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Case Summaries: Fourth Circuit Court of Appeals (April 4, 9, 10, 15, 16, 29 & 30, 2024)

Illegal reentry statute was not enacted with a discriminatory purpose and does not violate Equal Protection

U.S. v. Sanchez-Garcia, 98 F.4th 90 (April 4, 2024). 8 U.S.C. § 1326 makes it a crime to re-enter the United States after having been removed, deported, or denied entry. The defendants were prosecuted for illegal reentry in the Middle District of North Carolina and moved to dismiss, arguing that the statute violates the Equal Protection Clause by targeting them based on their race. Like nearly every other court to consider this claim, the district court rejected the argument and the Fourth Circuit agreed. The statute is facially race-neutral. While it is possible to sustain an Equal Protection challenge when the claimant can show that racial discrimination was a "substantial or motivating factor" underlying a facially neutral law, the claimants here could not meet that burden under either rational basis review or an intermediate standard of review. *Sanchez-Garcia* Slip op. at 13 (citation omitted). "Indeed, as the district court noted, 1952's [Immigration and Nationality Act] had a distinctly 'antiracist component,' eliminating racial bars to naturalization and other forms of racial discrimination in admissions." *Id.* at 23 (citation omitted). Further, while the Act's criminal prohibition on reentry under § 1326 has a disparate impact on immigrants from Mexico and Central America, this was properly attributable to geography and not racist motives.

The judgment of the district court was therefore unanimously affirmed.

Headlong flight at the sight of officers, coupled with other suspicious facts, supported stop; defendant abandoned any privacy interest in his bag by tossing it away from the officers before he submitted to their authority

U.S. v. Frazer, 98 F.4th 102 (April 9, 2024). Local police in the District of Maryland became aware of a shooting and discovered blood at the scene of the suspected crime but had no information relating to a suspect or victim. An eyewitness reported that one of the people involved was a dreadlocked Black man. The next day, an officer was on patrol near the scene of the suspected shooting and encountered the defendant and another man, Moore, both of whom were Black men. Moore had dreadlocks and wore a bandage on his arm. Both of the men were carrying "small, black bags" across their bodies. In the officer's experience, those types of bags are often used to transport guns or drugs. The officer did not approach the men and they eventually moved out of the officer's line of sight. Around two weeks later, the same officer and others were patrolling another area near the site of the shooting. They noticed the same two men carrying similar-looking black bags walking down a private road marked "no trespassing." The men were not walking on the sidewalk but instead were in the middle of the street. The officer who initially observed the men a few weeks earlier surveilled the pair for a few minutes until the men again disappeared. After around 10 minutes, the men reappeared, and the officer decided to stop them. The initial justification for the stop was a "pedestrian violation" for walking in the middle of the road, which the officer acknowledged as pretext to question the men about the shooting. The officer, who was in an unmarked car, called for backup, and two marked patrol cars responded. The men were standing in a

nearby breezeway at the time. At the sight of the patrol cars, the pair ran, and officers gave chase. Officers found the men hiding in a stairwell. Ignoring commands to stop, the men attempted to climb over the railing of the stairwell to the second floor. Moore jumped from the second story to the ground and ran away. The defendant was dangling from the second-story stairwell when an officer threatened to tase him if he did not come down. The defendant complied, but he first turned, walked over to the stairwell, and threw his black bag into the middle of the apartment complex courtyard. Another officer found the bag and immediately felt a gun inside. He searched, finding a loaded 9 mm handgun and bags of marijuana amounting to around 100 grams. Soon thereafter, Moore was apprehended, along with his black bag. A search of his bag also revealed a loaded gun and a similar amount of marijuana.

Both men were indicted in federal court for gun and drug offenses. The defendant moved to suppress, arguing that officers lacked reasonable suspicion to stop him and were unjustified in searching his bag without a warrant. The district court denied the motion, finding no seizure occurred until the defendant submitted to the officer's authority (after throwing his bag). The trial court also found that officers properly searched the bag as a part of the stop for officer safety. The trial court did not rule on whether the bag was abandoned by the defendant, as the government argued. After being convicted of being a felon in possession of a firearm and some of the drug offenses, the defendant appealed, arguing in part that the district court erred in denying his motion to suppress. The Fourth Circuit unanimously disagreed.

Under *Illinois v. Wardlow*, 528 U.S. 199 (2000), a person fleeing at the sight of a law enforcement officer "goes a long way towards establishing reasonable suspicion . . ." *Frazer* Slip op. at 13. *Wardlow* does not establish a categorical rule that running from the police always justifies an investigative detention, but it permits flight to be treated as a weighty factor in the totality of circumstances analysis. Here, the defendant broke into a run at the sight of officers even before the officers spoke to him. Only Moore and the defendant ran at the sight of the officers, unlike others nearby. The officers did not have weapons drawn at the time. "In this situation, the circumstances of Frazer and Moore's headlong flight was indicative of wrongdoing." *Id*. at 15. Further, the defendant not only repeatedly refused commands to stop by one of the officers, but he also began climbing a stairwell railing and threw his bag away from the officer. All of this amounted to reasonable suspicion of wrongdoing. As to the black bag thrown by the defendant, he abandoned it when he tossed it into the courtyard and therefore lacked standing to challenge its search. Thus, the district court did not err in denying the motion to suppress.

Another challenge to the conviction was likewise rejected, and the judgment of the district court was affirmed in all respects.

No abuse of discretion by giving jury instruction on validity of search warrants in the case following defense counsel's reference to items not being in plain view; prosecutor's brief reference to defendant's request for an attorney during the traffic stop was not an impermissible reference to the defendant's invocation of his right to counsel

U.S. v. Askew, 98 F.4th 116 (April 10, 2024). The defendant was convicted by a jury of drug trafficking and firearm offenses in the Eastern District of Virginia. During cross-examination by defense counsel, a government witness was asked about the witness's familiarity with plain view doctrine and whether the drugs found inside a suitcase at the defendant's apartment were found in plain view. The trial court sent the jury out and cautioned defense counsel that his reference to plain view was potentially misleading insofar as it implied the search (which was not challenged) was illegal. On the court's own motion, the

judge instructed the jury the next day that the search warrants in the case were appropriately issued and executed, and that "[t]here are no legal issues involving the search warrants in this case." *Askew* Slip op. at 13. The defendant complained on appeal that this instruction improperly vouched for the government's search and impugned the credibility of defense counsel. The Fourth Circuit disagreed. In its words:

> We find no abuse of discretion here. The district court worried that the case might skitter off into a debate over plain view search doctrine. It appropriately sought to head off any confusion by issuing a short and sweet corrective. Trials by their very nature can be subject to detrimental detours, and the job of the trial judge is to keep the case on track. *Id*. at 14.

The defendant also complained that the prosecution wrongly commented on the defendant's assertion of his right to an attorney during closing arguments. During the trial, a detective testified that during the traffic stop of the defendant, the defendant initially stated that the officer had the wrong person. But when the officer told the defendant that officers had been tracking him for some time, the defendant "… broke eye contact and looked away . . . and immediately asked for his lawyer." *Id*. at 15. There was no defense objection at the time of this testimony, and defense counsel reemphasized the defendant's request for his lawyer during cross-examination of that witness. Defense counsel argued during closing that the defendant's behavior during the traffic stop was inconsistent with being a drug dealer, pointing to his statement that police had the wrong man. During its closing, the prosecutor emphasized to the jury that the defendant's initially cooperative behavior changed once the detective told him he had been surveilled, stating: "That is when he got nervous, that's when he asked for an attorney." *Id*. at 16. The defendant immediately moved for a mistrial, which the trial court denied. That decision was affirmed on appeal. While improper commentary on the defendant's exercise of a constitutional right may result in a due process violation, such was not the case here. "[B]ecause the testimony only made passing reference to *Miranda*, and the prosecutor did not specifically exploit [the defendant's] exercise of his *Miranda* rights, we find no Due Process violation." *Id*. at 18 (internal citation omitted).

Other challenges to the conviction were similarly rejected, and the district court was unanimously affirmed.

Denial of qualified immunity to trooper for claim of excessive force against teenager affirmed by divided panel

Lewis v. Caraballo, 98 F.4th 521 (April 15, 2024). The plaintiff was a fifteen-year-old boy with known mental health problems in the District of Maryland. The child's mother called the police, reporting a domestic disturbance. The defendant, a state trooper, arrived and saw the plaintiff walking back and forth on the sidewalk near his mother. The mother reported that she had been assaulted by her son. The trooper tried to speak to the teen, but he told the officer to leave him alone and assumed a fighting stance. Another local police officer arrived on scene, and he and the trooper kept approaching the plaintiff. The plaintiff repeatedly told the officers not to touch him and kept backing away. The officer then commanded the teen to stop and threatened to tase him if he did not comply. The officer told the plaintiff to put his hand behind his back but did not answer when he was asked why. The officer and the trooper then both moved forward, grabbed the plaintiff by his shirt, and pushed him down into grass near the parking lot of the apartment complex. The trooper and the officer got the teen face down on the ground on his hands and knees. The trooper then hit the plaintiff in the back shoulder area with

three elbow strikes and three knee strikes. According to the plaintiff, the knee strikes were to the back of the child's head; according to the trooper, they were to the child's ribs. The trooper then punched the back of the plaintiff's head with his fists four or five times in rapid succession. At this point, the officer tased the teen. The child became compliant and asked to get up, at which point the trooper told the child, "[Yeah], get the fuck up motherfucker." *Lewis* Slip op. at 7.

The plaintiff sued the trooper for excessive force and other claims. The trooper-defendant sought summary judgment based on qualified immunity. The district court denied the motion, finding that the complaint presented a material issue of dispute on the question of excessive force, and the defendant appealed. The Fourth Circuit affirmed. Body camera footage of the incident was partially obscured at times and was inconclusive, but, viewing the evidence in the light most favorable to the plaintiff, it provided sufficient factual support for the plaintiff's claims. A jury could determine that the trooper continued using physical force against the plaintiff after the plaintiff no longer presented a threat. According to the court: "A jury could find that Caraballo exerted a high magnitude of force onto Lewis's head when he adopted 'a boxer-like stance' and punched the teenager in the head 'with powerful alternating swings.'" *Id*. at 16. This was a "significant" use of force and potentially amounted to deadly force, given that the blows were to the teenager's head. *Id*. at 16-17. While the trooper was responding to a reported domestic assault, the mother showed no signs of injury, the plaintiff was not armed, he did not attempt to assault the officers, and he did not flee from the officers. Further, the body cam footage showed that the plaintiff was at least partially under the officers' control at the time the trooper struck the plaintiff's head. Even if the initial use of force was justified, a jury could find that he unreasonably escalated the degree of force. "Because a reasonable jury could find that Caraballo struck Lewis while the adolescent was non-dangerous, non-actively resistant, and partially subdued, there is a material question of fact as to whether Caraballo applied excessive force by striking Lewis several times in the head." *Id*. at 20. It has long been recognized in the circuit that increasing the level of force against a suspect who is under police control and not actively dangerous constitutes excessive force. *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (per curiam). The right to be free from such escalation of force was therefore clearly established and the district court correctly denied qualified immunity to the trooper.

Chief Judge Diaz dissented in part. While he agreed that the trooper's actions may have constituted excessive force, he would have ruled that the constitutional right to be free from such use of force in this scenario was not clearly established at the time of the incident.

No error to admit expert ballistics testimony; no error to deny request for reappointment of counsel after voir dire; no error to deny mistrial request based on passing reference to uncharged murder

U.S. v. Hunt, 99 F.4th 161 (April 16, 2024). In this multi-defendant gang prosecution from the Eastern District of Virginia, the trial court did not err in admitting expert testimony on firearms ballistics used to link the defendants to several murders, attempted murders, and other shootings. The defendants filed a motion to exclude the experts from testifying at trial, arguing that the entire field of "toolmark" analysis was flawed and failed to meet the standards of reliability required under F. R. Evid. 702. The defendants did not specifically challenge any of the experts' qualifications or conclusions. The trial court denied the motion without holding an evidentiary hearing, noting it had recently rejected the same arguments by the same attorneys in a different case. On appeal, the Fourth Circuit affirmed. While acknowledging the trial court's role to serve as a gatekeeper against unreliable expert evidence, it emphasized that the

decision to allow forensic evidence in a given case is largely within the trial court's discretion. Only when the trial judge abuses that discretion will a defendant potentially be entitled to relief. Further, a trial court may place limitations on the use of forensic evidence without excluding it altogether. Here, the trial court ordered the government's experts to refrain from overstating their conclusions and instructed defense counsel to impeach the expert with whatever information they had bearing on the reliability and accuracy of the expert opinions. In the words of the court:

> Because the *Daubert* analysis is not intended to serve as a replacement for the adversary system, . . . the rejection of expert testimony is the exception rather than the rule. Thus, even shaky but admissible evidence should be addressed through rigorous cross-examination, presentation of contrary evidence, and careful instructions on the burden of proof, not through wholesale exclusion by the trial judge. *Hunt* Slip op. at 25 (cleaned up).

The trial court also did not err in deciding the 702 challenge without conducting an evidentiary hearing. Given that the trial court had recently considered identical arguments in another case and that the defendants only argued that toolmark evidence was categorically inadmissible, the trial court had enough information to decide the issue without a hearing. Moreover, "[a] trial court has considerable leeway in deciding in a particular case *how* to go about determining whether particular expert testimony is reliable. *Id*. at 26 (emphasis in original) (citations omitted).

There was also no error in the trial court's decision to deny a request by one of the defendants to reappoint counsel after jury selection and before opening statements. This defendant was initially appointed counsel but his motion to substitute counsel was allowed. His relationship with his second attorney fared no better, with the defendant twice firing the lawyer and asking to proceed as pro se. Each time the defendant eventually withdrew the request to represent himself and proceeded with appointed counsel. A month before trial, he requested to represent himself and to forego the assistance of counsel for a third time. The trial court granted the request and appointed the attorney as standby counsel, cautioning the defendant that the court would not permit the defendant's decision to represent himself to delay the trial. According to the Fourth Circuit: "We have recognized that judges have wide latitude to deny a late-breaking motion for substitution of counsel. Such last-minute motions place considerable strain on the ability of court and counsel to prepare for trial, and seriously undermine the public interest in proceeding on schedule." *Id*. at 28-29. The trial court did not abuse its discretion in denying the defendant's request to again have counsel re-appointed under these circumstances.

Finally, the defendants complained that their motion for a mistrial should have been granted following a government witness's testimony referencing an uncharged murder. When asked why the witness agreed to cooperate with law enforcement, he explained that he did so when two of the defendants were "locked up for the Ralph murder." No one was charged with that homicide in this case. Defense counsel objected and moved for a mistrial. The trial court denied the request for a mistrial but struck the testimony and gave the jury a detailed limiting instruction. It explained that none of the defendants were charged with "the Ralph murder" and that the jury should disregard any reference to it. The trial court also convinced the government to forego presenting other evidence that referenced that killing. This happened on the thirteenth day of trial, and no other reference to the Ralph killing was made throughout the rest of the trial (lasting three additional weeks). "…[T]he reference to 'the Ralph murder' was brief, ambiguous, and not repeated…And there is no question that the jury, if it followed the court's

extensive instruction, could make its own determination as to each defendant's guilt or innocence of the crimes charged." *Id*. at 49.

Other challenges were similarly rejected, and the judgment of the district court was unanimously affirmed.

No qualified immunity for malicious prosecution claim where officers had no reasonable basis to believe the plaintiff had willfully failed to comply with North Carolina's sex offender registration requirements

Thurston v. Frye, 99 F.4th 665 (April 29, 2024). The plaintiff was convicted of sexual assault of minors in Montana in 1992. He moved to Avery County, North Carolina, in 2015. Under state law, the plaintiff was required to register as a sex offender and to verify his address with the local Sheriff every six months. The Sheriff in Avery County mails a verification form to registered offenders at the six-month mark, and registered offenders must return it within three days. G.S. 14-208.9A(a)(2) and (a)(3)(a). The plaintiff registered and verified his address every six months as required. In 2016, the plaintiff contacted the Sheriff about attending an out-of-state wedding and asked how to comply with his registration requirements. The Sheriff told the plaintiff he could attend and advised him to email a copy of his visitor-registration form from the other state within 10 days. The plaintiff left the state and travelled to the wedding in Washington State, where he registered as a visitor and emailed the Sheriff that form as requested. He stayed for more than a month. While he was gone, the Sheriff's Office mailed the verification form to his home address in North Carolina. The plaintiff's sister informed the plaintiff about the form, and he reached out via text to the Sheriff asking for clarification. The Sheriff did not respond, and the plaintiff did nothing more, given their previous discussions about his whereabouts. A Sheriff's deputy began investigating the plaintiff for failure to register, checking for him at his North Carolina address. While still in Washington, the plaintiff was contacted by the local Sheriff there and informed that an Avery County deputy was searching for him and was contemplating involving the U.S. Marshalls Service. The plaintiff contacted the deputy, who told him (wrongly) that he was not permitted to leave North Carolina for more than 30 days. Notwithstanding that incorrect advice, the deputy told the plaintiff that no charges would be brought as long as he was back home in North Carolina within a few weeks, giving the plaintiff a date certain by which to return. The plaintiff traveled back to his home in North Carolina by the agreed-upon date. Nonetheless, the deputy sought advice from a local prosecutor and ultimately charged the plaintiff with failing to return his address verification, failing to personally report to the Sheriff's Office, and for being out of state for more than 30 days. A few days after returning to the state, the plaintiff went to the Sheriff's Office to return his verification and was promptly arrested. The plaintiff was able to make bail and the charges were ultimately dismissed as a "misunderstanding with regard to how to comply with technical requirements." *Thurston* Slip op. at 5. The plaintiff sued the Sheriff's Office, the high Sheriff, and the deputy, alleging Fourth Amendment and other violations. The district court denied the defendant's motions for summary judgment and qualified immunity, and they appealed. A unanimous panel of the Fourth Circuit affirmed.

Of the three crimes charged in the warrant for the plaintiff's arrest, one of them (being out of state for more than 30 days as a registered offender) was not a crime. As to the other two offenses (failure to personally report and failure to return the verification), the defendant-officers did not have reason to believe that the plaintiff was in willful violation of the laws. Both the deputy and the Sheriff knew that the plaintiff was trying to abide by his registration requirements, and that he completed all of the

instructions given to him by the Sheriff for his out-of-state visit. "[A] prudent officer could not reasonably conclude that Thurston was acting 'willfully;' so there was no probable cause to believe that he was guilty of either . . . offense." *Id.* at 13-14. The illegality of the plaintiff's arrest under these facts was also clearly established at the time. While the issuance of an arrest warrant will often immunize officers from an argument that they lacked probable cause to arrest, this was a rare instance of officers having knowledge that the warrant should not have been issued. State law at the time was clear that registration violations require a mens rea of willfulness on the part of the suspect, and, taking the evidence in the light most favorable to the plaintiff, the officers here knew the plaintiff was not willfully committing any offense. In the words of the court:

> [W]e [have] held that knowledge of sufficiently exculpatory information trumps the inculpatory evidence of the warrant. So too here. The district court found that Sheriff Frye and Deputy Buchanan knew that Thurston was not acting willfully and thus could not satisfy each element of the relevant crime, yet they sought a warrant and arrested him anyway. . . [N]o reasonable officer could believe that an arrest in such circumstances was lawful. *Id*. at 18.

That the deputy spoke to the local state prosecutor about the matter before seeking charges did not change the equation. According to the court:

> If the greater incompetence of the magistrate in issuing a warrant cannot excuse the officer's conduct, then it's hard to see what the greater incompetence of the district attorney can do so. . . [W]hen no reasonable officer would seek out a warrant, an officer's conversation with the state's lawyer does not—as a matter of law—overcome the unreasonableness of the criminal charge and it's lack of probable cause. *Id*. at 19.

The officer's actions here were objectively unreasonable and they were not entitled to qualified immunity. The district court's judgment on summary judgment and qualified immunity were therefore affirmed.

Use of cell site simulator was supported by probable cause; entry into apartment where defendant was found was consensual; detention and search of defendant was justified as a protective sweep; no discovery violation where the government never possessed video evidence; credibility issues of witnesses were for the jury to weigh and did not rise to the level of false testimony

U.S. v. Briscoe, ___ F.4th ___; 2024 WL 1864952 (April 30, 2024). The defendant was a drug dealer in Baltimore who robbed another dealer, killing her and her seven-year-old son in the process. Police examined the adult victim's phone and saw that the last number she dialed belonged to the defendant. A court issued an order authorizing the disclosure of the defendant's cell site location data and other information, which led to police using a cell site simulator to "ping" the defendant's phone. Police obtained a search warrant for the apartment where they believed the phone to be but came up empty-handed. The defendant was discovered in a nearby apartment that police were voluntarily permitted to enter by an occupant. The defendant and his phone were inside, along with drugs. The defendant was taken into custody and charged with state drug offenses. Those charges were later dismissed, and the defendant was released within a few months. Five years later, the defendant was arrested for federal drug and firearm offenses, and ultimately charged with federal offenses relating to the killings. He went to trial in the District of Maryland and was convicted on all counts. On appeal, the defendant complained

that the use of the cell site simulator and subsequent searches of him, his phone, and the apartment where he was found were illegal. He also argued that the government violated constitutional discovery guarantees by failing to adequately investigate whether a camera in the victims' kitchen contained footage of the murders. He further complained that the government knowingly offered perjured testimony at trial.

The court rejected all of the defendant's claims. As to his complaint that the use of a cell site simulator device violated his rights, the order permitting its use was a court order based on probable cause and supported by sufficient factual allegations. State law permits the use of such tracking orders on a showing of probable cause, and that standard here was met. According to the court:

> These facts included a description of the crime scene at [the victims'] home; the fact that the Appellant's cell phone was the last number dialed on the phone belonging to [the adult victim]; that Appellant was the last person to see [the adult victim] (according to her family); and that Appellant was the last person to speak to [the adult victim] via cell phone. Further, the affiant noted that Appellant discontinued a pattern of calls to the victim around the time of the murder. *Briscoe* Slip op. at 16.

As to the police entry of the apartment where the defendant was found, police relied on consent of an occupant with apparent authority to enter the premises. While police had a search warrant for another apartment (where the defendant was not found), it had nothing to do with their eventual entry into the apartment where the defendant was found and would not render the consent entry invalid even if the warrant was defective. The question here was one of consent. The court approved the ruling of the trial court that "the man who opened the door appeared to answer the officer calmly and step back so as to allow officers into the residence." *Id*. at 17.

The search of the defendant within the apartment was justified as a protective sweep. Officers saw people running out of the back of the apartment as they entered and reasonably believed that others could be inside who could present a threat to the officers. "Even assuming [that defendant had standing to challenge the search of the apartment], the officers' seizure of Appellant was justified by their need to conduct a protective sweep of the apartment." *Id.* at 19.

As to the defendant's *Brady* complaint that a camera within the apartment could have contained exculpatory evidence, the court again rejected the claim. The defendant could neither show that the evidence was in fact exculpatory, nor that the government suppressed the evidence. It was speculative to suggest that the camera captured helpful evidence, and, in any event, the government never possessed any evidence from that camera. At most, this evidence was only potentially useful, and the defendant could not demonstrate bad faith loss or destruction of any evidence by the government.

The defendant's claim that his conviction was tainted by the knowing use of perjured testimony likewise failed. While the defendant pointed to several contradictions and credibility issues with some of the witnesses against him, none of them rose to the level of a *Napue* violation. "These credibility issues and contradictions are not the same as false testimony. And credibility and reliability were for the jury to decide." *Id*. at 23.

Other challenges to the trial and conviction were similarly rejected and the decision of the district court was unanimously affirmed.