are not served when one party, particularly the moving party, fails in his statement to specify the material facts upon which he relies and merely incorporates entire affidavits and other materials without reference to the particular facts recited therein which support his view that no genuine issues of material fact exist. Such a defect is exemplified by the CIA's amorphous statement in this case. *See Thompson v. Evening Star Newspaper Co., supra*, 129 U.S.App. D.C. at 302 n.9, 394 F.2d at 777 n.9.

The District Court, in its discretion, may consider a motion for summary judgment even in the absence of a proper Rule 1-9(h) Statement. *Johnson v. American General Insurance Co., supra*, 296 F.Supp. at 805 n.4. However we believe it was inappropriate to do so in this case. When the CIA filed its motion for summary judgment and Rule 1-9(h) Statement, Gardels had not yet propounded his second set of interrogatories or deposed Blake, Oksenberg, or Wortman. Therefore the facts disclosed by the plaintiff's discovery were not addressed in the Rule 1-9(h) Statement. By the time the District Court granted summary judgment, however, the CIA's answers to the second set of interrogatories and the deposition transcripts had been filed with the court. The CIA did not amend its Rule 1-9(h) Statement and apparently relied primarily on the Blake and Oksenberg affidavits throughout the litigation in the trial court *Gardels v. CIA*, 484 F.Supp. at 370 [(1980)]. In the brief filed with this court, however, the CIA relies heavily on Blake's deposition testimony to sustain the summary judgment. This testimony explained and emphasized the usefulness of the information sought by Gardels to hostile foreign intelligence services. In contrast the Blake affidavit, cited in the Rule 1-9(h) statement, focused solely on the likely *domestic* consequences of confirming or denying the existence of the requested documents, that is, the likelihood of successful campus campaigns to identify and expose CIA sources affiliated with the University.

In *Founding Church of Scientology v. National Security Agency*, 197 U.S.App.D.C. 305, 610 F.2d 824 (1979), we disapproved the NSA's attempt to remedy deficiencies in its

public affidavit during the course of an appeal in this court. *Id.* at 313, 610 F.2d at 832. While we express no opinion on the adequacy of the CIA's affidavits in the present case, we do note the similarity between the litigation strategies of the two agencies, and we adhere to the position expressed in the *Founding Church* case that the District Court is the only appropriate forum for *de novo* consideration of the factual basis for claims of exemption under the FOIA. Because the CIA's affidavits dealt only with the "campus campaign" theory and because these affidavits were incorporated in their entirety as the Agency's Rule 1-9(h) Statement, the plaintiff's efforts to oppose the summary judgment were concentrated on raising a factual issue as to the likelihood of successful campus campaigns, and he was denied an opportunity fairly to contest the "foreign intelligence service" theory. That theory, therefore, was not subjected to the close, adversarial scrutiny that is the goal of Local Rule 1-9(h).

The CIA's inadequate Rule 1-9(h) Statement makes it impossible for us to determine whether genuine issues of material fact existed when summary judgment was granted. Moreover, we cannot determine whether and to what extent the District Court considered the deposition testimony and the foreign intelligence services theory contained therein when it awarded summary judgment to the CIA. Accordingly we find that the plaintiff was handicapped in his effort to oppose the summary judgment by the CIA's failure to file a proper Rule 1-9(h) Statement.

CONCLUSION

For the foregoing reasons we remand the case to the District Court so that the CIA may file a proper Rule 1-9(h) Statement and include therein a specific and detailed recitation of material facts relating to the foreign intelligence services theory, if it intends to rely on that theory, in whole or in part. Plaintiff will then be provided the opportunity of contesting the CIA's new Rule 1-9(h) Statement. Our remand is not to be taken as any indication of our views on the merits. Mr. Gardels' FOIA request raises issues that should not be considered by an appellate court without the benefit of the District Court's judgment, rendered after the parties have had an opportunity to develop the fullest possible factual background for the CIA's claims of exemption under the FOIA. *See Stearns v. Veterans of Foreign Wars*, 163 U.S.App.D.C. 120, 123, 500 F.2d 788, 791 (1974).

The case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

APPEAL

(Cont'd. from p. 2297)

dum was issued and appellee was once again brought to the District of Columbia.

The trial was set for January 1979. In the interim, appellee filed a motion to dismiss the indictment based on a violation of Articles III(d) and IV(e) of the IAD, on November 9, 1978. The motion was dismissed without prejudice on January 16, 1979. On January 22, 1979, the jury returned a verdict of guilty on charges of rape, sodomy, and robbery. On March 5, 1979, appellee renewed his motion for dismissal of the indictment based on the IAD violations, a hearing was held, and the motion was granted on March 27, 1979, supplemented by written opinion issued on April 4, 1979.

On August 7, 1979, the government filed a motion for reconsideration of the dismissal based on an intervening decision by another Superior Court judge in a similar case which was inapposite to the trial judge's decision in this case. The motion was denied and on August 10, 1979, the government filed a notice of appeal of the trial judge's denial of reconsideration.

At oral argument, counsel were invited to address the question whether D.C. Code 1973, §23-104(c) limits the government's right to appeal in this case, in light of the decision in *United States v. Greely*, 134 U.S.App.D.C. 196, 413 F.2d 1103 (1969). In that case, the court held that existing provisions of the Omnibus Crime Control Act did not authorize a government appeal from the refusal of the trial court to reopen a suppression hearing because such an appeal was not sanctioned by the language of the statute. Title 18 U.S.C. §3731 (Supp. IV 1965-1968), the statute involved in that case, provided in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> * * * *
>
> From an order, granting a motion for return of seized property or a motion to *suppress evidence*, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant. [Emphasis added.]

Section 23-104(c), a part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L.No. 91-358, 84 Stat. 473, was enacted to ensure the government's right to appeal from an order dismissing an indictment or information. That section provides:

> The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.

The government argues that D.C. Code 1973, §23-104(c), permitting appeal from dismissal of an indictment, ought to be applied expansively in this case because Congress overruled *Greely* by statute, Pub.L.No. 91-644, Title III §14(a), 84 Stat. 1890 (effective Jan. 3, 1971), as too narrow a construction of the government's right to appeal suppression orders. *See* S.REP. NO. 91-1296, 91st Cong., 2d Sess. 2 (1970). Since the same Congress, argues the government, also cited *Greely* when similarly amending D.C. Code 1967, §23-105(b) (Supp. II 1979) [now §23-104(a)(1)], the provision contained in §23-104(c) for appeal of indictment dismissals should also be interpreted expansively to allow this appeal. *See* H.R.REP.NO. 907, 91st Cong., 2d Sess. 111 (1970).

Judicial expansion of this statute to permit appeal from a motion to reconsider an order dismissing an indictment is not tenable. The United States cannot appeal in a criminal case without express congressional authorization. *United States v. Martin Linen Supply Company*, 430 U.S. 564, 568 (1977). The trial court's refusal to reconsider its initial order was not an order within the meaning of the statute. The language of the statute must be literally construed; it does not encompass other orders which may have the practical effect of achieving a similar or identical result. *See United States v. Alberti*, 568 F.2d 617, 621 (2d Cir. 1977); *United States v. Taylor*, 544 F.2d 347 (8th Cir. 1976). The judge's action from which the government appeals is not an order "dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant." D.C. Code 1973, §23-104(c). The dismissal order which was appealable under the statute was issued on March 27, 1979, and the government failed to note its appeal within the required ten days, irrevocably terminating the proceeding. D.C.App.R. 4II(b)(1) & (2).

The government's argument that §23-104(c) should be liberally construed is founded primarily on an analogy between 18 U.S.C. §3731 (1976), as amended by Congress in 1971, and D.C. Code 1973, §23-104(a)(1), as amended by Congress in 1970 in place of D.C. Code 1967, §23-105(b) (Supp. II 1969). The legislative history of both amendments reveals a congressional intent that they should be read broadly and not narrowly as the court in *Greely* had interpreted the prior statutory language. S. REP. NO. 91-1296, *supra* at 37; H.R. REP. NO. 907, *supra*. These amendments and the legislative history thereof, however, apply to orders denying the use of evidence at trial. To that extent, the court's decision in *Greely* may have been statutorily overruled. But to permit that rationale to apply also to an order dismissing an indictment violates the fundamental axiom in *United States v. Martin Linen Supply Co.*, *supra*. It is true that 18 U.S.C. §3731, as amended, contains a new section stating that "the provisions of this section shall be liberally construed to effectuate its purposes." *See United States v. Robinson*, 593 F.2d 573 (4th Cir. 1979); *United States v. Calandra*, 455 F.2d 750 (6th Cir. 1972). However, there is no such provision in D.C. Code 1973, §23-104. The separate provisions of §23-104 are to be read independently.

Despite this legislative attack on *Greely* and the expansion in recent years of the government's right to appeal, the guarded notion echoed in *Greely* that appeals are unusual, exceptional, and not favored has not been overruled and is still applicable in this instance. *See Will v. United States*, 389 U.S. 90 (1967); *Carroll v. United States*, 354 U.S. 394 (1957); *United States v. Shields*, D.C. App., 366 A.2d 454 (1976).

For this reason, we cannot agree that Congress intended to expand the government's right to appeal from the granting of a suppression motion to a right of the government to appeal from the dismissal of an indictment, by way of an appeal of a motion to reconsider the dismissal. Furthermore, the underlying purposes of permitting a government appeal which are discussed in *Greely* are inapplicable in this case because those principles apply to suppression evidence and not to dismissals in conformity with the legislative directive contained in the IAD.

Therefore, the trial court's refusal to reconsider its dismissal of the indictment in response to the government's motion was not an appealable order within the meaning of D.C. Code 1973, §23-104(c). Notice of appeal was due within ten days of the trial court's order dismissing the indictment on March 27, 1979. The requirement that an appellant file timely notice of appeal is mandatory and jurisdictional. *West v. United States, D.C.* App., 346 A.2d 504, 506 (1975). The failure to file timely notice of appeal pursuant to D.C.App. R. 4II(b)(1) deprives this court of jurisdiction to hear the appeal. *Brown v. United States*, D.C.App., 379 A.2d 708 (1977).

Accordingly, the appeal is

Dismissed.