

August 2018 Fourth Circuit Case Summaries: August 3 and 28, 2018

(1) No violation of Miranda where defendant volunteered answer to question about weapons in home directed to his wife; (2) No abuse of discretion for failure to disclose identity of informant that acted as a “mere tipster”

[U.S. v. Bell](#), ___ F.3d ___, 2018 WL 4087893 (August 28, 2018). The defendant was convicted at trial of various drugs and firearms offenses in the District of Maryland and appealed, arguing that the trial judge improperly denied his motions to suppress a statement and to reveal the confidential informant in the case, among other evidentiary and sentencing issues. An ATF task force raided the defendant’s residence pursuant to a search warrant that was supported in part by an informant’s statements. According to the search warrant affidavit, the informant told the ATF agents that large amounts of heroin were being stored and sold from the defendant’s residence. The informant claimed to have been to the residence recently and saw distribution quantities of drugs, as well as a firearm, and was able to identify the defendant. When agents entered the home, they cuffed the defendant and ultimately sat him in a chair beside his wife (who was actually the sole owner of the home). An agent approached the wife, informed her of the search warrant, and asked if there were any weapons in the home that might hurt the officers. Before his wife responded, the defendant volunteered that “there was a gun under the couch” and that “a friend had given him the gun . . .” A semiautomatic rifle was found under the couch, and substantial amounts of drugs, cash, and drug distribution paraphernalia were discovered throughout the home. The defendant moved to have his statement about the presence of the gun suppressed as a *Miranda* violation and to have the identity of the informant disclosed, both of which were denied by the trial judge.

The defendant’s suppression argument focused on whether the questioning of his wife in his presence constituted an “interrogation” for purposes of *Miranda*. *Miranda* warnings are required whenever a suspect is in custody and subject to interrogation. Interrogation can consist of “express questioning, or its *functional equivalent*.” Slip op. at 10 (emphasis in original). Under *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), “words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response” can constitute interrogation for *Miranda* purposes. The Fourth Circuit concluded that the agent’s question to the defendant’s wife did not rise to the level of direct interrogation or its functional equivalent:

Agent Oliver focused directly on [the wife] as the owner of the house, looked her in the eye, and asked a single question relating to officer safety—whether

there were any weapons in the house that would hurt an officer. The question was not posed to the defendant and did not seek a response from him, nor was there any evidence that it was intended to. *Id.* at 12.

That the defendant was married to his wife and sat nearby at the time was not enough to presume the agent should have known his question would prompt the defendant's response. The *Innis* "functional equivalent" standard was simply not met here without some other coercive action by the police, above and beyond the fact that the defendant was in custody. "It can hardly be said that overhearing a single question posed to one's spouse creates the necessary level of compulsion without more." *Id.* at 13. The court therefore affirmed the denial of the motion to suppress, finding the defendant fell "well short" of establishing that his statement was coerced.

As to the motion to reveal the informant's identity, the defendant had requested the court either order the informant's identity disclosed, or to question the informant in camera to determine the need for disclosure. The defendant argued that the drugs in his house actually belonged to a former roommate who had died before the search warrant was executed. Since that former roommate was no longer available as a witness, the defendant maintained he should be able to question the informant at trial about the informant's mistaken identification of the defendant and establish that the drugs belonged to the former roommate. Under *Roviaro v. United States*, 353 U.S. 53 (1957), disclosure of an informant's identity depends on the facts of the case, including the specific offenses charged, defenses raised, and potential value of the informant's testimony. The court stated:

[I]n applying *Roviaro*, we have held more particularly that the government is privileged to withhold the identity of an informant when he was a 'mere tipster', or was only used for obtaining the search warrant, but that failing to disclose the informant's identity more likely amounts to error when the informant was *an active participant* in the events leading to the arrest of the accused. *Id.* at 18-19.

Here, there was no abuse of discretion in the trial judge denying the request to disclose the informant's identity. The informant was not an active participant in the events leading to arrest and only served as the source of information for law enforcement to obtain the search warrant. The allegation that the informant could possibly have established that the drugs found at the defendant's home belonged to the defendant's former roommate was "in flat contradiction to the representations in the warrant affidavits [and] appears dubious, if not entirely speculative." *Id.* at 19. The court distinguished this case from others where the informant participated in controlled buys or was actively involved in setting up a drug transaction. There was likewise no error in the court refusing to question the informant in camera: "Under the circumstances, the court was entitled to conclude that any marginal benefit to [the defendant] from such a

proceeding would not be worth the added risk of disclosure of the informant's identity." *Id.* at 19-20.

The court also rejected challenges to the trial judge's admission of 404(b) evidence and the defendant's ACCA designation, affirming the convictions in all respects. A dissenting judge would have found that the defendant's inculpatory statement should have been suppressed under *Miranda* and that the defendant's prior convictions did not qualify as violent felonies for purposes of the ACCA.

Habeas petition stated claims for juror bias and misconduct and should not have been dismissed without hearing or discovery

[Porter v. Zook](#), 898 F.3d 408 (August 3, 2018). For the second time, this death case from the Eastern District of Virginia was remanded for consideration on the merits of the petitioner's juror bias claims. The petitioner was convicted in state court of capital murder of a police officer, and eventually pursued federal habeas relief. Among his various claims was an allegation that a juror at his trial failed to disclose during voir dire that he had a relative working in law enforcement in the district where the crime occurred (venue was moved to an adjacent county for the trial). The district court initially dismissed the petition. On appeal, the Fourth Circuit remanded for the trial judge to consider the actual juror bias claim. On remand, the trial judge again dismissed the actual bias claim without a hearing, and the petitioner again appealed. The Fourth Circuit then considered all of the claims from the original habeas proceeding, including the actual bias claim and a juror misconduct claim.

During the trial, one Juror Treacle acknowledged he had a nephew in law enforcement in Virginia when asked about his familial ties to law enforcement. He failed to mention his brother was a law enforcement officer in the jurisdiction where the offense occurred. He was ultimately seated on the jury. When Treacle was interviewed by post-conviction counsel, he acknowledged that the trial had been "difficult" and "very emotional" because of his relationship to his brother. The petitioner maintained that the failure to disclose this information violated his rights to due process and an impartial jury. This, he argued, constituted actual bias on the part of the juror (the actual bias claim), as well as juror misconduct during voir dire that prevented effective jury selection (a so-called *McDonough* claim). While the two claims are related, a claim of actual bias may proceed without the need to show that the juror was dishonest. A *McDonough* claim, on the other hand, must show juror "failed to answer honestly on voir dire" and that "a correct response [from the juror] would have provided a valid basis for a challenge for cause." Slip op. at 16 (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)).

The district court dismissed the actual bias claim, finding that the state court had fully adjudicated the claim on the merits. In fact, the state habeas court failed to address that claim. The state habeas court did address the petitioner's ineffective assistance of counsel ("IAC") claim, based in part on the failure of trial and appellate counsel to raise the issue of juror

Treacle's bias. That court found that the petitioner could not satisfy *Strickland's* performance or prejudice prongs and denied the IAC claim. The district court relied on these findings to justify summary denial of the actual juror bias claim. The Fourth Circuit noted the difference between an actual bias claim and IAC, observing:

In contrast [to an IAC claim], on the merits of an actual bias claim, Appellant must prove that a juror, because of his or her partiality or bias, was not 'capable and willing to decide the case solely on the evidence before it'. Thus, what a petitioner must prove to succeed in a *Strickland* claim – that not only did counsel make grave errors, but that those errors affected the outcome of the proceedings – is a much higher bar than what he must prove on an actual bias claim. *Id.* at 22 (internal citations omitted).

Further, actual bias claims focus on the juror's "lack of partiality", while IAC claims focus on defense counsel's performance "measured against established professional norms." *Id.* The district court erred in conflating the standards for IAC with those of an actual bias claim. Since neither the state habeas court nor the federal district court ever adjudicated this claim on the merits, and the Fourth Circuit was free to review the claim under the more relaxed de novo standard, rather than giving AEDPA deference. The court then concluded that the district court's dismissal of the actual bias claim without allowing discovery or holding a hearing was error. "The Supreme Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. . . . [a]nd preservation of the *opportunity* to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.* at 25 (emphasis in original) (internal citations omitted).

The district court judge improperly imposed "hurdles out of whole cloth and then faulted Appellant for not overcoming them." *Id.* at 28. The district court faulted defense trial counsel for not conducting a more "searching scrutiny" of the relationships of potential jurors to law enforcement. Given that trial counsel did in fact specifically ask the venire about their family members' relationship to law enforcement and Juror Treacle's answer omitted the fact that his brother was a law enforcement officer in the adjacent district, it was error to blame defense counsel for not asking more.

[T]he district court places a burden on trial counsel un contemplated by the Supreme Court or this court—that counsel must keep asking questions until a juror gives a complete answer, without knowing whether the answer is complete. Indeed, counsel had no opportunity to ask whether Juror Treacle could be impartial even though his *brother* was an officer *in the jurisdiction adjacent to the scene of the crime.*" *Id.* at 29 (emphasis in original).

It also erred in finding the record insufficient as a matter of law to establish a deliberate material omission in Treakle's answer—without a hearing or discovery, few (if any) appellants will ever have admissible evidence of bias. The district court also suggested that the relationship between the brother and Juror Treakle was insufficient without more (such as the brother being a victim of violence in the line of duty) to cast doubt on Treakle's impartiality. Finally, the district court erred in not accepting the petitioner's allegations as true at this stage. The district court made credibility determinations against the petitioner and in favor of Juror Treakle at the motion to dismiss stage. On a "woefully undeveloped and incomplete" record, it was error to make these determinations without an evidentiary hearing.

The *McDonough* claim likewise should have been accorded an evidentiary hearing and discovery. The state habeas court did address this claim on the merits, thus entitling that judgment to AEDPA deference. But the Fourth Circuit found that the state court (as well as the federal district court) unreasonably applied *McDonough* here. Both the state court and the district court found that Juror Treakle "honestly" answered the questions posed to him, reasoning that it was true that the juror had a nephew in law enforcement in Virginia. According to those lower courts, his omission of the additional family member in law enforcement (his brother) was either something he wasn't asked, or was not material. This was an unreasonable application of established federal law. Under circuit precedent, *McDonough* claims apply to "not just straight lies, but also failure to disclose." *Id.* at 37. The petitioner's allegations at this stage were therefore sufficient to state a claim under *McDonough*. Concluding, the court stated: "Point blank, Juror Treakle did not candidly answer counsel's question. Appellant is entitled to find out why." *Id.* at 38. Whether the truthful answer would have provided a "valid basis to challenge" Juror Treakle for cause was wholly speculative in absence of a developed record, and warrants an evidentiary hearing. Thus, the *McDonough* claim, along with the actual bias claim, were remanded for discovery and hearing.

In all of the other numerous non-juror claims advanced by the petitioner on appeal, the court found that the trial judge reasonably applied the law and affirmed the district court's dismissals. A dissenting judge would have affirmed the district court's dismissal of all of the petitioner's claims.