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Fourth Circuit Case Summaries: April 3, 9, 14, 15, 20, 22, and 24, 2020

Without deciding the scope of the private search doctrine as applied to digital devices, any defect in the warrant fell within *Leon* good-faith, and any misrepresentation in the affidavit was immaterial

U.S. v. Fall, 955 F.3d 363 (April 3, 2020). In this Eastern District of Virginia case, a relative of the defendant discovered several computers with child pornography at the defendant's residence and contacted police. The woman showed an officer the images she found and was referred to a detective. The detective examined the home screen of the laptop and saw thumbnail images that he thought could be child pornography. The detective clicked on the items and confirmed his suspicions. When contacted by police, the defendant refused to make a statement or consent to a search of his home. Officers went to secure the home while awaiting the search warrant. Around this time, neighbors saw a man climb out of an upstairs window of the defendant's residence, discard an item on the roof, jump down, and run away. Officers discovered a laptop on the roof, as well as other computers inside the home, all of which were later determined to contain child pornography. The search warrant application recounted the relative's report, the detective's viewing of the images identified by the niece and in the thumbnails and described those images. It also stated that neighbors had seen the defendant climbing out of the window (when in fact they had reported seeing only *someone* climb out). The defendant moved to suppress, arguing police exceeded the scope of the private search and materially misrepresented the neighbor's report. The district court denied the motion and the defendant was convicted at trial of various offenses. He appealed, arguing the motion to suppress should have been granted.

Under the private search exception, no Fourth Amendment violation occurs when a private person searches property in an individual capacity. Police may therefore lawfully review evidence obtained from a search conducted by a private party. However, law enforcement may generally not go beyond the scope of the search performed by the third party without obtaining a warrant unless the officers are "substantially certain" to learn nothing new by the additional examination. *See U.S. v. Jacobson*, 466 U.S. 109 (1984). Circuits have divided in applying this doctrine to electronic storage devices, with some requiring police to have "an exact one-to-one match" between what the private party found and what police examine, and others allowing police some leeway to go beyond the private search via the substantial certainty rule [Shea Denning blogged about the private search doctrine here]. The court determined it "need not

determine today the outer boundaries of the private search doctrine," because the good-faith exception applied. Under *U.S. v. Leon*, 468 U.S. 897 (1984), if officers rely on a facially valid search warrant in objective good faith, evidence will not be suppressed even if the warrant is later found to be defective. Here, the warrant was not defective and established probable cause even without the detective's statement about clicking on the thumbnail images.

The alleged misrepresentation about the neighbor's report to the police of seeing the defendant was found to be a harmless "miscommunication" between officers and did not rise to the level of a material misrepresentation, according to the trial court. The Fourth Circuit agreed, finding that "[this] error does not constitute evidence of dishonesty or recklessness in preparing the affidavit." *Fall* Slip op. at 12. The district court did not therefore err in denying the motion to suppress.

Other various challenges were also rejected, and the trial court was unanimously affirmed. [*Author's note*: The *Leon* good-faith exception does not apply to violations of the North Carolina Constitution under *State v. Carter*, 322 N.C. 709 (1988).]

Where grounds for recusal of trial judge would arise only during sentencing (if at all), defendant was not entitled to writ of mandamus ordering recusal from trial

In Re: John Moore, 955 F.3d 384 (April 9, 2020). The defendant was charged with robbery and firearms offenses in the Western District of North Carolina. He potentially qualified for a mandatory life sentence based on prior convictions for "serious violent felonies" if convicted. The sentencing court makes the determination of whether a prior conviction meets the definition of a "serious violent felony" and whether the "safety valve" provisions apply (which can allow the defendant to receive a sentence less than the mandatory term). Two weeks before trial, the parties discovered that the presiding judge had prosecuted the defendant for robbery in 1989 and secured conviction. The defendant moved for recusal, arguing that the judge had "personal knowledge of disputed evidentiary facts" about the case, and that grounds existed to reasonably question the judge's impartiality under the federal recusal statute, 28 U.S.C. § 455. The trial judge denied the motion. He had no memory of his involvement in the case 30 years earlier and found that any conflict would arise only as to the sentencing (and not trial) portion of the proceedings. The defendant sought a writ of mandamus from the Fourth Circuit for recusal, arguing that the judge must recuse himself now "as a 'prophylactic' measure," and that recusal at sentencing was insufficient. Slip op. at 6.

Mandamus is "a drastic remedy that must be reserved for extraordinary situations." *Id*. at 7. To prevail on mandamus relief, a petitioner must show "a clear and indisputable right" to the relief sought and that "no other adequate means" for redress exist. *Id*. Even then, the issuance of the writ is discretionary. Here, the defendant could not show a clear right to relief since the sentencing hearing might never arise at all (if the defendant is acquitted at trial). While circuits have split on the propriety of partial recusals—allowing a judge to recuse his or herself for only a portion of the proceedings rather than the whole case—the Fourth Circuit has condoned that

approach in the bankruptcy context. The split of authority itself indicates the lack of an "indisputable" right. Finally, if convicted at trial, the defendant will be able to challenge the denial of his recusal motion on direct appeal, allowing him an adequate means of redress. Under these circumstances, the court declined to invoke its mandamus powers, noting that the defendant could renew the motion to recuse at sentencing if that proceeding occurred and could again seek mandamus review of that decision if necessary.

(1) Where defendant disclaimed ownership of bag, he lacked standing to challenge search; (2) Even if the property was not abandoned, the bag was properly searched incident to the defendant's arrest

U.S. v. Ferebee, ___F.3d ___, 2020 WL 1933150 (April 22, 2020). In this case from the Western District of North Carolina, the defendant was visiting a friend who was on state probation. When officers arrived at the friend's home to conduct a probation search, the defendant was sitting next to a backpack and holding a marijuana cigarette. Officers asked the defendant to stand in order to check the couch for weapons. When he stood up, the defendant grabbed the backpack and held it while he was patted down. When asked if the bag contained any weapons, the defendant told the officer it was "actually not his [bag]." The defendant was placed under arrest for the marijuana and officers found a gun in the couch. A detective obtained the backpack from the officer with the defendant and searched it, finding the defendant's identification, marijuana-related contraband and another gun. During later questioning, the defendant admitted that the gun in the bag belonged to him. He was charged as a felon in possession and moved to suppress. The district court found that the defendant had no standing to challenge the search after disclaiming ownership. It further concluded that, even if the defendant had standing, the search was constitutional as a valid search incident to arrest. A divided Fourth Circuit affirmed.

(1) Under the collective knowledge doctrine, information known by an "instructing" officer may be imputed to the "acting" officer. The Fourth Circuit limits application of the doctrine—it does not apply it to "bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions." Slip op. at 5 (citation omitted). There was no evidence that the detective who searched the bag had overhead the defendant's statement to the officer that the bag was not his, and the defendant argued that the government improperly relied on collective knowledge in relying on his statement disclaiming ownership, rendering the search of the bag unreasonable. The Fourth Circuit disagreed. Because the defendant abandoned the bag, he had no reasonable expectation of privacy and was not entitled to suppression. "That rule makes sense, as one who abandons property would have no subjective expectation that the property would remain private, nor would society recognize any such expectation as reasonable." *Id*. at 7. While there must be some objective evidence that the defendant intended to abandon the property, the defendant's explicit disclaimer of ownership of the bag here was sufficient to forfeit any expectation of privacy. It was "irrelevant" that the searching detective did not hear the defendant's statement since the

search occurred after the abandonment, and the collective knowledge doctrine simply had no bearing on the case. That the defendant still had physical possession of the bag at the time of his statement disclaiming ownership was relevant to the court's abandonment inquiry but "the court is not precluded from finding abandonment where the defendant has physical possession of the property he has disavowed." *Id*. at 12.

(2) Assuming the defendant did not abandon the property, the search of the bag was also justified as a search incident to arrest. *Arizona v. Gant*, 556 U.S. 332 (2009), limited the scope of such searches in the vehicle context to circumstances where the defendant is not secured and is within reaching distance of the passenger area of a car (or where there is reason to believe evidence of the crime of arrest will be found inside the car, although that prong of *Gant* was not at issue here). The court assumed without deciding that *Gant* applied outside of the vehicle context and found that the defendant here was not "secured" despite having been cuffed. Unlike the facts in *Gant* (where the defendant was handcuffed in the back of a patrol car), this defendant was "only a few feet outside the house and thus could reach the other officers and the backpack within seconds." *Id*. at 20. In fact, body camera footage showed that the defendant threw away a marijuana cigarette without officers noticing while he was cuffed outside. According to the court:

> . . .[W]e need not rely solely on the speculative possibility that a handcuffed defendant can still be dangerous, as we have in this case a handcuffed defendant who in fact was able to tamper with evidence while handcuffed. We therefore conclude that, despite the fact that [the defendant] was handcuffed, the police could have reasonably believed that [he] could have accessed the backpack. *Id.* at 20.

The conviction was thus affirmed. Judge Floyd dissented on both issues and would have reversed the district court's denial of the suppression motion.

Erroneous advice about preservation of appellate issues resulting in open plea constituted ineffective assistance of counsel; general warnings in plea colloquy were insufficient to remedy the mistaken advice

U.S. v. Akande, 956 F.3d 257 (April 20, 2020). In this Maryland case, the defendant's motion to suppress was denied and he pled guilty without an agreement to federal fraud offenses. Before sentencing, he moved to withdraw the plea. His plea attorney had advised him that such an "open" plea would ensure preservation of all issues for appeal. This was incorrect. The defendant alleged he would not have pled guilty but-for the erroneous advice, and his plea counsel agreed. Other counsel was appointed to argue the motion, and that attorney ultimately withdrew the motion. The conviction and sentence were affirmed on direct appeal. The defendant sought habeas relief, alleging that his plea was not knowing and voluntary and that he received ineffective assistance of counsel ("IAC") from his first lawyer. The district court

denied relief without hearing, finding that the petitioner could not show prejudice, and the defendant appealed.

Here, plea counsel's advice was incorrect, and this constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). Where the court corrects any misunderstanding resulting from erroneous advice of counsel and the defendant acknowledges his understanding of the correction, the defendant cannot succeed on an IAC claim based on erroneous advice of counsel. *See U.S. v. Akinsade*, 686 F.3d 248 (4th Cir. 2012). While the trial court here conducted a typical plea colloquy, including advising the defendant about waiver of his right to appeal, those advisements "were too general to cure counsel's misadvice." *Akande* Slip op. at 10. The defendant was specifically concerned about preservation of his motion to suppress, and it was unlikely he understood that he was waiving review of the issue by pleading open, given the court's general advisements.

To establish *Strickland* prejudice based on incorrect advice resulting in a plea, the defendant must show by a reasonable probability that he would not have pled guilty and would have gone to trial without the erroneous advice. *Lee. v. U.S.*, 137 S. Ct. 1958 (2017). The defendant claimed that preserving his appeal rights was his "top strategic priority," and record evidence supported that assertion. This showed a reasonable probability that the defendant would have gone to trial instead of accepting an open plea based on the incorrect advice of counsel and amounted to *Strickland* prejudice, thus establishing IAC. The court unanimously reversed and remanded. Concluding the court observed:

> [T]he legitimacy of [guilty pleas] in our criminal justice system depends on a defendant's ability to understand the consequences of a guilty plea in order to make an informed decision about whether to enter one. Plea counsel's inaccurate advice deprived [the defendant] of this ability, and in doing so also denied [him] the Sixth Amendment right to effective assistance of counsel. *Akande* Slip op. at 14.

No Confrontation Clause violation where non-testifying codefendant statements were non-testimonial and otherwise did not implicate *Bruton*; any potential error was harmless

U.S. v. Benson, 957 F.3d 218 (April 24, 2020). This case involved the use of a firearm in furtherance of murder and arose in the Eastern District of Virginia. Four defendants were jointly tried and three were convicted. On appeal, they challenged the admission into evidence of out-of-court statements made to witnesses by various codefendants (among other arguments). One co-defendant told a witness that his vehicle was "hot" and mentioned a "robbery." This co-defendant told the witness that the crime was planned as a residential breaking and entering but had not gone well ("the Brown statements"). Another co-defendant told police officers the crime was "supposed to be a burglary," that "he and others . . . took Brown's truck" to the scene of the crime, and that "he didn't go inside the house where the murder occurred but was there in front of the car," among other statements ("the Wallace statements"). The final

codefendant made statements to three witnesses—he told a cellmate in pretrial detention that "they did the joint he was locked up for;" he told a jail visitor about being in town in Virginia for "something [he] wasn't supposed to do" and made other statements tending to show a conspiracy between the four men; he asked another witness to procure a gun for him ahead of the robbery and invited him to travel to Virginia and participate. According to that witness, the defendant also later told him someone had been shot during the robbery ("the Benson statements").

The defendants objected to the admission of these statements as a Confrontation Clause violation pursuant to *Bruton v. U.S.*, 391 U.S 123 (1968) (finding a confrontation violation when an out-of-court statement by a non-testifying codefendant incriminating the defendant is admitted at a joint trial). Slip. op at 10. The trial court found that all the challenged statements were non-testimonial, admitted the testimony, and gave limiting instructions as to the use of each statement at trial. The Fourth Circuit affirmed.

Citing *Richarson v. Marsh*, 481 U.S. 200 (1987), the Fourth Circuit observed:

> If the statement of a non-testifying codefendant incriminates another only by virtue of linkage to other evidence at trial—that is, if in incriminates 'inferentially' rather than 'facially'—then it does not implicate *Bruton*. *Benson* slip op. at 12.

Further, a *Bruton* confrontation issue only arises as to testimonial statements. Where there is no *Bruton* issue, jurors are presumed to apply the limiting instructions given by the trial court. No confrontation rights were violated here. The "Brown statements" were not testimonial and thus did not implicate *Bruton*, as the remarks occurred in an informal setting to the declarant's friend. As to the "Wallace statements," while a "clos[er] question" on the issue of whether the remarks were testimonial, the court found those statements only provided an inferential link to the defendant in question and thus did not implicate *Bruton*. With the "Benson statements," the remarks to the cellmate were "plainly non-testimonial" and did not implicate the defendant's confrontation rights. The statements to the witness before and after the crime were similarly non-testimonial, and the trial court did not err in admitting the statements made to the jail visitor. Any possible errors as to the admission of any of the statements were harmless under the facts of the case, and the confrontation claims were denied.

Other challenges were rejected, and the convictions unanimously affirmed.

Other Cases of Note:

Findings of South Carolina post-conviction court were reasonable and entitled to deference in federal habeas proceedings, and petitioner failed to establish cause to excuse procedural default on new claims; death sentence affirmed

Sigmon v. Sterling, 956 F.3d 183 (April 14, 2020; amended April 15, 2020). The petitioner was tried for murder and burglary in South Carolina state court and sentenced to death. The state appellate court affirmed on direct appeal, and state post-conviction proceedings were denied

after hearing. That decision was affirmed by the state supreme court and the petitioner sought habeas relief in federal court. His petition included the same six claims adjudicated by the state post-conviction court, as well as (ultimately) four new claims not raised in state court. The district court granted summary judgment on all ten claims and the petitioner appealed. The Fourth Circuit granted a certificate of appealability on all the state claims and three of the new claims. In a divided opinion, the Fourth Circuit affirmed.

As to the preserved claims (those adjudicated on the merits in state post-conviction), the petitioner must show that the state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law or if the decision was based on an unreasonable determination of facts" to obtain relief. 28 U.S.C. 2254(d). Five of these claims asserted ineffective assistance of counsel ("IAC") during the penalty phase, and one claim asserted a due process and equal protection claim for alleged error in the state post-conviction proceedings. None of the South Carolina Supreme Court's determinations as to the IAC claims involved an unreasonable application of established law or an unreasonable determination of facts, and the petitioner was therefore not entitled to relief under § 2254. As to the due process and equal protection claim, "claims of error occurring in a state post-conviction proceeding cannot serve as the basis for federal habeas corpus relief" under circuit precedent, and this claim too was denied. *See Bryant v. Maryland*, 848 F.2d 492 (4th Cir. 1988).

As to the new claims, they would normally be procedurally defaulted. However, under *Martinez v. Ryan*, 566 U.S. 1 (2012), where state law requires IAC claims to be brought in state post-conviction rather than on direct appeal (as South Carolina law provides), a "substantial" IAC claim may be excused where the petitioner had no counsel or where post-conviction counsel was ineffective by defaulting the claim. A substantial claim is one with "some merit." *Sigmon* Slip op. at 21 (citation omitted). A majority of the Fourth Circuit found that none of these claims were substantial, and the district court did not err in declining to hold an evidentiary hearing.

Judge King dissented. He found trial counsel's mitigation case at the penalty phase "feeble" and would have held that the petitioner was entitled to a hearing under *Martinez*.

Habeas petitioner met exacting standard for authorization to file a successive petition

In Re: Emerson Stevens, 956 F.3d 229 (April 15, 2020). The petitioner was convicted in Virginia state court of first-degree murder and other charges, which was affirmed on direct and collateral review in state proceedings. His first federal habeas petition was denied as meritless in 1993. In 2016, he again filed for collateral relief in state court. Three days later, law enforcement discovered a box of previously undisclosed materials relating to the case and turned it over to the petitioner's attorney. Shortly thereafter, the petitioner was granted parole, but his second state habeas petition was denied, and the state supreme court declined review. He then sought authorization for a subsequent federal habeas petition under 28 U.S.C. § 2244, arguing that the prosecution knowingly presented false testimony, suppressed evidence

indicating the testimony was false, and otherwise withheld exculpatory evidence. The Fourth Circuit unanimously granted the request.

A state prisoner typically has one opportunity to seek federal habeas relief. In order to bring a successive petition for claims not raised in the first habeas petition, the petitioner must demonstrate the existence of either a new retroactive constitutional rule affecting his case, or that the factual basis underlying the new claim could not have been discovered at the time of the first petition and that such new evidence establishes that, without the error alleged, no reasonable finder of fact would have convicted the defendant. *See* 28 U.S.C. § 2244(2)(B). The petitioner here met those "exceptional circumstances." Within the undisclosed materials, an FBI report showed that Virginia presented false expert testimony at trial about the location and movement of the victim's body and suppressed evidence that showed that testimony was false. The new evidence also showed that a lay witness testified falsely about the petitioner's whereabouts on the morning after the murder and suppressed evidence that would have further impeached that testimony at trial. Finally, at least seven other exculpatory items were found within the box. These items were material and could "collectively undermine confidence in the verdict." Slip op. at 13 (Thacker, C.J., concurring). New information showed that the medical examiner changed the cause of death from asphyxiation to "cutting wounds" after talking to investigators at the time of the initial investigation; the medical examiner opined at trial the wounds could have been cause by a knife owned by the defendant but now concludes the wounds were consistent with a boat propeller; hair analysis used at trial had since been debunked as a forensic science; and a key state witness at the trial has since pled guilty to obstruction of justice for lying during his testimony at the trial. This showing was sufficient to satisfy the standard for a successive petition, and the matter was remanded for the district court to consider the petition on the merits. Concluding, the court emphasized the federalism concerns embodied in federal habeas law and reminded the state of its authority:

> By limiting the power of federal courts, AEDPA shifts the focus to those actors who possess the ultimate discretion to prosecute, pardon, and preserve convictions. And, consistent with this great power, we expect executive actors to wield their authority in a manner consistent with our finest values and traditions. *Id.* at 7.

Judge Thacker concurred separately to explain the new evidence in more detail, agreeing with the majority's result.

Venue for SORNA registration violation was proper in either state where defendant moved from North Carolina and failed to register in the new state

U.S. v. Spivey, 956 F.3d 212 (April 15, 2020). In this failure to register case from the Eastern District of North Carolina, the trial court did not err in denying the defendant's motion to dismiss for improper venue. The defendant moved from North Carolina to Colorado while required to register as a sex offender pursuant to the Sex Offender Registration and Notification Act ("SORNA") for state convictions. He was charged with registration violations in

North Carolina after failing to register in Colorado and moved to dismiss for improper venue, arguing the case must be heard in Colorado. Because the defendant's interstate travel was an essential conduct element of the offense, and because the offense began in North Carolina (and ended in Colorado), venue was proper in either state. This result is also consistent with 18 U.S.C. § 3237 ("Offenses begun in one district and completed in another"). The district court was therefore unanimously affirmed.