

Fourth Circuit Case Summaries: August 1, 15, and 23, 2019

(1) Single click of website link close in time to when the link was posted supported probable cause under the totality of circumstances; (2) Information supporting search warrant was not stale; (3) Officers were entitled to good-faith reliance on the warrant

[U.S. v. Bosyk](#), 933 F.3d 319 (Aug. 1, 2019). In this child pornography case from the Eastern District of Virginia, the issue was whether a single click on a website link from the defendant’s IP address supported probable cause for a search warrant of the defendant’s home. Affirming the trial court, the Fourth Circuit held that probable cause existed and rejected the defendant’s other challenges to the search warrant.

Homeland Security was investigating “Bulletin Board A,” a dark web message board where users would share child pornography, in September of 2015. A post appeared on the site describing several child pornography videos, with multiple “video thumbnail images” showing minors engaged in sex acts. Underneath those images was a link to more child pornography, including video of sexual abuse of a toddler. The post provided a password to be used to access the material at the link. The link itself was random assortment of numbers and characters that did not indicate the content found at the link (but again, the link was posted underneath descriptions and images clearly denoting illegal pornographic content). The actual videos and images at the link were hosted at a different filesharing website, which hosted legal and illegal content. Records subpoenaed from the filesharing website in November 2015 showed that on the same day that the link was posted to Bulletin Board A, the defendant’s IP address downloaded or attempted to download the content at the link. In April of 2016, the government sought a search warrant of the defendant’s home.

The affidavit in support related the above facts, as well as general traits of people that possess child pornography—specifically, that such persons collect and store the illicit materials for a long time and generally keep them at home. A search of the defendant’s home and digital devices revealed thousands of instances of child pornography, as well as the defendant’s use of dark web browser to access Bulletin Board A and other similar child pornography sites. The defendant moved to suppress and ultimately pled guilty to receiving child pornography after the motion was denied. The defendant appealed, arguing that no probable cause existed for the search of his home, that the information in the affidavit was stale by the time of the search, and that the affidavit was false and misleading (and therefore did not qualify for the *Leon* good-faith exception to the warrant requirement).

(1) As to the probable cause argument, the defendant (and amicus, the Electronic Frontier Foundation, or “EFF”) argued that a single click of a website link was insufficient as a matter of law to establish probable cause. The court disagreed, finding that the timing of the click here (the same day as it was posted to the website) was a critical fact supporting the inference that the defendant found the link on that website. Because the link was clicked the same day that it appeared on Bulletin Board A, it was reasonable to assume that the person accessing the link knew the link would lead to child pornography. It was likewise reasonable to assume that the person accessing the link used the password to access the illegal material and that the person actually accessed the material. It was therefore probable that searching the defendant’s home would lead to evidence of crimes relating to the images. While the affidavit did not specifically recount the timing—that is, that the link was clicked after the link was posted to Bulletin Board A—it was likely on the facts that the link was accessed after it was posted there, and this omission did not invalidate the warrant.

In short, although the search relied on a ‘single click’ of an internet link, the click was to a video of child pornography in circumstances suggesting the person behind that click plausibly knew about and sought out that content. We think the magistrate judge therefore had a substantial basis for concluding that searching [the defendant’s] address would uncover evidence of wrongdoing. *Id.* at 11.

The court rejected arguments that the affiant should have attested to whether or not the link was accessible elsewhere on the web and whether legal content was also present at the linked site. The defendant argued that the affidavit failed to establish that the link was actually clicked via Bulletin Board A. Thus, the argument went, the defendant may have inadvertently accessed the material, since links to websites are “easily and frequently” distributed on the web. The court disagreed, stating that probable cause is not so demanding of a standard and does not require officers to dispel possible innocent explanations before obtaining a warrant:

Instead, the government needs only demonstrate a fair probability that contraband . . . will be found at the place to be searched. To be sure, innocent reasons may explain why someone accessed a file sharing page containing child pornography. . . . But this is all conjecture—no facts in the affidavit suggested the link existed elsewhere on the internet but on Bulletin Board A. And the possibility that it did doesn’t defeat probable cause when it’s fairly probable, given the temporal proximity, that the person clicked on the link because he was on Bulletin Board A and wanted to view child pornography. *Id.* at 12.

Given the common knowledge and recitations in the affidavit that persons viewing this type of material typically undertake efforts to avoid detection, it was unlikely that the defendant simply stumbled upon the link. The court acknowledged that “in a case based purely on an IP address connecting with a URL, probable cause may be hard to establish absent other incriminating evidence.” *Id.* at 15. But here, there was other evidence: the person accessing the link did so the same day it was posted to a “closed forum dedicated to child pornography.” *Id.* The court reviewed and distinguished other decisions in this context, again focusing on the closeness in time between the post appearing on the

website and the defendant's IP address accessing the link to find the warrant supported by probable cause.

(2) As to the staleness argument, the defendant pointed out that five months passed between his IP address accessing the link and the issuance of the warrant, arguing that any probable cause the government may have had dissipated by that time. Rejecting this argument, the court noted that probable cause is determined by the totality of the circumstances, "including the nature of the unlawful activity and 'the nature of the property to be seized.'" *Id.* at 19. Courts have tolerated longer delays in child pornography cases, due (again) to viewers of this material commonly collecting and storing the material, usually in a home, for long periods of time, as well as the fact that digital information can last a long time, including even after deletion. Under the circumstances and in the unique context of these offenses, this warrant was valid despite the five-month delay.

(3) Even if the warrant was defective, it would have been saved by the good faith exception. The warrant was supported by probable cause, as detailed above, and did not contain intentionally false or misleading information. Different courts have reached different conclusions in similar cases (and indeed, the judges of this panel were themselves divided). Thus, even if the warrant was lacking probable cause, the government was entitled to rely on the warrant under the good faith exception to the warrant requirement.

Concluding, the court observed:

We are sensitive to the privacy interests at stake here. But we also cannot ignore that many crimes are committed with just a few clicks of a mouse—including the very serious crime of downloading child pornography. In cases like this, our job is to ask precisely what "a single click" reveals under the circumstances presented, and whether that information justifies searching a person's most private places for evidence of a crime. Here, the magistrate judge who issued the warrant had a substantial basis for concluding that it did. *Id.* at 25-26.

In a 70-page dissent, Judge Wynn would have found that the warrant was not supported by probable cause due to omissions, mischaracterizations, and unsupported inferences of fact in the affidavit. He also would have found that the information supporting the search warrant was stale by the time of the search and would have found that *Leon* good-faith did not save the warrant. [*Author's note:* North Carolina courts do not recognize the *Leon* good-faith exception for constitutional violations.]

Vehicle search justified by search incident to arrest exception to warrant requirement

[U.S. v. Norman](#), ___ F.3d ___, 2019 WL 3819314 (Aug. 15, 2019). This case from South Carolina involved drugs and firearms offenses by a felon. Authorities were searching for the defendant to serve an arrest warrant for supervised release violations and received a tip about his whereabouts. Locating the defendant in a vehicle with another passenger, the officers placed the

defendant under arrest. A cell phone and “large amount of cash” was recovered from his person. A bag of cocaine was found in the passenger’s hair and she admitted it was cocaine. The officers placed the money taken off the defendant on the driver’s side seat of the car and noticed more cash on the floorboard. The combined total amount of the cash was over \$1,200.00. Officers also noticed a small bag of apparent powdered drugs sitting behind the gear stick in the middle of the car. That bag was later determined to contain heroin. Both occupants were arrested and a more thorough search of the car was conducted, revealing more cocaine and MDMA, as well as a firearm. The district court denied the motion to suppress (made at the conclusion of the government’s evidence), finding that the search was justified by plain view and the search incident to arrest exceptions. The Fourth Circuit affirmed, agreeing that the search was justified by the search incident to arrest of the passenger:

After finding a bag of white powder in [the passenger’s] hair—which she admitted to the arresting officer was cocaine—and observing a suspicious baggie and large amount of cash in plain view, the officer had a ‘reasonable basis’ to believe they might find additional drugs in the Camry . . . Slip op. at 5.

Under *Arizona v. Gant*, 556 U.S. 332 (2009), officers may lawfully search a vehicle incident to arrest when they reasonably believe that more evidence relating to the crime of arrest may be found inside the car. This situation fell squarely within that rule, and the trial court did not err in denying the motion.

A challenge to a sentencing enhancement was found to be error, but not plain error, and the district court’s judgment was therefore affirmed in all respects. A dissenting judge would have found that the district court committed no error in the sentence but otherwise concurred with the result.

Inmates have a qualified right of access and qualified right to compel consideration of video surveillance evidence in prison disciplinary proceedings

[Lennear v. Wilson](#), ___ F.3d ___, 2019 WL 3980165 (Aug. 23, 2019). The petitioner was an inmate in the Eastern District of Virginia and sought habeas relief to review the prison’s imposition of discipline on him, resulting in the forfeiture of his earned “good time” (thereby increasing the time he would spend in prison). Habeas is the only mechanism by which a federal inmate can challenge forfeiture of good time credits under *Pierce v. Freeman*, 121 F.3d 699 (4th Cir. 1997). During a count of the inmates at the prison, an incident occurred between the petitioner and a guard. According to the guard, the petitioner refused commands to stay in his “cubicle,” aggressively approached the guard, and commented to the guard that he was “sick of this shit.” According to the petitioner (a 55-year old diabetic), the dispute stemmed from his need to use the bathroom. Due to several medications taken by the petitioner, he has to use the bathroom frequently. When the inmate count began, he tried to wait, but became upset when the guard allowed several other inmates to use the bathroom that asked after his request. At that point, he asked the guard if this treatment was due to the issues between himself and another guard (the petitioner also alleged that the two guards involved here were romantically involved with one another). He denied making the other comments and actions alleged by the guard.

After the incident report, an investigation began and was ultimately substantiated by the prison through several administrative stages. The petitioner appealed to the regional director, stating that he had requested video footage of the incident at each stage of the prior proceedings and had been denied each time. Finding the request for the video untimely, the regional director denied the appeal and apparently did not review it. The petitioner again appealed to the Central Office with the same representations. It did not respond and the appeal was deemed denied. The petitioner then filed a habeas petition, alleging due process violations for the denial of the video evidence and refusal by the prison officials to consider the video. The district court denied relief without a hearing, finding no violation occurred. The petitioner appealed to the Fourth Circuit pro se. The court appointed counsel and ordered briefing on the questions of the scope of the due process rights involved in this context and whether prison officials violated any such right.

Inmates are entitled to basic procedural due process when prison decisions impacting the inmate's liberty interests are at stake, such as notice of the allegations and the reasons for the institution's decisions, under *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Wolff* recognized a "qualified right 'to call witnesses and present documentary evidence in his defense,'" to the extent that such evidence does not become "unduly hazardous to institutional safety or correctional goals." *Id.* at 13 (citing *Wolff*). This right entails both a right of access to the video by the inmate (subject to the qualified exception above) and a right to insist that corrections officials review the video. An inmate should be entitled to view video of the event and use it as documentary evidence in disciplinary proceedings unless the institution demonstrates specific facts that support a legitimate risk to institutional safety or goals. This right is critical to the inmate's ability to defend himself and is an "essential due process right . . ." *Id.* at 15. It is the prison's burden to show an exception applies. Cases must be considered individually and blanket rules about access to evidence should be avoided. When evidence is denied to the inmate, that decision should be made by a person not otherwise involved in the disciplinary proceedings. The prison should consider viable alternatives to meet the institutional objectives before simply denying all access to evidence, such as providing a summary of the evidence.

Similarly, the government must consider the evidence, unless the same exception applies—where the institution can show that consideration of the evidence will be harmful to the safety or goals of the institution. It is again the government's burden to demonstrate an exception applies that would allow the institution not to consider the evidence, and any such decision should be after consideration of the specific case. Any determination that documentary evidence is irrelevant should be made by a hearing officer and not a prison official involved in the incident. Where a risk is presented by the consideration of the evidence by the institution, it should consider viable alternatives before making a determination to refuse consideration. Refusal to consider the evidence will be justified less frequently than refusal to allow access to the evidence.

Here, the prison never attempted to justify its decision to not allow access or consideration of the video evidence with any proper purpose. There were disputed facts, including facts alleged by the petitioner that went unchallenged in the district court proceeding, and the district court erred in refusing to hold an evidentiary hearing. This record was insufficient to determine whether or not a due process violation occurred, and the matter was remanded for a hearing on the merits.

A dissenting judge would have found that the video evidence here was not material and could not benefit the petitioner. The dissent criticized the majority opinion for expanding discovery rights in this context. Even if a violation occurred, it would have been harmless, and the dissent would have therefore affirmed the district court.