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## Fourth Circuit Case Summaries: October 2, 12, and 14, 2020

**Evidence was sufficient to show violation of plaintiff’s substantive due process rights by deputy’s reckless driving during a non-emergency that caused a collision and serious injury; deputy was not entitled to qualified immunity**

[Dean v. McKinney](#), 976 F.3d 407 (Oct. 2, 2020). In this South Carolina case, the plaintiff was the guardian of a woman who received debilitating injuries following a collision with the defendant, a sheriff’s deputy. The deputy was responding to a radio call requesting backup at a traffic stop. Based on the tone of voice of the officer requesting backup, the dispatcher initially classified the call as an emergency. The call was quickly downgraded to non-emergency. Under state law, an officer may speed in a manner “that does not endanger life or property” in response to an emergency call and must display lights and sirens when doing so. Once the call was downgraded from an emergency, the defendant turned off his lights and sirens but continued driving at a high rate of speed. Around two minutes passed from the time the call was downgraded to when the defendant struck the woman in her lane of travel head-on. The defendant was driving at least 38 miles over the speed limit. The defendant had been involved in other “incidents” regarding his driving while on duty and had received corrective training on safe driving. The plaintiff sued under 42 U.S.C. § 1983, alleging a due process violation for the deputy’s “‘conscience-shocking deliberate indifference’ to [the plaintiff’s] life and safety.” Slip op. at 6. The defendant moved for summary judgment claiming qualified immunity, which the trial court denied. The defendant appealed and the Fourth Circuit affirmed.

The defendant argued that there was insufficient evidence of a constitutional violation and that it was not clearly established at the time that his driving could constitute a substantive due process violation. The court disagreed on both points. It first examined the appropriate standard for evaluating due process claims based on conduct shocking to the conscience. While mere negligence is insufficient to show a violation, the plaintiff was not required to demonstrate intentional misconduct. The U.S. Supreme Court has recognized a “culpability spectrum” with due process claims and acknowledged that cases involving government actions which are “something more than negligence, ‘but less than intentional’” may give rise to liability. *Dean* Slip op. at 9 (citation omitted). Different standards are applied to claims based on the level of culpability, and determination of the correct standard depends on the facts of the case. Here, the lesser standard of deliberate indifference was appropriate to apply at this stage of the litigation. In a true emergency, a plaintiff must show the defendant-officer acted with intent to harm in order to demonstrate a violation. In the absence of an emergency, deliberate indifference is the proper standard. “[W]hen an officer is able to make unhurried judgments with time to deliberate, such as in the case of a non-emergency, deliberate indifference is the applicable culpability standard for substantive due process claims involving driving decisions.” *Id.* at 11. The evidence supported a finding that the circumstances did not present an emergency, and a jury could so find based on the record.

The evidence also was sufficient for the jury to conclude that the deputy in fact acted with deliberate indifference in violation of the plaintiff's due process rights. The deputy was aware that the call had been downgraded from an emergency to a non-emergency and had deactivated his lights and sirens (per department policy). Nonetheless, he continued driving well over the speed limit on "a dark, curved road . . .", without lights or sirens, for more than two minutes after receiving notice that the call was no longer urgent. These and other facts could permit a finding of deliberate indifference.

The court acknowledged that few cases have addressed circumstances like these but found that the plaintiff's rights were clearly established based on "core constitutional principles." *Id.* at 17. The Supreme Court has previously indicated the possibility of liability for deliberate indifference of an officer's driving when responding to a non-emergency, and the Third Circuit has affirmed due process liability on similar (though not identical) facts. In the words of the court:

[W]hile the courts have yet to consider a case where an officer engaged in the same conduct as [the defendant], he is not absolved of liability solely because the court has not adjudicated the exact circumstances of his case. We find that a reasonable officer in [the defendant's] position would have known, based on rights 'manifestly included within more general applications of the core constitutional principles invoked,' that an officer may be subject to a claim under the Fourteenth Amendment under a deliberate indifference standard for unintentional injuries caused when not responding to an emergency or chasing a suspect. . . [S]ome conduct is so obviously unlawful that an officer does not need a detailed explanation. *Id.* at 18-19.

The deputy was therefore not entitled to qualified immunity. Another challenge to the plaintiff's claims was also rejected, and the district court's denial of summary judgment was affirmed.

Judge Richardson dissented. He would have found that the law was not clearly established and that the deputy was entitled to qualified immunity.

***Mt. Healy* burden-shifting approach to First Amendment retaliation claims applies to prisoner claims; trial court improperly credited the defendant's version of events; grant of summary judgment reversed.**

[Martin v. Duffy](#), 977 F.3d 294 (Oct. 12, 2020). In this South Carolina case, the plaintiff was an inmate at a prison and accused a guard of sexual assault. The defendant, a prison official, placed the plaintiff in segregation for 110 days following his report. The prison official claimed that the plaintiff was segregated to protect him during their investigation of his claims. He sued under 42 U.S.C. § 1983 for due process, equal protection and free speech violations. The trial court initially found the complaint failed to state a claim and dismissed. The Fourth Circuit reversed in part, allowing the plaintiff's First Amendment retaliation claim to proceed and denying qualified immunity to the defendant. On remand, the trial court granted the defendant summary judgment, finding that the defendant's decision to place the plaintiff into segregation was "rationally related to a legitimate penological interest." Slip op. at 5. The plaintiff again appealed, and a unanimous Fourth Circuit again reversed.

The plaintiff argued that his act of reporting the assault was protected speech and that the prison official's decision to place him into segregation was made in retaliation for his speech. As an issue of first impression, the Fourth Circuit adopted the "same-decision test" from *Mt. Healthy City School District*

*Board of Education v. Doyle*, 429 U.S. 274 (1977), for evaluating First Amendment retaliation claims in the prisoner context. Applying that decision, if an inmate can make a prima facie showing of retaliation by prison officials in response to the inmate's exercise of free speech, the burden of proof shifts to the defendant to demonstrate that the same decision would have been made regardless of the inmate's speech activity. If the prison can demonstrate this by a preponderance of the evidence, the prisoner's claim fails. Where the prison fails to demonstrate that the same decision would have been made without the inmate's speech, an inference that the plaintiff would not have been harmed but-for the defendant's act of violating the plaintiff's rights arises. Where, however, the defendant's actions in responding to the plaintiff's exercise of First Amendment rights could be either a permissible or impermissible response (a "unitary event" claim), the trial court must look beyond whether or not the defendant would have made the same decision and must instead examine the reason for the decision. If a defendant can demonstrate that the decision was made without a retaliatory motive, the claim fails.

Here, the trial court did not err in applying the *Mt. Healy* approach, but it erred in failing to credit the plaintiff's version of events at the summary judgment stage. The record reflected genuine disputes of material fact about why the plaintiff was placed in segregation, and the matter was consequently remanded for trial. The court declined to address an argument that the plaintiff's segregation was a matter of prison policy, whereby all inmates submitting a complaint against a prison official are removed from the general population. It observed, however, that "[a]n action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate," and expressed doubts about the constitutionality of such a policy, should it be found to exist. *Id.* at 20 (citations omitted).

#### **Attempted Hobbs Act Robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)**

[U.S. v. Taylor](#), \_\_\_ F.3d \_\_\_, 2020 WL 6495367 (Oct. 14, 2020). In this habeas case from the Eastern District of Virginia, the petitioner pled guilty to conspiracy to rob under the Hobbs Act and to the use of a firearm during a crime of violence (based on attempted Hobbs Act robbery). On a second habeas petition, the court agreed with the petitioner that underlying conviction for attempted Hobbs Act robbery was not categorically crimes of violence. The Fourth Circuit had previously held that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence. *See United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc). As to the attempt conviction, while Hobbs Act robbery itself qualifies as a crime of violence, an attempt to rob does not necessarily involve the use of force and therefore does not meet the definition of a crime of violence for purposes of 18 U.S.C. § 924(c). The unanimous court vacated that conviction and remanded the matter for resentencing.