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May 2018 Fourth Circuit Case Summaries

Cell phone seized at the border and analyzed off-site over a month-long period was properly within border search exception; any *Riley* violation fell within the good-faith exception

U.S. v. Kolsuz, 890 F.3d 133 (May 9, 2018, amended May 18, 2018 4th Cir.). The defendant, a Turkish national, attempted to board an airplane in Washington, D.C. with firearms parts in his luggage and was arrested. Customs agents seized the defendant's cell phone and manually examined it, although no evidence from that search was used at trial. Over the course of the next month, agents forensically analyzed the phone at an off-site location. That analysis recovered inculpatory texts which were later introduced at trial as substantive evidence of guilt. The defendant sought to suppress the records obtained from the later analysis of the phone. He argued that the border search exception could not reasonably apply after he was in custody and there was no chance of the phone crossing a border—in other words, that the justifications underlying the border search exception could not support this type of search. He further argued that under *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that a cell phone may not be searched without a warrant as a search incident to arrest), law enforcement should have obtained a search warrant supported by probable cause to analyze the entire contents of his phone, even in the context of a border search. The district court denied the motion and admitted the cell phone evidence, finding that the search of the phone was properly within the border search exception. It agreed with the defendant that under *Riley*, some individualized suspicion was required to digitally analyze the phone, but disagreed that probable cause was required in this context. Instead, it applied a reasonable suspicion standard and found it met on the facts of the case. The defendant was ultimately convicted of attempting to smuggle firearms and conspiracy and appealed the denial of his motion to suppress.

The court began by noting that a border search is one well-recognized exception to the warrant requirement of the Fourth Amendment. "At a border – or at a border's 'functional equivalent', like the international airport at which [the defendant] was intercepted – government agents may conduct 'routine' searches and seizures of persons and property without a warrant or any individualized suspicion." Slip op. at 4. This exception is grounded in the right of the sovereignty to control what enters its county, as well as to "protect and monitor exports from the country." Thus, that this was a border *exit* search, rather than an *entry* search, was of no consequence. Similarly, the Fourth Circuit and others have previously held that "a search initiated at the border may fall under the border exception even if it ultimately is conducted off-site and over a long period of time." *Id*. at 10. In regards to the forensic analysis of the phone, the court noted: "While suspicionless border searches generally are 'reasonable simply by virtue of the fact that they occur at the border', the Supreme Court has also recognized a category of 'nonroutine' border searches that are constitutionally reasonable only if based on individualized suspicion." *Id*. at 6. Nonroutine border searches include, for instance, body cavity examinations, searches involving destruction of property, or other "highly invasive" or "particularly offensive" searches. The panel agreed that, under *Riley*, the type of detailed analysis of the defendant's

phone performed here was properly considered a nonroutine border search, and thus was justifiable only with some level of individualized suspicion. The court expressly rejected the idea that a forensic analysis of a cell phone should be treated as a luggage or container search in light of *Riley*, but also rejected the notion that the search here should be properly viewed as a search incident to arrest (such that a warrant would be required to search the phone under *Riley)*. The court accepted the possibility that some purported border searches could, in some circumstances, become "untethered" from the purposes and rationale of the exception that such searches could no longer be reasonably viewed as a border search. "[E]ven a search initiated at the border could become so attenuated from the rationale for the border search exception that it would no longer fall within the exception." *Id.* at 16. Here, though, the defendant's offense in attempting smuggle guns out of the country "is a transnational offense that goes to the heart of the border search exception." *Id*. at 17. Moreover, the government has an interest in disrupting ongoing efforts to circumvent customs and licensing requirements in addition to its interest in preventing the import or export of contraband, and that purpose also falls within the justifications for the border search exception. "Because the forensic search of [defendant's] phone was conducted at least in part to uncover information about an ongoing transnational crime—in particular, information about additional illegal firearms exports already underway . . . it fits within the core rationale underlying the border search exception." *Id*. at 18.

Finding that the border search exception applied and that the forensic analysis of the phone was a nonroutine search, the court turned to the questions of whether the search was supported by individual suspicion and what level of suspicion was required. Reviewing cases, the Circuit determined that no court has ever required probable cause to justify a nonroutine border search. "Even as *Riley* has become familiar law, there are no cases requiring more than reasonable suspicion for forensic cell phone searches at the border." *Id*. at 25. Given that legal background, agents acted in reasonable reliance that at least reasonable suspicion was required and at least that standard was met here. Without deciding whether a standard higher than reasonable suspicion might be required for this type of search, the court found that the *Leon* good-faith exception acted to foreclose suppression as a remedy for any potential violation. The denial of the suppression motion was therefore unanimously affirmed. [*Author's note*: North Carolina does not recognize the *Leon* good-faith exception to violations of the state constitution].

Fourth Circuit affirms 20 year sentence for manufacturing marijuana by career offender based in part on North Carolina conviction for second-degree kidnapping but remands for sealing of sentencing memorandum

U.S. v. Harris, 890 F.3d 480 (May 21, 2018 4th Cir.). The defendant pled guilty to one count of manufacturing marijuana (involving around 100 plants). Before sentencing, he removed an electronic monitoring bracelet and fled to Thailand, where he married a Thai national and conceived a child before being rearrested and returned to the United States. Due to his criminal record, the defendant qualified as a career offender, resulting in a Sentencing Guidelines range of 360 months to life. In recognition of the "nationwide trend towards marijuana legalization", the district court imposed a downward variance and sentenced the defendant to 240 months imprisonment. Of his co-defendants, the next longest sentence was five years, although no co-defendants were career offenders. The defendant's original sentence was vacated on *Apprendi* grounds, and the district court ultimately imposed the same 240 month sentence at resentencing. On appeal, he argued that the district court erred by not considering

his proffered factors in mitigation (primarily his good behavior and completion of prison programs in the four years preceding his resentencing), by failing to apply an acceptance of responsibility reduction, and in treating his North Carolina conviction for second-degree kidnapping as a crime of violence. He also complained that the district court erred in refusing to seal or redact his sentencing memorandum.

The defendant pointed to remarks of the district court during the final sentencing such as, "I gave him what I thought was a valid, fair sentence. And I still think it's valid, and I still think it's fair;" and "Last time I have him 240 [months]. Now why can't I reinstate that sentence?" He argued that these comments reflected the district court's intention to impose an identical sentence without consideration of his mitigation evidence. The Fourth Circuit disagreed, finding that the district court adequately considered the evidence and personal characteristics of the defendant and explained its reasoning for imposing the same judgment. The court also determined that the district court did not err in refusing to grant an acceptance of responsibility reduction. The defendant received an enhancement for obstructing justice based on his flight to Thailand. "[D]efendants who have obstructed justice must make a heightened showing of acceptance of responsibility to receive the reduction." *Id*. at 10. The defendant's evidence of post-incarceration rehabilitation did not rise to the level of the "extraordinary circumstances" necessary to meet that standard. Denying the reduction for acceptance of responsibility was therefore not clear error.

As to the defendant's criminal history, the Commentary to the Guidelines then in effect lists kidnapping as a crime of violence. "'Commentary to the Sentencing Guidelines is authoritative and binding, unless it violates the Constitution or a federal statute' or is inconsistent with the Guidelines itself." *Id*. at 13. The court noted that the defendant did not claim this portion of the commentary was in conflict with any constitutional or statutory mandate, and that existing precedent established that the North Carolina offense of second-degree kidnapping was a crime of violence. *See U.S. v. Flores-Granados*, 783 F.3d 487 (4th Cir. 2015).

> First, this court has already held that kidnapping and other listed crimes in the commentary are additional enumerated offenses absent any conflict. Second, this Court has also held that North Carolina kidnapping is no broader than the generic definition of the offense. Taking those two holdings together, the inevitable conclusion is that [the defendant's] conviction categorically falls within the bounds of an enumerated offense. *Id*. at 15-16.

The defendant also raised a challenge to the proportionality of his sentence under the Eighth Amendment, but that claim failed on plain error review since the challenge was not raised at the trial level. The court left open the possibility that an appropriately preserved claim may have merit: "That is not to say that there is no colorable Eighth Amendment challenge if supported by an appropriately developed record or when reviewed under a standard less stringent that plain error review." *Id*. at 17.

The panel did, however, grant relief on the issue of whether the defendant's sentencing memorandum should have been sealed or redacted. In deciding such a motion, the trial court should balance the right of the public to access judicial records with the defendant's interest in protecting the information. The trial court should also consider alternatives to sealing the record and should make specific findings to support any decision to seal documents. "Courts have recognized that an interest in protecting the physical and psychological well-being of individuals related to the litigation, including family members and particularly minors, may justify restricting access." *Id.* at 18. No error occurred as a result of the trial court declining to seal the memorandum in whole, as it primarily contained routine information about

the defendant. The Fourth Circuit concluded, however, that the trial did err in declining to allow the defendant to file a redacted memorandum, whereby the names and images of his wife and minor child would be removed from public viewing. Such redaction here "would protect their privacy interest without undermining any of the public interest in access to the judicial process, as such information is not material to understanding [the defendant's] case." *Id*. at 19. The matter was therefore remanded for the limited purpose of allowing the defendant an opportunity to submit a redacted memorandum for his file. The judgment of the district court was otherwise affirmed as to all other issues.