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Case Summaries: Fourth Circuit Court of Appeals (May 2, 16, 23, and 31, 2024)

Any constitutional right limiting law enforcement's involvement in a repossession by a private entity was not clearly established; denial of qualified immunity to deputy reversed

Atkinson v. Godfrey, 100 F.4th 498 (May 2, 2024). In this case from the Middle District of North Carolina, the plaintiff purchased a car pursuant to an installment contract, whereby the seller retained a security interest in the vehicle. The plaintiff defaulted on the contract and the seller hired a financial services company to assist with repossession of the car. While the tow truck was attempting to take possession of the car, the plaintiff jumped into it and attempted to drive away. The driver of the tow truck and the plaintiff began arguing about the repossession, and the tow truck driver eventually called the Harnett County Sheriff's Department. A deputy soon arrived, ordered the plaintiff to exit her car, and allowed the tow truck driver to take possession of the car. The plaintiff sued the deputy individually for an alleged Fourth Amendment violation for illegal seizure of the car (among other claims), and the sheriff for failure to train and for policies leading to the alleged Fourth Amendment violations. The defendant law enforcement officers moved to dismiss for failure to state a claim and asserted qualified immunity (among other defenses). The trial court denied the motion on all grounds, and the defendants appealed.

The Fourth Circuit reversed. The U.S. Supreme Court has recognized that an officer's involvement in a seizure of property by a private entity may, in some circumstances, rise to the level of state action that implicates the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56 (1992). Notwithstanding this general principle, the boundaries of that rule are not clearly established, and the deputy here could not have reasonably been on notice of the point at which law enforcement involvement in a private seizure would incur liability. According to the court:

> …[W]hile *Soldal* may support the general principle Atkinson advances—that law enforcement officials may violate the Fourth Amendment by actively participating in a wrongful repossession—that principle is too broad to clearly establish that [the deputy's] conduct was unconstitutional. *Atkinson* Slip op. at 12.

No Fourth Circuit or state supreme court case has squarely addressed when an officer's involvement in a repossession crosses the line, and there is similarly a lack of consensus on the point among other circuits. In denying qualified immunity, the district court relied on a decision by a federal district court out of West Virginia, which was not precedential and did not, according to the court, clearly establish the right at issue. Given that lack of clarity on the point, the officer was entitled to qualified immunity and the district court erred in ruling otherwise.

The sheriff's appeal was dismissed for lack of jurisdiction. Had the court decided that no constitutional violation had occurred, it would have been appropriate to order the district court to dismiss the claim against him as well. Because the deputy's case was instead resolved on grounds that any constitutional right at issue was not clearly established, the claim against the sheriff could proceed. "While it may be less likely that a municipality may be found liable when the constitutional terrain was as murky as that here, the rules of pendent jurisdiction counsel staying our hand." *Id*. at 18.

The unanimous court therefore dismissed the sheriff's appeal and remanded the deputy's appeal with instructions for the district court to grant his motion to dismiss.

Defendant's fingerprint on a notebook left at the scene of the crime supported probable cause for search warrants; officer was entitled to good-faith reliance on the warrants even if they were defective; any error admitting lay testimony interpreting coded language was harmless when the witness could have been tendered as an expert

U.S. v. Darosa, 102 F.4th 228 (May 16, 2024). A jewelry store in Charlotte, North Carolina, was robbed at gunpoint one morning before opening. The robber left a roll of duct tape and a notebook at the scene, and police found the defendant's fingerprint on the notebook. Security camera footage from nearby establishments showed a man in the area at the relevant time who looked like the defendant. A search of DMV databases showed the defendant owned a silver car. A search of images within the city's license plate reader databases showed that the car was silver a few days after the robbery but had been painted black a few days later. The officer obtained an arrest warrant for the defendant and search warrants for his car and home. A search of the car revealed gloves similar to those worn by the robber, a receipt for the car paint job, a note with the names of three jewelry businesses, and currency matching that which had been taken in the robbery. The search of the defendant's home led to the discovery of handcuffs and two guns, one of which had been stolen in the robbery. Officers also discovered a receipt for more than $15,000 for items sold to another jewelry store eleven days after the robbery. The defendant was charged with robbery and firearms offenses in the Middle District of North Carolina. He moved to suppress the evidence obtained by the search warrants, arguing that they failed to establish probable cause. The district court denied the motion. Among other evidence a trial, the government presented cell phone data connecting the defendant to the robbery and recorded jail calls between the defendant and his girlfriend discussing stolen property and firearms in coded language. A detective testified to the meaning of the coded language without being tendered as an expert witness. The jury convicted on all counts, and the defendant appealed.

The Fourth Circuit determined that the district court properly denied the motion to dismiss. While the Fourth Circuit has expressed concerns about the value of fingerprint evidence on moveable items without evidence of when the print was created, here there was evidence that the notebook only appeared in the store after the robbery. Moreover, the case law discounting the value of fingerprints on moveable objects all relates to sufficiency of the evidence to support a conviction, not the question of probable cause. In the words of the court: "It's no surprise that this type of evidence isn't enough to satisfy the much higher 'beyond a reasonable doubt' standard. But the same isn't true when considering probable cause. We've repeatedly stated that potential innocent explanations don't defeat probable cause." *Darosa* Slip op. at 9. The court further reasoned that even assuming the warrants were defective, they were not so obviously invalid that a reasonable officer would know not to rely on them, and the evidence would have been admissible under the good-faith exception in the alternative.

The defendant also challenged the trial court's admission of the detective's lay testimony interpreting his jail phone calls. Even if the district court abused its discretion by admitting this evidence as lay testimony, any error was harmless in light of the fact that courts have "routinely" approved the use of expert law enforcement testimony to interpret coded drug language, and the detective here could have easily qualified as an expert in coded language relating to robberies and stolen property.

Challenges to the jury instructions and the sufficiency of the evidence were likewise rejected, and the convictions were unanimously affirmed in all respects.

Trial counsel's decision to forego admission of jail records purporting to refute jailhouse informant testimony was a valid strategic decision and the state post-conviction court did not unreasonably apply federal law in so deciding; denial of habeas relief affirmed

Cox v. Weber, 102 F. 4th 663 (May 23, 2024). In this habeas appeal from the District of Maryland, the petitioner was convicted at trial of first-degree murder and other offenses in state court. He was apprehended by law enforcement near the scene of the crime during a traffic stop for driving without a seatbelt and running a stop sign. His passenger was wearing clothes matching the description of the shooter, and a nine-millimeter gun was found in the car. A nine-millimeter shell had been recovered from the crime scene. Both men were charged with murder, conspiracy, and gun offenses, but the passenger's case was severed for trial, and he was ultimately acquitted of all offenses. In the proceeding against the driver, the defendant successfully moved to suppress the gun found inside the car. While the defendant was in pretrial custody, a jailhouse informant contacted law enforcement concerning the case. He claimed that the defendant and co-defendant made incriminating statements to him about the murder. Because the informant had been lifelong friends with the victim, he sought to aid the prosecution. His testimony became the main evidence against the defendant at trial. The informant was thoroughly cross-examined and impeached on several points, including his own pending charges and the possibility of a reduced sentence in that case in exchange for his assistance to the government. The jury convicted on all charges, and the convictions were upheld on appeal. He argued in state post-conviction relief ("PCR") proceedings that his trial lawyer was ineffective for failing to obtain and admit jail records, which he claimed would have proved that he and the informant were not in the same part of the jail at the time the informant claimed the inculpatory statements were made. At the evidentiary hearing, trial counsel testified that she had obtained the jail location records but had made a strategic decision not to use them. The jail records custodian would have testified that the records were often inaccurate, and the prosecutor had particular expertise with these types of records as a former administrator of the jail. This, to trial counsel, reduced the exculpatory value of the jail records and presented a risk to the defense strategy to highlight the lack of corroboration of the informant's testimony. The state post-conviction court denied relief, finding that defense counsel made a valid strategic trial decision about the records and that her performance was therefore not deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). The state appellate court declined to review that decision and the petitioner sought habeas relief in federal district court. The district court also denied relief but found the issue to be a "close call" and issued a certificate of appealability. The Fourth Circuit unanimously affirmed. It is the petitioner's burden to show that the state post-conviction court was "objectively unreasonable, not merely wrong." *Cox* Slip op. at 16 (citation omitted). The decision of trial counsel to forego admission of the jail records may have ultimately been a mistake, but the district court correctly found that the state post-conviction court's ruling that the decision amounted to a valid trial tactic was not an unreasonable application of *Strickland*. According to the court:

> Some strategic decisions fare better than others. While introducing the activity logs may have been the most effective way to challenge [the informant's] testimony, we cannot say that the state PCR court unreasonably applied *Strickland* in determining that Cox's trial counsel's decision was a valid trial strategy. Trial counsel made a reasonable investigation into the activity logs. She then determined that attempting to prove that

> Cox and [the informant] were not together in Central Booking using records of questionable reliability was too risky. *Id*. at 23.

The deficient performance prong of a *Strickland* claim requires deference to valid trial strategic decisions, even if the decision is ultimately questionable. Further, a habeas court is required to give "considerable deference" to the state post-conviction court's determinations. In light of this double deference, the unanimous court affirmed the district court's denial of relief.

Grant of qualified immunity to supervising officer on illegal seizure claim reversed; grant of qualified immunity on illegal search, excessive force, and retaliatory arrest claims affirmed; jury instructions on probable cause were not prejudicial on the facts of the case

Nazario v. Gutierrez, ___ F.4th ___; 2024 WL 2787963 (May 31, 2024). The plaintiff was an officer in the U.S. Army Medical Corps and was driving through Windsor, Virgina, around 6:30 pm one evening in December 2020. The plaintiff, who is Black and Latino, had leased his vehicle three months earlier, and it had a temporary license tag in its rear window, which was tinted. An officer who was still in training noticed the plaintiff's car and failed to see the temporary tag in the back window. Under Virginia state law, a license plate is required on the front and rear of a vehicle, but that offense is an infraction only. The officer blue-lighted the car, and the plaintiff slowed to a speed well under the speed limit. The car passed several places where it would have been possible to stop, but the plaintiff continued driving for one minute and 40 seconds, traversing around a mile at low speed before pulling into a well-lit gas station parking lot. The officer in training then conducted a felony stop, drawing his gun and pointing it at the plaintiff's car as he exited his patrol car, apparently based on his suspicion that the vehicle was possibly stolen or that someone within the car was planning to attack him. Another officer supervising the officer in training was on scene and he too drew his gun and pointed it at the plaintiff. The license plate in the rear window of the plaintiff's vehicle was visible to the officers as they approached the car. The officers then shouted a series of sometimes-contradictory commands to the plaintiff, telling him to roll down his window, show his hands, and turn off the engine. Within 15 seconds, the plaintiff had turned off his car and held his hands out the window. The plaintiff repeatedly asked the officers why their weapons were pointed at him and what was happening. The officers then ordered the plaintiff to exit his vehicle and to keep his hands outside of the car. The plaintiff was wearing a seatbelt, and his driver-side door was locked. He continued questioning the officers about their conduct. At this point, the officers had walked towards the car and could see that the plaintiff was wearing Army fatigues. The plaintiff stated to the officers that he was serving his country. When asked again what was happening, the supervising officer told the plaintiff, "What is going on is that you are fixing to ride the lightning, son." The officers repeatedly refused to tell the plaintiff the reason for the stop and continued telling him to exit his car. The plaintiff told the officers that he was in fear for his safety and did not want to get out. The supervising officer told the plaintiff, "Yeah, you should be [scared]." One of the officers attempted to open the driver's side door, but it remained locked. The supervising officer grabbed the plaintiff's arm, and the plaintiff calmly told the officer to remove his hand. The officer responded, "That is not a problem," removed his pepper spray from his belt, and started shaking it. The plaintiff ducked down while keeping his hands outside of the car window. The plaintiff continued asking the officers why he was being stopped and treated this way without any response. The officer in training reached into the driver-side window and was eventually able to unlock the car, but when he attempted to open the driver-side door, the plaintiff used his elbow to block it from fully opening and closed the door. The supervising officer then pepper sprayed the plaintiff. The plaintiff was able to partially block some of the

spray, but the officer sprayed three more times and succeeded in spraying the plaintiff in his face. When again commanded to exit his car, the plaintiff told the officers that he was worried about reaching inside the car to undo his seatbelt. He eventually started to get out of the car, but before his feet could touch the ground, the supervising officer grabbed his arm. The plaintiff—whose eyes were closed due to the pepper spray—asked for a supervisor while the officer continued commanding him to the ground. Within around 10 seconds, the supervising officer performed a knee strike while the training officer pulled the plaintiff's other arm, pushing him onto the ground. While on his hands and knees, the officers commanded the plaintiff to lie down face first. Eventually, the officers managed to handcuff the plaintiff. All of this occurred within six minutes of the initial stop.

The officers then engaged the plaintiff in conversation. When asked why he failed to stop, he told the officers he was looking for a brightly lit area in the interest of everyone's safety and told the officers that he respected law enforcement. The supervising officer told the plaintiff that this was "the wrong answer." After running the plaintiff's paperwork and allowing him to receive medical treatment for the pepper spray, the officers proposed that the plaintiff could either be charged with obstruction of justice and traffic offenses or "chill" and "let this go." Choosing the latter option, the officers then removed the handcuffs, and the plaintiff was allowed to be on his way. The entire encounter lasted 80 minutes.

The plaintiff sued, alleging Fourth Amendment violations for excessive force, illegal search, illegal seizure, along with a host of state tort claims and a First Amendment retaliation claim. The district court found that the officers had probable cause to stop and arrest the plaintiff and granted the officers summary judgment based on qualified immunity for the excessive force claim, the illegal seizure claim, and the First Amendment claim. The court granted summary judgment to the plaintiff for the illegal search claim as to the officer in training only. The illegal search claim as to the supervising officer and remaining tort claims proceeded to trial. During the trial, the judge instructed the jury that the officers had probable cause to believe the plaintiff was driving without a license, driving to elude arrest, obstructing justice, and failing to obey an order from a conservator of peace. The jury found the training officer not liable for assault, battery, and false imprisonment, but granted the plaintiff $1,000 in compensatory damages for the illegal search under state law (no damages were awarded for the Fourth Amendment illegal search claim). The supervising officer was found liable only for assault and was ordered to pay the plaintiff $2,685 in compensatory damages.

The plaintiff appealed, primarily arguing that the trial court erred in finding that the officers had probable cause to believe he was eluding arrest, obstructing justice, and failing to obey commands. This error, according to the plaintiff, affected both the summary judgment rulings and the jury instructions. The Fourth Circuit affirmed nearly all the trial court's rulings but reversed in part. The trial court incorrectly found that the officers had probable cause to believe the plaintiff was eluding arrest when he continued driving for more than a minute and a half after being blue-lighted. Once the officer activated his blue lights, the plaintiff slowed to 18 miles an hour in a 35-mile-per-hour zone and made no turns until pulling into the gas station.

> [A]ssessing the facts known to the Policemen here—in the light most favorable to Lt. Nazario—we are unable to say that a prudent person would believe that Nazario committed the misdemeanor offense of eluding under Virginia law. . . Driving slowly is a way to show an intention to comply with a police officer's signal to pull over. *Nazario* Slip op. at 20.

Further, once the plaintiff pulled into the gas station and parked his car, it was obvious that he was not eluding the stop.

On the other hand, officers did have probable cause to believe that the plaintiff was committing obstruction of justice under state law for failure to follow lawful commands. The officers had probable cause to believe that the plaintiff was driving without a rear license plate and were justified in asking him to exit the car under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The plaintiff having used his elbow to prevent the car door from being opened and actively closed it while officers were trying to open it amounted to probable cause to believe the plaintiff was committing obstruction of justice under state law.

As to the failure to obey an order from a conservator of the peace, the statute was wholly inapplicable here, as the officers did not qualify as conservators of the peace under state law, and the trial court again erred in finding officers had probable cause to believe the plaintiff committed this offense.

The trial court correctly determined that the officers were entitled to qualified immunity on the excessive force and First Amendment retaliation claims, but incorrectly awarded the supervising officer qualified immunity on the illegal seizure claim. The act of pointing guns at the plaintiff throughout the encounter amounted to a threat of deadly force, one that was unjustified in light of the plaintiff's nonthreatening behavior. The threat of deadly force was reemphasized by the verbal threats of the officer that the plaintiff was "fixing to ride the lightning" and that he "should be" scared. Police only had probable cause to believe a traffic violation had been committed at the time of the stop. These threats, in the light most favorable to the plaintiff, unduly extended the traffic stop and a jury could find that the seizure violated the Fourth Amendment. Further, the right to be free from physical and verbal threats of deadly force under these circumstances was clearly established. The Fourth Circuit noted that while the law is insufficiently developed in this circuit on the question of when an officer's use of threatened deadly force by pointing a gun will clearly violate the Fourth Amendment, common sense dictates that the officer's use of verbal death threats coupled with his pointing of a gun absent a threat to officer safety is unconstitutional. "If police officers have been informed that they are not to extend a traffic stop beyond its primary purpose, it is obvious that they should not prolong the stop by making unwarranted death threats." *Nazario* Slip op. at 32. Thus, the district court erred in granting the supervising officer qualified immunity on the illegal seizure claim. That ruling was reversed, and the matter remanded for additional proceedings.

As to the excessive force claim, the district court found that the plaintiff had a colorable claim and that officers may have used excessive force. But it also correctly found that the plaintiff's right to be free from such force under the circumstances was not clearly established at the time. Because the plaintiff was not in custody or otherwise under police control at the time he was pepper sprayed during a nighttime traffic stop, and because circuit precedent did not otherwise put the officers on notice that such a use of force was plainly illegal, they were entitled to qualified immunity despite the likely constitutional violation.

As to the retaliation claim, the plaintiff alleged that the choice given to him by the officers—"chill" or be charged criminally—amounted to a First Amendment violation. Speaking out against the police is protected speech, and the officers' message to the plaintiff likely chilled his exercise of the right to such speech. There was, however, no causal relationship between the officers' threat to arrest the plaintiff and the plaintiff's protected speech, a required element of a First Amendment retaliatory arrest claim. The U.S. Supreme Court has held that probable cause will normally extinguish any First Amendment

retaliatory arrest claim. *Nieves v. Barlett*, 139 S. Ct. 1715 (2018). Such was the case here. According to the court:

> [T]he district court correctly determined that the Policemen had probable cause for the arrestable offense of misdemeanor obstruction of justice under Virginia law. And the existence of probable cause resolves the causation inquiry of the retaliation claim in the Policemen's favor. There was therefore no constitutional violation and the court properly dismissed Lt. Nazario's First Amendment retaliation claim. *Nazario* Slip op. at 40 (cleaned up).

Finally, the plaintiff correctly argued that the officers lacked probable cause to arrest him for eluding arrest and failure to obey a command from a conservator of the peace, and the trial court should not have instructed the jury that officers had probable cause for those offenses (as discussed above). Because the officers did have probable cause to believe the plaintiff was committing obstruction under state law, though, the trial court's instruction on probable cause for that offense was correct. The plaintiff could not show prejudice on these facts. In the words of the court:

> . . . [I]f there is probable cause for obstruction of justice but not for eluding or failure to obey, the trial court could have nonetheless instructed the jury that the Policemen had probable cause to arrest Nazario. In turn, the closing arguments would have likely included statements by counsel that the Policemen had probable cause to arrest Nazario, and the jury could have still factored the presence of probable cause into their verdict. *Id*. at 42.

The court therefore declined to set aside the verdict, and the case was remanded for additional proceedings on the illegal seizure claim against the supervising officer only.

Judge Rushing wrote separately to dissent in part and to concur in part. While she agreed with the aspects of the district court's judgment that were affirmed by the court, she would have upheld the district court's ruling on the illegal seizure claim against the supervising officer as well.