Phil Dixon, Jr.
919.966.4248
dixon@sog.unc.edu
UNC School of Government ©

Fourth Circuit Case Summaries: December 4, 6, 17, and 18, 2019

Where search was conducted pursuant to valid inventory search procedure, discovery of firearm was inevitable

U.S. v. Seay, 944 F.3d 220 (Dec. 4, 2019). In this case from the Eastern District of Virginia, police were called to a hotel to assist removing a "difficult" occupant. Officers went to the room and the occupants (the defendant and a woman) agreed to leave. The defendant carried a clear plastic bag when he left. Officers searched the room after they left, finding a bullet in the toilet and drug paraphernalia wrapped in women's clothing. The defendant and woman were brought back to the room and interviewed separately. Officers decided to arrest the woman for the paraphernalia but wanted to determine who owned the other property. The woman acknowledged that the property in the clear bag was jointly owned by her and the defendant. A gun was found inside the bag and the defendant was indicted for possession of firearm by felon. He moved to suppress. The trial court granted the motion as to the defendant's statements during the interview in the hotel room but denied the motion as to the firearm, finding that the gun would have inevitably been discovered. The defendant appealed.

Inevitable discovery is an exception to the exclusionary rule that allows evidence obtained by illegal means to be admitted if the evidence would have inevitably been discovered "by lawful means." Lawful means include valid inventory searches. An inventory search must "'be conducted according to standardized criteria,' such as a uniform police department policy[,] and conducted in good faith." Slip op. at 6. Here, the officers testified at suppression about the police department's standard policy to search and catalog the property of arrestees "before or at lockup." Had the woman requested that the bag be given to the defendant, officers would have cataloged its contents before releasing it under the policy. These procedures helped protect officers from accusations of theft by arrestee and to ensure that no contraband entered the detention center. Here, probable cause existed to arrest the woman and policy dictated searching her property. The gun therefore would have inevitably been found. That officers had "limited discretion" under the department's policy to decide whether or not to inventory each piece of arrestee property on camera did not render the inventory search invalid. The district court's denial of the motion as to the gun was therefore unanimously affirmed.

(1) No reasonable expectation of privacy where phone was abandoned; (2) Defendant failed to demonstrate violation of Sixth Amendment right to impartial jury

U.S. v. Small, 944 F.3d 490 (Dec. 6, 2019). This case from the District of Maryland involved charges of federal carjacking and related offenses. The defendant robbed a victim of a car at gunpoint. That car was located three days later with the defendant driving. When officers tried to apprehend the defendant, he led them on a high-speed chase that ended when he crashed the vehicle into the fence at Fort Meade. The defendant fled on foot and evaded police throughout the night but was located and arrested in the morning. During the search the night before, officers located items discarded by the defendant, including his cell phone, shirt, and hat. Law enforcement noticed that the cell phone had missed calls

from a number identified on the phone as "Sincere my Wife." An officer called that number back and determined that the defendant was the likely owner of the phone. Later that morning, officers again used the phone to contact "Sincere," answered one of her calls, and recorded the phone's serial number. The government later obtained search warrants to obtain the phone's historical cell site location data, all of its calls, texts, internet history, and records on another phone that was in contact with the defendant's phone on the date of the offenses. The records produced pursuant to those warrants incriminated the defendant and a co-defendant. The defendant moved to suppress the warrantless searches of his phone. The district court denied the motion, finding that the phone had been abandoned. The defendant was convicted at trial. Post-trial, the defendant claimed that the trial court's denial of his motion to excuse and examine two jurors for potential improper contact violated his rights to an impartial jury. The trial court denied this and other post-trial motions, and the defendant appealed. The Fourth Circuit unanimously affirmed.

(1) Under *Abel v. U.S.*, 362 U.S. 217 (1960), a person has no reasonable expectation of privacy in abandoned property. Property that is merely lost is not abandoned. There must be some voluntary action by the defendant that supports finding the defendant renounced his interest in the property. In the words of the court:

> A finding of abandonment is based 'not [on] whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned'. To determine whether the defendant maintains a reasonable expectation of privacy in an item, the court performs 'an objective analysis' which considers the defendant's actions and intentions. *Id*. at 18 (citations omitted).

Here, the defendant left the cell phone in the area following his crash, along with the vehicle, its contents, his shirt, and his hat. He was actively fleeing police and likely discarded the items to avoid detection. The cell phone was found within 50 feet of the defendant's bloody shirt. The phone was found in a grassy area, away from "a place where [someone] normally might be," and this indicated that the defendant intended to discard it. A rational defendant might well decide to abandon their phone, given the potential for cell phone tracking. While it was possible that the defendant might have lost his phone, it was unlikely under these facts. "[W]hile phones occasionally slip out of pockets, shirts do not accidentally fall off their wearers—at the exact same moment as hats—and cars do not ditch themselves after a crash." *Id.* at. 20. These circumstances amply supported abandonment and the motion to suppress the cell phone was properly denied.

(2) The trial court did not err in denying the defendant's motion to excuse and question two jurors. During trial, Jurors number 5 and 11 reported feeling "watched" when coming to and from the courtroom and saw cell phones in the hands of some people outside the courtroom that could have filmed them. The trial court made inquiry of the jurors, increased security in and around the courtroom, and advised the jurors to report any other concerns to the court. The trial court did not inform the rest of the jury about the worries of these jurors based on concerns that the information might be more prejudicial than helpful, given the lack of detail regarding the incident. On appeal, the defendant complained that these acts violated his rights to an impartial jury under the Sixth Amendment.

Under *Remmer v. U.S.,* 347 U.S. 227 (1954), "any private communication, contact, or tampering directly or indirectly, with a juror during a [criminal] trial about matters pending before the jury is . . . deemed

presumptively prejudicial." *Id*. at 22. When the defendant shows there was improper outside contact and that such contact "reasonably draw[s] into question the integrity of the verdict," the government must demonstrate the contact was harmless in order to defeat the claim. *Id*. The defendant here failed to meet his burden to show the *Remmer* presumption applied. First, it wasn't clear that there was any extrajudicial contact at all—the jurors in question only reported feeling watched. "'Watching' can hardly be described as 'communication' or 'contact,' both of which imply an active exchange of information of some sort." *Id*. at 24. While "watching" a juror might rise to the level of an improper influence in some circumstances, there was no evidence here to support that finding. Second, the trial judge took appropriate measures in response to the jurors' reports: He treated the concerns seriously, increased security, advised them to report any additional concerns and ensured they knew how to do so. Rejecting the claim, the court noted: "The judge took a measured, thoughtful approach to the jurors' concerns. These modest steps were proportionate to what the situation required." *Id*. at 25. The district court did not err in denying this motion either and the convictions were unanimously affirmed.

Summary judgment to prison officials for denial of access to televised Friday prayer service and beard grooming policy reversed; remand for proper application of RLUIPA and Free Exercise standards

Greenhill v. Clarke, 944 F.3d 243 (Dec. 6, 2019). The plaintiff was a Muslim inmate with an extensive and "ongoing" disciplinary record in state prison in the Western District of Virginia. He was denied television access while housed in the prison's most restrictive unit and sued, claiming that the prison's refusal to allow him to participate in televised Friday prayer service violated rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the First Amendment. He also challenged the prison's policy on beard length on the same grounds. The district court granted summary judgment to the defendant-prison officials, finding the policies did not create a substantial burden to the plaintiff's rights. The Fourth Circuit vacated and remanded.

Prison policy dictated that inmates in the most restrictive housing unit were denied all access to television. The prison provides a "step-down" program, whereby inmates can earn television (and other) privileges back, but the plaintiff refused to participate. The prison justified this policy as a means of improving conduct of the inmates and to enhance overall security. This was improper to the extent the policy interfered with the plaintiff's religious practice. "While television access in general may well be used as a carrot to encourage inmate improvement and overall safety, access to religious exercise is a right and may not be so used." Slip op. at 13. The fact that the plaintiff's disciplinary issues led to the burden on religious practice was irrelevant under RLUIPA. RLUIPA requires the government to justify substantial burdens on religious practice by demonstrating that the policy achieves a compelling government interest and is the least restrictive means to do so. The "blanket" television ban here was not the least restrictive alternative, particularly in light of several alternatives to the total ban suggested by the plaintiff during the course of litigation. The district court erred in focusing on the merits of the "step-down" program to grant summary judgment without properly considering the plaintiff's rights, and the matter was remanded for the prison to attempt to justify its ban under the correct standard.

The trial court also found that the grooming policy did not impose a substantial burden on the plaintiff's religious rights. The policy dictated that an inmate would stay in segregated housing unless and until the inmate shaved his beard to the permissible length. This was enough to qualify as a substantial burden. That the prison had changed its grooming policy during the litigation indicated the original policy was

similarly not the least restrictive means. The district court's judgment as to the grooming policy was therefore also vacated and remanded.

While the Free Exercise clause provides lesser protections for inmates than RLUIPA, the plaintiff here stated claims for a violation as to each policy, and the district court erred in determining these policies were reasonably related to legitimate penological goals and did not impose substantial burdens on the plaintiff's religious rights. The district court erred here for largely the same reasons as the RLUIPA claims and these claims too were remanded for application of the proper First Amendment standard. Concluding, the court observed:

> Reasonably accommodating individual religious practice can have a demonstrably positive effect on prisoner adjustment and rehabilitation and, as a result, on the prison security environment as a while. In contrast, restrictions that unreasonably impede individual religious practice under the banner of prison security are likely to have the opposite effect. *Id*. at 19.

(1) Right to discovery and review by prison officials of surveillance footage in prison disciplinary hearing was not clearly established at the time; but (2) insufficient evidence supported the petitioner's disciplinary violation

Tyler v. Hooks, 945 F.3d 159 (Dec. 17, 2019). The petitioner was an inmate in state prison in North Carolina serving a 347-month sentence. He received a disciplinary violation for making a knowingly false statement about prison staff that could have exposed the staff to criminal liability (if true). The inmate had accused a guard of sexual assault. The prison determined the accusation was "unfounded" and began investigating the inmate for possible violation of the rule above. The inmate denied making a false statement. Two officers provided statements, with one disclaiming any knowledge of the events and the other stating only that the inmate's accusation was unfounded after investigation. The investigator reviewed surveillance video and found it did not corroborate either parties' statements. At disciplinary hearing, the inmate requested the video. It was unclear whether or not the hearing officer watched the video herself and it was not introduced into the record of the hearing. The inmate was found responsible for the violation and lost 20 days of good-time credit as a result. Following an administrative appeal, he sought habeas review in superior court, but the court summarily denied the petition. The state appellate division similarly declined review without comment, and he sought federal habeas relief. According to the inmate, the fact that the hearing officer did not review the video surveillance recording violated due process. He also complained that no evidence supported the violation. The district court granted summary judgment to the prison officials, but the inmate appealed, and the Fourth Circuit granted review.

(1) As to the video, the inmate argued that the hearing officer should have reviewed the footage personally, pointing to recent circuit precedent. *See Lennar v. Wilson*, 937 F.3d 257, 271 (4th Cir. 2019) (recognizing limited due process right to discovery and review by prison officials of surveillance footage in prison disciplinary violation context). *Lennar* was the first time this right was recognized, which occurred well after the petitioner's state appeals—if anything, precedent at the time indicated that there was no such right. "[A]t the time of the entry of the denial order by the North Carolina Supreme Court, no clearly established federal law required [the hearing officer] to personally view the requested video as part of the disciplinary decision." Slip op. at 15. This claim therefore failed to meet the

"formidable burden" to qualify for habeas relief from a state court conviction, as the state court decision was not "contrary to, or . . . an unreasonable application of, clearly established federal law[.]" *Id*. at 7-8.

(2) *Superintendent, Mass. Correctional Institution v. Hill,* 472 U.S. 445 (1985), requires "some evidence" to support a prison disciplinary violation. "Some evidence" is evidence with at least some minimal probative value. This "exceedingly lenient standard" looks only at whether or not the violation could be supported by the record. Here, no evidence supported the violation. The one officer's bare statement that the inmate's allegation was "unfounded" added nothing to the evidence. The prison investigator's report after watching the video indicated it neither confirmed nor contradicted either version of events. The other officer's statement that disclaimed any knowledge of the events whatsoever likewise failed to amount to some probative evidence. None of this showed that the inmate possessed the intention to violate the regulation and finding a violation on this evidence violated due process. The petitioner was therefore entitled to habeas relief and the restoration of his good-time credit. "[T]his is the very rare case where federal habeas will be available due to a total absence of evidence in the record, even under the "some evidence" standard, to support a disciplinary conviction." *Id*. at 23. The matter was therefore remanded with instructions for the petition to be granted.

Dismissal without prejudice for anti-shuttling violation under the Interstate Agreement on Detainer Act affirmed

U.S. v. Peterson, 945 F.3d 144 (Dec. 16, 2019). Two inmates in South Carolina state prison were indicted in federal court for drug distribution from prison and were tried together. Both were placed under a federal detainer and moved into federal custody. One inmate was improperly sent back to state custody, in violation of the "anti-shuttling" provision of the Interstate Agreement on Detainers Act ("IADA"). The district court dismissed both indictments without prejudice in response to the violation, and the government re-indicted, securing convictions at trial.

The "anti-shuttling" provision of the IADA requires "the indicting jurisdiction [to] retain custody of a prisoner and dispose of his charges before transferring him back to the sending jurisdiction." Slip op. at 6. The remedy for violation of the ani-shuttling provision by a receiving state is dismissal with prejudice. But where (as here) the receiving jurisdiction is the federal government, the district court has discretion to determine whether to dismiss with or without prejudice. The court considers the following factors:

> (1) The seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; (3) the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice. *Id*. at 7.

These were serious offenses involving distribution of methamphetamine from a state prison with attendant serious penalties for conviction, and both inmates were already serving long sentences for other serious offenses. The first factor therefore supported dismissal without prejudice. As to the second factor, the defendants showed that South Carolina has been violating the IADA on a systemic level for years. However, in this case, the defendant was shuttled back to state custody as a result of his own actions. The defendant requested to be closer to his defense counsel in order to prepare for trial and was placed back into state custody as a result of the trial court and U.S. Marshalls Service trying to accommodate the request. Nothing showed that the government sought the transfer in order to secure an advantage at trial or was otherwise acting in bad faith. The second factor therefore supported dismissal without prejudice. As to the final factor, the defendant did not identify any resulting injustice

or prejudice to his case. Further, “the federal government has a weight interest in resolving on their merits crimes as serious as those before us; the ‘corrosive and devastating effects’ of methamphetamine on society compel as much.” *Id*. at 12. The district court did not err in dismissing the indictments without prejudice and its order was unanimously affirmed.

The court rejected other timing challenges under the IADA and the Speedy Trial Act, as well as various evidentiary challenges, and unanimously affirmed.