

## Case Summaries: Fourth Circuit Court of Appeals (Feb. 6, 16, 21, and 22, 2024)

**Search and seizure of the defendant was supported by probable cause; extension of stop was supported by reasonable suspicion; girlfriend with possession of defendant's cell phone could consent to its search; loss of body cam video was not bad-faith destruction of evidence; convictions for witness tampering and obstruction of evidence did not plainly violate double jeopardy; alleged conflict of interest did not support ineffective assistance of counsel claim**

[U.S. v. Perry](#), 92 F.4th 500 (Feb. 6, 2024). Local police officers were patrolling a high crime area late one December night in Norfolk, Virginia, when they noticed a car without a front license plate as required by state law and with only a paper temporary tag on its rear. As the officers turned around their vehicle to follow the car, it sped away and ran two stop signs. The officers quickly found the car in a nearby parking lot with the passenger door ajar. The defendant was in the passenger seat and his girlfriend was the driver. As officers approached, the woman exited the car. The officers then saw the defendant lean down in the passenger seat before hopping over the console to exit from the driver's side as well. The pair were detained and separated for officers to investigate the license plate and stop sign violations. A frisk of the defendant revealed a blue bandana in his back pocket. This, coupled with information obtained from the police dispatcher, suggested to the officer that the defendant was connected to the Crips gang. The girlfriend consented to a search of the car, leading to the discovery of a pistol in a purse on the passenger side of the vehicle. The girlfriend confirmed that the gun belonged to the defendant. Police shortly found an additional pistol on the floorboard of the passenger side. This gun was determined to be stolen, and the defendant's girlfriend again indicated that it too belonged to the defendant. The defendant was a felon, and he was charged with being a felon in possession of a firearm in the Eastern District of Virginia. During the subsequent search incident to arrest, officers discovered suspected marijuana, which the defendant acknowledged as "weed." The girlfriend was allowed to leave with the car and the defendant's cell phone.

While the defendant was in pretrial custody, he gave his girlfriend the password information for the phone and she began using it as her own, including to talk with the defendant in jail. The defendant repeatedly attempted to have her recant her statements about his ownership of the guns. He also gave her instructions on how to avoid service of a subpoena, and repeatedly discouraged her from testifying in court against him. The woman ultimately appeared before a federal grand jury and turned over the defendant's cell phone and password to federal agents. She consented to a search of the phone as well, but the agents still attempted to get a search warrant. The magistrate refused the request to issue a warrant, pointing officers to a Fourth Circuit decision holding that the owner of a phone lacks a reasonable privacy expectation in the device when it is controlled by another person. *Casella v. Borders*, 404 F. App'x 800 (4th Cir. 2010) (unpublished). Officers then searched the phone based on the woman's consent, finding photos of the defendant with the guns discovered during the traffic stop. The defendant was charged with three counts of witness tampering, obstruction of justice, and drug possession in

addition to the firearm charge. He was convicted on all counts and appealed, raising numerous issues with his conviction.

The defendant argued that the district court erred in denying his motion to suppress the traffic stop and the cell phone evidence. The Fourth Circuit disagreed. Regarding the traffic stop, officers had both probable cause to believe that traffic violations had occurred (for running the two stop signs) and reasonable suspicion to believe other crimes may have been being committed based on the car's evasive actions in response to seeing the patrol car while in a high-crime area late at night. The stop sign violations and attempted flight from the officers were recorded on officer body cam. Between the unprovoked flight in a high crime area after seeing the officers and the officers' observation of the defendant leaning down in the passenger area before exiting through the driver side, officers had reasonable suspicion to detain the defendant during the traffic stop and investigate the unusual circumstances of the encounter. The officers also had grounds to extend the traffic stop to seek consent to search the car under these circumstances. The suspicions of the officers only increased from the time of their observation of the potential traffic violations, and their subsequent investigation was justified by the facts. "The search, therefore, advanced the traffic stop's mission of investigating suspected criminal activity. So the officers did not impermissibly extend the traffic stop either in asking for [the girlfriend's] consent or in searching the vehicle." *Perry Slip op.* at 13. The defendant's detention in handcuffs and in the backseat of the patrol car during the investigation was also reasonable, which was against consistent with the mission of the stop.

As to the cell phone, the defendant's girlfriend had authority to consent to a search of the phone as the person in possession of it. The district court correct found that:

"...[the girlfriend] had at least joint, if not sole, access and control over the cell phone at the time of the search...[F]or the seven months leading up to her decision to give the phone to federal authorities, [the girlfriend] was the only person to use the cell phone. And she regularly used the phone for purely personal purposes. Furthermore, she had access to the contents of the entire phone. *Id.* at 15.

There was also no evidence that the girlfriend's consent to search the phone was involuntary, and the district court did not err by refusing to suppress the cell phone evidence.

While body cam of the traffic stop was preserved, dash camera footage from the patrol car was destroyed by automatic process 30 days after the traffic stop. The defendant complained that this amounted to bad-faith destruction of the evidence, necessitating dismissal of his charges for a due process violation under *Arizona v. Youngblood*, 488 U.S. 51 (1988). To prevail on a *Youngblood* claim, a defendant must show that the lost or destroyed evidence was clearly exculpatory and that police acted in bad faith in destroying or losing it. According to the court, "Perry cannot satisfy even one of these elements." *Perry Slip op.* at 17. There was testimony from one of the officers that the body cam video footage that was preserved and played to the jury showed the same, or even higher quality, footage that the dash cam would have shown. This was "comparable evidence" to the dash cam and was provided to the defendant. At most, the dash camera footage was merely potentially helpful to the defendant and did not rise to the level of clearly exculpatory. Further, there was no showing of bad faith on the part of the officer. The officer's failure to preserve the dash cam based on his belief that it was duplicative of the body cam might have been wrong, but this "at most would show negligence, not bad faith." *Id.* at 18.

The defendant also argued a double jeopardy violation based on his convictions for both obstruction of justice and witness tampering. The defendant failed to raise this argument at the trial court, and the Fourth Circuit therefore reviewed for plain error only. The multiple counts of witness tampering all addressed separate acts of tampering, which all had different elements from the obstruction of justice offense. The court acknowledged without deciding that some “overlap might exist” between the offenses, but noted the absence of caselaw on point in determining that any error here did not amount to plain error. *Id.* at 24.

Finally, the defendant claimed he received ineffective assistance based on an alleged conflict of interest of his trial lawyer. When a defendant raises an ineffective assistance of counsel claim based on a conflict of interest for the first time on appeal, it is the defendant’s burden to show an actual conflict of interest that negatively impacted his lawyer’s conduct during trial. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Here, the defendant claimed only that his lawyer was conflicted based on the defendant having threatened him in a prior state case. This was insufficient to show an actual conflict causing prejudice, and this claim too was rejected.

Other challenges to the verdict and sentence were similarly rejected and the district court’s judgment was unanimously affirmed in all respects.

**Search warrants for Facebook accounts were supported by probable cause and were not overbroad; even if the lack of temporal limitation on account information for one of the warrants violated the Fourth Amendment, officers were entitled to rely on the warrant under the good faith exception**

[U.S. v. Zelaya-Veliz](#), \_\_\_ F.4th \_\_\_; 2024 WL 650818 (Feb. 16, 2024). In this multi-defendant case from the Eastern District of Virginia, the defendants were charged with sex trafficking of a minor child and related offenses. The men were associated with MS-13, an international criminal gang. After around six weeks, the 13-year-old girl escaped and met with local law enforcement. She identified and was able to help locate another minor being trafficked by the men. Eventually, the matter was turned over to the FBI. Relying on information from local law enforcement’s investigation, the lead agent discovered that the suspects were likely communicating via Facebook to accomplish the trafficking and prostitution of the minors. Agents ultimately obtained four search warrants for Facebook accounts associated with the suspects, each building on the information obtained from the previous warrant.

The first warrant sought information associated with four accounts connected to one of the suspects and a fifth account of another man, none of whom were parties to this case. The warrants sought all information related to the accounts for the entire time the accounts had been in existence, including all direct messages. While the warrants permitted the government to search all of the information provided by Facebook, they limited the seizures of information to evidence of the four specific potential crimes (all of which related to sex trafficking of a minor). The affidavits in support of these warrants explained the information learned during the course of the investigation, including that both men had communicated with minors on Facebook about prostitution and that one of the men had sexual contact with one of the minors. It also stated that MS-13 members were known to communicate via Facebook and that its members often utilized sex trafficking as a means of generating money.

The second Facebook warrant requested similar information on eight different accounts, five of which belonged to one defendant and three other accounts by other co-conspirators. The one defendant was identified by a minor victim as a person who facilitated her trafficking and prostitution. A credit card in

the defendant's name was connected to the cell phone possessed by the child when she was found by law enforcement as well. Like the first warrant, the seizures of information authorized by the warrant were limited to evidence of four specific sex trafficking related crimes but were not limited by any specific time frame.

The third warrant requested an account belonging to a different defendant, multiple accounts of other, unindicted people, and five accounts belonging to three minor victims. Unlike the first two warrants, this warrant only requested information within a ten-month period prior to and over the period when the minors were trafficked. This warrant also sought broader categories of information associated with the accounts, including IP address and location data. Again, the warrant only authorized seizure of information showing involvement of the suspects in four specific sex trafficking offenses.

The last warrant requested account info on 22 Facebook accounts, some of which were associated with other defendants. It too limited seizure of the information produced in response to the warrant to evidence of sex trafficking offenses. It recounted information obtained from earlier warrants showing that these defendants discussed coordinating prostitution of minors, transporting minors for commercial sex, obtaining explicit photos of minors, and admissions to sex trafficking of minors.

Five of the six defendants challenged the denial of their motions to suppress the information obtained from Facebook on appeal, arguing the warrants were overbroad and not based on probable cause. The Fourth Circuit unanimously affirmed.

As to the first warrant, the defendants lacked standing to challenge it. Because this warrant only targeted information from other co-conspirators who were not involved in the current matter, the court declined to consider any challenge to it. (One of the men targeted in this warrant pleaded guilty to sex trafficking conspiracy prior to the trial of the defendants.) Regarding the second, third, and fourth warrants, each was aimed towards obtaining the account information of at least one of the named defendants in the case and the defendants could challenge those. The court noted that most courts that have considered the question have agreed social media users have a reasonable expectation of privacy in private messages sent through a social media application. The Fourth Circuit agreed that such private messages sent through a third-party provider remain constitutionally protected and that the government must typically obtain a search warrant before accessing them. "It cannot be the rule that the government can access someone's personal conversations and communications without meeting the warrant requirements or one of the Supreme Court's delineated exceptions to it. The judiciary would not allow such a trespass upon privacy at its core." *Zelaya-Veiz* Slip op. at 21.

Turning to the merits of the challenges, the court first determined that the warrants were all amply supported by probable cause. The second warrant was supported by information that the target defendant had trafficked the minor recovered by police, that he had multiple accounts in fake names, that his credit card was connected to a phone in possession of a minor victim when police found her, and that his known affiliates were using Facebook to accomplish trafficking and other forms of child abuse. This information, coupled with information about how MS-13 operates and typically uses Facebook based on the agent's training and experience, established probable cause. The third warrant was supported by identification of the target defendant by one of the minor victims and information from the first warrant showing that the target communicated over Facebook to facilitate crimes by gang members. Likewise, the affidavit in support of the fourth warrant demonstrated that account activities of each target defendant showed the targets either coordinating prostitution of minors, discussing the

trafficking of a minor, admitting to sexual abuse of a minor, or making sexual advances towards minors. This information was corroborated by the minor victim and easily established probable cause. In the words of the court:

The warrant affidavits in this case are well-sourced. They incorporated information from a reliable witness, the experience of an agent well-versed in the workings of MS-13, and—with each successive warrant—an increasingly incriminating chain of messages that tethered successive Facebook accounts to a larger conspiracy. *Id.* at 26.

The defendants also argued that the warrants were overbroad, in that the second and third warrants sought account information without any time limitation. They also argued that the warrants scooped up too many categories of account information. The court rejected these arguments as well. While the warrants required Facebook to disclose all the requested information connected to the accounts, the warrants limited the seizure of that information to evidence of the crimes of investigation only. According to the court:

We have previously found that a warrant’s particularity is bolstered where, as here, the scope of the seizure it authorized was limited to evidence of enumerated offenses. The warrants in this case thus appropriately confined the officers’ discretion, by restricting them from rummaging through the appellants’ social media data in search of unrelated criminal activities. *Id.* at 28.

The timeframe limits on the third and fourth warrants that included a period beyond the time during which the minor victims were trafficked also did not render the warrants overbroad. Law enforcement had information that the defendants were engaged in a far-reaching sex trafficking conspiracy involving multiple victims and that the perpetrators used Facebook to communicate about the crimes before and after their commission. “The extensive nature of the conspiracy being investigated in this case meant that less temporal specificity was required here than in other contexts where evidence can be more readily confined to a particular time period.” *Id.* at 32 (cleaned up).

The court agreed with the defendants that the lack of any timeframe limitation in the second warrant was problematic and potentially unreasonable under the Fourth Amendment. “... [A] time-based limitation is both practical and protective of privacy interest in the context of social media warrants.” *Id.* at 34 (cleaned up). However, the second warrant was not so obviously illegal that a reasonable officer would have recognized it as such, and the good faith exception acted to save the warrant here. The court cautioned that social media warrants without any temporal limitation could be subject to an overbreadth challenge. In its words: “... [F]uture warrants enhance their claims to particularity by requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy.” *Id.* at 35. In a footnote, the court also noted that its opinion did not address the contours of the plain view exception in the context of social media warrants.

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

**Failure to disclose court involvement of friends and family during voir dire were race neutral reasons to peremptorily strike the potential jurors; no *Batson* violation**

[U.S. v. Wiley, Jr.](#), 93 F.4th 619 (Feb. 21, 2024). The defendant was charged with robbery, conspiracy, and related offenses in the Middle District of North Carolina. Potential jurors in the case were screened with a questionnaire. Among other questions, it asked whether the potential juror or any of their family members had even been a party in any criminal, civil, or family law case. Three jurors responded affirmatively and were asked follow-up questions. These included whether the potential juror or their friends or family had been a victim of a crime and whether the juror had been a party or witness in any proceeding. The government asked the trial court to question the potential jurors about whether the friends or family of potential juror had been a party or witness to any proceeding as well. One potential juror answered all of the follow up questions in the negative, contrary to her answer on the questionnaire. Another potential juror answered affirmatively but did not provide the same details disclosed in the jury questionnaire. The government used peremptory strikes to remove these two potential jurors, who were both African American. The defendant objected to the strikes as a *Batson* violation. The trial judge conducted a hearing and the government offered that its use of the strikes was due to the failure of the two potential jurors to disclose the details they had listed on the questionnaire when asked in open court. The court denied the *Batson* challenge. The jury was ultimately composed of seven people identifying as white, four identifying as Black, and one identifying as mixed race. The defendant was convicted of most of his charges, He appealed, arguing in part error in the denial of his *Batson* challenge.

The court presumed that the defendant made a sufficient prima facia showing that the government's peremptory strikes of the two Black potential jurors was discriminatory based on the government having offered a race-neutral explanation for its use of the strikes. According to the government, one of the strikes was motivated by the potential juror's failure to orally disclose in open court that her brother had been convicted of a crime despite having admitted that on the juror questionnaire. The strike of the other potential Black juror was motivated by the juror's disclosure of one family member's involvement in a court case and her failure to disclose another family member's court involvement, despite her having admitted that both family members had been court-involved in the questionnaire. According to the court, these were "facially race neutral" reasons for exercising the peremptory strikes. The burden then shifted to the defendant to show that the proffered reasons were pretextual and that race improperly played a role in the use of the strikes. One way to show pretext is if the offered explanation for the strike could apply equally to white jurors who were allowed to remain on the jury. *Miller-El v. Drette (Miller-El II)*, 545 U.S. 231 (2005). The defendant argued that a white potential juror who was also individually questioned by the court about the involvement of his family members with the court system showed that the government's explanation was pretextual. The court disagreed. That potential juror, unlike the two potential jurors who were struck, responded to the trial court's inquiry with the same information he had disclosed on the questionnaire. This sufficiently distinguished the white potential juror from the excused Black potential jurors.

The defendant also argued that the government questioned white and Black potential jurors in a disparate manner, which can also show discriminatory intent. *Id.* "... [A]ny disparity in the form of the questions asked is explained by how the district court conducted the voir dire." *Wiley Slip op.* at 13. Nor was it significant that the government asked the trial court to repeat one of the questions from the questionnaire during voir dire. According to the court:

We reject Wiley’s argument that because question four was on the questionnaire, the government’s insistence on asking it again during voir dire was a trap for Black jurors. We don’t think that argument is persuasive, particularly since every prospective juror was asked question four, whether directly or by the court’s referencing its previous questions. *Id.* at 14.

The government could have requested the court to further inquire about the discrepancies between the potential jurors’ answers on the questionnaire compared to their answers in court, and the court suggested that such further inquiry would be the better practice. “But the government’s failure to do so here doesn’t prove discriminatory intent.” *Id.*

All other challenges were likewise rejected by the unanimous court, and the judgment of the district court was affirmed in full.

**Material issue of fact existed as to the circumstances of officer’s shooting of the plaintiff’s dog; grant of summary judgment to officer reversed; case remanded for trial**

[Ray v. Roane](#), 93 F.4th 651 (Feb. 22, 2024). The plaintiff was the owner of a German Shepard dog who was shot and killed by the defendant-police officer while the animal was tethered in the plaintiff’s front yard. The plaintiff sued in the Western District of Virginia, claiming an unconstitutional seizure by the officer in shooting her pet. The district court initially dismissed the case, finding that the plaintiff failed to state a Fourth Amendment claim and, alternatively, that the officer was entitled to qualified immunity. The plaintiff appealed in a previous case and the Fourth Circuit reversed (summarized [here](#)). *Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020). Taking the plaintiff’s allegations as true, there was evidence that the officer acted unreasonably by shooting the animal and the complaint adequately stated a claim for an unlawful Fourth Amendment seizure. It also reversed on the issue of qualified immunity, finding it was clearly established at the time of the incident that deadly force could only be used against a pet when the animal “poses an immediate danger and the use of force is unavoidable.” *Id.* at 230. On remand, discovery was conducted. Three law enforcement officers testified in depositions that the officer was “backpedaling” in an effort to escape the advancing animal until the shooting. Two other officers testified they were not sure whether the officer stepped forward to shoot the dog. Three civilian witnesses, including the plaintiff, testified that the officer stopped out of the dog’s reach, took a step forward, and shot the animal. The district court granted summary judgment to the officer despite this factual dispute, finding that the officer acted reasonably, and that no Fourth Amendment violation could be shown on the facts. The plaintiff again appealed, and the Fourth Circuit again reversed. Because the plaintiff presented evidence from which a jury could find that the officer acted unreasonably and that his version of the events was not credible, summary judgment was not appropriate. “...Ray has met her burden to survive summary judgment, generating a dispute resolvable only by crediting one group of witnesses over another—a task for a jury, not a court.” *Ray Slip op.* at 10 (cleaned up).

The court emphasized that it was for the jury to decide which version of the facts was true and that it would not be compelled to find that the animal presented no threat to the officer even if they believed the plaintiff’s version. It also emphasized that the issue of qualified immunity at the summary judgment stage was determined in the previous appeal.

The district court’s judgment was therefore unanimously reversed, and the matter was remanded for trial.

## **Guards who mistakenly strip searched jail nurse were not entitled to summary judgment or qualified immunity**

[Amisi v. Brooks](#), 93 F. 4th 659 (Feb. 22, 2024). On her first day as a contract nurse for a local jail in the Eastern District of Virginia, the plaintiff was mistakenly treated as if she was an inmate reporting for a weekend stint in jail. Dressed in scrubs, the plaintiff encountered a detention center officer in the parking lot and asked where she should report. He pointed her to a backdoor of the jail where “weekender” inmates—those serving nonconsecutive periods of incarceration—go for intake. Guards inside realized they had no paperwork on the plaintiff. The Weekend Coordinator of the jail agreed to come speak with the woman. While she was waiting for the coordinator, another guard asked the plaintiff to follow her into the women’s locker room. Inside, the guard patted down and strip searched the plaintiff. She sued the guards involved, alleging an unlawful search and seizure in violation of the Fourth Amendment, among other state claims. The defendants sought summary judgment and argued they were entitled to qualified immunity. The district court denied the motion and the defendants appealed.

The Fourth Circuit unanimously affirmed. Viewing the facts in the light most favorable to the plaintiff, any mistake about whether the plaintiff was a weekend inmate by the guards was not objectively reasonable. The woman allegedly told the guards she was a nurse, asked if all jail employees were subject to strip searches, and asked to call her staffing agency. It was also clearly established that a jail employee may not be strip searched without individualized suspicion that the employee was secreting contraband. *Leverette v. Bell*, 247 F.3d 160 (4th Cir. 2001). The district court therefore did not err in denying qualified immunity and summary judgment to the defendant-guards.

Other arguments from the defendants relating to state tort claims were likewise rejected and the district court was affirmed in all respects.