

## Case Summaries: Fourth Circuit Court of Appeals (May 7 and 11, 2021)

### ***Gant* limitations on search incident to arrest exception apply outside of the vehicle context; searches of backpack and vehicle after defendant was secured were improper**

[U.S. v. Davis](#), 997 F.3d 191 (May 7, 2021). Officer Derek Richardson with the Holly Springs Police Department stopped a car driven by Howard Davis for a [window tinting violation](#). While Davis was on the side of the road, two other officers arrived in a separate patrol car, with the lights activated. While the three officers conferred behind his car, Davis put his hand outside of his window and made a pointing gesture indicating he was leaving. He drove off, leaving his driver's license and insurance card with Richardson. The officers chased Davis's car through a residential neighborhood. Davis drove into someone's backyard, got out of his vehicle carrying a backpack, ran on foot into a swamp, and got stuck in knee-high water. Richardson, who was pursuing Davis on foot at this point, drew his gun and ordered Davis to come out of the swamp. Davis returned to dry land, dropped his backpack, and lay down on his stomach.

Richardson patted Davis down and discovered a large amount of cash. He then handcuffed Davis's hands behind his back and arrested him for traffic offenses, including speeding to elude. Richardson then unzipped the backpack and found cash and cocaine inside. Officers also searched Davis's car, finding a digital scale and cash. A witness reported seeing Davis throw a gun from the car while fleeing, and officers found a gun on the path Davis drove through the neighborhood. Davis was indicted for federal drug and gun charges. He moved to suppress the evidence seized from his backpack and vehicle, arguing that both searches violated the Fourth Amendment. The trial court denied his motion. Davis was convicted at trial and was sentenced to thirty-five years of imprisonment. He appealed.

The Fourth Circuit began by reviewing the United States Supreme Court case law identifying and defining the parameters of the exception to the warrant requirement that permits searches incident to a lawful arrest. The court noted that the authority to search a vehicle incident to a suspect's arrest had been curtailed in *Gant*. There, the Supreme Court [held](#) that officers may search a vehicle incident to a recent occupant's arrest in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonable to believe that evidence related to the crime of arrest might be found in the vehicle.

Davis urged the Fourth Circuit to apply the first *Gant* holding to the search of his backpack. The court obliged, reasoning that this holding was not limited to the vehicle context and that

it applied to searches of containers more generally. The Fourth Circuit pointed to the *Gant* Court's reliance on a non-vehicle case, *Chimel v. California*, 395 U.S. 752 (1969) (determining that it was reasonable for arresting officers to search an arrestee and the area within the arrestee's reach, from which the suspect might access a weapon or destroy evidence), as a basis for the standard it articulated. The *Davis* Court noted that the Third, Ninth, and Tenth Circuits had likewise concluded that *Gant* was not limited to automobile searches. (Ever-prescient Professor Jeff Welty [predicted this outcome](#) more than a decade ago.)

Applying *Gant*, the court determined that the search of the backpack was unlawful. Davis was face-down on the ground with his hands handcuffed behind his back when Richardson unzipped the bag and searched it. There were three officers and no other suspects or distracting bystanders on the scene. Thus, the court reasoned, Davis was secured. Moreover, the court concluded that even though the bag was next to Davis, the fact that Davis was face-down and handcuffed meant that the bag was not within his reach.

The court distinguished *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020), a case in which the Fourth Circuit reasoned that officers could properly search a backpack located inside the house where defendant Ferebee was handcuffed and arrested even after Ferebee was taken out of the house. There, the court concluded that Ferebee, though supervised by an officer, "still could walk around somewhat freely and could easily have made a break for the backpack inside the house." *Id.* at 419. In addition, Ferebee had, while handcuffed and before being escorted from the house, surreptitiously discarded a marijuana joint without officers noticing. Davis, though handcuffed like Ferebee, was prone with his hands handcuffed behind his back, facts that the court said rendered him secure and the bag out of reach.

The *Davis* Court also distinguished the Third Circuit's decision in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), a case it relied upon in *Ferebee*. In *Shakir*, the defendant was arrested and dropped a duffel bag at his feet. Officers handcuffed the defendant and then searched the duffel bag. The Third Circuit held that the search was permissible because, even though the defendant was handcuffed and guarded by two officers, there was a "sufficient possibility" that he could access a weapon in the bag. *Id.* at 321. The court noted that Shakir was subject to an arrest warrant for armed bank robbery and that he was arrested in public "near some 20 innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers." *Id.* Davis's circumstances were different in key ways. Again, Davis was positioned on his stomach with his hands cuffed behind his back. A gun was pointed at him. There were three officers on the scene, a lone defendant, and no one else. Davis, unlike Shakir, could not have accessed his bag by dropping to the floor.

The court next considered the lawfulness of the warrantless search of Davis's car, which occurred before officers learned of the gun. Davis argued that the search was not permissible under the automobile exception, which requires probable cause that the car contains evidence of a crime, or under *Gant*, since he was secured, the car was out of reach, and it was not reasonable to believe that evidence of his crime of arrest would be discovered in the vehicle. Again, the Fourth Circuit agreed with Davis.

Without the evidence from the backpack, probable cause to search the car rested on Davis's flight, his arrest, and the cash discovered on his person. The court concluded that while these facts may have given the officers an articulable suspicion that evidence of a crime was in the vehicle, it did not provide probable cause. Thus, the search was not authorized under the automobile exception. As for the first prong of *Gant*, Davis was secured and the car was out of reach. As for the second *Gant* prong, Davis was arrested for speeding to elude, resisting an officer, and other traffic offenses. The court said it was not reasonable to believe that Davis's car would contain evidence of those crimes.

The Fourth Circuit reversed Davis's convictions and remanded for entry of an order granting the motion to suppress. [This summary is reproduced from Shea Denning's blog on the case, [here](#).]

### **Suppression remedy not available for violation of administrative warrant requirement**

[U.S. v. Santos-Portillo](#), 997 F.3d 159 (May 7, 2021). In this case from the Eastern District of North Carolina, the defendant was in the country without authorization. He was convicted of a felony in 2011 and deported to Honduras. In 2018, a Homeland Security agent recognized the defendant, leading to his arrest for illegal reentry. Following his arrest, he made inculpatory statements. Under 8 U.S.C. § 1357(a), immigration officers may arrest without a warrant only where evidence exists to show that the arrestee will escape if not immediately arrested. Here, no warrant was obtained and there was no evidence that the defendant was a flight risk. The defendant moved to suppress the evidence obtained after his arrest based on the statutory violation. The district court agreed the arrest was unlawful but found that suppression was not a proper remedy in this context.

A divided Fourth Circuit agreed. In the majority's words:

There is absolutely no statutory basis for Santos-Portillo's argument that we should suppress the evidence against him. 8 U.S.C. § 1357(a) makes no mention of suppression or any other remedy for those arrested without an administrative warrant. This absence is notable, considering that Congress has authorized a suppression remedy in other contexts. *Santos-Portillo* Slip op. at 6 (citations omitted).

The arrest was reasonable under the Fourth Amendment, and that precluded suppression as a remedy absent statutory authorization.

The defendant also argued that the court had the inherent authority to fashion a suppression remedy despite the absence of clear authority in support. This too was rejected by the majority: "[T]he once freewheeling power of the federal courts to create remedies where Congress did not has met only disfavor from the Court itself [in recent times]." *Id.* at 9. The court's position here is consistent with other circuits that have considered the question.

Other arguments in favor of a suppression remedy were similarly rejected, and the district court was affirmed in full.

Judge Floyd dissented. He would have found that a suppression remedy was available as a matter of the court's supervisory authority and that remedy should have been considered as an option by the district court.

### **Conviction for abusive language based on racial slur reversed on First Amendment grounds**

[U.S. v. Bartow](#), 997 F.3d 203 (May 11, 2021). The defendant was a white retired Lieutenant Colonel with the U.S. Air Force. While in a store on a military base in the Eastern District of Virginia, he became verbally abusive towards several people within. He loudly used the slur "n\*\*\*\*r" towards at least one African American man and other people. He was charged with abusive language under a Virginia law prohibiting language likely to cause a breach of peace (akin to one version of North Carolina's disorderly conduct offense, [G.S. 14-288.4\(a\)\(2\)](#)). He was prosecuted in federal court under a federal statute incorporating state law. He was convicted at trial and appealed. The Fourth Circuit unanimously reversed.

So-called "fighting words" are unprotected under the First Amendment pursuant to *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However, the U.S. Supreme Court has not recognized any speech since *Chaplinsky* as falling within the fighting words exception and has significantly limited the reach of the exception. No longer are words that "by their very utterance inflict injury" recognized as fighting words. *Bartow* Slip op. at 6 (citations omitted). Fighting words must be directed at an individual personally. "Without evidence of a direct personal insult, the Court has determined that the Government may not obtain a conviction for 'fighting words.'" *Id.* at 7 (citation omitted). To qualify as fighting words, the speech at issue must also be likely to provoke immediate violence from the listener towards the speaker. Finally, fighting words must be evaluated in light of all of the circumstances and in the context under which the speech was made.

The court recognized that the defendant's use of the racial slur was grossly offensive. "It is hard to think of an English term that is more abhorrent." *Id.* at 9. The word itself does not, however, rise to the level of fighting words. Here, there was no evidence presented that the people who heard the defendant's slur reacted violently to it, nor any evidence that a reasonable person would violently react to it under the circumstances. This was fatal to the conviction. According to the court:

The record contains no evidence that Bartow employed other profanity, repeated the vile slur, or issued any kind of threat, let alone one dripping with racism [as in another case where a similar offense withstood a First Amendment challenge]. . . He did not take any aggressive actions that might have provoked violence. Indeed, Bartow's mode of speech—a series of rhetorical questions while trying on shoes — did not provoke anyone. *Id.* at 13 (cleaned up).

The unanimous court acknowledged its ruling permitted the defendant to avoid criminal liability for his “shameful speech,” but concluded the First Amendment required that the conviction be reversed.