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Tenth Circuit Warns Against Ignoring Procedural Rules in Declining to Reach the Merits of a Criminal Appeal

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A recent Tenth Circuit opinion underscores the procedural requirements to preserve issues for review in both the trial court and on appeal.

“Those who disregard procedural requirements play a dangerous game and do so at their peril.” Thus said the U.S. Court of Appeals for the Tenth Circuit in *United States v. McBride*, 94 F.4th 1036 (10th Cir. 2024), where the court declined to reach the appellant’s merits arguments due to procedural errors, including invited error, failure to articulate the applicable standards of review, and failure to request plain error review for unpreserved issues. The opinion underscores the procedural requirements to preserve issues for review in both the trial court and on appeal.

Factual Background

Whitney McBride and her company, Odyssey, won a \$99 million government contract. To do so, Odyssey had to be “HUBZone-eligible,” meaning at least 35% of its employees must live in a Historically Underutilized Business Zone. Odyssey was ineligible, but McBride made it appear it was “by cooking the books and fudging the numbers,” according to the opinion.

Losing bidders protested, claiming Odyssey had common ownership with Cadence, the incumbent contractor. To fend off the protests, McBride sent the Small Business Administration a letter disclaiming any relationship between Odyssey and Patrick Hendrickson, an attorney serving as Cadence’s contract administrator. After Odyssey and McBride were indicted for conspiracy to commit wire fraud, wire fraud, and major fraud against the United States, prosecutors sought to interview Hendrickson. McBride then filed a declaration asserting that her prior letter was false because Hendrickson had been an attorney for Odyssey (such that Odyssey’s communications with him were privileged), the opinion said. The government then brought an additional charge against her for filing a false declaration in court.

The District Court Proceedings

At trial, the parties proposed joint jury instructions. The court adopted their language defining a “scheme to defraud,” which referred to elements of both Counts II and III, the opinion said. The parties couldn't agree on Count V relating to the false declaration, and the court excluded McBride's proposed language on the substantive law of attorney-client relationships. McBride and Odyssey were convicted on all counts. After the convictions, the Supreme Court decided *Ciminelli v. United States*, 598 U.S. 306, 309 (2023), holding that the “right to control” theory of fraud was an invalid basis for liability under 18 U.S.C. § 1343, because “‘potentially valuable economic information’ needed to make ‘discretionary economic decisions’ is not a traditional property interest.”

The Tenth Circuit Declines to Reach the Merits of Appellant's Arguments

McBride appealed, contending her fraud convictions on Counts I, II, and III should be vacated because under *Ciminelli*, fraud statutes protect only traditional property interests, and the jury instructions on the fraud counts were therefore improper. She also contended that the jury instruction on Count V misstated the law and that the government didn't meet its burden to prove her declaration was false. The Tenth Circuit, however, declined to address the merits of any of these arguments due to appellant's “numerous procedural stumbles.” 94 F.4th at 1040.

Invited Error and the 'Supervening Decision' Exception

The circuit court rejected McBride's assignments of instructional error on the fraud claims on two grounds. The court first agreed with the government that because McBride herself offered the instruction, she was precluded from challenging it under the invited error doctrine, according to the opinion. This doctrine “precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt,” (citation omitted). McBride conceded at oral argument that she proffered the challenged instruction. But she claimed that the instruction was now insufficient under *Ciminelli*. And in her reply, she “implied” that the court's “supervening decision doctrine” offered an exception to the invited-error rule.

The Tenth Circuit was unpersuaded. The supervening decision doctrine, the court explained, is an exception to invited error only when a party relied on settled law below, and thus, McBride had to show she relied on such law in proffering the instruction. But she did not claim to have relied on settled law or cite Tenth Circuit case law on the “right to control” theory. Nor was the court convinced the law really did change. Deprived of the exception, McBride invited the error.

The Consequences of Failing to Articulate and Apply the Standard of Review

The circuit court alternatively rejected McBride's challenges to the instruction on the fraud claims because she separately waived this issue by failing to argue for plain error review on appeal. The court began by observing that an appellant's brief must contain, “for each issue, a concise

statement of the applicable standard of review,” (quoting Fed. R. App. P. 28(a)(8)(B)). Moreover, when an appellant fails to argue for plain error review, the court will treat an unpreserved issue as “waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise” (citation omitted).

McBride didn't address plain error in her opening brief. And in her reply, she didn't substantively respond to the government's argument that she had waived the issue. She didn't articulate or attempt to apply the plain error standard. The court thus ruled that her assignment of instructional error was “effectively waived” and unreviewable.

The court also declined to reach the merits of McBride's challenges to her conviction on Count V, the false-declaration claim. One claim of error—that the jury instruction on Count V inaccurately paraphrased her declaration—met a similar fate as the instruction on the fraud claims. Because McBride didn't contend that the instruction was inaccurate in the court below, she had to request plain error review. But in her opening brief, she failed to argue for plain error or any other standard of review. She therefore waived that issue.

McBride preserved her other arguments on Count V but again omitted any discussion of the standard of review applicable to those issues. The court held that this omission was fatal, particularly where the “omission of such a basic component of an appellate brief” was “inexcusable” and “that omission is only one of among several other briefing deficiencies,” including failure to appropriately cite the record. It declined to pick out and apply the applicable standard of review on its own initiative without the benefit of adversarial briefing. It therefore affirmed the conviction on Count V.

Judge Eid Concurs

In her concurrence, Judge Allison Eid agreed that McBride had waived her appellate claims by failing to argue for plain error or any other standard of review. She parted ways with the majority because, in her view, its rulings on invited error and the supervening-decision exception were unnecessary to resolve the appeal. And though she agreed with the majority's conclusions that McBride invited the error on the fraud claims and could not rely on the supervening-decision exception, she disagreed that establishing the exception requires an appellant to have cited a specific Tenth Circuit case.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Masciocchi co-chairs the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Van Bockern helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.

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