

## Fourth Circuit Case Summaries: February 8, 20, and 26, 2019

**(1) 31 day delay in obtaining search warrant for phone was unreasonable; denial of motion to suppress reversed; (2) Hearsay statements properly introduced at trial under forfeiture by wrongdoing exception**

[U.S. v. Pratt](#), 915 F.3d 266 (Feb. 8, 2019). (1) This South Carolina case arose from an investigation into a prostitution ring involving minors. The defendant posted an ad to Backpage.com advertising the services of a 17 year old female. Agents posed as a potential customer and arranged to meet the girl at a hotel. Upon revealing his identity as a law enforcement agent, the girl informed the agent of her age, acknowledged that she worked as a prostitute in the hotel, and that the defendant (her “boyfriend”) brought her to South Carolina from North Carolina. She also indicated that she had texted the defendant nude pictures of herself and gave the agent her phone. Agents approached the defendant in the parking lot at the same time, who was holding a phone of his own. He acknowledged the phone belonged to him and that it contained pictures of the girl. Agents seized the phone, informing the defendant that they would be obtaining a warrant. The defendant refused to consent to a search of the phone and refused to provide the password to unlock it. A search warrant for the phone was not obtained for 31 days. When the phone was then searched, law enforcement discovered inculpatory texts and images on the phone. The defendant was subsequently indicted for various offenses relating to sex trafficking and child pornography. While in pretrial detention, the defendant attempted to continue the prostitution operation by coordinating with his mother on the phone from detention. His mother also arranged for the minor girl to speak to the defendant during these calls, where the defendant discouraged her from testifying several times.

The defendant moved to suppress the cell phone evidence. His motion only alleged that the seizure of the phone was improper, but at argument he raised the issue of the timeliness of the warrant based on the delay between the seizure of the phone and the issuance of the warrant. The government accounted for the delay by pointing to the need to determine in which jurisdiction the warrant should be sought (North or South Carolina). The trial judge denied the motion. At this point, the government attempted to secure the minor child as a witness, but she became uncooperative and later could not be found. The government then sought to introduce her statements to agents at the hotel, which was allowed. The defendant was convicted at trial and received multiple life sentences. He appealed, arguing the district court erred in denying his motion to suppress and in admitting the girl’s statements to agents.

The Fourth Circuit reversed the denial of the suppression motion.

A seizure that is lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringed possessory interests. To determine if an extended seizure violates the Fourth Amendment, we balance the

government's interest in the seizure against the individual's possessory interest in the object seized. Slip op. at 6.

Where the government has a stronger interest, a more extended seizure may be justified. Where the defendant's interests are stronger, such extended seizure may become unreasonable. Here, the government's only explanation for the delay was the need to decide where the warrant would be obtained. This, according to the court, was "insufficient to justify the extended seizure of [the defendant's] phone." *Id.* at 7. A longer delay may be permissible where the defendant consents to the seizure or otherwise shares the information. Delays may likewise be justified where police or judicial resources are limited or overwhelmed. No such circumstances existed here. "Simply put, the agents failed to exercise diligence by spending a whole month debating where to get a warrant." *Id.* at 8. The government admitted at oral argument that the decision of where to obtain the warrant was not likely to impact the prosecution. Given that the defendant never consented to the seizure and thus retained his interest in the phone, here "a 31 day delay violates the 4th Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay." *Id.* at 9. The court rejected the government's alternative position that the phone constituted an instrumentality of the crime and thus could have been retained "indefinitely". It was the data on the phone, not the phone itself, that held potential evidentiary value—the phone could have been returned to the defendant had agents copied the files from the phone. Instead, by keeping the phone and failing to seek a warrant in a timely manner, the seizure became unreasonable and the motion to suppress should have been granted. This error was not harmless as to the child pornography production convictions. Without the images on the phone, there was insufficient evidence to support those counts. As to the remedy, the court recognized it possessed discretion to vacate only that portion of the defendant's total sentence. "But because sentences are often interconnected, a full resentencing is typically appropriate when we vacate one or more convictions." *Id.* at 13. The court therefore vacated the entire sentence and remanded for a new sentencing.

(2) The defendant also complained that the minor child's statements were improper hearsay statements and admitted in violation of the rules of evidence and his Confrontation Clause rights. The district court found forfeiture by wrongdoing applied to both objections. Where the defendant's wrongful acts are intended to prevent a witness from testifying and accomplish that purpose, the defendant may forfeit hearsay and confrontation objections. *See* Fed. R. Evid. 804(b)(6) and *Giles v. California*, 554 U.S. 353 (2008). The government presented evidence of the defendant's attempts to intimidate the minor during phone conversations with his mother from prison, and other witnesses testified to the defendant's history of violent acts towards women he deemed "disobedient." The calls to the minor were clearly wrongful acts, and the defendant clearly expressed the intent to make the witness unavailable there. The court had little difficulty concluding these acts caused the witness to be unavailable. "[The witness] would have received the message that [the defendant] would hurt her in the future if she disobeyed [the defendant] and testified against him." *Id.* at 16. Consequently, the district court did not err in admitting the statements. The case was therefore affirmed in part, vacated in part, and remanded for resentencing.

#### **Good faith exception applied to search conducted in violation of Military Rules of Evidence**

[U.S. v. Seerden](#), \_\_\_ F.3d \_\_\_, 2019 WL 693099 (Feb. 20, 2019, amended Feb. 21, 2019). The defendant was a member of the Navy stationed in California but was attending training in Virginia Beach, Virginia.

After a sexual encounter with a woman he met at a bar, the woman accused him of sexual assault. The next day, the defendant attempted to call the woman, but she did not answer. She reported the incident to a base sentry, who passed the information to the Naval Criminal Investigation Service (“NCIS”). With NCIS assistance, a “controlled text message conversation” between the defendant and the woman was conducted. The defendant acknowledged during the conversation that they had sex the night before and that the woman was not sober. NCIS then contacted the commanders of the California base (where the defendant was normally stationed) and the Virginia Beach base to obtain permission to search the defendant’s phone and hotel room. They ultimately decided that the Virginia Beach commander should authorize the search of defendant’s hotel room there, while the commander of the California base should authorize the search of defendant’s phone. A digital analysis of the phone indicated signs of child pornography. Based on that evidence, a federal search warrant was obtained in the Eastern District of Virginia for further examination of the phone. That second search the phone revealed child pornography—there were images known child victims and videos of the defendant performing sexual acts in the presence of sleeping minors. The defendant was charged with possession and production of child pornography. He moved to suppress, arguing that the first search was conducted in violation of the Military Rules of Evidence and that the second search was therefore fruit of the poisonous tree. The district court agreed that the first search by military authorities was subject to suppression for violation of the Military Rules of Evidence, but found the second search was saved by the good-faith exception. The defendant pled guilty, reserving his right to appeal the denial of the motion, and was sentenced to 324 months. He appealed, arguing the motion to suppress should have been granted.

The military rules require a search to be authorized only by certain individuals with authority over the place or person to be searched at the location of the search, and a search is only valid under these circumstances. Mil. R. Evid. 315(d)(1) and (2). Because a California commander purported to authorize the first phone search (which took place in Virginia), the district court concluded it was invalid and could not be saved by good faith. The Fourth Circuit affirmed on alternative grounds. It noted that military searches are different, and that compliance with the Military Rules of Evidence is a factor in the Fourth Amendment reasonableness analysis. Where a violation of those rules operates to impair a military member’s reasonable expectation of privacy, a Fourth Amendment violation may occur. However, “the Fourth Amendment governs whether evidence is admissible in federal criminal proceedings. The Military Rules of Evidence cannot usurp the Fourth Amendment.” Slip op. at 7. Assuming without deciding that a Fourth Amendment violation did occur here, the court applied the good faith exception to both searches. The defendant argued that no reasonable officer would have relied on the order authorizing the first search since the commander had no such authority under the military rules (and therefore lacked jurisdiction for the order). This argument was foreclosed by circuit precedent applying the good faith exception to situations where a magistrate authorized a search warrant without jurisdiction. The purpose of the exclusionary rule is to deter police misconduct, not mistakes of judges or magistrates, and this situation was analogous to a magistrate lacking jurisdiction.

The defendant also argued that the order for the first search was so lacking in probable cause as to make any reliance on the order unreasonable. This too was rejected by the court. “[T]he threshold for establishing this exception is a high one” and “to preclude application of the good faith exception, an officer’s reliance on an issuing authority’s probable cause determination must have been ‘entirely unreasonable.’” *Id.* at 12. Here, the affidavit in support of the order contained the accusations of the woman alleging sexual assault and the defendant’s admissions to the woman during the controlled text

exchange, which were consistent with the woman's version of events. "Presented with such information, it would not be entirely unreasonable for an officer to believe that [the order] was supported by probable cause." *Id.* at 13. The district court's judgment was therefore affirmed.

### **Bribery convictions vacated for insufficient evidence in "Operation Rockfish" case, but sentence left intact**

[U.S. v. Tillmon](#), \_\_\_ F.3d \_\_\_; 2019 WL 921534 (Feb. 26, 2019). This case from the Eastern District of North Carolina was part of "Operation Rockfish" investigating police corruption in Northhampton and Halifax Counties. Undercover officers pretended to be a part of an international drug ring that sought police protection to move large amounts of heroin and cocaine to New York. A warehouse was set up to prepare and package drugs for transport, although no actual controlled substances were used. Information about the organization was leaked to a local law enforcement officer (already himself a target), who then established communication with the undercover agents. The local officer then recruited other officers to participate in the scheme, including the defendant. A meeting was held with the undercover federal agents and the local police recruits where the plan to move the drugs was established. All participants were given the opportunity to opt out of participation. The next day, the defendant and other members of the group met at the warehouse and loaded packages of (fake) drugs into secret compartments of a vehicle. The car was then driven to Maryland and delivered to other undercover agents involved in the operation. The defendant was paid \$2,000 for his efforts. Another transport took place two months later, and another delivery to Maryland was made, with the defendant again receiving \$2,000. A third trip was made a few months later, with the defendant this time receiving \$2,500. Arriving at the warehouse for a fourth trip, the defendant was arrested. All other codefendants pled guilty; the defendant proceeded to trial on various drugs, firearms, bribery, and conspiracy charges. He was convicted at trial on nine counts and appealed, arguing various insufficiency issues along with a challenge to an evidentiary ruling.

The Fourth Circuit rejected all of the defendant's issues on appeal except the challenge to the bribery convictions. The court found the government's evidence as to those three counts insufficient and vacated the convictions. However, this could not change the defendant's sentence: all three of those counts were set to run concurrently with another 120 month term, which was a mandatory minimum. The defendant's 60 month consecutive term for the use of firearm in furtherance of drug trafficking was also unaffected by the decision. Thus, no remand for resentencing was required and the defendant's sentence was left intact.