

Case Summaries: Fourth Circuit Court of Appeals (November 15 & 21, 2023)

Denial of Due Process challenge by pretrial detainees against county's use of Pretrial Services lacked findings of fact and conclusions of law; vacated and remanded

[Frazier v. Prince George's County, Maryland](#), 86 F.4th 537 (Nov. 15, 2023). In this case from the District of Maryland, the plaintiffs were a class of pretrial detainees. They argued that the county's pretrial release procedures violated due process and asked for a preliminary injunction ordering their release from custody. A person arrested in Prince George's County has an initial appearance before a magistrate. The magistrate makes the preliminary decision whether the person should be released outright, released with conditions, or detained, per state law. When an arrestee is not immediately released, a hearing before a county judge is held soon thereafter. The detainee is entitled to counsel at this hearing and may present evidence, and the judge makes an individualized determination about the propriety of the detention. Under state law, the detainee must be released unless it is reasonably likely that the defendant presents a threat to a victim or the public or that the defendant will not appear. Even then, the person may only be detained if the court finds by clear and convincing evidence that no conditions of release will protect against those risks. The judge is required to make a record of such findings. Judges sometimes order the detainee to be released at the discretion of the local Pretrial Services operation, which then uses its own criteria to determine release eligibility and order release, without further judicial input. The detainee may await a decision from Pretrial Services for months without any update, and some inmates are never contacted at all. The plaintiffs argued that the involvement of Pretrial Services after a judicial determination of eligibility for release violates Due Process principles.

The district court held a telephone hearing on the preliminary injunction and determined it lacked facts to determine the issue. It noted that discovery would need to be conducted in order for the court to adjudicate the motion but declined to order discovery at this stage of the litigation. The parties were given ten days to stipulate to sufficient facts for the court to consider the motion but were unable reach agreement within that timeframe. The judge then denied the preliminary injunction without prejudice "for reasons stated during the telephone conference," and otherwise made no findings. *Frazier* Slip op. at 7. The plaintiffs appealed, and a unanimous panel of the Fourth Circuit reversed.

Rule 52(a)(2) of the Federal Rules of Civil Procedure requires a district court to find facts and make legal conclusions when ruling on a preliminary injunction. The reasons for the ruling may be given orally, but still must provide an adequate explanation. The district court here erred by failing to do so. When there is sufficient information in the record for the appellate court to determine the issue, it may excuse this error and exercise its discretion to decide the merits of the issue. Here, the record was not sufficient for the reviewing court to reach the merits, so the matter was returned to the district court. In the words of the court: "...Federal Rule of Civil Procedure 52(a)(2) requires a district court to say more than: 'No.' So we vacate and remand for further proceedings." *Id.* at 3.

Any right to be free from the use of a single burst of pepper spray by a noncompliant and resisting driver was not clearly established on the facts of the case; destruction of booking photos of the plaintiff without her hijab mooted that portion of the Sheriff's appeal

[Omeish v. Kincaid](#), 86 F.4th 546 (Nov. 15, 2023). Local law enforcement stopped the plaintiff for a red-light violation in the Eastern District of Virginia around 8pm. The plaintiff repeatedly refused requests to produce her license or registration, instead arguing that she had not run the light. After six requests for identification, the officer gave the woman a choice between producing her documents or being arrested. She again declined to produce a license and the officer attempted to arrest her. He asked her thirteen times to exit the car before attempting to physically remove her. At this point, the plaintiff agreed to produce her license but refused to exit the car. The officer asked her an additional fourteen times to exit the car to no avail. When the plaintiff reached for a dark object (her phone), the officer pepper-sprayed the woman with one "burst" towards her hairline. He was then able to take the woman into custody.

Under local detention center policies, arrestees must be photographed without any head coverings. The woman strongly objected to removing her hijab, telling officers that her religion required she not be seen by unrelated men without the covering, but the officers were insistent. Two officers made a partial barrier with a blanket to cover part of the woman's face on one side, but her uncovered head was visible to other male officers on the other side. The officers took at least two pictures of the woman without her head covering. She sued the local Sheriff, the local police department, the local police chief, and one of the officers individually for a Fourth Amendment excessive force claim, First and Fourteenth Amendment claims, and for a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). On cross-motions for summary judgment, the district court granted the plaintiff's motion for RLUIPA claim, finding that the Sheriff failed to use the least restrictive means to further the government interest in obtaining a booking photo by keeping the photos of the plaintiff without her hijab. The Sheriff was ordered to destroy those photos and to request any other parties who may have received a copy of the photo to destroy them as well. All photos of the woman's uncovered head were destroyed in accordance with that order. The district court granted the summary judgment to the officer in his individual capacity for the Fourth and First Amendment claims on the basis of qualified immunity, finding that any constitutional rights were not clearly established in this context. The Sheriff appealed the summary judgment ruling against her, and the plaintiff appealed the judgment dismissing her claims against the individual officer.

A unanimous panel of the Fourth Circuit affirmed. As to the Sheriff, that appeal was mooted by the destruction of the offending photographs and was dismissed. As to the plaintiff's appeal on the question of qualified immunity, the Fourth Circuit again affirmed. The reasonableness of an officer's use of force is judged by an objective standard, considering the "proportionality of the force in light of all the circumstances." *Omeish* Slip op. at 16 (internal citations omitted). The use of pepper spray can constitute excessive force depending on the specific facts of the case. *See, e.g. Park v. Shiflett*, 250 F.3d 843, 853 (4th Cir. 2001) (finding use of pepper spray directly into eyes of a handcuffed and secured arrestee in violation of department policy was constitutionally excessive). Here, the plaintiff was unsecured and noncompliant with multiple commands, and pepper spray was used to effectuate the arrest (and not after the arrestee was secured). On these facts, the court declined to decide whether the use of pepper spray constituted excessive force. Instead, the court held that any constitutional right to be free from the use of pepper spray in these circumstances was not clearly established at the time. According to the court:

[The circumstances in *Parks*] differ materially from those here, where the officer faced an escalating situation over the course of four minutes in which Omeish disobeyed his orders both to produce documentation and to exit the car and resisted his efforts to arrest her. The officer used pepper spray only once with a burst at her forehead, while in the process of attempting to take control over her person. Moreover, the officer's use of pepper spray here complied with governing police procedures . . . *Omeish* Slip op. at 20.

The district court's dismissal of the excessive force claim on the basis of qualified immunity was therefore affirmed. Additionally, the district court's denial of attorney fees to the plaintiff was vacated and remanded for further proceedings.

Handgun qualification license requirement and related delay in obtaining a handgun had no historical analog and violates the Second Amendment under *Bruen*

[Maryland Shall Issue, Inc. v. Moore](#), 86 F.4th 1038 (Nov. 21, 2023). Maryland state law generally requires an application and seven-day waiting period for a background check in order for an applicant to purchase or transfer any firearm. For handguns specifically, there is an added requirement that a person obtain a "handgun qualification license." Obtaining this license requires submitting fingerprints for an additional background investigation and the completion of a four-hour gun safety course. Once the application for the handgun qualification license is complete, applicants must wait as much as 30 days before obtaining approval, at which point they may begin to pursue the regular application and waiting period process required for all firearms transfers. If the recipient of a handgun does not obtain the requisite handgun license, both the transferor and transferee of a handgun in any transaction incur criminal liability. Under state law, if a person meets the requirements for a handgun license, properly applies, and pays the application fee of \$50.00, then the State "shall issue" the license within the 30-day window.

The plaintiffs sued in federal district court, arguing that the handgun qualification license requirement unduly burdened their Second Amendment rights and seeking a preliminary injunction against its enforcement. The case was initially dismissed for lack of standing, but the Fourth Circuit reversed in an earlier decision. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020). On remand, the district court determined on the merits that Maryland handgun qualification license scheme did not violate the Second Amendment. Shortly after its decision, the U.S. Supreme Court decided *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). Under *Bruen*, if the regulated conduct at issue is protected by the Second Amendment, then "the challenged regulation is unconstitutional unless the government can show that 'the regulation is consistent with this Nation's historical tradition of firearm regulation.'" *Bruen* at 2126. Here, the state licensure requirement for handgun transaction plainly implicates protected conduct under the Second Amendment. The plaintiffs are not disqualified from purchasing or possessing a handgun and asserted that they intended to use the weapons for "lawful purposes." Handguns are a type of weapon covered by the Second Amendment under *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). A person may not "keep or bear" a handgun as the Second Amendment permits in Maryland without complying with the state handgun licensing requirement. Despite the "shall issue" nature of the law for qualifying applicants, "it still prohibits [the plaintiffs] from owning handguns now." *Maryland Shall Issue, Inc.* Slip op. at 10 (emphasis in original). According to the majority, this was enough to bring the statute within the ambit of conduct covered by the Second Amendment. In its words:

Nothing in the Amendment’s text or *Bruen* says it protects only against laws that *permanently* deprive people of the ability to keep and bear arms. Yet, under the challenged scheme, an applicant without a firearm cannot possess or carry one until they are approved—a process that can take thirty days. And the law’s waiting period could well be the critical time in which an applicant expects to face danger. So the temporary deprivation that Plaintiffs allege is a facially plausible Second Amendment violation. *Id.* at 11-12 (emphasis in original).

Maryland pointed to historical law restricting “dangerous” people from possessing firearms and to historical requirements that required training for militia members in support of its argument that its handgun licensing law was consistent with historical regulation of guns. According to the majority, these historical regulations were not “relevantly similar” to the handgun license scheme. The court noted that Maryland admitted as much at oral argument, conceding that it had not found any historical regulations “[requiring] advance permission” to obtain a firearm. *Id.* at 14.

The Maryland handgun license qualification scheme therefore violates the Second Amendment and the district court’s decision to the contrary was reversed.

Judge Keenan wrote separately to dissent. She argued that the majority misapplied *Bruen*, which distinguished between “shall issue” permitting schemes and the type of “may issue” scheme struck down in that case. She also noted that the state law contained a severability clause. She therefore would have remanded the case for the district court to apply *Bruen* and to conduct a severability analysis.

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