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Case Summaries: Fourth Circuit Court of Appeals (April 4, 5, 11, 18, 19, and 26, 2023)

Officer was not entitled to qualified immunity where a reasonable jury could conclude she faced no imminent threat; ratification claim against city was properly dismissed

Franklin v. City of Charlotte, 64 F.4th 519 (April 4, 2023). In this case from the Western District of North Carolina, Charlotte officers received two dispatches about a man threatening customers and staff with a gun at a local fast-food restaurant. When two officers arrived on scene, the man was outside next to a car in the parking lot. The restaurant manager was in the passenger seat of the car, apparently trying to calm the man down. The man, Franklin, was crouched down on the balls of his feet about a foot from the passenger door with his hands clasped together between his legs. The manager was apparently praying with the man and did not see a weapon in the man's hands. The officers encircled the car and ordered the man alternatively to show his hands and to drop his weapon, which was not visible to the officers. After repeated commands to put down his gun, the man responded that he had heard the command the first time. The man, whose eyes were fixed towards the ground, did not change his position, and his "demeanor seemed passive." *Franklin* Slip op. at 5. He did not immediately move or otherwise respond to the officers' commands, but he eventually reached into his coat slowly and began to remove a handgun. He was holding the gun by the barrel with the gun's grip towards the officers and the muzzle pointed away from them. He did not otherwise move his legs or head. One of the officers fired twice, striking the man in the chest and arm, resulting in his death. His last words were, "You told me to." All of this was captured on body cams and occurred within 43 seconds of the officers' arrival on scene. During the police department's internal review of the incident, both officers gave versions of the events that were contradicted by the videos. Franklin's estate sued the officers for excessive force and asserted a claim against the city based on its finding that the shooting was justified, along with state tort claims for assault, wrongful death, and negligent training. The district court granted summary judgment to the defendant-officers and the city and dismissed the case, finding that no constitutional violation occurred and that no state tort laws were violated. On appeal, the Fourth Circuit reversed in part.

Excessive force claims under the Fourth Amendment are analyzed for reasonableness under the factors articulated in *Graham v. Conner*, 490 U.S. 386 (1989), whereby the court should consider the "severity of the crime;" "whether the suspect pose[d] an immediate threat to the safety of officers or others;" and "whether [the suspect] is actively resisting arrest or attempting to evade arrest." *Id.* The second factor is of particular significance in deadly force cases. *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 579 (4th Cir. 2017). Here, the officer may have violated the Fourth Amendment and qualified immunity was inappropriate. While the officers were responding to what was reported as an imminent threat involving a gun, the situation they encountered upon arrival was much different. According to the court:

> Franklin was no longer inside the restaurant, nor was he aggressive or outwardly threatening when Officer Kerl approached him. He also made no attempt to resist the officers or flee the area. . . Watching the events unfold, one cannot help noticing that the

> intensity of the situation emanated not from Franklin, but from the volume and vigor of the officer's commands. *Franklin* Slip op. at 16.

The conflicting orders by the officers, the fact that they could not see a gun in the man's hands, his subdued manner, and his ultimate compliance with the order to drop the weapon all created an issue of fact for the jury to decide regarding the reasonableness of the officer's action. "A reasonable jury could conclude that Franklin did not pose an imminent threat to the officers or anyone else." *Id*. at 20. Further, it was clearly established at the time of the shooting in the Circuit that possession of a gun, standing alone, cannot justify the use of deadly force. For these reasons, the grant of summary judgment to the officer based on qualified immunity was reversed and the case remanded for further proceedings.

The district court correctly determined that the city was not liable for the death, and dismissal of that claim was appropriate. ". . . Franklin's death is not traceable to a subordinate's decision that may be approved as final by a city policymaker." *Id*. at 25. Regarding the state tort claims, the court reversed the district court's dismissal of the wrongful death and assault claims but affirmed the dismissal of the negligent training claim.

Judge Wilkinson concurred, agreeing that the matter should be tried before a jury, but writing separately in support of qualified immunity.

Use of a single photo to identify the defendant did not undercut probable cause; any Confrontation Clause error was harmless

U.S. v. Hicks, 64 F.4th 546 (April 5, 2023). An informant in the Eastern District of North Carolina reported that the defendant was selling drugs from his home. Two controlled purchases were made from the defendant at his house. After the buys, officers showed the informant a picture of the defendant, who positively identified him as the person from whom the informant had purchased drugs. This information was used to obtain a search warrant for the premise. Officers executing the warrant found cocaine, marijuana, scales, and other paraphernalia consistent with drug distribution, along with guns, ammo, and shell casings. The defendant was indicted for various drug and drug charges and moved to suppress, arguing error in the officers' use of his photo. The district court denied the motion and the defendant was ultimately convicted at trial. The Fourth Circuit found no error.

The warrant was supported by probable cause, even without the photo. The affidavit in support showed that the informant was reliable and related the controlled buys by the informant which occurred at the defendant's home. The identification of the defendant by the photograph was not necessary to establish probable cause and its removal from the equation did nothing to detract from the facts supporting the warrant. There was also no plain error in officers' seizure of a cell phone and evidence from the defendant's vehicle during the search. The search of the car was explicitly authorized by the warrant, as was the seizure of "all electronics." Thus, the district court correctly denied the suppression motion.

The defendant also challenged the admission of testimony regarding the tip, the controlled buys by the informant, and certain pictures from his cell phone as a Confrontation Clause violation. Any error in the admission of this evidence was harmless on the facts of the case.

Other challenges were likewise rejected, and the conviction and sentence unanimously affirmed.

For-cause strikes of unvaccinated juror did not implicate fair-cross-section rights

U.S. v. Colon, 64 F.4th 589 (April 11, 2023). In this Eastern District of Virginia case, a husband and wife were jointly tried for drug conspiracy and money laundering offenses. Trial was set for September 2021, just as the Delta strain of the COVID-19 virus began spreading throughout the country. In the interest of safety, the trial court asked the defendants for their vaccination status and for the parties to state whether they would move to strike unvaccinated jurors from the venire. The defendants were unvaccinated and objected to striking unvaccinated jurors from the jury pool. A jury questionnaire was distributed to potential jurors asking about vaccination status and other questions related to risk factors and potential exposure to the virus. The trial court ultimately struck for cause all unvaccinated jurors (although not always solely for that reason). The defendants expressed concern that the venire was unrepresentative of their peer group of unvaccinated individuals. The trial court treated this objection as a *Batson* challenge and denied it, finding that unvaccinated people do not constitute a protected class. Defense counsel responded that he was not raising a *Batson* challenge, arguing instead that the court's ruling "excludes a section of the potential jurors." The defendants were convicted and argued on appeal that the trial court violated their Sixth Amendment right for the venire to be composed of a fair-cross section of the community. The Fourth Circuit disagreed.

Under *Duren v. Mississippi*, 439 U.S. 357 (1979), a prima facie case for a fair-cross-section violation is made when the defendant shows exclusion of a "distinctive" group in the community from the venire, that the representation of the excluded group is unreasonable given the number of members of the excluded group present in the community, and that such "underrepresentation is due to systematic exclusion of the group in the jury selection process." *Id*. at 364. According to the court, the fair-cross-section requirement was inapplicable to these facts. The requirement does not apply to petit juries, which need not be representative of the local community, and the strikes of unvaccinated jurors here came after the venire was gathered.

> Any group defined solely in terms of shared attitudes that may render members of the group unable to serve as jurors in a particular case may be excluded from jury service without contravening the basic objectives of the fair-cross-section-requirement." *Lockhart v. McCree*, 476 U.S. 162, 176-77 (1986) (cleaned up).

Both vaccinated and unvaccinated people were included in the original venire, which was drawn from voter registration lists (a method previously approved of by the Circuit). *U.S. v. Cecil*, 836 F.2d 1431 (4th Cir. 1988). Removing the unvaccinated jurors from the venire served as both a safety measure for all trial participants and helped to ensure that selected jurors would be able to serve without falling ill. The court noted that for cause strikes of unvaccinated jurors may implicate *Batson* and that categorical exclusion of the unvaccinated could constitute an abuse of discretion. *Colon* Slip op. at 13. Because the defendants here expressly waived reliance on *Batson*, and because the fair-cross-section requirement was not implicated, the cases were unanimously affirmed.

Federal Tort Claims Act permits battery claims against TSA agents for acts in performance of their duties

Osmon v. U.S., 66 F.4th 144 (April 18, 2023). The plaintiff was an airline traveler in the Western District of North Carolina. She alleged that a Transportation Security Administration ("TSA") screener touched and fondled her genitals during security screening and sued the federal government for battery under

the Federal Tort Claims Act ("FTCA"). The district court dismissed the claim, agreeing with the magistrate judge that the FTCA did not waive the federal government's immunity and finding that the plaintiff failed to properly object to the magistrate's recommendation. The Fourth Circuit unanimously reversed. Joining the Third and Eighth Circuits, the court found that battery claims against TSA agents are permitted under the FTCA. (*Note*: By way of contrast, the Fourth Circuit recently rejected a *Bivens* claim against TSA officers for constitutional violations. *Dyer v. Smith*, 56 F.4th 271 (4th Cir. 2022) (summarized here)).

State Bar's disciplinary order precluded recovery of alleged money owed for legal fees and expenses

Halscott Megaro, P.A. v. McCollum, 66 F. 4th 151 (April 18, 2023). The plaintiff, a law firm, sued the defendants for unpaid legal bills. The defendants were the McCollum brothers, famously exonerated from death row after 31 years. The district court dismissed the action. It took judicial notice of the North Carolina State Bar's discipline of the firm relating to its representation of the defendants, which included findings that the firm entered into an improper fee agreement with the brothers, contracted with the men despite their lack of capacity to contract, and ultimately resulted in suspension of one of the firm's attorneys for five years for misconduct relating to dishonesty. The Fourth Circuit unanimously agreed with the district court and affirmed dismissal of the law firm's claims.

Putman v. Harris, 66 F.4th 181 (April 19, 2023). In this case from the Western District of Virginia, the plaintiff sent texts to his wife threatening to kill himself and stating that he had a gun in his mouth. She called 911 and spoke to responding officers, indicating that her husband owned multiple guns and was a regular drinker. She was unsure if he was currently armed. A consent search of the home resulted in the discovery of a rifle. Officers used a tracking dog to explore the wooded area around the home. Officers found the plaintiff laying in a ditch, smelling of alcohol and allegedly surrounded by beer cans. Officers could not see any weapon. They ordered the man to stand up, an order he initially disregarded. When he did stand, he refused to turn around and show his back, instead arguing with officers and commanding them to leave his property. The canine handler cautioned the man that he was going to be bitten by the dog if he continued to refuse officer commands. The man responded that he would "f**king sue" in that event. The man eventually lifted his shirt to show his waistband but still refused to show his back. The handler eventually released the dog, which bit the man and "latched" on the plaintiff's arms while officers effectuated an arrest (which took 30 seconds). The plaintiff did not possess a gun. All of this was captured on body cam. The plaintiff's arm suffered "severe damage" as a result of the bite, and he sued the officers for constitutional and state tort law violations. The district court dismissed the claims at the summary judgment stage except for the excessive force claim against the officer handling the dog and state torts relating to that claim. The officer appealed and a unanimous Fourth Circuit reversed, finding that the officer was entitled to qualified immunity.

The court determined that no constitutional violation occurred. The district court erred in finding that the officers could not have reasonably believed that the plaintiff was not armed with a gun. The officers had probable cause to believe that the plaintiff was in a mental health crisis and was armed. The plaintiff's wife had shown the officers the texts her husband sent threatening suicide by gun, and the plaintiff refused to show the officers the back of his waistband during the encounter. ". . . We conclude a reasonable officer could have believed that Putman was armed and thus posed an immediate threat.

And since this immediate safety risk was likely to be cured by using the dog, Harris's deployment was justified." *Putman* Slip op. at 11 (cleaned up). While deadly force would not have been authorized under the circumstances, the use of force risking serious injury was appropriate, and the officer was entitled to qualified immunity on the excessive force claim.

The case was therefore unanimously reversed on the issue of qualified immunity and remanded for resolution of the remaining state tort claims.

Denial of for-cause challenge of a juror with hearing difficulties was not an abuse of discretion

U.S. v. Odum, 65 F.4th 714 (April 26, 2023). The defendant was convicted of armed robbery and possession of a firearm in furtherance of robbery stemming from a gas-station stickup in the Western District of North Carolina. During jury selection, Juror Eight indicated issues with his hearing. The trial court needed to repeat several questions and the man acknowledged difficulty with his ability to hear. Defense counsel asked follow-up questions of other jurors but did not question Juror Eight on his hearing or anything else. Defense counsel later moved to strike the juror for cause, which the trial court denied. It indicated that it felt the juror could adequately hear when voices were spoken into the microphone. No other concerns about the juror's hearing ability were raised at any point.

Decisions by the trial court to excuse a juror for cause will not be disturbed on appeal absent a "manifest abuse of discretion." *Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 222 (4th Cir. 1989). While bias or physical limitations on one's ability to serve as a juror may form the basis of a for-cause challenge, the defendant has the burden to show such disqualification. The trial court's handling of the potential issue with Juror Eight showed that it considered the juror's ability to hear and determined he was capable of serving. The Fourth Circuit was unwilling to substitute its judgment for that of the trial court. The trial court also permitted additional questioning by defense counsel, who failed to follow up on the point. This failed to show a manifest abuse of discretion.

All other challenges to the verdict and sentence were similarly rejected and the case was unanimously affirmed.