Robert L. Farb
School of Government
December 14, 18, & 21, 2015

Fourth Circuit Court of Appeals
(Note: You may access the court's opinion by clicking on the case name)

Court Holds That Officers Lacked Reasonable Suspicion of Criminal Activity to Detain Defendant for Dog Sniff of Vehicle After Traffic Stop Had Been Completed and After Defendant Had Refused to Consent to Search

United States v. Williams, ____ F.3d ___, 2015 WL 8598561 (4th Cir. Dec. 14, 2015). The defendant was convicted of a cocaine offense in a North Carolina federal district court. The district court denied the defendant's motion to suppress evidence resulting from a traffic stop. The fourth circuit reversed the district court's ruling. It held that the officers involved in the stop lacked reasonable suspicion of criminal activity to detain the defendant driver for a dog sniff of the vehicle after the traffic stop had been completed, and after the defendant had refused to consent to a search of his vehicle.

Shortly after midnight on February 13, 2012, two North Carolina law enforcement officers were separately patrolling on I-85 near Lexington and saw two vehicles driving toward Charlotte and traveling close together. Officer A stopped the lead vehicle and officer B stopped the second vehicle, which was going 80 mph in a 70 mph zone and driven by the defendant. The defendant had a New York driver's license and a Hertz rental agreement for the vehicle rented from a New Jersey Hertz office. The agreement provided for the vehicle's return by 2:30 p.m. on February 13, 2012 (that afternoon). The defendant said he was going to visit his brother in Charlotte and extend the rental agreement when he arrived. When the officer requested an address to complete a written warning he was issuing for speeding, the defendant gave the post office box address of his place of employment in New York, which differed from the post office box address on his driver's license.

After brief conversation, officer B asked the defendant for consent to search his vehicle, which the defendant denied. Despite the denial, officer A, who had returned to the scene, conducted a dog sniff of the vehicle and cocaine was seized from the trunk.

The fourth circuit noted that since the denial of the suppression motion and defendant's appeal of his conviction, the United States Supreme Court held in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), that absent reasonable suspicion of criminal activity, a detaining officer may not extend an otherwise-completed traffic stop to conduct a dog sniff. *Rodriguez* rejected as impermissible a *de minimis* extension of a completed traffic stop to allow a dog sniff without reasonable suspicion, so the three-minute extension in *Williams* could not justify the dog sniff.

The fourth circuit continued its analysis and rejected the district court's conclusion that reasonable suspicion existed. The four factors relied on by the district court were insufficient: (1) the defendant was traveling in a rental car; (2) the defendant was traveling on a known drug corridor at 12:37 a.m.; (3) the defendant's proffered travel plans were inconsistent with and would likely exceed the due date for the return of the rental car; and (4) the defendant was unable to provide a permanent New York home address even though he claimed to live there at least part-time and had a New York driver's license.

The fourth circuit analyzed these factors as follows: The use of a rental vehicle is of minimal value in determining reasonable suspicion. Use of an interstate highway, standing alone, is entitled to very little weight. Nor is there support that nighttime travel—alone or in combination with these other factors—is an indicator of drug trafficking, at least as set out in the district court record. No doubt that if this factor had been keyed to other compelling suspicious behavior, it might have contributed to

reasonable suspicion. But reasonable suspicion does not arise simply from the rental expiration. Although the district court related that the defendant had failed to provide either officer with his home address, the record showed that neither officer asked him for it. The officers failed to develop the fourth factor with the defendant during the traffic stop and offered no explanation of how that factor contributed to reasonable suspicion.

The court noted that its analysis that each of the fourth factors standing alone failed to support reasonable suspicion does not end its inquiry because reasonable suspicion may exist even if each fact standing alone is susceptible to an innocent explanation. But the facts in their totality should eliminate a substantial portion of innocent travelers, which they did not in this case. And even if the four factors were to eliminate a substantial portion of innocent travelers, the defendant would still prevail. The officers did not articulate how the defendant's particular behavior was suspicious nor logically demonstrate that his behavior was indicative of some more sinister activity than appeared at first glance.

Court Holds That Defendant Was Not Seized Under *California v. Hodari D.*, 499 U.S. 621 (1991), When Officers' Vehicle Blocked Defendant's Parked Vehicle, Because Defendant Left Vehicle and Walked Away From Officers to Front of Vehicle and Ignored Officer's Command to Get Back in Vehicle; He Did Not Submit to Their Authority Until Officer Pointed His Gun at Defendant

United States v. Stover, ___ F.3d ___, 2015 WL 9259062 (4th Cir. Dec. 18, 2015). The defendant was convicted in a Maryland federal district court of possession of a firearm as a felon. The district court denied the defendant's motion to suppress evidence, and the fourth circuit affirmed the district court's ruling. It held that the defendant was not seized under *California v. Hodari D.*, 499 U.S. 621 (1991) (seizure of person occurs when officer applies physical force or offers show of authority, and defendant submits to force or authority), when the officers' vehicle blocked the defendant's parked vehicle, because the defendant thereafter left his vehicle, walked away from the officers to the front of his vehicle despite an officer's command to return to his vehicle. He did not submit until an officer later pointed a gun at him.

In the early morning hours of March 13, 2013, two county police officers in Maryland were patrolling an area where several violent robberies had recently occurred. They saw a vehicle double-parked in an apartment building's private parking lot. A man was in the driver's seat and a woman in the front passenger seat. The officers decided to return a few minutes later to check on the vehicle. When they did, the vehicle and its occupants were still there. Because of the vehicle's out-of-state plates, the area's high-crime reputation, the late hour, and double-parking, the officers concluded they had the right to stop and to see what was going on. They pulled their vehicle into the lot and parked at a 45-degree angle about three feet behind the vehicle, blocking it in. They activated their vehicle's emergency lights, and officer A illuminated the driver's side of the parked vehicle with a spotlight. The district court found as facts that thereafter the defendant got out of the car, opened the backside driver's side door, and walked away from the officers to the front of the car. Officer B told him to get back in the car when he saw the defendant move to the front of the car and drop a gun. When he did not get back, the officer ran to the defendant with his gun out and pointed it at the defendant's face. Only then did the defendant get back in his vehicle.

The government did not argue that the officers had reasonable suspicion to block the defendant's vehicle with their vehicle. Instead, it argued that a seizure did not occur under *California v. Hodari D.*, 499 U.S. 621 (1991), because the defendant did not submit to the officers' show of authority when they blocked the car and activated emergency lights. The court indicated that if the defendant had simply remained seated in his car, he would have passively acquiesced to the show of authority and a seizure would have occurred then. Instead the defendant left his vehicle with a gun in his hand, despite

a command to get back in his vehicle, and was not seized until after he dropped the gun, which was abandoned under the Fourth Amendment.

Court Holds That Fourth Amendment's Exclusionary Rule Barred Admission of Evidence Discovered in Search of Apartment Because Officer Lied to Defendant That Officers Had Search Warrant to Search Apartment

United States v. Rush, ___ F.3d ___, 2015 WL 9269763 (4th Cir. Dec. 21, 2015). The defendant was convicted in a West Virginia federal district court of possession with intent to distribute crack cocaine. The district court denied the defendant's motion to suppress. The fourth circuit reversed. It held that the Fourth Amendment exclusionary rule barred the admission of evidence of the cocaine offense discovered in the search of an apartment because an officer lied to the defendant by telling him that the officers had a search warrant to search it.

On May 23, 2012, Ms. W. called a Charleston, West Virginia, drug enforcement team to request that they remove the defendant from her apartment. She suspected that the defendant, who had been staying with her for the prior two nights, was dealing drugs from her apartment. She later gave officers the key to her apartment and signed a consent form authorizing them to search it. She told them that she was afraid of the defendant because his family had a history of violence, but she did not indicate that he had committed any crimes against her. Officers went to the apartment, opened the door with the key, and entered with their guns drawn, yelling "police" to announce their presence. They found the defendant in a bedroom. He asked what was happening. One officer responded that the officers had a warrant to search the apartment, even though he knew that was not true. This officer testified at the suppression hearing that he lied about having a search warrant to protect Ms. W. The ensuing search discovered crack cocaine, which led to the federal charge against the defendant.

The district court found a Fourth Amendment violation in entering the apartment, but denied the motion to suppress. The court held that the officers did not intentionally impair the defendant's rights, but instead lied about the search warrant to protect Ms. W. And the court determined that suppressing the evidence would have little deterrence on police misconduct because there was a vanishing low likelihood of future recurrences of the same behavior.

The fourth circuit reversed the district court's ruling on the suppression motion. It first noted that the government did not contest that the defendant's Fourth Amendment rights were violated. The defendant had a right to object to the search as a present co-occupant of the apartment, *Georgia v. Randolph*, 547 U.S. 103 (2006), and the officers unconstitutionally denied the defendant the opportunity to object to the search by falsely stating that they had a search warrant.

The fourth circuit then reviewed United States Supreme Court rulings on good faith exceptions to the application of the Fourth Amendment's exclusionary rule. It noted that the Court had applied exceptions to isolated negligence and reasonable reliance on inaccurate court records and a facially valid search warrant. *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1 (1995); *United States v. Leon*, 468 U.S. 897 (1984). Unlike these cases, however, the search in this case was unconstitutional because an officer intentionally decided to make an untruthful statement to the defendant that the officers had a search warrant—"a deliberate lie." In addition, the officers did not have an objectively reasonable belief that it was lawful to conduct the search after lying about the existence of a search warrant. The court rejected the government's argument that the officers acted in good faith because they did not intend to violate the defendant's rights as they sought only to protect Ms. W.--the subjective intent of the officers was irrelevant. The officers did not have an objectively reasonable belief that their conduct was lawful.

Court Holds That All North Carolina Felonies Qualify Under 18 U.S.C. § 922(g)(1) (Crime Punishable By Imprisonment For Term Exceeding One Year) for Federal Offense Of Possession of Firearm As Felon

United States v. Barlow, ___ F.3d. ___, 2015 WL 9269972 (4th Cir. Dec. 21, 2015). The defendant was convicted in a North Carolina federal district court of the federal offense of possession of a firearm as a felon under 18 U.S.C. § 922. He had been previously convicted of North Carolina Class H felonies of speeding to elude arrest and felonious breaking or entering. The court held that since the North Carolina General Assembly's enactment of the Judicial Reinvestment Act (hereafter, JRA), effective for offenses committed on or after December 1, 2011, all North Carolina felonies qualify under 18 U.S.C. § 922 (g)(1) (crime punishable by imprisonment for term exceeding one year) for possession of a firearm as a felon. The court explained that in accord with the amended statutory tables, the lowest possible maximum term of imprisonment for a felony conviction in North Carolina, regardless of offense class or prior record level, is 13 months. For example, the defendant's prior convictions (Class H felonies and Prior Record Level II) would not have qualified if the offenses had occurred before the JRA's effective date because the maximum was 10 months, but the Act increased the maximum period to 19 months to include post-release supervision. The court rejected the defendant's argument that post-release supervision is *supervision* and not a term of *imprisonment*. The court concluded, after reviewing the JRA, that North Carolina law places the time spent on post-release supervision within, not outside of or in addition to, the maximum term of imprisonment. And 18 U.S.C. § 922 (g)(1) only concerns what term of imprisonment that a defendant was exposed to for his conviction, not the most likely duration of his imprisonment.