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

Court, On Rehearing En Banc, Holds That Officer Had Authority to Conduct Frisk Of Lawfully-Stopped Person Whom the Officer Reasonably Believed To Be Armed With a Concealed Firearm, Regardless of Whether the Person May Have Been Legally Entitled To Carry the Firearm

United States v. Robinson, ___ F.3d ___, 2017 WL 280727 (4th Cir. Jan. 23, 2017) (en banc). On March 24, 2014, an unidentified man called the Ranson, West Virginia police department and said that he had just seen a black male in a bluish green Camry load a firearm and conceal it in his pocket while in the parking lot of a 7-Eleven on North Mildred Street. The caller also said that the car was being driven by a white woman and had just left the 7-Eleven parking lot and was headed south on North Mildred Street. Evidence presented by officers at the suppression hearing showed that this area constitutes the highest crime area in Ranson and well-known to the officers for drug trafficking.

An officer spotted a car matching the description traveling on North Mildred Street and noticed that the two occupants (white female driver with black male passenger) were not wearing seatbelts, a violation of West Virginia law. He stopped the car for the violation. It had been two to three minutes since the anonymous call and about three-quarters of a mile from the 7-Eleven. The female driver provided her license and registration. The defendant passenger was asked to step out of the car. Another officer who had arrived there asked him if he had any weapons. In response, he gave a "weird look" or, more specifically, an "oh, crap look" (as described by the officer). The officer took the look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." The officer then frisked him for weapons, discovering a firearm in the defendant's pants pocket. (The officers did not know the defendant was a convicted felon before he was frisked.)

The defendant was tried in a West Virginia federal district court of being a felon in possession of a firearm. The trial court denied his motion to suppress the incriminating evidence based on an unconstitutional frisk. The defendant was convicted and appealed to the fourth circuit, and the three-judge panel reversed his conviction (814 F.3d 201 (4th Cir. 2016)). It held that the frisk violated the Fourth Amendment because there was insufficient evidence of dangerousness. However, the government's petition for a rehearing en banc (which means a panel of all the fourth circuit's judges) was granted, which and the three-judge panel's judgment and opinion were vacated.

Before the en banc court, the defendant acknowledged that: (1) the officers had the right to stop the vehicle for the seat belt violation; (2) to order him to the exit the vehicle; (3) the anonymous call was sufficiently reliable to justify the officers' reliance on it; and (4) the district court was correct in concluding that the officers had reasonable suspicion to believe he was armed with a concealed firearm. The defendant argued, however, that while the officers may well have had good reason to suspect the defendant was carrying a loaded concealed weapon, they lacked objective facts indicating that he was also dangerous to justify a frisk for weapons, because an officer must reasonably suspect that the person to be frisked is both armed and dangerous. The defendant noted that West Virginia permits a person to lawfully carry a concealed firearm if they have a license to do so. And because the officers did not know whether he possessed such a license, the anonymous call was a report of innocent behavior that was insufficient to indicate that he posed a danger to others. In addition, the defendant argued that his behavior during the stop did not create a belief he was dangerous.

The en banc court rejected the defendant's arguments and held that the officer's frisk of the defendant was justified under the Fourth Amendment. The court analyzed various United States Supreme Court rulings on frisk and stated that they impose two requirements to conduct a frisk: (1) an officer had conducted a lawful stop, which includes a traditional Terry v. Ohio, 392 U.S. 1 (1968), stop as well as a traffic stop; and (2) that during a valid but forcible encounter, the officer reasonably suspects that the person is armed and therefore dangerous [the court's underlining]. The court continued that in both *Terry* and Pennsylvania v. Mimms, 434 U.S. 106 (1977),

> the Court deliberately linked "armed" and "dangerous," recognizing that the frisks in those cases were lawful because the stops were valid and the officer reasonably believed that the person stopped "was armed and thus" dangerous. The use of "and thus" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed. In this case, both requirements—a lawful stop and a reasonable suspicion that [the defendant] was armed—were satisfied, thus justifying [the officer's] frisk under the Fourth Amendment as a matter of law [quotation marks and underlining are the court's].

The court continued that the presumptive lawfulness of a person's gun possession in a particular state does not negate an officer's reasonable concern for his or her own safety when forcing an encounter with a person who is armed with a firearm and whose propensities are unknown. The court added that while not necessary to the conclusions in this case of the frisk's legality, the facts (e.g., anonymous report of defendant loading firearm and concealing it in his pocket, drug trafficking area, the defendant's evasive response when confronted by the officer) confirm the officer's reasonable suspicion that the defendant was dangerous and therefore should be frisked to protect the officer and others present.

In Plaintiff's Civil Lawsuit Under 42 U.S.C. § 1983 Against Officers for Fourth Amendment and Related Tort Claims That She Was Arrested Without Probable Cause, Court Holds That Officers Were Not Entitled to Summary Judgment

Smith v. Munday, ___ F.3d ___, 2017 WL 465287 (4th Cir. Feb. 3, 2017). In 2009 North Carolina local law enforcement officers used a confidential informant who was wired with audio and video recorders to make a purchase of crack cocaine. After the transaction, the informant told the officers that he purchased drugs from April Smith, a black female. An officer's notes identified her as "B/F April Smith" and "April B/F Smith skinny $20 1 rock in plastic, Smith 40s." For technical and other reasons both the audio and video did not capture the drug sale, although there was video of an unidentified black female sitting on the front porch. During the next nine months, an officer scanned police databases for residents of his county named April Smith who had criminal records. He then discovered April Yvette Smith, a black female and the plaintiff in this case who lived in the county and had been convicted of selling crack cocaine in 1993, 1997, and 2005. His search revealed at least two other April Smiths with criminal records. He had no indication that the female who sold crack cocaine to the informant in 2009 had a criminal record or was even a county resident. The record reflects no further attempt by the officer or connect her to the crime. The officer obtained an arrest warrant for the plaintiff nine months after the transaction, arrested her in her home, which was eleven miles away from the transaction. She was held in custody for about 80 days, when the local district attorney's office dismissed the charges. She filed a lawsuit in a North Carolina federal district court under 42 U.S.C. § 1983 for Fourth Amendment and related tort claims based on her arrest without probable cause.

The federal district court granted the officers' motion for summary judgment. The district court reasoned that the officers were looking for a black woman named April Smith who sold drugs, and they

found a black woman named April Smith who previously sold drugs, and who was arrested only eleven miles from the drug transaction. The one factor the district court believed counseled against probable cause was Smith's weight. The seller was a skinny female, the plaintiff was 160 pounds when arrested, and she alleged that she weighed more than 200 pounds on the date of the transaction. But the court noted that the officers were unaware of the plaintiff's weight at the time of the transaction and reasoned that 160 pounds was not so different from "skinny," especially with an intervening nine months, so as to discredit a finding of probable cause even if the officers ultimately were mistaken.

The fourth circuit reversed the district court's grant of summary judgment. The court reasoned that when applying for the arrest warrant, the officer simply did not have enough information for any reasonable or prudent person to believe there was probable cause. He lacked any information connecting the plaintiff's conduct to the contours of the offense, and certainly lacked enough evidence to create any inference more than mere suspicion. Of the offense, the officer knew only that the confidential informant used by other officers but new to the officer said "April Smith," a skinny, black female, sold him crack cocaine. He did not know if she had been previously convicted of selling crack cocaine or if she lived in the county. He chose one of the black females named April Smith for no immediately apparent reason. There is: (1) no evidence that the officer attempted to identify the plaintiff as the black female in the video footage of the front porch; (2) no evidence that the officers showed the informant a photo of the plaintiff for identification; and (3) no evidence that the officers investigated the plaintiff herself. Although courts accord great deference to a magistrate's determination of probable cause, that deference is not boundless. In this case, the evidence placing the plaintiff at the crime scene was so scant (indeed, nonexistent) that deferring to the magistrate was inappropriate. And qualified immunity does not apply under Malley v. Briggs, 475 U.S. 335 (1986), when an arrest warrant is so lacking in indicia of probable cause to render official belief in its existence unreasonable.