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Fourth Circuit Case Summaries: January 8, 9, 10, 21, and 22, 2020

Divided panel affirms denial of habeas relief; state court's determination of *Brady* claims was reasonable despite misstatement of *Brady* standard

Long v. Hooks, ___ F.3d ___, 2020 WL 89109 (Jan. 8, 2020). In this habeas case from the Middle District of North Carolina, the petitioner was convicted of rape and burglary in 1976 and sentenced to two life sentences in state court. He appealed and sought state and federal post-conviction relief without success.

In subsequent state post-conviction proceedings in 2005, "dozens of documents" relating to the case were disclosed by the State, including documentation relating to forensic testing from the State Bureau of Investigation ("SBI"), the "master" investigative file, and the medical records of the victim. The forensic reports showed hair samples from the defendant failed to match hairs on the crime scene and that clothing items recovered from the defendant did not match fiber samples recovered from the scene. A latent shoeprint from the scene was compared to the defendant's shoes and found to be inconclusive. Burned matches at the scene compared to matches found in the defendant's car were similarly inconclusive. The case file showed that an officer had requested testing on a shoeprint from the scene, as well as on clothing and other items from the defendant (although an officer testified at trial that only the shoeprint was tested). The medical records showed that forensic examinations were performed on sperm samples and vaginal swabs, and that pubic hairs were collected. The hairs and one of the sperm samples were released to an officer after the test. None of this evidence was disclosed ahead of trial (and none of the medical evidence could be located in post-conviction). The petitioner again sought relief in state court, alleging new evidence and *Brady* violations. The state post-conviction court denied both claims and the state Supreme Court affirmed.

In 2015, the North Carolina Innocence Inquiry Commission's Postconviction DNA Testing Assistance Program located an additional 43 latent fingerprints from the scene that did not match the petitioner and were not disclosed at the time of trial. This led to the present case, his second federal habeas petition. The petitioner did not pursue a claim related to the discovery of the latent prints—this "unexhausted claim" had not been litigated in state court proceedings and was therefore not eligible for federal habeas review under *Rose v. Lundy*, 455 U.S. 550 (1982). Instead, the petitioner argued that the state post-conviction court's resolution of his *Brady* claim in was an unreasonable application of clearly established federal law. In order for a federal court to grant habeas relief on a state claim that was fully adjudicated on the merits, the state court's resolution of the issue must be "objectively unreasonable" on the facts, or be "contrary to or involve an unreasonable application of clearly established federal law." Slip op. at 13. The district court granted summary judgment to the State, and a divided Fourth Circuit affirmed.

The state post-conviction court found that the petitioner's new evidence would have had no impact on the trial's result, and that it failed to establish by a preponderance of evidence that a *Brady* violation occurred. This was a mistaken statement of the standard for *Brady* claims.

> *Brady* requires that the defendant show that there is a reasonable probability that a jury would find him innocent, given the new evidence. It does not require 'demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.' Because the state court's conclusion imposed a preponderance burden, it directly contradicts Supreme Court precedent. *Id*. at 16.

However, this misstatement of the standard was not enough to establish that the state court decision was unreasonable. The state court determination that the new evidence would have no impact on the result at trial was "sufficient" to deny the claim, and "it is irrelevant that the court also invoked [an improper] ground." *Id*. at 17. "To overcome the required deference to state courts, [the petitioner] must show that *each reason* supporting the state court's decision is objectively wrong beyond the possibility for fairminded disagreement." *Id*. at 3. (emphasis in original) (citation omitted). Here, the state court's materiality determinations were reasonable, both as to each piece of undisclosed evidence and as to the cumulative effect of all of the new evidence. The petitioner thus failed to meet the "high bar" required to overturn the state court judgment, and the judgment was affirmed.

Judge Thacker dissented. He agreed that the state court misapplied the *Brady* standard to the petitioner's claims but would have ruled that the petitioner's evidence met the standard for a *Brady* violation, in that the new evidence created a "reasonable probability of a different result." Concluding, the dissent observed:

> For more than 43 years, Appellant has consistently maintained his innocence and continued to search for the truth. In contrast, we arrive at this point as a result of the actions of the state—the slow, stubborn drip of undisclosed evidence that the state originally claimed did not exist. . . In this circumstance, Appellant must prevail. To hold otherwise would provide incentive for the state to lie, obfuscate, and withhold evidence for a long enough period of time that it can then simply rely on the need for finality." *Id*. at 51-52.

Denial of *Faretta* motion cannot be appealed pretrial

U.S. v. Sueiro, 946 F.3d 637 (Jan. 9, 2020). The defendant sought to represent himself on child pornography charges in the Eastern District of Virginia. The district court denied the *Faretta* motion and the defendant sought interlocutory review of that decision. The Fourth Circuit dismissed, finding it lacked subject-matter jurisdiction to consider the issue pretrial.

Federal appellate jurisdiction is normally limited to review of final judgments. A "narrow exception" exists under the collateral order doctrine. A collateral order may be reviewed where:

> (1) 'it conclusively determine[s] the disputed question,' (2) 'resolve[s] an important issue completely separate from the merits,' and (3) is effectively unreviewable on appeal from a final judgment. . . collateral orders are only 'effectively unreviewable' if 'an important right . . . would be lost irreparably if review awaited final judgment.' Slip op. at 3 (citations omitted).

All three elements must be met to satisfy the collateral order doctrine and must be met to the "utmost strictness in criminal cases." *Id*. at 4. The U.S. Supreme Court has recognized certain types of orders that typically meet that standard—denial of a double jeopardy claim, Speech or Debate Clause claims, denial of bail reduction, and forcible medication of a criminal defendant. The Supreme Court has not determined whether or not the denial of a *Faretta* motion can be immediately appealed but has held that an order disqualifying defense counsel in a criminal case cannot be appealed pretrial. *Flanagan v. U.S.*, 465 U.S. 259 (1984). The Court there found that a disqualification order would be effectively reviewable on direct appeal and therefore failed to meet the requirements of the collateral order doctrine. Dicta from *Flanagan* strongly suggest the same result in the context of self-representation. Because denial of the right to self-representation is structural error (requiring a new trial without the need for showing prejudice), the issue is likewise effectively reviewable on appeal. *See McKaskle v. Wiggins*, 465 U.S. 169 (1984).

The defendant analogized his right to self-representation to the right to be free from forced medication. *See Sell v. U.S.,* 539 U.S. 166 (2003). The court rejected this argument. Unlike a forced medication case (where the harm inflicted—forcing medication—will have already occurred and cannot be undone), the improper denial of self-representation may be cured by a new trial. Further, the Supreme Court did not expand the collateral order doctrine when it recognized the right to be free from forced medication. That the defendant would not be able to represent himself in the event he is acquitted at trial was also not sufficient to make the order reviewable pretrial. ". . .[I]f we were to find jurisdiction based on this acquittal theory, then all trial rights would be subject to immediate appeal, and the collateral order doctrine exception would swallow the final judgment rule." *Id*. at 8. Accordingly, the court dismissed the appeal without considering the merits of the *Faretta* issue.

Strip search of jail visitor requires reasonable suspicion; totality of circumstances supported reasonable suspicion and no Fourth Amendment violation occurred

Calloway v. Lokey, ___ F.3d ___, 2020 WL 290922 (Jan. 21, 2020). In this case from the Western District of Virginia, a visitor to a prison was strip searched. She sued under 42 U.S.C. § 1983, alleging a Fourth Amendment violation. The plaintiff was visiting an inmate who had previously been caught attempting to sneak contraband inside of another prison. Prison officials were also tipped off two days in advance of the plaintiff's visit that the same inmate was smuggling drugs and decided to closely monitor the plaintiff's visit. Officers thought they saw the visitor unbuttoning her pants during the visit. They requested that the plaintiff submit to a strip search and obtained written consent to do so. Finding no contraband, the plaintiff was allowed to complete her visit. The district court granted the defendant prison officials summary judgment, finding that the search was supported by reasonable suspicion. A divided Fourth Circuit affirmed.

During the plaintiff's entry to the prison, several guards noticed that she appeared nervous. The visit was monitored by camera with guards focusing on the pair from a control room. The guards there noticed that the inmate was apparently watching the guards inside the visitation room. One guard in the control room had a history of observing suspicious movements during visitation which had led to the discovery of contraband several times in the past. Here, the plaintiff was seen repeatedly adjusting her clothes and "fidgeting with her waistband," movements that the officers interpreted as possibly consistent with attempting to retrieve hidden contraband. A guard later observed the plaintiff apparently reach inside her pants and unbutton them. The visit was interrupted, and the plaintiff was separated from the inmate.

Guards informed her that she "would need to consent to a strip search." Slip op. at 7. If no drugs were found, she would be allowed to continue visits with the inmate, but if she refused the search, she would not be allowed further visitation at the facility. The plaintiff was taken to the bathroom and searched by female officers. The search included inspecting her genital area and having the plaintiff remove her tampon for inspection. The plaintiff was allowed to resume the visit when no drugs were found.

Prison employees may be strip searched when reasonable suspicion exists under existing circuit precedent. Other circuits have applied the same standard to strip searches of prison visitors, and this circuit had applied that standard to visitors in an unpublished opinion. The court adopted that standard here:

> [T]he standard under the Fourth Amendment for conducting a strip search of a prison visitor—an exceedingly personal invasion of privacy—is whether prison officials have a reasonable suspicion, based on particularized and individualized information, that such a search will uncover contraband . . . *Id*. at 14.

Here, the totality of the circumstances supported reasonable suspicion. Prison officials reasonably believed that this inmate would attempt to have a visitor smuggle contraband inside the facility based on the inmate's prior scheme to do so at a different facility, as well as the tip received two days before the visit from another inmate at the facility. The guard who observed the plaintiff's suspicious movements had a proven record of observing similar behavior leading to the discovery of contraband. The video supported the prison officials' interpretation of the movements as suspicious and supported an inference that the plaintiff may be committing a crime. All of this combined to justify the strip search under the totality of circumstances. The search was also conducted in a reasonable manner on these facts. Because the search was supported by reasonable suspicion, no Fourth Amendment violation occurred and the district court's grant of summary judgment to the prison officials was affirmed.

Judge Wynn dissented. He found the majority failed to consider the evidence in the light most favorable to the plaintiff and by treating the search as a strip search, versus a more invasive body cavity search. According to the dissent, the majority opinion's reasoning belies the purpose underlying the civil rights statute, and he would have reversed and remanded for trial.

Clearly established law requires reasonable threat to justify shooting dog; summary judgment to officer reversed where facts supported claim that officer unreasonably shot a restrained dog

Ray v. Roane, ___F.3d ___, 2020 WL 356486 (Jan. 22, 2020). This civil rights case arose in the Western District of Virginia. Officers arrived at the plaintiff's home to serve an arrest warrant. The plaintiff's dog Jax (a German Shepard) was tethered to a line between two trees that allowed it to move within a limited area of the yard. Other officers on the scene parked in the driveway away from animal's play space, but the defendant-officer parked within that space. Other officers on the scene told the defendant to wait and allow the plaintiff to get her dog. According to the plaintiff, the dog barked and moved towards the defendant as he walked towards the plaintiff's home, but the dog quickly reached the end of the rope and could not move any closer to the officer. The plaintiff was holding the line attached to the dog and calling the dog's name when the defendant stepped forward and shot the animal in the head, causing its death. The plaintiff sued the officer, alleging an unlawful Fourth Amendment seizure (among other claims) by the defendant in shooting her animal. The district court dismissed the complaint, finding the shooting was reasonable and that the officer was entitled to qualified immunity. The Fourth Circuit reversed.

The court recognized that killing a privately owned dog was a seizure within the meaning of the Fourth Amendment and that such seizure must be reasonable to pass constitutional muster. The officer claimed the shooting was justified because he faced a large animal that rapidly approached him. In the light most favorable to the plaintiff, there was evidence that the officer stopped backing away from the animal once it reached the end of its leash and that the officer had to step towards the dog to shoot it. "These factual allegations yield the reasonable inference that Roane observed that the dog could no longer reach him, and, thus, could not have held a reasonable belief that the dog posed an imminent threat." Slip op. at 8. These were different circumstances than cases where the animal was unrestrained and more clearly posed a threat to officers. The district court erred in not treating the plaintiff's allegations as true at this stage and dismissing the matter.

Turning to qualified immunity, the court noted the absence of "directly on-point" precedent in the circuit but found that found the right at issue here (that an officer may not kill an animal where the officer has no reasonable belief that the animal poses a threat) was nonetheless clearly established at the time. "Based on [the] preexisting consensus of case law . . . we hold a reasonable officer in Roane's position would have known that his alleged conduct was unlawful at the time of the shooting in this case." *Id*. at 13. Qualified immunity was therefore not appropriate. The district court's judgment was unanimously reversed, and the matter was remanded for trial.

Other Cases of Note:

Federal identity theft statute applies to the use of a deceased person's information

U.S. v. George, 946 F.3d 643 (Jan. 9, 2020). This case from the Eastern District of North Carolina involved a question of first impression in the circuit—whether the federal identity theft statute applies to use of a deceased person's personal information. The district court found that it did not and allowed the defendant to withdraw his guilty plea to that offense. It then dismissed the aggravated identity theft charge and sentenced the defendant on the remaining charge. The Fourth Circuit reversed. Joining every other circuit to consider the issue, the court held that "person" within the meaning of the statute included both living and deceased victims of identity theft. The district court's decision was vacated, and the matter remanded for resentencing on the original charges of conviction.

Failure to properly advise of mandatory minimum sentence was plain error

U.S. v. Lockhart, ___F.3d ___, 2020 WL 110799 (Jan. 10, 2020). The defendant pled guilty to one count of felon in possession in the Western District of North Carolina. During his plea colloquy, the government represented that he faced up to 10 years in prison at sentencing. Based on his prior criminal record, the defendant qualified as an Armed Career Criminal ("ACCA") and actually faced a 15-year mandatory minimum sentence. The district court sentenced the defendant under the ACCA over defense objection. The Fourth Circuit initially affirmed but rehearing en banc was granted, and the full panel reversed. The failure to advise the defendant of the correct sentencing exposure was plain error on these facts, and a majority of the court vacated the plea and conviction. Four judges dissented and would have affirmed the district court.