Case Summaries: Fourth Circuit Court of Appeals (August 2020)

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This post summarizes criminal law and related opinions decided during August 2020 by the Fourth Circuit Court of Appeals.

Claim of malicious prosecution for offense of blocking sidewalk could proceed; grant of summary judgment reversed

Salley v. Myers, ___ F.3d ___, 2020 WL 4664808 (Aug. 10, 2020). The plaintiff, a former U.S. Marine, was standing in front of a hospital in Columbia, South Carolina, where his sister had recently been admitted. He discovered his sister had been discharged and walked towards a nearby bus stop. The bus stop was apparently a high-crime area, and officers approached the plaintiff as he neared, claiming he was blocking the sidewalk. The plaintiff initially thought the officers were kidding, but they grabbed and ultimately handcuffed him, allegedly injuring his shoulder in the process. According to the plaintiff, an officer said twice that he was "making a statement." The officer searched the plaintiff's pockets and stated that he was looking for drugs (none were found). The plaintiff then overheard officers discussing possible charges, including a potential charge for obstructing the sidewalk. The officers ultimately issued a citation for that offense. Immediately after being cited, the plaintiff filed a formal complaint with the police department and gave notice of intent to have a jury decide his case. His complaint to the police department was never investigated.

Under South Carolina law for this type of infraction offense, the officer acts as the prosecutor and has the power to dismiss, plea bargain, or proceed to trial. More than three and a half years elapsed before the matter was ready for trial, at which point the officer dismissed the case. The plaintiff concurred with this relief at the time, but also expressed a desire to see his day in court. The officer stated that he dismissed because he wanted to "cut [the plaintiff] a break," in part because of the defendant's age (the plaintiff was 62 at the time of the incident and 65 at the time of the dismissal). The plaintiff subsequently sued the officer under 42 U.S.C. § 1983 for malicious prosecution. The district court granted summary judgment to the officer, finding that the plaintiff could not demonstrate that the dismissal qualified as a termination of the proceedings in his favor. The plaintiff appealed, and a divided panel of the Fourth Circuit reversed.

The court observed that the claim of malicious prosecution is rooted in Fourth Amendment seizure principles as well as the common law. The elements of the claim are: "(1) the defendant seized the plaintiff pursuant to legal process not supported by probable cause, and (2) the criminal proceedings terminated in the plaintiff's favor." Slip op. at 8 (citation omitted). This type of South Carolina dismissal (a "nolle prosse") does not automatically qualify as a proceeding terminating in the plaintiff's favor. If the dismissal was due to some reason not relating to the innocence of the accused, such as the unavailability of a witness, it cannot support the favorable termination element. The plaintiff here sufficiently alleged circumstances surrounding the entry of the dismissal that a jury could have found were related to the plaintiff's innocence—the plaintiff immediately filed a complaint after the incident and demanded a jury trial; the prosecution lingered for more than three years; the circumstances of the arrest according to the plaintiff; and the officer's stated justifications for dropping the case all provided circumstantial evidence that the termination of the case may have been in the plaintiff's favor. The district court erred by failing to view the evidence in the light most favorable to the plaintiff and granting summary judgment to the officer. The matter was therefore vacated and remanded for further proceedings.

Judge Agee dissented and would have affirmed the district court's ruling.

Where law enforcement had probable cause to believe evidence of murder would be found on defendant's computer, discovery of child pornography on device fell within plain-view; search warrant for contents of the computer was sufficiently particular under the circumstances

U.S. v. Cobb, 970 F.3d 319 (Aug. 11, 2020; amended Aug. 17, 2020). In this case from the Northern District of West Virginia, the defendant lived at home with his parents and a cousin. The defendant and cousin got into a fight at the home resulting in the cousin's death, which the parents witnessed. Police responded to 911 calls from the parents and arrested the defendant for second-degree murder. When the parents called 911, they failed to hang up the phone and were recorded begging the defendant to stop injuring the cousin. The parents gave conflicting information to law enforcement regarding the incident, including a statement by the father that the cousin had a gun and that the gun was the subject of the fight. The next day, the defendant called his parents on a recorded jail call and they discussed different variations of their stories. The defendant's mother admitted to faking an injury in support of her son's purported self-defense claim. The very next day, the defendant was again recorded on a call to his father, asking that his father move and "keep safe" a computer in the defendant's room. The computer "had some shit on it," and needed to be "wipe[d] down or clean[ed]," in the defendant's words. State prosecutors sought a search warrant of the defendant's home for any and all laptops and firearms, based on the death and the recorded calls from jail. A second warrant issued for the search of the computer itself, based on the same information. Both warrants purported to authorize searches for evidence of "any and all crimes." Child pornography was discovered shortly after the computer was examined. When interviewed, the defendant's parents did not "seem shocked" to hear about the child pornography present on the computer and blamed the deceased cousin.

State prosecutors increased the charge to first-degree murder, suspecting that the argument may have been about the child pornography. The defendant ultimately pled to second-degree murder in state court for the death. He was subsequently indicted in federal court for possession of child pornography. He moved to suppress the computer evidence, arguing both warrants lacked probable cause and that the second warrant for the contents of the computer lacked particularity. The district court found both warrants were supported by probable cause and that the "any and all crimes" language of the warrants was mere surplusage. It also rejected the particularity challenge, finding that the child pornography was admissible under either the plain-view exception to the warrant requirement or the L*eon* good-faith exception to the exclusionary rule. The defendant pled guilty and appealed, renewing his challenge as to the second warrant only.

According to the defendant, the lack of limiting principles on the warrant authorizing the search of his computer rendered it insufficiently particular. He argued that the broad search of his device was not appropriate based on the information about the death that officers had at the time. He also complained that the warrant should have indicated the types of files sought, their locations, the relevant timeframes, and the relationship of the files being searched to the investigation. The Fourth Circuit disagreed, affirming the trial court:

> So long as there is probable cause to believe that contraband or evidence of a crime will be found in a particular place, the Fourth Amendment specifies only two things that must be particularly described in the warrant: the place to be searched and the person or things to be seized. Slip op. at 10 (citations omitted) (cleaned up).

Within 48 hours of the murder, the defendant called his parents, alleged that the victim had been using the computer, and told them to "clean" it. This gave officers probable cause to believe that the computer would contain evidence relating to the murder investigation, and the warrant therefore met the particularity requirement.

The court also rejected that the warrant should have more specifically described the files within the computer to be searched. Under circuit precedent, a valid warrant for evidence on crime on a computer that is supported by probable

cause gives officers implied authority to examine each file on the computer "at least cursorily . . ." for evidence of the crime under investigation, and evidence of other crimes observed during such examination will fall within the plain-view exception to the warrant requirement. While other computer searches may require more detail about the information sought, the circumstances here did not require the type of limiting principles advanced by the defendant. In the words of the court:

> [T]he officers had no way of knowing when they applied for the warrant exactly *what* the evidence was that Cobb sought to destroy, or *where* Cobb had placed the evidence on the computer. The officers had probable cause to believe that Cobb's computer contained evidence pertinent to Cobb's murder of Wilson . . ., and that Cobb's parents were willing to lie, destroy evidence, and manufacture evidence to support the narrative that Cobb's murder of Wilson was defensive in nature. Accordingly, more specificity was not required under the Fourth Amendment, nor was limiting the scope of the computer search practical or prudent under the circumstances of this investigation. *Id*. at 15.

The court agreed with the district court that the "any and all crimes" language failed to render the warrant invalid and was severable from the otherwise-valid search warrant. It similarly approved of the district court's application of plain-view, declining to address the good-faith issue. The district court was thus affirmed in all respects.

Judge Floyd dissented. He would have found the second search warrant insufficiently particular and that neither plain-view or *Leon* good-faith applied. "By failing to persist in our historical commitment to the particularity requirement in this context, I believe that the majority further opens the door to unrestricted searches of personal electronic devices." *Id*. at 42 (Floyd, J., dissenting).

Prior unadvised intelligence interrogation did not render statements from subsequent interrogation inadmissible where agents provided a thorough Miranda advisement tailored to cure any prejudice of the earlier interrogations; denial of motion to suppress affirmed

U.S. v. Khweis, ___ F.3d ___, 2020 WL 4659876 (Aug. 11, 2020). The defendant was an American who travelled to the Middle East to join the ISIS movement in Syria and Iraq. He was captured by Kurdish forces and transported to a detention center in Iraq. An FBI attaché questioned the defendant about ISIS without any *Miranda* warning multiple times over the span of several weeks, focusing on intelligence about ISIS operations in the area. Ten days after those interviews were complete, different FBI agents interrogated the defendant about potential U.S. criminal violations. The defendant underwent multiple interrogations with these agents and was Mirandized before each. The new team of interrogators was "walled off" from the attaché and did not have access to the information obtained in the course of the first series of interviews (although they were aware that the defendant had been questioned on ISIS intelligence matters). The second set of interviews were conducted in a different location from the first series of interviews, involved none of the same officers or agents, and *Miranda* warnings were given specifically informing the defendant he did not need to speak to agents simply based on the fact that he had previously made statements to others. The agents also informed the defendant of his right to counsel and that his family in the U.S. had in fact obtained counsel for him. The defendant waived his rights and made inculpatory statements.

The defendant was indicted for providing material aid to terrorists and other offenses in the Eastern District of Virginia. He moved to suppress the statements given to the second team of agents, arguing that agents deliberately used a two-step interview process to circumvent *Miranda* protections, and that this rendered his post-*Miranda* warning statements involuntary. The district court denied the motion, finding that agents did not intentionally circumvent *Miranda* and that the *Miranda* warnings eventually given to the defendant were sufficient to render the statements admissible. The defendant was convicted on all counts at trial and appealed.

The Fourth Circuit noted that the U.S. Supreme Court has addressed such "midstream" *Miranda* warnings. In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court noted that "absent deliberately coercive or improper tactics in obtaining the

initial statement, the mere fact that a suspect has made an [earlier] unwarned admission does not warrant a presumption of compulsion." *Elstad* at 314. Thus, where a suspect makes a voluntary statement before being advised of Miranda rights, subsequent *Miranda* warnings can be effective and may be knowingly and voluntarily waived by the defendant (rendering his subsequent statements admissible). *Missouri v. Seibert*, 542 U.S. 600 (2004), recognized an exception to this rule when law enforcement intentionally uses a two-step process strategy to sidestep *Miranda* protections. In that case, subsequent *Miranda* warnings will be ineffective (and any statements obtained as a result thus inadmissible) unless "curative measures" are taken that would "ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id*. at 622 (Kennedy, J., concurring) [Justice Kennedy's concurrence controls in *Seibert*].

Here, the court found it need not decide whether an intentional two-step interview strategy was used, because the agents undertook adequate curative measures to ensure the warnings were understood and that any waiver was voluntary. In the court's words:

> The break in time and place, total separation of personnel, and thorough explanation to Khweis about the distinction between the Mirandized interviews and anything that had come before sufficed to communicate to him 'the import and effect of the *Miranda* warning and of the *Miranda* waiver.' *Khweis* Slip op. at 15.

The district court's ruling on the suppression motion was therefore affirmed.

Judge Floyd dissented on this issue and would have reversed the ruling, finding that the FBI intentionally employed a two-step interview process and failed provide adequate curative measures.

Virginia conviction for possession with intent to distribute heroin qualified as controlled substance offense for purposes of career offender enhancement

U.S. v. Ward, ___ F.3d ___, 2020 WL 5014873 (Aug. 20, 2020). This defendant in the Eastern District of Virginia was convicted of distribution of cocaine after selling an informant approximately 0.17 grams of the substance. The government contended the defendant qualified as a career offender based on Virginia state convictions for possession with intent to sell heroin. The Guidelines range for the offense without the career offender enhancement was 24-30 months; with the enhancement, the defendant's exposure rose to 151-188 mos. The trial court found the state convictions qualified, applied the enhancement (but departed downward), and sentenced the defendant to 120 months. The defendant appealed, arguing again that the state convictions failed to qualify as a controlled substance offense within the meaning of the enhancement statutes. A majority of the Fourth Circuit affirmed the trial court.

Chief Judge Gregory concurred in judgment but wrote separately to argue the majority erred by applying the categorical approach to the Virginia statute, rather than the modified categorical approach.

***Rehaif* error in firearm by felon trial was plain error**

U.S. v. Medley, ___ F.3d ___, 2020 WL 5002706 (Aug. 21, 2020). The defendant in this Maryland case was tried on charges of carjacking and weapons offenses, including felon in possession. He was convicted of the felon in possession offense only and appealed. During the pendency of the appeal, the U.S. Supreme Court decided *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019), holding that the government must prove the defendant was aware of their status as a person prohibited from possessing firearms in a felon in possession prosecution. The Fourth Circuit has previously held that it was plain error to fail to advise the defendant of this element of the offense in the context of a guilty plea. *See U.S. v. Gary*, 954 F.3d 194 (4th Cir. 2020). As in *Gary*, a majority of the Fourth Circuit determined that the failure to address the element of the defendant's knowledge as a person prohibited from possessing firearms at trial was plain error and required the conviction to be vacated without prejudice. In the words of the court:

> In short, the issue here is about whether the fairness, integrity, and public reputation of judicial proceedings are in question where a defendant was not put on notice of an essential element, did not have the Government list all the elements at trial, did not have the jury of his peers hear sufficient evidence regarding an element, and did not have the district court identify the element in its instructions to the jury. Taken individually, each of these would give us pause. Taken collectively, we are confident that failing to notice these errors would seriously affect the fairness, integrity, and public reputation of judicial proceedings. *Medley* Slip op. at 34.

Judge Quattlebaum dissented and would have affirmed the conviction, pointing out the Fourth Circuit's stance on this issue differed from that of every other circuit to have ruled on the issue. According to the dissent, the majority improperly treated the issue as structural error.

Anti-Riot Act prohibitions on speech that does not rise to the level of incitement to violence are overbroad under the First Amendment, but the unconstitutional provisions are severable; defendants' convictions for committing acts of violence at protests fell within the lawful provisions of the Act and were affirmed

U.S. v. Miselis, ___ F.3d ___, 2020 WL 5015072 (Aug. 24, 2020). This case from the Western District of Virginia involved charges under the Anti-Riot Act (18 U.S.C. § 2201-02), stemming from the defendants' involvement in violence at various white supremacist rallies in California and Charlottesville, VA. The defendants entered conditional guilty pleas when their challenges to the statute were rejected by the district court. On appeal, the Fourth Circuit affirmed the convictions, but agreed with the defendants that the Anti-Riot Act was unconstitutionally overbroad in part. According to the court:

> The Anti-Riot Act sweeps up a substantial amount of speech that retains the status of protected advocacy under *Brandenburg* insofar as it encompasses speech tending to 'encourage' or 'promote' a riot under § 2101(a)(2), as well as speech 'urging' others to riot or 'involving' mere advocacy of violence under § 2102(b). Slip op. at 11.

The court noted that the Anti-Riot Act was passed one year before the modern incitement test emerged from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (rejecting the former 'clear and present danger' test in favor of a the more narrow definition of incitement—language spoken with intent to cause imminent law-breaking, and that is also likely to do so). "These days, then, advocacy of lawlessness retains the guarantees of free speech unless it's directed and likely to produce imminent lawlessness." *Miselis* Slip. op. at 17. Examining different provisions of the law, the court concluded it was substantially overbroad, but the overbroad provisions were severable from the remainder of the law. The conduct of the defendants here, however—committing acts of violence against counter protestors at rallies—fell within the valid provisions of the Act after the unconstitutional provisions were severed. The court also rejected vagueness challenges to the Act, and the district court was unanimously affirmed.

Divided en banc court reveres earlier panel decision and remands for merits determination of Brady claims; conviction vacated on remand by consent of the state

Long v. Hooks, ___ F.3d ___, 2020 WL 5014875 (Aug. 24, 2020; amended Aug. 26,2020). Sitting en banc, the Fourth Circuit reversed an earlier three-judge panel decision. The panel below affirmed the trial court's grant of summary judgment to North Carolina on the petitioner's successive writ of habeas corpus. [That decision was summarized here.] Since the defendant's conviction for rape in 1976, "a trickle of posttrial disclosures has unearthed a troubling and striking pattern of deliberate police suppression of material evidence in violation of *Brady* . . ." Slip op. at 5. A majority of the full court found that the state post-conviction court's determination that the suppressed evidence would not have impacted the petitioner's trial was unreasonable and therefore vacated and remanded the matter back to district court for additional hearing.

Judge Wynn, joined by Judges Thacker and Harris, would have granted the petitioner habeas relief and vacated the conviction without further hearing, complaining that subjecting the petitioner's *Brady* claims to the more stringent standard of review in habeas proceedings rewards state actors who suppress material evidence.

Judges Wilkinson dissented, joined by Judges Agee, Niemeyer, Quattlebaum, and Rushing. The dissenting judges would have denied relief based on the deferential standard of review of state proceedings in federal habeas.

After the Fourth Circuit's decision, the State of North Carolina consented to vacate the conviction, and Mr. Long was freed after 43 years.