Phil Dixon
919.966.4248
dixon@sog.unc.edu
UNC School of Government©

Fourth Circuit Case Summaries: June 5, 18, 21, and 24, 2019

Warrant was supported by probable cause under the totality of circumstances

U.S. v. Drummond, 925 F.3d 681 (June 5, 2019). This South Carolina case arose from a drug investigation in Greenville, SC. A deputy received a tip from an established informant about Nicolas Finely selling methamphetamine from a specific hotel room in town. The deputy knew Finely as a felon and someone involved with drugs and firearms. She and another deputy drove to the hotel to investigate and noticed the sole car in the parking lot was in front of the hotel room named in the tip. That car had fake tag, and a deputy looked to check the car's VIN. Finely came out of the hotel room with his pit bull as the deputies looked at the car. He agreed to let the deputies into the room and to put his dog in the bathroom. The seven people inside the room (including the defendant) all showed the deputies identification, and Finely told the officers that no one else was present in the room. The deputies asked to check the bathroom and Finely agreed. A woman was inside the bathroom with a hypodermic needle cap on the floor near her feet. The name given by the woman could not be verified, and no one present was able to explain the needle cap. The deputies obtained a warrant to search the room for drugs and paraphernalia based on these observations. Guns, ammo, multiple bags of meth, and paraphernalia (including needles) were found inside. A bag with a loaded pistol, ammo, and paperwork in the defendant's name was found at the defendant's feet during the search, and the defendant's fingerprints were later located on that weapon. The defendant was charged as a felon in possession and moved to suppress the warrant for lack of probable cause. The trial court denied the motion and the defendant was convicted at trial. The Fourth Circuit affirmed.

The defendant pointed to the several alleged deficiencies in the warrant: there was no information about the tipster or the tipster's reliability; the tip was not corroborated beyond Finley's presence at the hotel; the fake tag was insufficient to justify the warrant; the needle cap was "nothing more than a piece of trash." Slip op. at 6. In upholding the warrant, the court observed:

> The totality of circumstances test precludes this sort of divide and conquer analysis . . . The totality of circumstances requires courts to consider the whole picture, and the whole is often greater than the sum of its parts—especially when viewed in isolation. Nor does the probable cause analysis require a magistrate to rule out every innocent explanation for suspicious facts. *Id.* (internal citations and quotation omitted).

Here, while the identity and history of the tipster was not disclosed to the magistrate, the deputy testified about the danger the tipster faced from the target. The deputy knew Finley's reputation for involvement in drugs, and that information plus the tip led the deputies to investigate the hotel. From there, the tip

was corroborated at least in part. Finely was in the room identified by the tipster and the only car present in the lot was parked in front of that room with a fake tag. Finely let the deputies into the room but put his dog in the bathroom first and lied about the room occupant in the bathroom. The presence of the woman in the bathroom (whose identity couldn't be verified) with an unexplained needle cap at her feet added to probable cause. While the tip, or any one of the other factors, may not have been enough standing alone, taken together, they indicated the probability of a crime occurring involving the defendant. The court noted:

> We hold these circumstances, viewed in their totality, were sufficient to justify the magistrate's determination that there was a fair probability that evidence of methamphetamine distribution and additional drug paraphernalia would be found in the motel room. Accordingly, we affirm the district court's denial of the motion to suppress the evidence against him, and we affirm his conviction. *Id*. at 7.

Summary judgment and qualified immunity again reversed; material issue of fact existed on whether officer continued using deadly force "seconds" after the threat had ceased

Harris v. Pittman, ___ F.3d ___; 2019 WL 2509240 (June 18, 2019). For the second time, the Fourth Circuit reversed and remanded this 42 U.S.C. § 1983 action from the Eastern District of North Carolina. Defendant Pittman, a Fayetteville police officer, shot the plaintiff several times while the two struggled with each other in close proximity. The plaintiff sued, alleging a Fourth Amendment excessive force violation. The incident began when the officer heard a 'be on the lookout' ("BOLO") dispatch regarding "early- to mid-teenage black males" and a stolen car. An officer saw the plaintiff, a thirty-eight year-old black male, nearby. The plaintiff was "on his cell phone, walking at a fast pace, sweating excessively, and appeared to be nervous." Slip op. at 4. The officer observed that the plaintiff "avoided eye contact and had rapid head and hand movement" and believed this was suspicious. As the officer began to pursue him, the plaintiff ran and came across Officer Pittman. Pittman ultimately tackled the plaintiff and the two began struggling with one another. The officer tried to tase the plaintiff, and the plaintiff attempted to use the taser on the officer (neither made contact but both felt "partial effects"). The fight continued and the two began struggling over the officer's gun (the parties dispute who reached for the gun first). The gun fired while still in the officer's holster and the bullet severed part of the plaintiff's finger. The officer claimed that the plaintiff then obtained control of the gun, pointed it at the officer's face and pulled the trigger, only to have to firearm malfunction. The officer then wrestled the gun from the plaintiff and shot him repeatedly at close range. According to the officer, he was on the ground with the plaintiff above him when the shots were fired. According to the plaintiff, he was the one on the ground with the officer above him at the time of the shots. The final shot hit the plaintiff in his left buttock, "suggesting that [the plaintiff] rolled onto his stomach before Pittman fired for the last time." *Id*. at 6. The plaintiff had no involvement in the car theft that was the subject of the BOLO and was unarmed (other than allegedly possessing the officer's weapon during the struggle). The plaintiff later pled guilty pursuant to *Alford* in state court to charges stemming from the incident.

The parties agreed that the first shot into the plaintiff's chest was justified, but the dispute centered around the other shots. The use of deadly force must be justified by probable cause to believe the suspect presents a risk of "serious physical harm" at the time the force is used. If circumstances change and the suspect no longer presents such a threat, the continued use of force can become excessive:

> Because the inquiry into excessiveness turns on 'the information possessed by the officer at the moment that force is employed,' 'force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.' *Id*. at 11 (internal citation omitted).

The trial judge initially credited the officer's account. It found that the use of force was objectively reasonable and the Fourth Amendment prohibition on excessive force was not violated. The Fourth Circuit reversed and remanded, finding that there was a material dispute over when the last shots were fired and under what circumstances. On remand, the trial court operated on the assumption that Pittman was standing over the plaintiff when the final shots were fired but found that this also objectively reasonable based on the quick succession of shots and the "relentless attacks" by the plaintiff on the officer (among other factors). The trial court again held these facts did not rise to the level of a constitutional violation, and even if they did, the officer was entitled to qualified immunity. The plaintiff appealed a second time, and the Fourth Circuit reversed once more. The trial court's reasoning on remand again drew factual inferences in favor of the officer and failed to consider the plaintiff's version of events in the light most favorable to him. Qualified immunity was also inappropriate, as a constitutional violation could have occurred viewing the evidence in the light most favorable to the plaintiff. Further, such alleged violation of the right to be free from excessive force in this context was clearly established at the time of the incident:

> Since 2005, it has been established that 'an imminent threat of serious physical harm to an officer is not sufficient to justify the employment of deadly force *seconds after the threat has been eliminated* if a reasonable officer would have recognized when the force was employed that the threat no longer existed. *Id*. at 28 (internal citation omitted) (emphasis in original).

The court took no position on the likelihood of success of the claim but remanded for resolution on the merits. A dissenting judge would have found that there was no reasonable factual dispute and that the officer was entitled to qualified immunity.

(1) Traffic stop and consent search did not violate the Fourth Amendment; (2) Miranda violation was harmless error

U.S. v. Bernard, ___ F. 3d ___, 2019 WL 2571238 (June 24, 2019). (1) This appeal from the Western District of North Carolina arose from a traffic stop in Iredell County in December of 2012. The officer observed the defendant driving erratically and stopped his car on suspicion of impaired or fatigued driving. The driver appeared nervous and agreed to a frisk. He also agreed to sit with the officer in the patrol car. During a warrant check, the computer had problems and the officer had to call in the information, which lasted between five and seven minutes. During that time, the two talked casually, and the defendant informed the officer that he was here from California to sell and possibly repair motorcycles in North Carolina. The officer thought this was suspicious given that motorcycles are not frequently driven in North Carolina during the winter. The defendant denied possessing any contraband. The officer wrote the defendant a warning ticket and then asked if he could further question the defendant. The defendant agreed, and ultimately consented to a search of his truck orally and in writing. The officer found jars full of marijuana in the luggage rack on the top of the vehicle, along with two

firearms in the truck. The defendant was arrested and placed into a police car. An officer then asked him about the marijuana, and he admitted it was three pounds and that he grew it. On the way to the detention center, the officer told the defendant that "there may be some people up there that might want to talk to him and that he might want to think about trying to help himself out." Slip op. at 4. The defendant made inculpatory statements in response. No Miranda warning was given. The defense moved to suppress the physical evidence from the car as well as the defendant's statements. The trial court denied the motion. The defendant was convicted at trial and appealed.

Following Anders review, the Fourth Circuit affirmed. The officer credibly testified to the defendant's "erratic driving" and this supplied grounds to stop the vehicle for a traffic violation. During the stop, the officer diligently performed the mission of the stop and did not unlawfully extend it. From there, the defendant gave verbal and written consent to search.

> [T]he traffic stop continued after Officer Willis issued the citation only because [the defendant] provided both verbal and written consent for the vehicle search. [The defendant's] motion to suppress could not be granted on Fourth Amendment grounds, as he suffered no cognizable Fourth Amendment violation. *Id.* at 9.

(2) As to the defendant's inculpatory statements, the defendant was under arrest at the time and therefore in custody for purposes of Miranda. The court focused on whether or not the officer's statement was the "equivalent of express questioning", which would trigger the need for a Miranda warning. Miranda protections apply not only to explicit interrogation, but also to questions "reasonably likely to elicit an incriminating response from the suspect." *Id*. at 10. The government argued that this conversation was "friendly" and uncoercive. The court rejected this argument, finding "coercion can just as readily be built on hope as it can be built upon fear." *Id*. at 11. The officer should have known that his statement to the defendant about "help[ing] himself out" was the functional equivalent of express questioning, and a Miranda warning should have been given. However, in light of the overwhelming evidence of guilt and the significance of the defendant's statements within the context of the other evidence, this error was harmless. The court therefore unanimously affirmed the district court. A concurring judge would have found that the officer's statement to the defendant was not the equivalent of express questioning but agreed with the result.

Failure to advise of mandatory deportation consequence was prejudicial; error to dismiss petition without *Strickland* hearing

U.S. v. Murillo, ___ F.3d ___, 2019 WL 2574637 (June 24, 2019). In this post-conviction case from the Eastern District of Virginia, the defendant pled guilty pursuant to a plea bargain to one count of conspiracy to distribute cocaine. The defendant was a lawful permanent resident that had lived in the U.S. since 1995 (when he was seven years old). During the plea negotiations, the defendant's main concern was that the conviction would affect his immigration status. His defense attorney advised him that "deportation was a mere possibility that he could fight in immigration court." Slip op. at 2. Because the offense to which the defendant pled is an aggravated felony under the Immigration and Nationality Act, this advice was incorrect and the defendant faced mandatory deportation following his conviction. He moved to vacate the judgment as a result of the ineffective assistance of his counsel.

The defendant hired an attorney that held herself out as someone with knowledge of immigration law, and he heard her advertising her services to the immigrant community on her radio show, Tu Abogada Latina ("Your Latina Lawyer"). The attorney did negotiate the removal of six immigration-related terms from the plea bargain, including waiver of the right to contest removal proceedings. Further, the charge to which the defendant ultimately pled allowed him to avoid an otherwise mandatory five-year active sentence. However, the plea bargain did mention deportation as a "possibility" and required the defendant to acknowledge he wanted to plead guilty despite that possibility. The defense attorney repeatedly assured the defendant he would be able to contest his deportation in immigration proceedings. At court, the sentencing judge and defense attorney both referred to the immigration consequences as a "possibility." In his motion to set aside the conviction, the defendant provided affidavits from himself and others. In his affidavit, the defendant alleged he would have gone to trial but for the erroneous advice in order to still have a chance to remain in the country. The defense attorney responded that she advised the defendant to hire an immigration attorney and that while she was aware the defendant sought to fight his immigration case, "there was no plea offer available to [the defendant] that could have avoided immigration consequences." *Id*. at 8. The district court denied the motion without a hearing, concluding that the defendant could not show prejudice: he rationally accepted the plea to avoid the mandatory prison time, he acknowledged in the potential immigration consequences in the plea agreement and colloquy, and immigration consequences could not have been avoided here for a conviction of any of the charges faced by the defendant. The trial court did not address the question of the defense attorney's performance.

The Fourth Circuit reversed. The court observed that the guarantee of effective assistance of counsel applies to the plea-bargaining process. In the context of plea bargains, a defendant must show that but for the deficient advice of counsel, he sincerely would not have accepted the plea. In the words of the court:

> [W]hen deficient performance causes a defendant to accept a plea bargain he might not have otherwise, the defendant must point to evidence that demonstrates a reasonable probability that, with an accurate understanding of the implications of pleading guilty, he would have rejected the deal. *Id*. at 12.

The district court erred by giving "dispositive weight" to the plea agreement language concerning potential immigration consequences without holding a hearing to consider whether the defendant would have pled guilty if he had known of the mandatory consequences. "Giving dispositive weight to boilerplate language from a plea agreement is at odds with *Strickland's* fact-dependent prejudice inquiry." *Id*. at 13. While the terms of the plea bargain are relevant (such as the immigration warning here), those terms are not conclusive without evidence of the context of the defendant's understanding of the plea, context that needed to be developed at a hearing. Here, the record shows the defendant was primarily concerned with avoiding mandatory deportation—he hired his attorney based on her purported immigration experience, sought to negotiate immigration terms in the plea bargain, and he had resided in the U.S. since he was seven. The qualified warnings in the plea agreement and colloquy ("pleading guilty *may* have consequences") were not enough to overcome the defendant's evidence that avoiding mandatory deportation was his primary goal. The case was remanded for a *Strickland* hearing on the merits. A dissenting judge would have affirmed the trial court's denial of the motion.

No manifest necessity existed for mistrial; double jeopardy prohibits retrial of murder case

Seay v. Cannon, ___ F.3d ___, 2019 WL 2552953 (June 21, 2019). In this South Carolina habeas case, the petitioner was allegedly among a group of men that kidnapped and murdered a police informant. Startasia Grant was a key government witness in the case, and she testified at the trial of one of the co-defendants (resulting in his conviction). Her testimony was necessary to place the petitioner-defendant with the co-defendants at the time of the crime. She was charged with obstruction of justice at the time of her testimony in the first trial, but that charge was dismissed following her testimony. Over two years later, a subpoena was issued for her to testify in the petitioner's murder trial. The subpoena commanded Grant to appear July 25, 2016 and each day thereafter for the term of court. It further stated that the prosecutor "may be able to give . . . a more specific date and time to appear" but nothing indicated that the witness was told not to appear. Grant did not appear the first day of trial. The trial was continued to the next day for unrelated reasons, and Grant again did not appear. The government began the trial and a jury was empaneled. Efforts to contact Grant during trial were unsuccessful. On July 27, the government alerted the court to Grant's absence and a bench warrant for her arrest was issued. Court adjourned to the next day, but again Grant did not appear and law enforcement could not locate her. The government moved for a mistrial, claiming surprise and expressing fear for Grant's safety. The petitioner objected, but the trial court granted the mistrial, finding that the government was surprised by Grant's absence. Following reindictment, the state court denied the petitioner's double jeopardy motion, as did the federal district court. The Fourth Circuit reversed.

In the court's words:

> The Double Jeopardy Clause . . . prohibits states from subjecting a person to trial twice for the same crime. 'In a jury trial, jeopardy attaches when the jury is empaneled,' after which 'the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury.' *Id*. at 7 (internal citation omitted).

A mistrial is one such limited exception, but a mistrial must be supported by a manifest necessity where the defendant objects to it. When a mistrial is declared because of weaknesses in the government case, such as missing witnesses, the government bears a "heavy" burden to justify the mistrial, subject to the "strictest scrutiny" on review. *Id*. at 8. The U.S. Supreme Court had previously held that if a prosecutor begins trial uncertain of whether her witnesses are available, she "t[akes] a chance" that evidence at trial will be insufficient to convict and that jeopardy will attach. *Id*. at. 9 (citing *Downum v. U.S.,* 372 U.S. 734 (1963)). The government here did just that and could not claim unfair surprise at Grant's absence—it knew for at least two days before a jury was empaneled that Grant had not complied with the subpoena and was clearly concerned about her absence during that time. The government chose to begin trial under those circumstances, instead of seeking a continuance. The finding of unfair surprise was therefore unsupported by the record.

The government also pointed to the lack of alternatives available to the trial court under the circumstances. A vital part of the manifest necessity question is availability of alternatives to the declaration of a mistrial. "If the trial court's assessment of reasonable alternatives does not appear on the record, a finding of manifest necessity will not be upheld under the lens of strictest scrutiny." *Id*. at 14. Here, the record did not reflect any consideration of alternatives, such as further continuing the trial, or allowing testimony from other witnesses to proceed while the search for Grant continued. The court concluded:

> Finally, we emphasize that this case sharply illustrates the consequences of the government's too ready reliance on the short-term solution of a mistrial to solve a common trial predicament. The clear loser in this scenario is the public, which had a strong interest in having [the petitioner] tried under the murder indictment. However, as a result of the government's ill-advised request for a mistrial, approved by the state trial court without consideration of existing alternatives, [the petitioner] is entitled to the habeas corpus relief that will afford him his constitutional rights under the Double jeopardy Clause. *Id.* at 15-16.

The conviction was therefore vacated and the case remanded with instruction for the petition to be granted. A dissenting judge would have found the mistrial supported by a manifest necessity and that no double jeopardy violation occurred.