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District court erred in dismissing Rastafarian prisoner's Free Exercise claim against DOC staff and officials on the pleadings; dismissal of prison chaplain affirmed

Wilcox v. Brown, ___ F.3d ___, 2017 WL 6031844 (4th Cir. 2017). The plaintiff, an inmate at Marion Correctional Institution and member of the Rastafarian faith, sued the director of the chaplain program for the North Carolina Department of Correction, the prison chaplain, and various other Marion prison officials under 42 U.S.C. § 1982. He alleged that the Rastafarian group religious services at the prison were wrongfully suspended and remained unavailable even after a new chaplain began working at the prison. Before filing suit, the plaintiff completed the administrative complaint and appeal process within the prison system without success. The district court treated the complaint as alleging a Free Exercise violation under the First Amendment, among other claims. It found that the prison chaplain could not be liable for merely following the orders of the prison supervisors, and dismissed that portion of the case for failure to state a claim. In regards to the remaining defendants, the district court found that the plaintiff had failed to exhaust his administrative remedies and dismissed the claims for that reason, as well as for failure to state a claim.

The Fourth Circuit affirmed the dismissal of the prison chaplain from the suit, but reversed as to the other defendants. The court observed that the complaint need not affirmatively show exhaustion of administrative remedies at the pleading stage; exhaustion is a defense for the defendants to raise. That the plaintiff could have filed an additional grievance internally with the prison after the new chaplain was hired, or could have applied to be a religious leader of the group himself (as the district court found), were not sufficient grounds to support a finding of failure to exhaust. Further, the face of the plaintiff's pleading did not demonstrate an obvious failure to exhaust. It was therefore error to dismiss the claim on that basis at this stage. Insofar as the district court dismissed the case for failure to state a claim, the court noted the elements of a prisoner Free Exercise claim: 1) The inmate has a sincerely held religious belief; and 2) the policies or practices of the institution place a substantial burden on the prisoner's practice of his beliefs. Slip op. at 8. Construing the facts in the light most favorable to the plaintiff, the complaint here met that threshold. He was not required to explain how or why his religious beliefs required group worship. "At the pleading stage, the allegation that Wilcox's beliefs required him to attend the group service was sufficient." *Id*. at 9. The finding of the district court that he could pray on his own or attend group services of another religion at the prison was simply irrelevant to the plaintiff's claim that prison officials interfered with his ability to worship in a *group* service of *his own* religion. The court noted the defendants' invocation of the *Turner* doctrine, whereby a prison policy that is "reasonably related to the achievement of a legitimate penological objective," does not violate the First Amendment, but observed the defendants had yet to raise any such justification. *Id*. at 11. The defendants also pointed to 42 U.S.C. § 1997(e), which forbids prisoner suits based on purely mental or emotional injury, seemingly arguing it as another basis for dismissal. The court rejected this too—citing

Piver v. Pender Cty. Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987), it stated "an injury to a protected first amendment interest can itself constitute compensable injury wholly apart from any emotional distress . . . " *Id*. at 13. The court therefore remanded the matter as to the remaining defendants.

No qualified immunity for sexually invasive search of minor despite search warrant

Sims v. Labowitz, ___ F. 3d ___ 2017 WL 6031847 (4th Cir. 2017). The plaintiff, a 17 year old minor, was investigated for sending a sexually explicit video of himself to his 15 year old girlfriend. A detective applied for and obtained a search warrant to photograph the plaintiff's genital area, specifically including his erect penis. During the execution of the warrant, the detective allegedly commanded the plaintiff to manipulate his penis to obtain an erection, ostensibly for comparison to the images on the video. The plaintiff was unable to do so. The officers then took photos of the plaintiff's exposed body. In the related criminal case, the plaintiff was found guilty of possessing child pornography, although none of the photographs were used in that trial. The case was ultimately dismissed once the plaintiff completed juvenile probation. The plaintiff then sued the detective under 42 U.S.C. § 1983, alleging a Fourth Amendment violation of his privacy rights and other claims. The doctrine of qualified immunity generally protects government actors from liability if no constitutional right was violated, or if the constitutional right at issue was not clearly established at the time of the alleged violation. Before the district court, the defendant argued that the complaint failed to state a claim and, in the alternative, that any right to privacy as alleged by the plaintiff was not clearly established, particularly in light of the officer's reliance on the search warrant in obtaining the photos. The district court agreed that qualified immunity applied and dismissed all claims. The Fourth Circuit reversed, rejecting both of the defendant's arguments.

In examining sexually invasive searches under the Fourth Amendment, the court balances "the invasion of personal rights caused by the search against the need for that particular search." Slip op. at 9. Factors to determine that balance are: "(1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed." *Id*. The court found this search highly intrusive. "Requiring Sims to masturbate in the presence of others . . . constituted 'the ultimate invasion of personal dignity.'" *Id*. The search was conducted in a locked room while the plaintiff was surrounded by three armed law enforcement officers, circumstances that the court called "intimidating." *Id*. at 11. The evidence was never used in the case, which undercut any justification for the search, and the court found itself unable to imagine circumstances where this type of search would ever be justified. That the search took place in a non-public, closed room "did not mitigate the overall circumstances of this exceptionally intrusive search." *Id*. at 12. The plaintiff therefore stated a claim for a Fourth Amendment violation. Turning to whether the right was clearly established, the court found it clear under existing precedent that sexually invasive searches require "greater justification under the Fourth Amendment." *Id*. at 13. While some cases have upheld examinations of a suspect's genitalia, those generally involved looking for a distinct characteristic and "none of the searches required that an individual achieve an erection or masturbate in the presence of others. Thus, the type of search conducted here . . . far exceeded the intrusions into privacy described in those . . . decisions." *Id*. at 15. Further, those cases dealt with adult suspects, unlike the juvenile at issue here, and the age of this suspect called for "additional considerations" in order to be reasonable. *Id*. While acting pursuant to a validly-issued search warrant will often shield officers from liability, "here,

the obvious, unconstitutional invasion of Sims' right to privacy that was required to carry out the warrant rendered reliance of that warrant objectively unreasonable, thereby eliminating [that] protection . . . " *Id*. at 17. The court therefore remanded the case for further proceedings. A dissenting judge would have would have upheld the district court finding of qualified immunity.

The plaintiff also claimed he was a victim of child pornography as a result of the pictures being taken, and sought damages under 18 U.S.C. § 2255(a), a statute that allows the victim of child pornography to seek civil damages from offenders. Despite the inappropriateness of the process of taking the images, the images were not produced for a "lascivious" purpose, but rather an investigatory one. They therefore did not qualify as child pornography, and the district court's dismissal of this claim was affirmed.

North Carolina's common law robbery offense qualifies as a crime of violence under the revised enumerated clause of Section 4B1.2 of the Sentencing Guidelines

U.S. v. Gattis, ___ F. 3d ___ 2017 WL 6001522 (4th Cir. 2017). The defendant was convicted of possession of firearm by felon in the eastern district of North Carolina. The trial court increased the sentence based on the defendant's prior felony conviction for common law robbery in NC, determining that it qualified as a crime of violence under § 4B1.2(a) of the Sentencing Guidelines. The defendant appealed and argued that his previous conviction did not qualify as a crime of violence under *U.S. v. Gardner*, 823 F.3d 793 (4th Cir. 2016). *Gardner* held that North Carolina's common law robbery offense was not categorically a crime of violence under the force clause of the Armed Career Criminal Act ("ACCA"). The force clause under the ACCA mirrors the force clause in § 4B1.2 of the guidelines. However, the government here did not argue that common law robbery qualified under the force clause; rather, it pointed to the revised enumerated offenses clause of § 4B1.2. That clause was amended effective August 1, 2016, and expanded the enumerated offenses to include robbery. Robbery is not defined in the commentary to § 4B1.2. The court therefore analyzed whether North Carolina common law robbery qualified as generic robbery under the enumerated clause. The defendant cited North Carolina decisions stating that common law robbery may be committed with minimal force, arguing that it is closer to the offense of larceny from the person than to generic robbery. The Fourth Circuit disagreed, finding that the "generally accepted contemporary meaning" of robbery encompassed the North Carolina offense. Slip op. at 11. The offense did not qualify under the force clause of the ACCA in *Gardner* because, under that clause, the force must be "capable of causing physical pain or injury to another person." *Id*. at 16. In the context of the force clause of the ACCA, that common law robbery in NC may be committed by minimal force (and thus not necessarily force capable of causing pain or injury) meant that it could not qualify as a crime of violence. In the context of the enumerated clause of § 4B1.2, however, the degree of force is not determinative; the question rather is whether the offense required the use of more force than is necessary take the item from the victim and is thus comparable to generic robbery. NC common law robbery requires an additional level of force beyond the actual taking to qualify as robbery (even if such force is de minimis), and the offense is thus properly treated as generic robbery. The court also rejected challenges to various other sentencing enhancements relating to the number and use of the firearms. The sentence was therefore affirmed in all respects.

Knowing use of peer-to-peer file sharing system sufficient to establish a factual basis for distribution of child pornography

U.S. v. Stitz, ___ F.3d ___ 2017 WL 6374137 (4th Cir. 2017). In this child pornography distribution case arising out of the western district of North Carolina, the defendant challenged the sufficiency of the factual basis for his guilty plea, questioning whether it supported proof of the elements of the crime. There was no dispute that the material on the defendant's computer qualified as child pornography. The defendant's argument focused on whether his use of a file-sharing network, whereby other users of the network could remotely access the defendant's computer and download images, qualified as knowing distribution of the images. Although the defendant admitted he was aware that participation in the file-sharing network allowed other people to share his illegal files and he knew that his files were in fact shared with others, he asserted that this activity was more passive than more traditional distribution methods and did not support the knowledge or distribution elements of the crime. As a part of his plea negotiation, the defendant signed a stipulation to the factual basis, which was expressly adopted by the defendant during his plea colloquy. The Fourth Circuit found that this issue was argued in the district court as a part of an argument for a downward variance, not as a challenge to the sufficiency of the factual basis. The court therefore reviewed for plain error only. Noting that the district court has wide discretion to determine a factual basis, and that "a stipulated recitation of facts alone [is] sufficient to support a plea", the court found that the knowledge element was met here. Slip op. at 7. The defendant admitted he knew the images on his computer were actually shared, and his counsel conceded that the defendant had such knowledge. As further circumstantial proof, the defendant had spent nearly two decades working in information technology. This was sufficient to support the mens rea element of the crime. In regards to the distribution element, the court joined the 1st, 3rd, 5th, 9th, and 10th Circuits in holding that "where files have been downloaded from a defendant's shared folder, use of a peer-to-peer file-sharing program constitutes 'distribution' pursuant to 18 U.S.C. § 2252A," a position that no circuit has thus far rejected. *Id*. at 11. The district court therefore committed no error.

Counsel's failure to object to career offender designation constituted ineffective assistance; prior determination that no plain error occurred in the case was not a bar to relief under ineffective assistance standard

U.S. v. Carthorne, ___ F.3d ___ 2017 WL 6521302 (4th Cir. 2017). In this case from the middle district of North Carolina, the defendant appealed his conviction to the Fourth Circuit alleging that he was erroneously categorized as a career offender. The prior conviction used by the trial court in determining career offender status was the Virginia offense of assault and battery of a police officer. The trial court believed that the offense qualified as a crime of violence under Section 4B1.2 of the Sentencing Guidelines, and defendant's trial counsel conceded that point. In its opinion denying relief on direct appeal, the Fourth Circuit held that the offense was categorically not a crime of violence under either the force clause or the residual clause of § 4B1.2. However, because the defendant did not object at sentencing, the court reviewed for plain error only. Given a then-existing circuit split on whether the Virginia offense qualified as a crime of violence and a lack of clear precedent on the issue within this circuit at the time, the court concluded this mistake did not rise to the level of plain error and affirmed. Following that appeal, the defendant pursued post-conviction relief under 28 U.S.C. 2255, alleging that his counsel was ineffective for failing to object to the career offender enhancement. The district court

denied relief. To the district court, the Fourth Circuit's earlier determination that no plain error occurred meant that the defendant could not demonstrate deficient performance under the *Strickland* standard (although it agreed that the defendant was prejudiced). On appeal of the denial of the 2255 motion, the Fourth Circuit vacated and remanded, emphasizing the difference between the standards for plain error and ineffective assistance. Plain error is a narrow exception to the rule that arguments not raised by parties are waived on appeal and is rooted in federal procedural rules. Review by the appellate court is focused on "particularly egregious" errors of the court and is limited to errors affecting "substantial rights." Relief is possible "only on the basis of settled law." Slip op. at 9-10. "When neither the Supreme Court nor this Court has addressed a legal issue directly and a circuit split exists, a district court does not commit plain error by following the reasoning of another circuit." *Id*. at 10. Ineffective assistance of counsel, on the other hand, is rooted in the Sixth Amendment and focuses on the responsibilities of defense counsel. Under *Strickland*, the defendant must demonstrate that the lawyer's performance was objectively unreasonable (the performance prong) and that such performance caused prejudice (the prejudice prong). The court noted:

> The ineffective assistance inquiry focuses on a factor that is not considered in a plain error analysis, namely, the objective reasonableness of counsel's performance. In addition, plain error review requires that there be settled precedent before a defendant may be granted relief, while the ineffective assistance standard may require that counsel raise material issues even in the absence of decisive precedent (internal citations omitted). *Id*. at 11.

Ineffective assistance can therefore occur without plain error, and plain error can occur without ineffective assistance. "The plain error and ineffective assistance of counsel standards do not necessarily generate identical outcomes with respect to the same alleged error." *Id*. at 12. Here, while no plain error occurred, counsel for the defendant did not render effective assistance. Remarks by defense counsel during sentencing made clear that the attorney had fundamentally misunderstood the analysis required to determine if an offense qualified as a crime of violence. It was also clear that the attorney failed to identify case law within the circuit that indicated the predicate Virginia offense was not a crime of violence. "Counsel's failure here to demonstrate a grasp of the relevant legal standards, to conduct basic legal research relating to those standards, and to object to the sentencing enhancement (even though there was a strong basis for such an objection), taken collectively, constituted deficient performance." *Id*. at 19. From there, the court had no difficulty concluding that the deficient performance prejudiced the defendant—the difference in the defendant's guidelines range without the enhancement was more than seven years. This was enough to show a "reasonable probability" of a different result had defense counsel objected. The case was therefore remanded for resentencing.