

The Fourth Circuit Chastises the Government

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The Fourth Circuit recently decided a very interesting case with a lot of North Carolina connections. The case is *United States v. Foster*, and it's available [here](#).

The facts were as follows. A police officer in Henderson, North Carolina was eating lunch at a restaurant with his wife. As he left the restaurant, he saw the driver of a parked SUV speak, at which point another man -- the eventual defendant -- sat up in the passenger seat from a crouching position. The defendant then moved his arms in what the officer believed was a furtive manner, though he couldn't see the defendant's hands. The officer was familiar with the defendant and knew that he had been arrested previously for a drug-related crime, so the officer spoke briefly to him, and the defendant said that he was "just chilling."

After watching the SUV from across the street for fifteen minutes, the officer conducted a *Terry* stop, based on "(1) his prior knowledge of Foster's criminal record; (2) Foster's sudden appearance from a crouched position in a parked [SUV], immediately after the driver had apparently said something to him after seeing the detective walking towards them; and (3) Foster's frenzied arm movements, including the movement of his arms down toward the floor of the car [as the officer neared]." The *Terry* stop led to the discovery of drugs, and to federal charges in the United States District Court for the Eastern District of North Carolina. The defendant moved to suppress, and when his motion was denied by Judge Boyle, entered a conditional guilty plea, reserving the right to appeal the denial of the motion.

Durham lawyer Scott Holmes represented the defendant in the Fourth Circuit, and the court reversed. (Another North Carolina connection: Judge Wynn was on the panel.) The court didn't view the facts observed by the officer as being strongly indicative of criminal activity, especially given that the interaction took place in a low-crime area and that the defendant was not noticeably nervous. In particular, the court seemed to view the defendant's arm movements as ambiguous -- echoing a thread in North Carolina case law that distinguishes between movements that are clearly furtive and those susceptible to multiple interpretations.

Although the decision itself may not be terribly surprising, the strong language used by the court is striking. (Judge Gregory wrote the opinion, and Judge Motz joined it, along with Judge Wynn.) The panel admonished the prosecution by saying "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception." Some folks I've spoken to think that the quoted language just reflects the views of the particular judges on the panel, while others are inclined to see this decision as exemplifying a broader trend on the Fourth Circuit towards being less friendly to the prosecution. Anyone have any insights on that issue?