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Case Summaries: Fourth Circuit Court of Appeals (June 11, 14, 15, 16, 24, 28, and 29, 2021)

Question about the existence of contraband in the car during a traffic stop was not an improper extension or deviation from the mission of the stop

U.S. v. Buzzard, 1 F.4th 198 (June 11, 2021). In this case from the Southern District of West Virginia, an officer stopped the defendants for a brake light violation around 1:30am. This occurred in a high crime area with a known drug house nearby. The officer recognized the passenger as a person he had dealt with before and knew him to be a felon with multiple prior drug arrests. He also knew the passenger had recently been released from prison. During the initial encounter, the passenger exhibited nervous behavior, interrupting the officer, refusing to make eye contact, and fidgeting in a way that led the officer to believe he may be inclined to flee. The driver could not produce a license or registration. Given the late hour and multiple occupants of the car, the officer called for backup before checking the men's information. Before the backup officer arrived, the officer asked if there was anything illegal in the car. The driver admitted to having marijuana paraphernalia and turned a pipe over to the officer. The passenger leaned down and was seen "fiddling" with something under the seat. The backup officer arrived within 3 to 5 minutes of being called and took control of the driver outside of the car. The passenger then admitted to the stopping officer that he too possessed drug paraphernalia and turned over a hypodermic needle. The driver then admitted to the backup officer that there were guns in the car. A search found a firearm under the driver seat and another under the passenger seat, and both men were charged with felon in possession. They moved to suppress, arguing that the officer's question about having anything illegal was an improper extension of the traffic stop and an improper deviation from the mission of the stop. At suppression, both men testified and contradicted the officer's version of events, but the officer's version was ultimately credited. The district court denied the motions to suppress, and a unanimous panel of the Fourth Circuit affirmed.

Under *U.S. v. Rodriguez*, 575 U.S. 348 (2018), the reasonableness of a traffic stop's duration depends on the purpose of the stop—normally to address the traffic violation causing the stop, and to address any related officer safety concerns (absent any additional reasonable suspicion). In that case, an officer extended an already-completed traffic stop by running a drug dog around the car, which was found to violate the Fourth Amendment. Here, the district court determined that the officer's question about any contraband in the car was related to officer safety concerns. The Fourth Circuit agreed:

> [The officer] was outnumbered, and he asked the question because of 'the time of night and the high drug area, [the passenger's] history and [the passenger's] behavior.' Given the totality of the circumstances, it makes sense that he needed to know more about what [the driver and passenger] had in the car. *Buzzard* Slip op. at 10.

Further, the question was asked during the middle of the traffic stop before the officer had completed routine checks and before the backup officer arrived (who, again, was called to ensure officer safety). To the extent the question deviated from the mission of the stop, it was permissible because it did not extend the stop's duration, which was ongoing. The motion was therefore properly denied.

Other challenges were likewise rejected, and the district court was affirmed in all respects.

No error in allowing the defendant to represent himself or in failing to order a competency evaluation

U.S. v. Ziegler, 1 F.4th 219 (June 14, 2021). The defendant sped by an officer and ultimately crashed in the Southern District of West Virginia. The officer noticed empty beer cans in the car and that the defendant was "disheveled and erratic." The defendant refused to submit to breath testing and exclaimed that any charges would be dropped because he was an Assistant United States Attorney ("AUSA"). He was charged with impaired driving and other traffic offenses. Before the magistrate, the defendant again claimed to be an AUSA and stated he would represent himself. After posting bond, he attempted to recover his vehicle from the tow truck company and again claimed to be an AUSA (as well as a sovereign citizen). The defendant later met with the state prosecutor in his impaired driving case and stated once more that he was representing himself as an AUSA. This prompted the prosecutor to check with the United States Attorney's office. That office confirmed that the defendant was not and had never been an AUSA. He was subsequently indicted in federal court for two counts impersonating an AUSA—one for his statements to law enforcement and the prosecutor, and one for his statements to the tow company.

After being appointed a federal public defender, the defendant moved to represent himself. In support of the request, he argued that he had previously represented himself effectively and, although he was convicted in the matter, the conviction was overturned on appeal. Upon investigation of this claim, it was determined that the previous conviction was overturned for failure of the trial court to follow proper procedure before permitting the defendant to represent himself. The trial court specifically asked the defendant if his intention was to do the same thing in the present matter—that is, to proceed pro se and then complain of errors in allowing the pro se representation on appeal. The defendant denied any such intent.

The defendant also professed knowledge of federal criminal procedure, evidence, constitutional law, and criminal law generally. He agreed that his waiver of counsel was knowing and voluntary. After recommending that the defendant keep his appointed attorney,

the defendant stated that he "absolutely" wanted to represent himself. The public defender agreed that the defendant was competent to waive counsel. The trial court allowed the federal defender to withdraw and permitted the defendant to proceed pro se (although the defender was kept on as stand-by counsel).

Several pretrial motions were heard and argued, including a motion to suppress. The defendant made some "odd" and "rambling" statements, and some of his motions were not relevant or out of the ordinary (including an attempt to remove his impaired driving case to federal court). The trial court again advised the defendant to allow a licensed attorney to represent him in the case and even offered to appoint a different attorney. The trial judge stated: "I read your submissions carefully, and it's obvious to me that you're not a sophisticated person as far as your knowledge of the law. There are a lot of things that it's apparent to me that you don't understand that you think you understand." *Zieglar* Slip op. at 7. The trial court again considered the defendant's competency to waive counsel again and found that while the defendant's decision was ill-advised, the defendant was competent to make it.

During trial, the defendant's behaved strangely at times, asking irrelevant questions and arguing with witnesses and the court. He also introduced evidence, made objections that were sustained, "made good points on cross," and otherwise performed many of the necessary incidents of representation. After the jury convicted on both counts, the defendant claimed he needed an evaluation of his mental health for the first time. The district court denied the motion and sentenced the defendant to time served. The defendant appealed, and a unanimous Fourth Circuit affirmed.

The defendant argued that the trial judge failed to properly consider his competency to waive counsel before allowing him to proceed pro se, and that his conduct during trial should have triggered a reexamination of the issue. A defendant is competent to waive counsel if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and (2) 'he has a rational as well as factual understanding of the proceedings against him.'" *Id*. at 11 (citation omitted). Competence to waive counsel is distinct from competence to provide effective representation for oneself, and only the former is required. The trial court observed the defendant and engaged in repeated and extensive pretrial colloquies with him regarding self-representation. This was a sufficient examination of the defendant's competency to waive counsel. The fact that the defendant had argued he had a prior conviction overturned due to his legal skill, when in fact the conviction was overturned for errors relating to the defendant's waiver of counsel, was not enough to change the analysis and was not itself reason for the trial court to order a mental health evaluation. According to the court:

> [N]othing about that case, nor about the way Ziegler presented it to the district court, created cause to believe Ziegler was mentally incompetent. Not every misleading claim or lack of knowledge suggests mental illness, and 'not every

manifestation of mental illness demonstrates incompetence to stand trial' or to waive the right to counsel. *Id*. at 18 (citation omitted).

The defendant's behavior during trial likewise did not create reasonable grounds to believe he was incompetent. He performed "quite well" as his own attorney, notwithstanding some "bizarre statements and mistakes." *Id*. at 19. Although he represented to the court that he was skilled in the law and acted strangely with some witnesses and arguments, this was not enough to seriously question his competency: "Many great trial lawyers are combative and a bit full of themselves, if not outright narcissists. And 'persons of unquestioned competence have espoused ludicrous legal positions.'" *Id*. at 20. Such behavior alone is not enough to trigger a competency evaluation, and the district court properly did not abuse its discretion in allowing the defendant to represent himself or in failing to sua sponte order a competency evaluation during trial.

A challenge to the sufficiency of evidence was also rejected, and the district court was affirmed in full.

No constitutional violations for denial of in-person visitation with minor daughter where plaintiff was convicted of sexual offenses with a minor

Desper v. Clarke, 1 F.4th 236 (June 15, 2021). In this case from the Western District of Virginia, the plaintiff was a prison inmate and sex offender. He previously exercised in-person visitation with his minor daughter for years during his incarceration. In 2015, the prison changed its policy to disallow in-person visits between minors and sex offenders convicted of an offense involving a minor unless the prison issued an exemption, which affected the plaintiff. After unsuccessfully seeking an exemption several times, he sued, claiming various constitutional violations. The district court dismissed the case and the Fourth Circuit unanimously affirmed.

Whether grounded in the First Amendment right of free association or in Fourteenth Amendment due process rights, the parent-child relationship enjoys constitutional protection. However, any right to prison visitation is not clearly established under either authority. The court here was unwilling to find that a person convicted of a sexual offense against a minor was constitutionally entitled to in-person visitation with a minor. Under *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461 (1989), "[t]he denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence,' and therefore is not independently protected by the Due Process Clause." (citation omitted). The court "doubt[ed]" that the plaintiff had a liberty interest in in-person visitation and the prison visitation policies did not separately confer one here. Fair process was provided for the plaintiff to seek an exemption, and the plaintiff suffered no permanent deprivation, given his ability under the prison policy to seek an exemption each year. The prison's denial of in-person visitation also did not rise to level of shocking misconduct

necessary to state a substantive due process claim. Finally, the plaintiff failed to state a claim for an Equal Protection violation based on alleged differential treatment as compared to other prisoners. The district court was therefore affirmed in all respects.

First Amendment protects the dissemination of truthful, publicly available court records; ban on distributing recordings of criminal court proceedings was subject to strict scrutiny

Soderberg v. Carrion, 999 F.3d 962 (June 15, 2021). Under Maryland law, broadcasting criminal court proceedings is criminally prohibited. The ban applies to both live and previously recorded proceedings and applies only to criminal cases—civil matters are not covered by the ban. Thus, the press or public is free to broadcast or distribute any recorded civil court proceeding but is barred from doing the same for criminal cases. Other state laws require court proceedings to be recorded and provide for a right of public to access the audio or video recordings (subject to exceptions for closed proceedings and the like). The plaintiffs sued, challenging the ban's application to previously-recorded matters as a First Amendment violation. The State argued that the law was a "content-neutral regulation of the time, place, and manner of speech" subject only to intermediate scrutiny. The district court agreed with the State and dismissed the case for failure to state a claim. A unanimous Fourth Circuit reversed.

The First and Fourteenth Amendments protect the dissemination of publicly available court records. Under relevant U.S. Supreme Court precedent, "…States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Soderberg* Slip op. at 10 (citation omitted). That general rule applied to the information at issue here, and the district court erred in failing to review the law under strict scrutiny. The district court's judgment was therefore vacated, and the matter remanded for further proceedings under the correct standard of review.

Abortion providers had standing to challenge North Carolina's criminal abortion laws

Bryant v. Woodall, 1 F.4th 280 (June 16, 2021). Abortion providers sued in the Middle District of North Carolina, seeking to enjoin the State from enforcing its criminal prohibitions on abortion. *See* G.S. 14-44, 14-45, and 14-45.1. The plaintiffs argued that the statutes violated the due process rights of their patients. The district court found that the plaintiffs had standing and ultimately granted summary judgment on their behalf. On appeal, the State renewed its argument that the plaintiffs lacked standing, pointing out that it had not prosecuted under these laws for almost fifty years. North Carolina amended its abortion rules in 2015 and this indicated "a renewed interest in regulating abortion." *Bryant* Slip op. at 11. A unanimous Fourth Circuit agreed that the plaintiffs had established a credible threat of prosecution for purposes of standing, and the district court's judgment was consequently affirmed.

On rehearing en banc, court reverses denial of preliminary injunction enjoining Baltimore's aerial surveillance program

Leaders of a Beautiful Struggle v. Baltimore Police Department, ___ F.4th ___, 2021 WL 2584408 (June 24, 2021). The plaintiffs in this District of Maryland case were a group of community advocates who regularly travelled in and around crime scenes in the city. They sought a preliminary injunction to prohibit the defendant from operating a novel aerial surveillance system known as Aerial Investigation Research ("AIR") and to prohibit the police from accessing any information obtained via operation of the system, alleging First and Fourth Amendment violations. "[A]ny single AIR image—captured once per second—includes around 32 square miles of Baltimore and can be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs." *Leaders of a Beautiful Struggle* Slip op. at 5. The district court denied relief, and a three-judge panel of the Fourth Circuit affirmed, finding no constitutional violations (summarized here). During the litigation, the defendants ceased the program and city officials pledged to not renew the practice. They also deleted all but around 14% of the data collected. On rehearing en banc, the majority reversed.

Because of the possibility that the plaintiffs may be included within the remaining data, the matter remained a live controversy:

> 14.2 percent of all the data collected—millions of photographs documenting thousands of hours of public movements over six months—is a significant quantity of information. Indeed, the preserved 14.2 percent is the needle in the proverbial haystack that the AIR program was designed to discover. *Id*. at 12.

The matter was therefore not moot, as the defendant retained access to some amount of data collected by the AIR program. The majority determined that the case was controlled by *U.S. v. Carpenter*, 138 S. Ct. 2206 (2018) (holding that long term tracking by use of historical cell site location data constituted a Fourth Amendment search). Like the cell site location data there, the AIR program here provides police with a "'detailed, encyclopedic,' record of where everyone came and went within the city during daylight hours over the prior month-and-a-half." *Leaders of a Beautiful Struggle* Slip op. at 19. While the program only operated during daylight hours (weather-permitting), the technology here was more accurate than the cell site data in *Carpenter* and amounted to long term tracking of every person in the city when the system was operative—thus violating the reasonable expectation of privacy of each person recorded. In the court's words:

> The AIR program records the movements of a city. With analysis, it can reveal where individuals come and go over an extended period. Because the AIR program enables police to deduce from the whole of individuals' movements, we hold that accessing its data is a search, and its warrantless operation violates the Fourth Amendment. *Id*. at 28.

The plaintiffs therefore established a likely constitutional violation and a risk of irreparable harm supporting an injunction against the policy. Other factors in support of the injunction

were similarly met, and the district court erred by failing to preliminarily enjoin the defendant from restarting the AIR policy or accessing its data.

Chief Judge Gregory concurred in a separate opinion, joined by Judges Wynn, Thacker, and Harris. His opinion criticized the dissent for its emphasis on policing as the sole answer to the crime problems of Baltimore and took issue with the dissent's argument that disenfranchised communities in the city would be "hopeless" without the AIR program.

Judge Wynn also penned a concurrence, joined by Judges Motz, Thacker, and Harris, to express disagreement with dissent's "dire rhetoric" and its "insinuat[ion] that the dissent alone has Baltimore's best interests at heart." *Id*. at 39 (Wynn, J., concurring).

Judge Wilkinson dissented, joined in full by Judges Neimeyer, Agee, Quattlebaum and joined in part (in various combinations) by Judges Diaz, Richardson, and Rushing. He would have affirmed the district court and panel decision below as moot. He also criticized the majority opinion for failing to properly apply the requirements for the issuance of a preliminary injunction, contravening Fourth Amendment precedent on aerial surveillance, trampling principles of federalism, and for imposing a "straitjacket" on Baltimore's ability to experiment and attempt new solutions to its epidemic of violent crime. "Today's precipitous and gratuitous ruling will contribute to the continuation of a great human tragedy." *Id*. at 74 (Wilkinson, J., dissenting).

Judge Neimeyer also dissented separately, faulting the majority for its "stunning judicial overreach," and recommending review by the U.S. Supreme Court. *Id*. at 75 (Neimeyer, J., dissenting).

Judge Diaz also penned a dissent and would have found the matter moot.

First Amendment right of access to public court documents includes right to reasonably contemporaneous access

Courthouse News Service v. Schaefer, ___ F.4th ___, 2021 WL 2583389 (June 24, 2021). The plaintiff was a news organization reporting on civil litigation. It sends reporters to courthouses to review new complaints each business day in its course of business. Certain clerks of court in the Eastern District of Virginia did not make complaints promptly available for review, with the reporters often waiting days to obtain copies of the documents. The plaintiff sued, alleging First Amendment right of access violations. After the complaints were filed, the clerks began providing copies of complaints filed at a significantly faster pace. The district court agreed with the plaintiff and issued a declaratory judgment, finding the clerks actions in delaying release of the complaints violated the First Amendment. The clerks appealed, and the Fourth Circuit unanimously affirmed.

The First Amendment protects access to judicial records where the information sought "'ha[s] historically been open to the press and general public'; and (2) where 'public access plays a significant positive role in the functioning of the particular process in question.'" *Courthouse News* Slip op. at 12 (citation omitted). The complaints sought here easily satisfied both parts

of that test. The defendants largely agreed but argued there was no right to contemporaneous access of the documents. The court disagreed: "The press and public thus have an important interest in reasonably contemporaneous access to civil complaints." *Id*. at 16. While some minor deviation or occasional delay to court documents will not violate the right of access, court documents should be made available "as expeditiously as possible" to avoid a First Amendment violation. *Id*. at 19. The district court correctly determined that the defendants had failed to do prior to the filing of the current action, and its declaratory judgment was unanimously affirmed.

52-year sentence for offense committed as a juvenile did not violate the Eighth Amendment

U.S. v. Friend, ___ F.4th ___, 2021 WL 2639249 (June 28, 2021). In this case from the Eastern District of Virginia, the defendant was originally sentenced to life without parole for carjacking resulting in death and other offenses committed when he was 15 years old. Following a resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012), he was sentenced to a 65-year term of imprisonment. On appeal, the Fourth Circuit reversed, finding that the district court failed to properly weigh the defendant's age and immaturity at the time of his offenses. On remand, the district court took additional evidence and ultimately sentenced the defendant to a 52-year term of years. The defendant again appealed, alleging an Eighth Amendment violation. The Fourth Circuit denied relief.

Under *Jones v. Mississippi*, 141 S. Ct. 1307, 1313 (2021), a "discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" for purposes of the Eighth Amendment in the context of juvenile murder sentences. Here, the district court recognized its discretion and exercised it to impose a sentence less than life (and 20% shorter than its previous sentence). Further, the defendant was not sentenced to life without parole—he will be released at age 60. The court rejected the idea that the term amounted to a de facto life sentence. While recognizing the possibility that a term of years sentence could transform into a de facto life term, such was not the case here. The district court carefully considered the defendant's individual situation, and its sentence did not violate the Eighth Amendment. Other challenges to the reasonableness of the sentence were also rejected, and a majority of the court affirmed.

Judge Floyd dissented and would have found that the sentence was procedurally and substantively unreasonable.

No due process or ex post facto violation for upward variance at *Johnson* resentencing

U.S. v. Abed, ___ F.4th ___, 2021 WL 2655324 (June 29, 2021). In this case from the Western District of Virgina, the defendant was sentenced to a total of 570 months for his involvement in a violent racketeering scheme, including the use of a destructive device during a crime of violence. Following changes in the law regarding the definition and reach of a "crime of violence" under federal law, the defendant successfully sought a resentencing. *See Johnson v.*

United States, 576 U.S. 591 (2015). He argued that the district court was bound by sentencing guidelines in place at the time of his offense, which would have required a sentence of no more than 235 months. The district court disagreed and varied upward to sentence to impose a 360-month sentence for the remaining convictions, noting that the sentencing guidelines are now discretionary as a matter of Sixth Amendment law. *See U.S. v. Booker*, 543 U.S. 220 (2005). On appeal, the defendant argued ex post facto and due process violations.

The ex post facto clauses in the Constitution prohibit legislatures at the state or federal level from passing ex post facto laws, but these clauses do not apply to the judiciary. While due process can limit ex post facto actions by the judicial branch, the application of *Booker* here—treating the sentencing guidelines as discretionary at a resentencing—did not implicate a judicial ex post facto action. The court likewise rejected the due process arguments. The sentence was not improper or driven by retaliation for the defendant's successful exercise of his rights. The total term of the defendant's imprisonment decreased from 570 months to 360 months. This was not vindictive and did not otherwise violate due process. Other challenges to the sentence were similarly rejected, and the district court affirmed in full by a unanimous court.