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United States v. Lozoya: The Turbulence of Establishing Venue for In-Flight Offenses

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UNITED STATES V. LOZOYA: THE TURBULENCE OF ESTABLISHING VENUE FOR IN-FLIGHT OFFENSES

by: Daeja Pemberton[*]

Abstract

The U.S. Constitution protects one's right to a fair trial in a proper venue. Typically, venue is proper in whatever territorial jurisdiction a defendant commits an offense. But this rule is not as clear-cut when the offense takes place in a special jurisdiction, such as American airspace. A court must then determine whether the offense continued into the venue of arrival, making it proper under the Constitution. This issue was reexamined when Monique Lozoya assaulted another passenger on an airplane during a domestic flight. In United States v. Lozoya*, the Ninth Circuit Court of Appeals failed to correctly identify the assault as a "continuing offense" and in doing so risked harming the criminal procedure process for prosecutors and offenders alike.*

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I. INTRODUCTION

This Note analyzes a 2019 Ninth Circuit opinion that revisited a narrow issue of criminal procedure: whether the district of arrival is a proper venue to prosecute an offense committed on an airplane. In *United States v. Lozoya*, the court ruled that a simple assault the defendant committed on an airplane mid-flight was not a "continuing offense" as defined by 18 U.S.C. § 3237(a).[1] Because the assault was brief and did not continue into the Central District of California—where the flight landed and where the prosecution brought suit—the court held that the Central District was an improper venue.[2]

The court's decision is wrong in that it: (1) unduly required the simple assault have an interstate transportation conduct element; (2) incorrectly applied the *locus delicti* conduct element test; and (3) disregarded the public policy concerns behind finding the venue of arrival improper. This decision poses a negative outlook on the criminal procedure process in such cases, making it harder for the prosecution to prove its case and affecting a defendant's right to a fair trial. It could also have a significant effect on cases in which defendants traveling in interstate commerce, namely airplanes, commit more violent offenses.

This Note will give a background of the facts and procedural posture of *Lozoya*, a background of prior case law about continuing offenses and venue, an analysis of the court's opinion, and recommendations for how courts should deal with this issue moving forward.

II. THE CASE—*UNITED STATES V. LOZOYA*

On July 19, 2015, Monique Lozoya boarded an airplane in Minneapolis, Minnesota bound for Los Angeles, California.[3] Another passenger, Oded Wolff, sat directly behind Lozoya.[4] At some point during the flight, Wolff "repeatedly jostled" Lozoya's seat, disturbing her.[5] Wolff later went to the restroom, and upon his return, Lozoya confronted him.[6] She claimed she turned around and asked Wolff to stop hitting her seat, and Wolff reacted abrasively, shouting and putting his

[1] United States v. Lozoya, 920 F.3d 1231, 1239–40 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019); *see also* 18 U.S.C. § 3237(a).
[2] *Id.* at 1243.
[3] *Id.* at 1233.
[4] *Id.*
[5] *Id.*
[6] *Id.*

hand close to her face; the reaction scared Lozoya, so she pushed Wolff away with an open palm to his face.[7]

Wolff claimed instead that his hands remained on the seats behind and in front of him during the confrontation and that, after Lozoya yelled at him to stop hitting her seat, she hit him in the face with her hand.[8] After the lead flight attendant spoke with both parties, Wolff agreed to meet Lozoya at the airport after the plane landed, but when she did not show up, Wolff filed charges against her.[9]

The FBI charged Lozoya with simple assault under 18 U.S.C. § 113(a)(4); a magistrate judge arraigned Lozoya on April 5, 2016.[10] During the bench trial, Lozoya moved for acquittal, arguing that the Central District of California was an improper venue.[11] The judge denied the motion and held that the venue was proper, reasoning that the assault was a continuous offense because it involved interstate commerce; any offense that does so "may be prosecuted in any district from, through or into which such commerce moves."[12] The judge found Lozoya guilty.[13] Lozoya appealed to the district court, and the court denied the appeal.[14] Lozoya appealed again, this time to the Ninth Circuit court.[15]

The Ninth Circuit held that the Central District of California was an improper venue.[16] Because the assault was brief and happened in one district, the court held that paragraph one of § 3237(a) did not apply.[17] It further explained that assault merely involving interstate commerce is insufficient to be a continuing offense under paragraph two of § 3237(a); rather, transportation in interstate commerce must have been a "conduct element" of the assault.[18] Proper venue was the district in which the airplane was flying over when Lozoya assaulted the victim.[19]

In reversing Lozoya's conviction, the decision raised a few public policy concerns, including the possible increase in violent offenses on airplanes.[20] Circuit Judge John Owens highlighted some absurd results that the *Lozoya* majority opinion could bring to future similar cases.[21]

III. BACKGROUND OF PRIOR LAW

The U.S. Constitution protects a defendant's right to a fair trial at an appropriate venue.[22] Article III requires that "[t]he Trial of all Crimes … shall be held in the State where the said Crimes shall have been committed."[23] To combat issues with establishing venue for crimes involving

[7] *Id.*
[8] *Id.* at 1233–34.
[9] *Id.* at 1234.
[10] *Id.* at 1234–35.
[11] *Id.* at 1235.
[12] *Id.*
[13] *Id.* at 1236.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1243.
[17] *Id.* at 1239.
[18] *Id.* at 1239–40.
[19] *Id.* at 1241.
[20] *Id.* at 1243.
[21] *Lozoya*, 920 F.3d at 1244 (Owens, J., concurring in part and dissenting in part).
[22] United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004).
[23] U.S. CONST. art. III § 2, cl. 3.

transportation, Congress implemented 18 U.S.C. § 3237(a).[24] Paragraph one of the statute defines "continuing offenses" as crimes that are "begun in one district and completed in another, or committed in more than one district."[25] These continuing offenses can be "prosecuted in any district in which such offense was begun, continued, or completed."[26] Paragraph two expands the definition of a continuing offense: "Any offense involving the use of … transportation in interstate … commerce … is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce … moves."[27]

Several courts have interpreted § 3237(a) to include offenses happening on interstate transportation. In *United States v. Breitweiser*, a jury convicted Russell Breitweiser of abusive sexual contact with a minor and simple assault after he inappropriately touched a 14-year-old girl on a flight.[28] Breitweiser appealed the decision, arguing the Northern District of Georgia, where the flight landed, was an improper venue.[29]

The Eleventh Circuit ruled that the venue was proper.[30] Analyzing the facts under the first paragraph of § 3237(a), the court explained that it would be "difficult if not impossible" for the prosecution to pinpoint exactly what district the plane was flying over when Breitweiser committed the offense.[31] Citing its earlier 1982 opinion in *United States v. McCulley*, the court reasoned that § 3237 is a "catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue"; all the prosecution has to do to establish venue is show that the offense happened on a form of interstate commerce.[32] Because the prosecution showed that Breitweiser committed the crime on a plane that landed in the Northern District of Georgia, the court found the venue was proper.[33] Several federal circuit court opinions have used a similar interpretation of § 3237(a) to establish venue in criminal cases involving transportation.[34]

Other courts have considered mere involvement of interstate commerce insufficient to support venue. In *United States v. Morgan*, Jeffrey Morgan was convicted of receiving stolen government property.[35] Morgan's aunt, an employee at the U.S. Department of Education in Washington, D.C., orchestrated the theft and delivery of a Department computer to Morgan's mother's home in Maryland.[36] He later took the computer with him to his brother's home (also in

[24] *Breitweiser*, 357 F.3d at 1253–54.
[25] 18 U.S.C. § 3237(a).
[26] *Id.*
[27] *Id.*
[28] *Breitweiser*, 357 F.3d at 1251–52.
[29] *Id.*
[30] *Id.* at 1254.
[31] *Id.* at 1253.
[32] *Id.* at 1253–54.
[33] *Id.*
[34] *See* United States v. Lozoya, 920 F.3d 1231, 1243–45 (9th Cir.) (Owens, J., concurring in part and dissenting in part), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019); United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982); *cf.* United States v. Cope, 676 F.3d 1219, 1221–22, 1225 (10th Cir. 2012) (ruling that the venue of arrival for a plane was proper when a co-pilot operated the plane while intoxicated; the venue was proper because the offense involved transportation in interstate commerce).
[35] United States v. Morgan, 393 F.3d 192, 194 (D.C. Cir. 2004).
[36] *Id.* at 194–95.

Maryland); federal agents subsequently seized the stolen computer.[37] Morgan appealed his conviction, arguing that the District of Columbia was an improper venue.[38]

The prosecution argued that the computer traveling from Washington, D.C. to Maryland meant that the offense "involved" transportation in interstate commerce as § 3237(a) outlines; the court disagreed.[39] It reasoned that the "most natural reading" of § 3237(a) would require the use of interstate commerce to be an element in the relevant stolen-property offense; because it was not, the court held that the crime was not a continuing offense and that the D.C. venue was improper.[40]

The United States Supreme Court used the same conduct-element test as *Morgan* in a 1999 case. In *United States v. Rodriguez-Moreno*, Jacinto Rodriguez–Moreno kidnapped the middleman of a drug transaction in Texas.[41] In search of a thieving drug dealer, the defendant drove from Texas to New Jersey, New Jersey to New York, and New York to Maryland, while holding the middleman captive.[42] In Maryland, the defendant threatened the middleman at gunpoint.[43] The middleman escaped, and the prosecution later charged Rodriguez-Moreno in the District of New Jersey with: (1) kidnapping; and (2) using and carrying a firearm during and in relation to a violent crime.[44] At trial, Rodriguez-Moreno moved to dismiss for improper venue, arguing that he did not use the gun in New Jersey.[45] The court denied the motion and convicted him of the offenses.[46] He appealed, and the Third Circuit reversed the conviction.[47] The prosecution sought certiorari.[48]

The crux of the Supreme Court's opinion relied on the *locus delicti* of the offense, which determines the conduct of the crime and the location it took place.[49] The Court said that the offense had two conduct elements: (1) committing the kidnapping; and (2) using and carrying a gun while doing so.[50] In determining the location(s) the offense took place, the Court held that because Rodriguez-Moreno used the gun in relation to the kidnapping, it did not matter in which district he used it; the elements only require that he used the gun at some point during the kidnapping.[51] The Court ruled that venue was proper in any district where the defendant committed either of the two elements, making the crime a continuing offense under paragraph one of § 3237(a).[52] New Jersey was therefore a proper venue.[53]

[37] *Id.* at 195.
[38] *Id.* at 194.
[39] *Id.* at 201.
[40] *Id.* at 198, 201.
[41] United States v. Rodriguez-Moreno, 526 U.S. 275, 276–77 (1999).
[42] *Id.* at 277.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 278.
[48] *Id.*
[49] *Id.* at 279.
[50] *Id.* at 280.
[51] *Id.* at 281.
[52] *Id.*
[53] *Id.* at 282.

IV. ANALYSIS OF *LOZOYA*

A. *No Conduct Element Required*

The Ninth Circuit should have deemed Lozoya's simple assault a continuing offense under § 3237(a). The court's main argument was that because the simple assault did not have a conduct element that required transportation in interstate commerce, the offense could not be a continuing offense under the statute.[54] In coming to this conclusion, the Ninth Circuit overlooked a critical part of the *Morgan* opinion it used as support. Although it ruled that the venue was improper because transportation in interstate commerce was not an element in the relevant stolen-property offense, the *Morgan* court acknowledged that lacking this element is not dispositive when determining if § 3237(a) applies: "Even in the few cases in which courts have applied § 3237(a) ¶ 2 to offenses that do not include transportation in interstate commerce as an element, they have always required *a tight connection* between the offense and the interstate transportation."[55] The court then cited *Breitweiser* and *McCulley* as examples.[56]

Lozoya committed the assault while on an airplane, like the defendants in *Breitweiser*, *Cope*, and *McCulley*. Although transportation in interstate commerce may not be an element of simple assault, a tight connection between the offense and the interstate transportation makes it a continuing offense under paragraph two (as suggested in *Morgan*). This means that the Central District of California was a proper venue.

B. Locus Delicti

The Ninth Circuit also dismissed the notion that paragraph one of § 3237(a) applied to the simple assault but relied on the U.S. Supreme Court's decision in *Rodriguez-Moreno* to support its reasoning. A judge convicted Lozoya of violating 18 U.S.C. § 113(a)(4), which requires that the offender: (1) commit simple assault; and (2) commit the assault within a "maritime or special territorial jurisdiction" of the U.S.[57] Both of these requirements are conduct elements of the offense; a court cannot convict anyone under § 113(a)(4) without meeting both elements. In determining the *locus delicti*, the court overlooked the latter of these conduct elements. Using the same reasoning as the Supreme Court, because Lozoya assaulted the victim in a special territorial district—and continued to be in a special territorial district while on the plane—any district in which she committed the assault or in which the plane flew overhead was proper. This includes the Central District of California. If the court correctly applied the *locus delicti* conduct test, it would have found that the simple assault was a continuing offense under paragraph one, making the Central District a proper venue.

[54] United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019).

[55] United States v. Morgan, 393 F.3d 192, 200 (D.C. Cir. 2004) (emphasis added).

[56] *Id.*

[57] 18 U.S.C. § 113(a)(4).

C. *Public Policy Outweighs Absurdity*

Even if the simple assault was not a continuing offense under § 3237(a), public policy should still warrant a crime an offender commits on transportation in interstate commerce to be litigated in the venue of arrival.

Firstly, the Ninth Circuit's ruling will make it harder for the prosecution to establish venue. The opinion laid out an elaborate calculation the prosecution could use to estimate the plane's location during the assault. This calculation included using the average flight speed, the flight route, the estimated flight duration, and testimony about how long into the flight the assault happened to determine where the plane was at that time.[58] The majority acknowledged that this would be difficult, but claimed it was not "impossible."[59] A procedure for establishing venue should not necessarily have to be impossible to be unreasonable. Discovery can be costly and time consuming. The longer discovery takes, the harder it will be to gather information and contact witnesses. Putting even more of a burden on the prosecution taints the criminal procedure process and risks the prosecution losing the case from the start.

Additionally, the court's proposal for proving the exact district the offense happened in has the potential to be unfavorable for defendants in future cases. The purpose of venue provisions is to provide a defendant with a convenient forum for suit. Requiring a defendant to go to court in a jurisdiction he or she likely has no connection to is an infringement of that defendant's right to a fair trial.[60] Looking at it from either the prosecution or the defendant's side, public policy warrants criminal trials to be fair, and the *Lozoya* decision supports the opposite.

Lastly, the Ninth Circuit recognized how absurd its decision was, but it suggested Congress was responsible for remedying the absurdity.[61] Waiting on legislative action from Congress will not prevent unfairness in criminal procedure. It will also not prevent defendants from committing more violent offenses on airplanes, like sexual assault or murder,[62] and using a venue challenge to escape liability.[63] Instead of waiting for legislative action that may never come—because Congress enacted § 3237(a) to "eliminate the need to insert venue provisions in every statute where venue might be difficult to prove"[64]—the court should not have so easily dismissed persuasive case law on the matter.

V. CONCLUSION

By narrowly constraining the application of § 3237(a), the Ninth Circuit has harmed the criminal procedure process. Moving forward, courts should take extra care to identify all conduct elements of an offense when determining the *locus delicti*. And if paragraph one of § 3237(a) does not apply, they should consider whether there is a tight enough connection between the offense and transportation in interstate commerce for paragraph two to apply. Lastly, courts should seriously consider the implications of not applying § 3237(a) to cases where crimes on interstate

[58] *Lozoya*, 920 F.3d at 1242.
[59] *Id.* at 1241–42.
[60] *Id.* at 1245 (Owens, J., concurring in part and dissenting in part).
[61] *Id.* at 1242–43 (majority opinion).
[62] *Id.* at 1244 (Owens, J., concurring in part and dissenting in part).
[63] United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004) (citing United States v. McCulley, 676 F.2d 346, 350 (11th Cir. 1982)).
[64] *McCulley*, 673 F.2d at 350.

transportation is involved. This approach will not just benefit victims by making sure defendants do not have an easy way to dismiss a conviction, but it will also benefit defendants by making sure they have a convenient forum to stand trial.