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Fourth Amendment Case Update

Racial Equity Network Annual Convening

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En banc court affirms grant of motion to suppress, reversing prior decision; exigent circumstances based on the sound of gunshots in the area did not justify stop and frisk

U.S. v. Curry, 965 F.3d 313 (July 15; amended July 16,2020).

Four Richmond, Virginia police officers were patrolling Creighton Court, a heavily populated neighborhood, as a part of a "focus mission team" in response to recent shooting and homicides. The officers heard gunshots nearby and responded to the area where they believed the shots originated in less than a minute, an open area between apartment buildings. Five to eight people were walking away from the area in various directions in a field between buildings and other people were standing closer to the buildings. Two dispatch calls relayed reports of gunshots in the area but did not provide any further information. The officers spread out and began approaching different people in the field, asking them to show their hands and waistbands and using a flashlight to check for weapons. The defendant and another man were separately walking in the field when an officer stopped them and asked them to raise their hands. The defendant complied and pointed the officer in the direction the shots had come from. When asked to raise his shirt, the defendant complied in a "lackadaisical manner" according to the officer, and eventually two officers patted him down, finding a gun. The defendant was charged with felon in possession of firearm and moved to suppress. The district court granted the motion, finding that officers lacked reasonable suspicion for the stop and that exigent circumstances did not apply. The government appealed, and a panel of the Fourth Circuit reversed. [I summarized that decision here, and Jeff Welty blogged about it here (presciently, I'd note).] On rehearing en banc, the divided full court reversed the three-judge panel decision and affirmed the trial court 9-6.

The government conceded on appeal that no reasonable suspicion supported the stop but maintained that the exigencies of the situation justified the stop and frisk. The majority disagreed. Exigent circumstances are an exception to the warrant requirement arising when an emergency justifies immediate action by the police. *See Mincey v. Arizona*, 437 U.S. 385 (1987). The "narrow" exception has traditionally been applied to situations involving pursuit of a fleeing suspect, prevention of "imminent harm," and prevention of destruction of evidence. The government argued that the recent nearby gunshots constituted a threat of imminent harm. The court disagreed.

> Though the 'emergency-as-exigency approach,' may sound broad in name, it is subject to important limitations and thus is quite narrow in application. For example, the requirement that the circumstances present a true "emergency" is

> strictly construed—that is, an emergency must be "enveloped by a sufficient level of urgency. *Curry* Slip op. at 16 (citation omitted).

Further, the exigent circumstances exception is typically applied to the search of private property, not to pedestrian stops, and the court declined to apply the doctrine to these facts. "[T]he few cases that have extended the exigent circumstances exception to such seizures all involve specific and clear limiting principles that were absent in Curry's stop." *Id.* at 18. The officers here did not have any specific information about the crime or the suspect. According to the court:

> [T]he officers approached Curry in an open field, at one of several possible escape routes, in an area that they only *suspected* to be near the scene of an *unknown* crime. Likewise, the officers lacked a description of the suspect's appearance or, more importantly, any indication that the suspect was in the vicinity. . . *Id*. at 21 (emphasis in original) (citations omitted).

The officers also stopped only the men walking in the area and not other people standing around. This illustrated the "relatively unrestricted nature of the search." *Id.* While the exigent circumstances exception may allow this type of search with a known crime or suspect or more controlled geographic area, here it did not. The trial court's ruling was therefore affirmed.

Judge Wilkinson dissented. He argued that the majority decision would lead to underpolicing of disadvantaged communities. His opinion emphasizes that police were in the area due to so-called "predictive policing" strategies (aimed at crime prevention) and warns that the majority opinion's "gut-punch" to those strategies will harm high-crime communities.

Judge Richardson also dissented separately, joined by Judges Wilkinson, Neimeyer, Agee, Quattelbaum, and Rushing. They would have found no Fourth Amendment violation based on the exigent circumstances exception and criticized the majority's limitations on that doctrine.

Chief Judge Gregory wrote separately to concur with the majority and to address Judge Wilkinson's dissent. His opinion emphasizes the problem of overpolicing in minority communities (while acknowledging the problem of under-policing emphasized by Judge Wilkinson) and responds to the dissent's criticism that the majority opinion undermines effective policing practices.

Judge Wynn wrote separately to concur, noting that Judge Wilkinson's dissent relied on statistical data and that the U.S. Supreme Court had recently expressed skepticism of the use of such data in deciding constitutional issues. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018). He also addressed Judge Richardson's dissent, arguing that the approach there would allow police to stop frisk anyone in a high-crime area or near the scene of recent gunshots. "[A] consideration of the high crime area alone is anathema under our jurisprudence. Individuals who happen to live in high crime areas are not second-class citizens." *Curry* Slip op. at 47 (Wynn, J., concurring).

Judge Diaz wrote separately to concur, joined by Judge Harris. His opinion argues that exigent circumstances may be justified as a special need under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and finding that case persuasive in this context. [A majority of the panel who initially decided the case in favor of the government relied on a variation of this argument.]

Judge Thacker also wrote separately in concurrence, joined by Judge Keenan. Her opinion also took issue with Judge Wilkinson's dissent and condemned predictive policing strategies as "little more than racial profiling writ large." *Curry* Slip op. at 58 (Thacker, J., concurring).

Qualified immunity denied for officers where decedent was allegedly secured and incapacitated when officers used deadly force; Fourth Amendment excessive force claims may proceed

Estate of Wayne A. Jones v. City of Martinsburg, 961 F.3d 661 (June 9, 2020).

This case involved the police killing of a 51-year-old homeless black man with schizophrenia. A city police officer encountered Jones walking in the road downtown in Martinsburg, West Virginia. Pedestrians are required to use the sidewalk under state and local law, and the officer briefly followed the man before stopping him. Jones was unable to produce identification at the officer's request. When asked if he had any weapons, Jones asked the officer, "What's a weapon?" When told a weapon could be anything, Jones responded that he had "something." When ordered to put his hands on the patrol car, Jones became uncooperative, refusing commands, moving away from the officer, and asking what he did wrong. The officer did not reply and used a taser on Jones without apparent effect. Another officer arrived and also tased the man without effect. Jones ran away from the officers, and one officer caught up, striking him in the arm. As the two officers reached him, Jones appeared to raise his hands in surrender. During the process of securing him though, the group "tumbled down the stairs" together, injuring one of the officers. Jones was then put in a choke hold on the ground, where he could be heard "choking or gurgling" on bodycam audio. Three more officers arrived on scene. While Jones was face-down with his legs kicking in the chokehold, one officer called him "a mother**ker;" another officer kicked him; a third officer tased him again (again to no seeming effect). The officer still holding Jones in a choke hold "felt 'like a scratch on [his] hand'" and a few seconds later felt "a sharp poke in [his] side." He noticed a knife in Jones' right hand and alerted the other officers, who all stepped approximately five feet away and drew their guns. Jones was motionless on the ground laying on his right side while the officers ordered him to drop his weapon. He did not move or respond, and a few second later, the officers fired 22 shots, killing him. No first aid was attempted by the officers following the shooting, and "a small fixed blade knife" was recovered from the decedent's right sleeve. The officers were recorded on body cam audio acknowledging their need to "have to gather some f**cking story" regarding the incident.

The decedent's estate sued under 42 U.S.C. § 1983, alleging an excessive force claim against the officers (among other claims) and a *Monell* claim against the city for failure to train and discipline officers. *See Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978) (allowing § 1983 claims

against municipalities where the entity has a pattern or policy of constitutional violations). The district court previously twice granted the defendants' motions for summary judgment and the Fourth Circuit twice reversed. In the current appeal, the district court found that qualified immunity protected the officers from liability and that *Monell* liability did not apply to the City. The Fourth Circuit reversed as to the officer-defendants and affirmed as to the City.

It is clearly established in the Fourth Circuit that officers may not continue to use force on a secured or incapacitated suspect. Taking the evidence in the light most favorable to the plaintiff, a jury could find that Jones was secured at the time of the shooting, whether he was armed at the time or not. "If Jones was secured, then police officers could not constitutionally release him, back away, and shoot him. To do so violated Jones's constitutional right to be free from deadly force under clearly established law." *Jones* Slip op. at 13. Similarly, in the light most favorable to the plaintiff, a jury could find excessive force based the decedent's incapacitation at the time of the shooting. "By shooting an incapacitated, injured person who was not moving, and who was laying on his knife, the police officers crossed a 'bright line' and can be held liable." *Id*. at 15. The grant of summary judgment as to the officers was therefore reversed, the order of dismissal again vacated, and the matter remanded for further proceedings.

The plaintiff failed to state a claim for *Monell* liability against the city, and the district court's award of summary judgment as to it was affirmed. In conclusion, the unanimous court observed:

> Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity [to the officers] at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept. *Id.* at 20.

Consent was voluntary under the circumstances; while defendant's race was a relevant factor in voluntariness analysis, no individualized showing that race played a role here

State v. Bartlett, 260 N.C. App. 579 (2018).

The trial court properly denied the defendant's motion to suppress heroin discovered following a search of the defendant during a traffic stop. A tactical narcotics officer noticed a Lincoln sedan weaving in and out of heavy traffic at high speeds, nearly causing multiple collisions. The vehicle pulled into a Sonic Drive-In parking lot next to an unoccupied Honda. The defendant, a

passenger in the Lincoln, got out, approached the Honda, and placed his hand inside the passenger window of that vehicle. The driver of the Honda appeared and spoke with the defendant briefly. The defendant then returned to the Lincoln and the vehicle drove away. No one in the Lincoln had ordered any food. Based on his experience, the officer concluded that the defendant had participated in a drug transaction. The officer stopped the car for reckless driving and speeding. Four other officers participated in the stop; all five officers were in uniform. The first officer approached the passenger side of the vehicle, while two others approached the driver's side. The officer ordered the defendant out of the vehicle. According to the officer, he asked the defendant for consent to search his person the defendant agreed, saying, "go ahead." The defendant testified that he never consented to a search. The search ultimately produced a plastic bag containing heroin. Defendant was arrested.

The court found that the defendant consented to the search, rejecting the defendant's argument that his consent was not voluntary given the coercive environment fostered by the police. On appeal, the defendant argued that his race was highly relevant to the determination of whether he voluntarily consented to the search because people of color will view a "request" to search by the police as an inherently coercive command, and he cited various studies in support of this claim. The court agreed that the defendant's race may be a relevant factor in considering whether consent was voluntary. However, aside from the studies presented by the defendant, the record was devoid of any indication that the defendant's consent in this case was involuntary.

North Carolina Supreme Court remands to Court of Appeals for reconsideration of equal protection challenge

State v. Johnson, No. 197P20, 847 S.E.2d 410 (N.C., Sept. 23, 2020).

By Special Order of the North Carolina Supreme Court, the defendant's petition for discretionary review was allowed for the matter to be remanded to the Court of Appeals. The trial court had denied defendant's motion to suppress for lack of reasonable suspicion and an equal protection violation, which the Court of Appeals affirmed. Reversing, the Supreme Court stated:

> The remand for reconsideration of the trial court's 14 November 2018 Order is necessary because the Court of Appeals opinion concluded that there was no violation of defendant's right to equal protection under the law because the law enforcement officer had "the reasonable suspicion necessary for the subsequent stop of defendant" under the Fourth Amendment. *See State v. Johnson,* 840 S.E.2d 539 (2020) (unpublished). We remand to the Court of Appeals for an examination of defendant's equal protection claims under the state and federal constitutions separate from its analysis of his Fourth Amendment claims.

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In a DUI case, the Court of Appeals upheld the denial of Defendant's Fourth Amendment claim that officers used excessive force to draw his blood pursuant to a warrant.

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (2020).

The defendant in Hoque actively resisted officers' attempts to gather evidence of impaired driving, beginning with his refusal to provide a roadside breath test. After he was arrested and advised of his implied consent rights, he refused to sign the rights form. He then refused to blow into the Intoximeter. A search warrant for the withdrawal of defendant's blood was issued, and he was taken to a hospital emergency room for that procedure. There, the defendant told a hospital nurse that she did not have permission to take his blood. Hospital staff told the arresting officer that the defendant would need to be held down for the blood draw. Two officers handcuffed the defendant and put him on his stomach. Two nurses helped the two officers hold the defendant down, and his blood was withdrawn. The defendant moved to suppress the results of the blood test on the basis that his blood was drawn by excessive and unreasonable force. The trial court denied the motion, and the defendant appealed. The court of appeals found no error.

Excessive use of force claims should be analyzed under the Fourth Amendment's reasonableness standard.

The Court's consideration was focused on the force used to extract Hoque's blood, but used broader language, citing *Graham v. Connor*, 490 U.S. 386 (1989) (claims that a law enforcement officer has used excessive force in the course of an arrest or other seizure should be analyzed under the Fourth Amendment's reasonableness standard). *See also Muehler v. Mena*, 544 U.S. 93, 99-100 (2005) (holding the increased intrusion of properly applied handcuffs while detaining Defendant during a search for weapons in the home of a wanted gang member met Fourth Amendment's reasonableness requirement, citing *Graham*).

The Court of Appeals in *Hoque* noted that the officers had a valid warrant and that the defendant's blood was drawn by medical personnel in a hospital – methodology deemed reasonable in *Schmerber*. The Court concluded that the use of force was caused by the defendant's refusal to comply with a lawful warrant and was reasonable.

Consider raising increased intrusion/excessive force claims as Fourth Amendment violations warranting suppression. *E.g.* moving a driver into a patrol car during an ordinary traffic stop.

A trooper unlawfully extended a traffic stop initiated for speeding by asking the defendant additional investigatory questions and for consent to search after the trooper had returned the defendant's paperwork, issued him a warning ticket, and stated that the stop had ended

State v. Reed, No. 365A16-2 (N.C. Feb. 28, 2020).

Traffic stop of Reed, a passenger, and their pooch. Reed was placed in a patrol car while the officer processed the ticket. The officer told Reed to shut the door, and another officer stood outside. After finishing the ticket and returning all paperwork, the officer asked about illegal substances and asked for permission to search the car. Reed deferred to the passenger, who had rented the car, and the officer told Reed to "sit tight." The trial court found reasonable suspicion to continue the detention. The majority disagreed, discounting the articulated reasons:

- Rental car outside of geographic restriction, but officer determined possession was lawful.
- Paid cash for the rental car.
- Trash , energy drinks, pillows, sheets in the car, without more, "utterly unremarkable."
- Dog food was explained by presence of the dog.
- Reed's nervousness about closing the patrol car door was ordinary nervousness.
- Travel statements were not contradictory.

Davis dissented, finding RS to extend the detention, adding that

- There were inconsistent statements about travel plans.
- Dog food was a tactic used by drug traffickers to distract K-9 units.
- Air fresheners

As to whether the encounter became consensual, the majority relied on totality of the circumstances to hold that a reasonable person would not have felt free to leave, even though the officer had returned all paperwork and told Reed he was done. The Court relied on the instruction to close the door, the presence of the other officer outside the passenger door, and the instruction to, "sit tight." Newby dissented.

(1) Presence of pocketknife in center console did not support Terry frisk; (2) Defendant's act of fleeing during an illegal search was not an intervening circumstance supporting application of attenuation doctrine; denial of motion to suppress reversed.

State v. Duncan, 846 S.E.2d 315 (N.C. Ct. App. 2020).

Duncan was stopped by two officers in broad daylight in downtown Charlotte for a malfunctioning taillight. One officer saw a closed, 4 or 5-inch pocket-knife on the console. He got Duncan out of the car to frisk him. Duncan objected but acquiesced. The frisk turned into a search of Duncan's pocket. Duncan objected again. The officer did not stop, and Duncan ran. Drugs were found near the arrest site. The trial court denied Duncan's suppression motion. The Court of Appeals reversed.

As to the frisk issue, the trial court held, and the COA affirmed, that the presence of the pocket-knife alone did not provide justification for the frisk. The opinion discusses and distinguishes *Malachi* and *Robinson* (both gun cases), which is helpful.

As to the more intrusive search, *Duncan* recognizes that searches for contraband are unrelated to the traffic stop's mission and render the seizure unlawful.

Finally, there was no probable cause to arrest for resisting because Duncan was lawfully fleeing an unlawful search and seizure.

Pending cases addressing race as part of a NC State Constitutional challenge:

***State v. Johnson*, COA20-564 Brief of Appellant, (pp 23-34)**

Johnson was stopped for a seatbelt violation. The officer got him out of his car and asked for consent to search. Johnson testified that he was asked for and gave consent only to a frisk for weapons. The officer said he did not limit his request to a frisk. Officer searched Johnson's pockets and found drugs.

On appeal, Johnson challenged the validity of his consent on several bases, including arguing that the NC Constitution affords greater protection than the Fourth Amendment. Under Fourth Amendment analysis, going outside the scope is a violation only if it increases the duration of the detention. *State v. Bullock*, 370 N.C. 256 (2017). Unrelated questions are okay as long as they do not add time to the stop. *Johnson* raised an issue of whether under the NC Constitutions investigative detentions must be limited in scope and duration because of gross racial disparity in how traffic stops are conducted.

***State v. Tabb*, COA20-131, Brief of Appellant**

Defendant was a passenger in a car sitting in the parking lot of an apartment complex in a high crime neighborhood around midnight. Tabb argued, *inter alia*, that finding RS based on high-crime neighborhood would violate our constitution's prohibition of general warrants and guarantee of equal protection.