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March 2018 Fourth Circuit Case Summaries: March 1, 14, and 30, 2018

Extension of traffic stop was not supported by reasonable suspicion

U.S. v. Bowman, 884 F.3d 200, 2018 WL 1093942 (4th Cir. 2018). DEA agents had notified local authorities in the western district of North Carolina that they believed two suspects would be travelling through the area and may be transporting methamphetamine. The DEA provided a general description of the vehicle ("a red, older model Lexus") and a license plate number. At 3:40am, a State Trooper saw the vehicle and began following it, ultimately stopping the car on suspicion of impaired driving based on speeding and crossing the fog line. The defendant was driving and, according to the officer, both occupants exhibited nervousness—the defendant's hands were shaking when he handed the officer his license, the passenger did not make eye contact with the officer but stared straight ahead, and the carotid arteries of each occupant were noticed by the officer—all of which the trooper thought suspicious. The car was also messy with energy drinks, fast food wrappers, scattered clothes and luggage, which to the trooper indicated a long period of travel. The defendant was asked to exit the car and sit with the trooper in the patrol car. While in the patrol car, the trooper noticed the passenger was moving around and looking back at the defendant and officer, behavior that again raised the suspicions of the trooper. The defendant was not impaired. The defendant explained that he did not realize he was speeding and that he had only recently purchased the vehicle. When he was twice asked about his travel plans, the defendant explained that he had picked up the passenger from a friend's home a few minutes earlier. The defendant could not provide the address or name of the friend, but indicated the address was in the GPS device in his vehicle. When asked what he did for a living, the defendant mentioned he was currently unemployed but sometimes buys automobiles off of Craigslist. The trooper gave the defendant a warning ticket for speeding and unsafe movement and asked permission to question the defendant further, to which the defendant agreed. The trooper then asked to speak to the passenger. The defendant responded "okay." As the trooper exited the vehicle to speak to the passenger, he told the defendant "just hang tight right there, okay." Slip op. at 6. Upon speaking with the passenger, the officer determined the two stories of the defendant and passenger were not consistent. Shortly thereafter, a K-9 unit arrived on the scene, which hit on the vehicle. Scales, ammunition, and methamphetamine were discovered within the car, leading to the defendant's conviction.

The magistrate judge recommended that the motion be denied. While he agreed that the defendant was not free to leave at the point that the trooper began questioning the passenger,

he determined that the trooper had developed independent reasonable suspicion at that juncture to justify extending the detention. That suspicion was supported by: 1) the nervous behavior of the occupants, 2) the fact that the appearance of the car indicated they had been travelling longer than the defendant said, 3) that the defendant did not know where the friend lived, and 4) that the defendant claimed to have recently purchased the vehicle despite his lack of current employment. The district court agreed and denied the motion. The Fourth Circuit unanimously reversed. Under *U.S. v. Rodriguez*, 135 S. Ct. 1609 (2015), a traffic stop cannot be extended longer than is necessary to accomplish the purpose of the stop without consent or reasonable suspicion of a crime. Here, the court agreed that at the point the trooper asked the defendant for permission to ask additional questions, the encounter remained consensual. However, at the point that the trooper told the defendant to "just hang tight right there", the encounter lost its consensual character. That the defendant responded "okay" to this remark did not make the continued detention consensual, nor was the fact that the trooper phrased the remark as a question determinative of consent. "[The trooper] said "hang tight" *as he was exiting* the patrol car and [the defendant] was not given an opportunity to decline [the trooper's] request to extend the stop so he could question [the passenger]." *Id*. at 16(emphasis in original). The trooper's own testimony at the suppression hearing supported the fact that the defendant was not free to leave at this point. Because the encounter was no longer consensual, the continued detention could only be justified if the trooper had developed reasonable suspicion of criminal wrongdoing.

The court analyzed the factors argued by the government in support of reasonable suspicion individually and collectively. Notably, the parties agreed that the DEA tip would not be considered as a part of the analysis. As to the nervousness of the occupants, the court noted, "Although nervous, *evasive* behavior is relevant to the determination of reasonable suspicion, mere nervousness is of limited value to reasonable suspicion analyses." *Id*. at 20 (emphasis in original). Here, the signs of nervousness by the defendant and passenger were nothing out of the ordinary: Even assuming the defendant's hands were shaking when he handed his license to the trooper, the dash cam video showed that the defendant "appeared and sounded calm for the remainder of the traffic stop." *Id*. at 21. As to the trooper's observation of the carotid arteries of the men, the trooper admitted he had no specialized medical training and that there were many other reasons that an artery could throb. The court did not credit the passenger's lack of eye contact as supporting reasonable suspicion, pointing out that the government has at times argued that sustaining eye contact with an officer was suspicious. The trooper's testimony that the defendant "was unable to remain still while he sat in the patrol car" was not connected to any reason why this was suspicious. The court therefore rejected that the nervousness shown here supported reasonable suspicion.

As to the appearance of the car, the court stated that the presence of the luggage, clothes and food wrappers in the car was "without more, utterly unremarkable." *Id*. at 23. As to the failure of the defendant to recall the address of his passenger's friend, the court observed that the defendant repeatedly told the officer that he found the address by way of his GPS device, which

the trooper did not check. Neither this fact nor the appearance of the car was connected to any suspicion of criminal activity. As to the trooper's suspicions about the defendant's purchase of vehicles, the court found the suspicions were based on "unsubstantiated assumptions" *Id*. at 26. The trooper assumed that since the defendant had no current steady job, he must not have been able to afford to purchase another car recently through legitimate means. This factor, like the other three identified by the government, is "entitled to little weight" *Id*. at 28. Even combining all of these factors together under the totality of the circumstances, the court found no reasonable, articulable suspicion existed. "[T]he facts, in their totality, should eliminate a substantial portion of innocent travelers. The factors present in this case do not." *Id*. Thus, the denial of the motion to suppress was reversed, the defendant's conviction vacated, and the matter remanded for further proceedings.

On rehearing, Fourth Circuit affirms earlier decision denying qualified immunity for sexually invasive search of minor plaintiff, and reverses dismissal of 18 U.S.C. 2255(a) claim

Sims. v. Labowitz, ___ F.3d ___, 2018 WL 1312259 (4th Cir. 2018). In a December, 2017 opinion, the court reversed the district court's grant of qualified immunity to the defendant, allowing the plaintiff's Fourth Amendment claim to proceed (that opinion was previously summarized here). The plaintiff was suspected of sending a nude video of himself to his fifteen-year old girlfriend in the eastern district of Virginia. The detective obtained a search warrant to photograph the minor suspect nude, specifically including his erect penis. In attempting to execute the warrant, the minor was instructed to manipulate himself to obtain an erection, although the minor was ultimately unable to do so. The minor sued under 42 U.S.C. § 1983, alleging a civil rights violation under the Fourth Amendment, among other claims. On cross motions for rehearing after the court's December 2017 decision, the court issued largely the same opinion as to the Fourth Amendment claim and qualified immunity issue. However, in the earlier opinion, the court had rejected the plaintiff's claim under 18 U.S.C. § 2255(a), affirming the district court's dismissal. That statute allows the victim of child pornography to seek civil damages from the offender. The earlier opinion had determined that, while the process of taking the images here was inappropriate, the images were not produced for a "lascivious" purposes (as required to qualify as child pornography), but were instead produced for investigatory purposes. On rehearing, the court reversed itself on this issue, finding that 18 U.S.C. § 2255(a) provides for a claim for damages independent of the 42 U.S.C. § 1983 claim, and that the district court erred in dismissing it. The case was remanded for the trial court to consider the § 2255(a) claim and for the Fourth Amendment claim to move forward.

North Carolina's AWDWIKISI is a crime of violence under the force clause of the ACCA

U.S. v. Townsend, ___ F. 3d ___, 2018 WL 1547107(4th Cir. 2018). The defendant pled guilty in 2010 to possession of firearm by felon and was sentenced as a career offender under the

Armed Career Criminal Act in the middle district of North Carolina, a conviction that was affirmed on direct appeal. The prior crimes of violence included a conviction from North Carolina for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). In 2013, the defendant sought post-conviction relief, questioning the application of the ACCA to his case in light of *Johnson v. U.S.*, 135 S. Ct. 2551 (2015) (finding the residual clause of the ACCA unconstitutionally vague). The district court denied the petition, but the Fourth Circuit granted review to determine whether the conviction for AWDWIKISI qualified as a crime of violence under the force clause of the ACCA. Under that provision, an offense is a violent felony if it is punishable by more than one year in prison and "has as an element the use, attempted use, or threatened use of physical force against the person of another." Slip op. at 6. Applying the categorical approach, the court found that it did qualify. "We conclude that AWDWIKISI is categorically a violent felony under the force clause of the ACCA because the intent to kill element of AWDWIKISI requires proof of a specific intent to kill." *Id*. at 7. The court rejected the argument that the offense could be committed with mere negligence or recklessness. Since the offense has an element the specific intent to kill, it requires a defendant to "act with a mens rea more culpable than negligence or recklessness", and thus meets the minimum requirements for the use of force under *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The conviction was therefore affirmed.