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Case Summaries: Fourth Circuit Court of Appeals – (Feb. 4, 9, 10, and 22, 2021)

Unanimous Fourth Circuit reverses grant of summary judgment in part, finding stop and identify statute unconstitutional as applied; seizure and arrest of plaintiff violated Fourth Amendment; officers were entitled to qualified immunity only on illegal arrest claim

Wingate v. Fulford, 987 F.3d 299 (Feb. 4, 2021; amended Feb. 5, 2021). In this case from the Eastern District of Virginia, the plaintiff experienced engine trouble and pulled over to the side of the road around 1 or 2 a.m. The plaintiff formerly worked as a mechanic and had tools in his trunk which he used to attempt a repair. A deputy on patrol noticed the plaintiff's car and approached. The plaintiff explained his circumstances and the deputy requested identification. The plaintiff demurred, asking if he had committed a crime and whether he was free to leave. The deputy indicated that he did not believe the plaintiff had committed a crime and was not being detained, but also stated that the plaintiff was not free to leave until he identified himself. The plaintiff was ultimately arrested pursuant to a Virginia statute criminalizing failure to identify oneself under circumstances where a reasonable person would believe that "public safety requires such identification" (citation omitted). The plaintiff resisted arrest and attempted to flee, incurring additional charges. The state declined to proceed on the charges, pointing to a potential constitutional challenge to the validity of the initial statute of arrest. The plaintiff then sued under 42 U.S.C. § 1983, claiming illegal seizure and arrest. The district court granted summary judgment to the defendant-officers. A unanimous Fourth Circuit reversed in part.

At the point that the deputy told the plaintiff he was not free to leave, the plaintiff was seized for purposes of the Fourth Amendment. This seizure was not supported by reasonable suspicion. The fact that the plaintiff was parked on the side of the road late at night was not suggestive of criminal activity, even if better-lit areas at which the man could have stopped were nearby. Although businesses in the area had experienced some larcenies recently and presence in a high-crime area is a relevant consideration in the reasonable suspicion analysis, "simply being in an area where crime is prevalent is minimally probative in the . . . analysis." Slip op. at 10 (citation omitted). The plaintiff exited his car when the deputy approached, which the deputy felt was a "red flag." The court agreed that a driver exiting his car during a traditional traffic stop can be suspicious but flatly rejected this as a relevant factor on these facts: "[T]he notion that the driver of a broken-down vehicle creates suspicion of criminal activity by approaching the officer trying to render him aid, put candidly, defies reason." *Id.* at 11. The officers also pointed to the plaintiff's dark clothing, arguing that he was dressed like other larceny suspects apprehended in the area. This too was insufficient to establish reasonable suspicion: "[W]hen a nondescript style of clothing is commonplace for both criminal suspects and an immeasurable subset of the law-abiding population, it is of little investigatory value." *Id*. at 12. The fact that the plaintiff's engine was idling at the time (despite the plaintiff's claim of engine trouble) also did not support suspicion of a crime: "As any seasoned driver knows, a vehicle that runs is not always a vehicle that runs well." *Id*. The

factors, individually and collectively, failed to establish reasonable suspicion of a crime, and the trial court erred in dismissing the illegal seizure claim.

The court also found the plaintiff's arrest unsupported by probable cause. Under *Brown v. Texas*, 443 U.S. 47, 52 (1979), police may not demand identification without reasonable suspicion. They may demand identification during a valid stop, pursuant to *Hiibel v. Sixth Judicial Dist. Court of Nev*., 542 U.S. 177, 187–88 (2004). The statute under which the plaintiff was initially charged was thus unconstitutional as applied. In the words of the court:

> Read together, *Brown* and *Hiibel* illustrate that a valid investigatory stop, supported by *Terry*-level suspicion, is a constitutional prerequisite to enforcing stop and identify statutes. Necessarily so. The prevailing seizure jurisprudence flows from the idea that, short of an investigatory stop, a person is 'free to disregard the police and go about his business.' To be sure, officers may always request someone's identification during a voluntary encounter. But they may not compel it by threat of criminal sanction. *Id*. at 17-18 (citations omitted).

As to the illegal seizure, the officer who initially seized the plaintiff was not entitled to qualified immunity, as the principles at issue were clearly established. The officers were however entitled to qualified immunity for the illegal arrest claim, as the statute at issue had not previously been found to be unconstitutional and it was reasonable for the officers, relying on the statute, to believe that the plaintiff had committed a crime. The matter was therefore reversed and remanded for further proceedings on the illegal seizure claim. The district court was otherwise affirmed.

Judge Richardson wrote separately in concurrence. He noted that reasonable suspicion may not always be required under the Virginia stop and identify statute in different circumstances, such as during a valid checkpoint or border search, and would have clarified that the holding was limited to the facts of this case.

Term of post-release supervision under North Carolina law counted as part of the state sentence for purposes of federal sentencing enhancement

U.S. v. Velasquez-Canales, 987 F.3d 367 (Feb. 9, 2021). The defendant was previously convicted in North Carolina state court of felony larceny of a motor vehicle and fleeing to elude arrest. He received a 6–17-month sentence. Following release, the defendant was deported and reentered the country illegally, leading to a federal prosecution. At sentencing, the district court applied an enhancement based on the defendant's prior state felony conviction resulting in a sentence more than a year and a month. On appeal, the defendant argued that his post-release supervision was not a part of the underlying sentence—that is, once the nine months of post-release supervision time was subtracted from his state prison term, the sentence no longer met the requirements for the federal enhancement of a sentence more than 13 months. The Fourth Circuit previously rejected this argument in *U.S. v. Barlow*, 811 F.3d 133, 140 (4th Cir. 2015). According to the court: "Simply put, under *Barlow*, the period of post-release supervision [of a North Carolina state conviction] is part of a term of imprisonment and not the equivalent of a suspended sentence." *Velasquez-Canales* Slip op. at 6. The district court was therefore unanimously affirmed.

Trial court correctly denied *Franks* challenge; no evidence that the affiant acted intentionally or recklessly in omitting certain information from the search warrant application

U.S. v. Pulley, 987 F.3d 370 (Feb. 10, 2021). Following a string of pharmacy robberies in the Eastern District of Virginia, law enforcement received information from a confidential informant implicating one suspect. That suspect was apprehended and ultimately provided police information sufficient to obtain search warrants against the defendant for his involvement in the crimes. The defendant moved to suppress pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), based on alleged material omissions from the search warrant affidavit. The district court denied the motion after a two-day hearing and the defendant pled guilty, preserving his right to appeal.

A defendant may be entitled to suppression where he or she can show that the affiant intentionally or recklessly made a material misrepresentation, or intentionally or recklessly omitted material information, from a search warrant application. The district court found that the affiant did not intentionally misrepresent or omit material facts, a point not challenged on appeal. The defendant was therefore required to demonstrate that the affiant acted with reckless disregard in making the alleged misrepresentations or misleading omissions, a difficult standard to meet. According to the court:

> Reckless disregard is a subjective inquiry; it is not negligence nor even gross negligence. To establish a *Franks* violation, the particular affiant must have been subjectively aware that the false statement or omission would create a risk of misleading the reviewing magistrate judge and nevertheless chose to run that risk. *Pulley* Slip op. at 8-9.

The affidavit contained information about statements made by a cooperating co-defendant and alleged the co-defendant "ha[d] given information found to be credible by detectives." The defendant argued that this was false and that police knew the co-defendant was not credible. While there were many reasons to question the co-defendant's veracity, the affidavit only alleged that he had provided information found to be credible—not that he was a credible or trustworthy person generally. Given that law enforcement corroborated much of the information from the co-defendant, this was not a false statement.

The defendant also argued that the warrant falsely stated that he disposed of some clothes involved in the robbery, when in fact the co-defendant had done so. Although the affiant did not know the co-defendant's statement on this point was false at the time of her application, another officer did. This, according to the defendant, amounted to a reckless omission. The court disagreed. "An officer who does not personally know information cannot intentionally or recklessly omit it, and . . . the collective knowledge doctrine cannot apply in the *Franks* context." *Id*. at 13. Further, the affiant credibly testified that she was unaware of the information at the time and would have pursued the warrant regardless of which party was responsible for disposal of the evidence.

One officer involved in the investigation believed that the defendant had been incarcerated during two of the robberies. The affiant questioned this information at the time, and ultimately the information was proven wrong. The defendant nonetheless argued that the detective recklessly disregarded this information from her affidavit. The court again rejected the argument. "Including the false information [about the defendant's supposed incarceration] would have made the affidavit misleading, rather than more accurate." *Id*. at 15.

Finally, the defendant argued that certain incriminating acts by the co-defendant—initially denying all involvement in the crimes, and later being found with a distinctive weapon involved in the robberies—were recklessly omitted from the affidavit in violation of *Franks*. This too the court rejected. The

detective explained during the hearing why this information was not included and stated she did not intentionally leave it out. Rather, she believed it was not relevant. This did not amount to a reckless omission on the facts. The trial court was therefore affirmed.

Judge Keenan dissented. She would have found that the detective acted with reckless disregard in omitting the facts casting doubt on the co-defendant's veracity and that these facts were material to the probable cause determination. Accordingly, she would have struck the detective's statements from the affidavit. Without that information, the affidavit failed to establish probable cause and Judge Keenan would have granted the motion to suppress.

Federal firearms prohibition for persons convicted of misdemeanor crimes of domestic violence met intermediate scrutiny and did not violate the Second Amendment, irrespective of the age of conviction or plaintiff's law-abiding behavior since then

Harley v. Wilkinson, 988 F.3d 766 (Feb. 22, 2021). The plaintiff was convicted in Virginia state court of a misdemeanor crime of domestic violence in 1993. Under 18 U.S.C. § 929(g)(9), the plaintiff is permanently prohibited from possessing a firearm. He sued, arguing that application of the federal firearm ban was unconstitutional as applied to him under the Second Amendment. He pointed to the 27-year period of good behavior since his conviction in support. The district court rejected this argument and granted the defendants' motion for summary judgment. On appeal, a divided Fourth Circuit affirmed. The court assumed without deciding that the plaintiff's Second Amendment rights were implicated the federal firearms ban. The Fourth Circuit and other circuits have applied intermediate scrutiny to Second Amendment challenges, where the government must show "a reasonable fit between the challenged law and a substantial governmental objective" to justify intruding upon the constitutional right. Slip op. at 7 (citation omitted). The court previously found § 929(g)(9) met intermediate scrutiny in *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), and that case dictated the result here. The federal prohibition is not subject to a time-limitation or good-behavior exception. According to the court:

> [The plaintiff's] suggested approach is fundamentally flawed because it effectively would create an exception to the statute that does not exist. The statute imposes a flat prohibition, with no reference to individual circumstances occurring after the disqualifying conviction. Despite its power to do so, Congress did not provide a sunset clause or a good behavior exception to the statute. *Harley* Slip op. at 8.

Congress was aware of its authority to limit the federal ban and did so in numerous ways, including exclusions for convictions that have been expunged or the subject of a pardon. The ban also only applies to misdemeanor crimes of domestic violence involving the use or attempted use of force, and only where the defendant was either represented by counsel at trial or where the defendant knowingly and voluntarily waived his rights to counsel and to a trial. The defendant also did not challenge on appeal that his conviction did not involve the use or attempted use of force (or that another exception to the ban applied). The court noted that while § 929(g)(9) is "potentially overinclusive," this was insufficient to establish a Second Amendment violation. It is the role of Congress to limit the application of the statute, not the courts. Accordingly, the district court's judgment finding the statute constitutional as applied to the plaintiff was affirmed.

Judge Richardson dissented and would have reversed and remanded the case for evidence of the specific circumstances and underlying conduct of the plaintiff's conviction, finding that the case implicated important questions about as-applied Second Amendment challenges.

Judge Wynn wrote separate to concur and to address the dissent. According to the concurrence, the statutory text and legislative intent of the federal statute banning this category of people from possessing firearms are clear, as are circuit precedents on point, and the dissent's argument would "effectively gut the statute." *Harley* Slip op. at 13 (Wynn, J., concurring).

[Jeff Welty blogged about the federal firearms prohibition for persons convicted of a misdemeanor crime of domestic violence and North Carolina assault law, here.]