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Case Summaries: Fourth Circuit Court of Appeals – (Dec. 2, 3, 15, and 21, 2020)

Miranda protections do not apply to supervised release proceedings

U.S. v. Ka, 982 F.3d 219 (Dec. 2, 2020). In this case from the Western District of North Carolina, the defendant was serving a term of supervised release. The terms of release included a condition that the defendant answer questions of his probation officer truthfully. During a meeting with his probation officer, the defendant admitted to selling drugs in violation of other terms of his release. Those statements were used by the district court in finding the defendant in violation and revoking his release. He appealed, arguing that his statements were obtained in violation of *Miranda* protections. Although he did not invoke his right to remain silent during the interview with his probation officer, he claimed that the condition of his release requiring truthful answers brought his case within the "penalty exception," where a defendant need not invoke *Miranda* if the invocation of the right will result in punishment. *See Garner v. U.S.,* 424 U.S. 648 (1976).

Under circuit precedent, protections from self-incrimination under the Fifth Amendment do not apply to "ordinary" revocation proceedings. *U.S. v. Riley*, 920 F.3d 200, 207 (4th Cir. 2019). "[T]he clause is violated 'only if [the self-incriminating] statements are used in a criminal trial.' 'Supervised release revocation proceedings, however, are *not* part of the underlying criminal prosecution.'" Slip op. at 5 (citation omitted) (emphasis in original). The Supreme Court's recent decision in *U.S. v. Haymond*, 139 S. Ct. 2369 (2019), finding a different, "unusual provision" of the supervised release statute unconstitutional, did not overrule *Riley*. This ruling is in accord with all other circuits that have examined the issue. The admission of the defendant's statements therefore did not implicate *Miranda* protections and the district court did not err in admitting the statements at the defendant's revocation hearing.

Chief Judge Gregory dissented. He would have ruled that *Haymond* abrogated *Riley* and that the defendant's Fifth Amendment protections applied at revocation proceedings.

Plaintiff failed to state a Fourth Amendment seizure claim and summary judgment properly entered on search claim where unrebutted evidence showed a proper canine alert

Varner v. Roane, 981 F.3d 288 (Dec. 2, 2020). The plaintiff was drinking at a bar in the Western District of Virginia when he was approached by a police officer. The officer and plaintiff knew each other from previous encounters. The officer asked the plaintiff to leave the bar and he agreed. Outside, the officer requested the plaintiff to empty his pockets and frisked the plaintiff. The officer requested the plaintiff to submit to an alcohol breath test, which the plaintiff refused. A drug dog unit arrived on scene and performed a sniff of the defendant's vehicle. The dog alerted and the car was searched, but no contraband was found. The plaintiff sued the officer, alleging an unlawful seizure of his person and an unlawful search of his vehicle. The district court dismissed the seizure claim, finding the plaintiff failed to sufficiently plead that the encounter with the officer was nonconsensual. After discovery, the district court granted summary judgment to the officer on the search claim as well, finding that the canine alert

supplied probable cause for the officers to search and that the plaintiff failed to show that the canine alert was wrongfully "manufactured" by the officer. In the alternative, the district court held that qualified immunity would apply if the plaintiff had demonstrated a constitutional violation. The plaintiff appealed and a unanimous Fourth Circuit affirmed.

The Fourth Circuit agreed that the plaintiff failed to state a claim for an unlawful seizure. There was no show of authority, no threat or use of force, no accusation of a crime, no restraint or impediment of the plaintiff's movement, no misrepresentations, and no seizure of the plaintiff's property by the officer during the encounter. The "conclusory allegation" that the plaintiff was "commanded" to leave the establishment was, on its own, insufficient to plead a nonconsensual encounter and the circumstances as pled objectively indicated a consensual encounter, so the district court's dismissal of the seizure claim was proper.

As to the search claim, because the plaintiff failed to rebut evidence that the canine was properly trained and in fact alerted on his vehicle, summary judgment to the officer-defendant was properly granted. In the court's words:

> [The plaintiff's] ipse dixit assertion that Zeke alerted when [the officer] slapped the side of the car facing him is speculative and unsupported. [The plaintiff] knew nothing about drug-sniffing dogs, nor about Zeke's training in particular. And he was not standing in a position where he could even see the alert that [the defendant] testified occurred. His assertion that Zeke did not alert as [the defendant] testified is not based on personal observation. Slip op. at 9.

The district court's judgment was therefore affirmed in all respects.

Indictment for possession of firearm by prohibited person and jury instructions were defective under *Rehaif*, but the errors were harmless; Second Amendment did not preclude prosecution for firearm offense where defendant had been committed to a mental institution

U.S. v. Collins, 982 F.3d 236 (Dec. 3, 2020). In this case from the Southern District of West Virginia, the defendant had been involuntarily committed to a psychiatric facility in 2013. In 2018, he applied for a permit to purchase a firearm, checking "no" in response to a question on the form regarding whether he had ever been adjudicated incompetent or involuntarily committed. He later obtained a handgun. Federal law prohibits a person who has been "adjudicated as a mental defective" or who "has been committed to a mental institution" from possessing firearms. 18 U.S.C. § 922(g)(4). The defendant was charged with making false statements on the permit application form and possession of firearm by a prohibited person. He was convicted at trial and appealed the firearm conviction, arguing that the indictment and jury instructions were defective in light of *Rehaif v. U.S.*, 139 S. Ct. 2191 (2019). *Rehaif* held that in an unlawful possession of firearms case, the government must show both that the defendant knew he had a firearm and that he knew he belonged to a category of people prohibited from possessing the weapon. The indictment here failed to allege the knowledge of status element and was thus defective. However, the error did not prejudice the defendant because the indictment also charged the defendant with knowingly making a false statement regarding his eligibility to possess a firearm. "The allegation (and evidence) that [the defendant] knowingly made this false statement mandates the conclusion that [he] was provided with notice of the accusations against him and a description of those allegations." Slip op. at 7.

A related jury instruction challenge similarly failed: "The jury found, beyond a reasonable doubt, [the defendant] guilty under Count One. In doing so it necessarily found that [the defendant] knew he had been committed to a mental institution, satisfying the knowledge-of-status element in Count Two." *Id.* at 8.

The defendant also argued that application of 18 U.S.C. § 922(g) as applied to him violated his Second Amendment rights. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court observed that limitations on gun possession by the mentally ill were "presumptively lawful." *Id*. at 626-627. The court rejected the argument that the defendant's mental health commitment was outside of the definition of "commitment" within the statute. Accordingly, the Second Amendment challenge failed.

A sentencing challenge was also rejected, and the district court's judgment was unanimously affirmed.

Habeas statute of limitations was not extended by *McCoy v. Louisiana*, as it does not retroactively apply to cases on collateral review

Smith v. Stein, 982 F.3d 229 (Dec. 3, 2020). The petitioner was convicted of premeditated murder and felony murder in a North Carolina state court in 2001. During closing argument, his trial counsel admitted to the jury that the defendant was guilty of felony murder. The defendant maintained that he instructed his trial counsel that he did not agree with any admission of guilt—a point not contested by the state. The trial judge conducted a colloquy with the defendant to ensure he understood that his attorney would be admitting guilt in closing argument. In response, the defendant stated, "if he has got to do it, he has got to do it. If he doesn't, I don't think he should." Slip op. at 2. The jury convicted on first-degree murder and felony murder and the defendant was sentenced to life without parole. The conviction was affirmed on direct appeal in 2003 and his first post-conviction motion was denied in 2005 (a decision from which he did not seek appellate review). A second motion for appropriate relief was filed in 2016, arguing among other claims that he received ineffective assistance of counsel based on his attorney's unauthorized admission of guilt. This motion was also denied, and that decision was affirmed on appeal. The petitioner sought federal habeas relief in 2017.

A state inmate seeking federal habeas relief has one year from the date of final judgment to pursue his or her claims. An exception exists whereby the period of limitations may be extended a year when the U.S. Supreme Court recognizes a new right, but "'only' if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Slip op. at 5 (citation omitted). The petitioner argued that the Supreme Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (recognizing the defendant's right to control his defense and finding structural error where counsel admits guilt over the defendant's objection), provided such an extension. The district court disagreed and dismissed the petition as untimely. On appeal, the Fourth Circuit agreed and unanimously affirmed.

Under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule typically applies only to cases on direct review. A new rule will be applied retroactively only "if the new rule is substantive, rather than procedural, or if it is a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Smith* Slip op. at 5-6 (citation omitted). The defendant conceded that *McCoy* did not pronounce a new substantive rule. The Fourth Circuit noted without deciding that *McCoy* arguably announced a new rule, but found the rule was not a "watershed" one.

> For a new procedural rule to be 'watershed,' it (1) 'must be necessary to prevent an impermissibly large risk of an inaccurate conviction' and (2) 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.' *Id*. at 8 (internal citations omitted).

Over the course of more than a dozen cases, the Supreme Court has never recognized a rule as "watershed." While the rule in *McCoy* may "be necessary to prevent an impermissibly large risk of inaccurate conviction," the court found that it did not "alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding," and thus failed to meet the requirements for retroactive application. "As the Supreme Court has repeatedly stated, it is 'unlikely' that any watershed rules 'have yet to emerge.'" *Id.* at 10 (citation omitted). While the Supreme Court has indicated that the right to counsel recognized in *Gideon v. Wainwright*., 372 U.S. 335 (1963), may be a watershed rule, and that the *McCoy* decision is derivative of *Gideon,* "at bottom, *McCoy* presupposes what *Gideon* commanded—that a criminal defendant have a right to counsel in the first place. *McCoy* refines the *Gideon* rule, but it is an extension of a watershed rule rather than a watershed rule itself." *Id*.

The unanimous court therefore held that *McCoy* was not retroactively applicable to cases on collateral review like the petitioner's, and the district court correctly found the petition was time-barred.

Trial and appellate counsel were not ineffective for failing to pursue double jeopardy claim when the argument was unsupported at the time of the defendant's sentencing

U.S. v. Palacios, 982 F.3d 920 (Dec. 15, 2020). In this Maryland case, the defendant was a member of the MS-13 gang and was convicted of using a firearm during a crime of violence and murder stemming from his use of a firearm during a crime of violence. Both offenses related to the same murder. Trial counsel moved to dismiss the "multiplicious [sic] counts" pretrial, which the district court denied. After verdict, the defendant did not renew the motion or raise a specific double jeopardy argument. The convictions were affirmed on direct appeal, where the defendant again failed to raise a double jeopardy argument. The defendant sought habeas relief, arguing that trial counsel was ineffective for failing to raise the claim. The district court denied the petition, finding that trial and appellate counsel's failure to raise the issue was not unreasonable. The Fourth Circuit agreed to review the issue and affirmed.

Since 2014, the government has conceded that the offense of use of a firearm during a crime of violence is a lesser-included offense of murder resulting from the use of a firearm during a crime of violence and has agreed that a defendant may not be sentenced for both offenses under double jeopardy principles. The Fourth Circuit acknowledged this development and agreed with the analysis but noted there was no authority existing at the time of the defendant's trial or appeal that supported this view. "The law was thus far from settled even in 2011, let alone at the time of [the defendant's] trial in 2008." Slip op. at 9. When judging a claim of ineffective assistance of counsel, the court examines the state of the law at the relevant time of counsel's performance. Given the state of the law on this point at the time of the defendant's trial and appeal, counsel could not have rendered deficient performance. The district court's order was therefore unanimously affirmed, and the remainder of the appeal dismissed.

Defendant failed to make a credible showing of juror bias or misconduct; no error to deny evidentiary hearing

U.S. v. Loughry, ___ F.3d ___, 2020 WL 7483758 (Dec. 21, 2020). The defendant was the chief justice on the Supreme Court of West Virginia and was convicted at trial for mail and wire fraud, stemming from wrongful expenditures of public money in office. He sought a new trial from the district court based on alleged juror bias and misconduct. The district court declined to grant the motion or conduct a hearing on it. The defendant appealed and a divided Fourth Circuit affirmed.

During voir dire, the trial judge asked if jurors had been exposed to knowledge about "this case." The judge also asked potential jurors if they had knowledge of the related impeachment proceedings underway at the state legislature. If a juror indicated they had knowledge of either matter, the judge asked follow-up questions regarding the jurors' ability to set that knowledge aside and to decide the case on the evidence presented at trial. Potential jurors were also asked about any biases regarding the defendant's guilt or innocence. Trial counsel was permitted to individually examine jurors who indicated they had been exposed to information about either the case or the impeachment proceedings. Juror A indicated she did not have knowledge of the facts of this case but acknowledged her awareness of the impeachment. She indicated she could set any that information aside and decide the case on the evidence. Trial counsel for the defendant asked follow-up questions of other jurors that indicated some knowledge of the case or impeachment, but did not follow up with any questions of Juror A. She was seated on the jury. The jury returned a mixed verdict, convicting on some counts, hanging on one count, and acquitting on others (related to the defendant's act of removing an antique desk from chambers to his home, and alleged misuse of an automobile).

After trial, defense counsel obtained information that Juror A had activity on her Twitter account about the case. Upon investigating, counsel discovered that the juror had liked or retweeted several messages (or "tweets") generally referencing about the scandal at the state supreme court over the course of four months preceding the trial. The tweets liked by Juror A also contained links to news items about the scandal but those focused on the impeachment and a related ethics investigation (and not the criminal charges). Counsel also discovered that Juror A tweeted during the trial, but only regarding sporting events, and that she followed two journalists on Twitter who had worked on the scandal story. The defendant claimed this showed improper outside influence on Juror A, as well as improper bias by Juror A, and sought a new trial or an evidentiary hearing. The district court denied the juror bias claim, finding the juror truthfully answered voir dire questions. While the facts of the other related matters overlapped with the facts of the case, trial counsel would have known that at the time of voir dire. Further, the facts discussed in the linked articles dealt with the antique desk allegation and other allegations on which the jury acquitted. The judge declined to fault the juror for failing to volunteer this information and noted that defense counsel could have questioned her more extensively but chose not to do so. The trial judge also rejected the juror misconduct claim. Jurors were instructed to avoid social media about the case during trial and the fact that Juror A tweeted about football during trial did not show she disregarded this instruction. "The court . . . never admonished the jurors to make *no* use of social media during trial," only that they should avoid social media discussing the case. Slip op. at 8 (emphasis in original). According to the trial judge, this failed to meet the standard for an evidentiary hearing.

Under *Remmer v. U.S.*, 347 U.S. 227 (1954), "outside conduct 'with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial,'" and gives the defendant a right to a hearing on the question of prejudice. *Id.* at 229. Here, the defendant failed to credibly allege outside contact by Juror A. The tweets and liking of tweets by Juror A during trial dealt with sports, not the case at hand. The fact that the juror followed two journalists (one of whom tweeted about the scandal during the trial), without showing Juror A actually saw that tweet, was also insufficient to allege outside contact and amounted to mere speculation. Additionally, "the jurors were repeatedly instructed to avoid social media 'about this case,' and we presume that the jury followed these instructions." *Loughry* Slip op. at 11. The defendant also argued that Juror A violated the court's instruction by accessing social media at all during trial. Over the course of 8 days of preliminary instructions about the need to avoid media about the case, the trial judge once stated, "It's all out," referring to social media. In context though, the judge's instruction clearly instructed jurors to avoid all media and discussion about the case specifically, not that they must avoid any social media in general. The trial judge did not therefore abuse its discretion in refusing to grant a hearing on the juror misconduct claim.

As to the juror bias claim, the defendant argued that Juror A's answer during voir dire were false and misleading. The Fourth Circuit rejected this claim too, finding that the tweets liked by the defendant related only to the impeachment and ethics proceedings, not the criminal case. The juror indicated she could set her feelings about those matters aside and weigh the evidence at trial fairly. The fact that she failed to volunteer more information when asked about any predetermined opinion of guilt or innocence did not show bias on these facts. "[A] juror's failure to elaborate on a response that is factually correct but less than comprehensive does not establish juror dishonestly where no follow-up question is asked." *Id*. at 21 (cleaned up) (citation omitted). Defense counsel had the opportunity to further question Juror A but chose not to pursue it, and the defendant "cannot now use his failure to follow up with Juror A as grounds for an evidentiary hearing." *Id*. Because the defendant failed to show the juror made false or misleading responses in voir dire, it was not error to refuse a hearing on the point.

It was also not error to hold a hearing on the question of actual bias by Juror A, again based on her alleged misleading answers in voir dire. According to the court:

> [W]hen asked directly by the district court whether she could put aside what she had learned before trial about the impeachment proceedings and decide the case 'based solely on the evidence as we receive it here in the courtroom through the witnesses and the exhibits that are admitted into evidence,' she said "yes." It is difficult to see how the same pretrial Twitter activity that likely led Juror A to tell the court that she had heard about the impeachment proceedings now undermines that answer. *Id*. at 23.

The trial court did not abuse its discretion in refusing to hold a hearing, and its judgment was affirmed.

Judge Diaz wrote separately to dissent in part and would have found the defendant entitled to a Remmer hearing to explore the extent of Juror A's Twitter activity during trial.