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Case Summaries: Fourth Circuit Court of Appeals (Dec. 1, 5, 9, 13, and 29, 2022)

(1) Two different false statements made during the course of a single interview constituted only one count of making false statements; (2) District court properly denied jury instruction on entrapment

U.S. v. Smith, 54 F.4th 755 (Dec. 1, 2022). In this case from the Western District of North Carolina, the defendant was interested in travelling to Syria and fighting against the Syrian government. An informant reported this to the FBI, sparking an investigation. A second informant acted as an ISIS recruiter on behalf of the FBI. The defendant met with this informant and acknowledged his willingness to travel to Syria and to fight and kill for ISIS. The defendant later met with a third informant and offered to help the man obtain a discounted airline ticket to Syria. The defendant ultimately bought such a ticket for a different, fictitious person whose identity was created by the FBI. After he discovered that the ticket was not used, the defendant cut off contact with the informant-recruiter. The FBI then sent a subpoena to the defendant's wife. In response, the defendant contacted the FBI and agreed to meet with an agent. During that meeting, the defendant was advised that it was a crime to lie to the FBI and shown a copy of the false statements statute. He denied ever having discussed going to Syria to fight or having any plan to travel there. He also denied knowing anything about the airline ticket. He was indicted for two counts of making false statements for each of those statements and was convicted of both at trial. On appeal, the defendant argued that he could only properly be punished for one count, since the statements at issue all occurred at the same time during the same interview. A divided court agreed that the charges were multiplicitous. Because the false statements statute is ambiguous as to the permissible unit of prosecution, the rule of lenity required the ambiguity to be resolved in the defendant's favor. The defendant's motion to dismiss the second count therefore should have been granted, and the district court's judgment to the contrary was reversed.

The defendant also complained that the district court erred in refusing to instruct the jury on an entrapment defense. He argued that the pressure tactics by the FBI towards his wife were sufficient governmental inducement to commit the crime. The court unanimously rejected this argument. "Smith offered no evidence to suggest the FBI induced him into lying, even if the agency aimed to get him into the hot seat. . . The FBI's repeated efforts to ensure Smith told the truth belie any claim that agents coaxed him into lying." *Smith* Slip op. at 31 (citation omitted).

Other arguments concerning sufficiency of the evidence and the sentence were likewise rejected. The district court was therefore affirmed in part, reversed in part, and the case remanded for a new sentencing hearing on the single count.

Judge Heytens penned a separate concurrence to note that the defendant may have had a valid entrapment defense under a different theory. Since it was a government agent who originally mentioned ISIS and he directed the defendant not to disclose their conversation to others, it could be argued that "the government originated a criminal design and implanted an innocent person's mind

with the disposition to commit a criminal act." *Id*. at 35 (cleaned up). Here, the issue was not argued as such, and the court therefore had no occasion to address it on the merits.

Judge Diaz dissented in part and would have affirmed the district court's denial of the motion to dismiss the second count of false statements. He would have found that the statute was not ambiguous, and that the two counts were not multiplicitious. He otherwise joined the court's opinion in full.

Failure to move to suppress cell phone data was not ineffective assistance of counsel where good-faith exception would have applied

U.S. v. Taylor, 54 F.4th 795 (Dec. 5, 2022). The defendant was charged with and convicted of marijuana distribution in the District of Maryland. The investigation began in 2013. DEA agents prepared and served administrative subpoenas under the Stored Communications Act ("SCA") to obtain cell phone account information and a log of incoming and outgoing calls from the defendant's phone during certain periods of time relevant to the investigation. Some of the phone record data also reflected the defendant's likely location at the time of the calls, which was information provided by the cell phone company that exceeded the scope of the subpoenas. The DEA later obtained a new subpoena for historical cell site location information ("CSLI"), which in turn led to a subpoena for real-time GPS tracking of the defendant's phone. This data helped link the defendant to drug shipments from across the country. Eventually, the defendant was tracked to U-Haul business, where she was seen renting a van. When agents saw her and her son taking a large wooden box from the van at their home, they detained the pair and applied for a search warrant. $30,000.00 in cash, nine cell phones, and records of drug transactions were found inside the defendant's home, while 286 pounds of marijuana was found inside the crate. The defendant was convicted at trial of all counts and sentenced to 144 months in prison. After her direct appeal was denied, she filed a motion to set aside or vacate the judgment, arguing that her trial counsel was ineffective for failing to move to suppress the cell records and GPS tracking for statutory and Fourth Amendment violations. The district court denied the motion. It found that the CSLI information and search warrants were obtained in conformity with established law at the time and that a suppression motion would not have been successful. Even if the data was obtained in violation of the Fourth Amendment, the good-faith exception would have applied. The defendant appealed.

A unanimous panel of the Fourth Circuit agreed that the good-faith exception applied and affirmed the district court. According to the court:

> Because the Government relied in good faith on court orders issued in accordance with the Federal Stored Communications Act, did not request the [repoll] data in its subpoenas, and the use of a subpoena to obtain the data was lawful at the time, we hold that the district court's admission of the challenged evidence must be sustained. Thus, any motion to suppress filed before Appellant's trial would not have been meritorious. *Taylor* Slip op. at 797.

490-day delay between arrest and trial did not violate Sixth Amendment Speedy Trial rights

U.S. v. Robinson, 55 F.4th 390 (Dec. 9, 2022). The defendant was tried for and ultimately convicted of charges relating to drug distribution, including distribution of fentanyl causing death, in the Northern District of West Virginia. The defendant was originally indicted in October of 2018. In March of 2019, the

government served a superseding indictment on the defendant. Trial did not occur until early January 2020. The delay was allowed by the trial court at the Government's request, as they sought to try the defendant jointly with his co-defendants, one of whom was in state custody until November 2019. Once the co-defendant in state custody was released in November, the trial court severed the cases to allow for the co-defendant's counsel to prepare for trial and to avoid further delay of the defendant's trial. The defendant pointed to the 490-day delay between his arrest and trial and complained that his Sixth Amendment speedy trial rights were violated. While that delay was presumptively prejudicial, the reason for the delay—awaiting resolution of state proceedings—was "without question" a valid reason. The defendant did not assert a speedy trial claim until more than a year after his arrest, and the defendant was tried within 100 days of his request. While the defendant was in custody during the delay, he pointed to no specific prejudice other than the potential for memory loss for himself and other witnesses. Given that the balance of those factors favored the Government, the trial court correctly denied the defendant's motion to dismiss for a speedy trial violation.

Other challenges were similarly rejected, and the judgment of the district court was affirmed. Judge Wynn dissented in part on another issue.

Conditions of confinement claim against federal prison officials presented new *Bivens* context and was properly dismissed

Tate v. Harmon, 54 F.4th 839 (Dec. 13, 2022). A federal inmate in the Western District of Virginia sued prison officials for money damages based on alleged "degenerate" conditions of confinement, claiming a cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) for Eighth Amendment violations (among other claims). The district court dismissed the suit, finding that the claims presented new context from previously recognized *Bivens* claims and that extension of *Bivens* was not warranted. On appeal, a unanimous panel of the Fourth Circuit affirmed. While an Eighth Amendment claim for deliberate indifference to medical treatment has been recognized in the past, a conditions of confinement claim is sufficiently distinct to present new *Bivens* context. The deliberate indifference claim recognized in *Carlson v. Green*, 446 U.S. 14 (1980) was "materially distinct from a systemic claim based on a collection of prison conditions that could vary from cell to cell, from prison to prison, and from time to time . . . ." *Tate* Slip op. at 847. For the same reasons, separation of powers concerns caution against extending *Bivens* here. "We conclude that in this context, the political branches are 'better equipped to decide whether the existing remedies should be augmented by the creation of a new judicial remedy.'" *Id*. at 848 (citation omitted).

First and Fourth Amendment claims against TSA agents presented new context and involved special factors counseling against extension of *Bivens* remedy

Dyer v. Smith, ___ F.4th ___; 2022 WL 17982796 (Dec. 29, 2022). A married couple was travelling through an airport in the Eastern District of Virginia and one of the men was ordered to submit to a pat-down search. His husband began filming the search, but a Transportation and Security Administration ("TSA") agent quickly ordered him to stop, and a supervisor informed the man that no recording was allowed. The man stopped recording, but the TSA agents insisted that he delete the video. The man did so, and the family was allowed to board the plane (the video was ultimately recovered from the deleted files on the phone). The man sued the TSA agents involved, alleging First and Fourth Amendment violations. The defendants moved to dismiss, arguing that there was no cause of action under *Bivens v.*

Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and claiming qualified immunity. The district court denied the motion. It found that, while the claims presented new *Bivens* context, no special factors existed warranting caution against extending *Bivens* to either claim. It also denied qualified immunity to the defendants, finding that the right to record government officials in performance of their duties was clearly established.

On appeal, a unanimous panel of the Fourth Circuit reversed. The U.S. Supreme Court has recognized an implied cause of action against federal officials under *Bivens* despite the absence of a statutory remedy in limited circumstances. In recent years, however, the Court has indicated extension of *Bivens* is disfavored. *See, e.g., Egbert v. Boule*, 142 S. Ct. 1793 (2022). Here, the parties agreed that the plaintiff's claims presented new *Bivens* context. Turning to whether special factors cautioned against extending *Bivens* to this context, the court noted that Congress has authorized a process for travelers to lodge complaints against the TSA. The existence of that alternative remedial structure (however ill-suited for the plaintiff's claims) "counsels against extending *Bivens* in this case." *Dyer* Slip op. at 5. Application of *Bivens* to TSA agents also implicates national security concerns, and this was another special factor warranting hesitation in *extending* Bivens liability. Given those special factors and considering the Supreme Court's guidance that "even a single sound reason to defer to Congress" is sufficient to justify refusing to extend *Bivens*, the court held that no cause of action for money damages existed. The district court's judgment was therefore reversed, and the matter remanded with instructions for the defendants' motion to dismiss to be granted.