No. 22-

IN THE

Supreme Court of the United States

QUINTON MARKIS CUTHBERTSON,
A/K/A QUINTON MARQUIS CUTHBERTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER D. ZELLMER
Counsel of Record
PETER D. ZELLMER, PLLC
421 North Edgeworth Street
Greensboro, NC 27401
(336) 274-1168
peter.zellmer@zellmerlegal.com

Counsel for Petitioner

320334

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Do police violate a person's Fourth Amendment rights against unreasonable seizure when they provoke, through subterfuge and intimidation, a person to flee and then rely upon that flight as the basis for a stop?
2. What remedies should be imposed in a Suppression Hearing for Due Process and Spoliation violations when material evidence is destroyed or not preserved?

LIST OF ALL PARTIES AND RELATED CASES

All Parties appear in the caption of the case on the cover page.

Related Cases

- *U.S. v. Cuthbertson*, No. 20-CR-28-1, U.S. District Court for the Middle District of North Carolina. Judgment entered Feb. 19, 2021.

- *U.S. v. Cuthbertson*, No. 21-4069, U.S. Court of Appeals for the Fourth Circuit. Judgment entered January 4, 2023.

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PETITION FOR WRIT OF CERTIORARI

Quinton Cuthbertson, an inmate currently incarcerated at Williamsburg FCI in Salter, South Carolina, by and through Peter D. Zellmer, CJA Panel Attorney from the Middle District of North Carolina, respectfully petitions this court for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINION BELOW

The District Court did not issue a formal reported opinion. All findings of fact and rulings of law issued by the District Court were done orally in court during the suppression hearing, a portion of which can be located at Appendix B, 5a-11a.

The Fourth Circuit's opinion is unreported, but is available at *United States v. Cuthbertson,* No. 21-4069, 2023 U.S. App. LEXIS 111 (4th Cir. Jan. 4, 2023), and at Appendix A, 1a-4a.

The Fourth Circuit's order denying rehearing is available at *United States v. Cuthbertson,* No. 21-4069, 2023 U.S. App. LEXIS 3013 (4th Cir. Feb. 7, 2023), and at Appendix C, 12a.

JURISDICTION

The Fourth Circuit issued its opinion on January 4, 2023. Petitioner's writ for rehearing or rehearing *en banc* was denied on February 7, 2023. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *United States Constitution, 4th Amendment*.

"No person shall be … deprived of life, liberty, or property, without due process of law". *United States Constitution, 5th Amendment*.

STATEMENT OF THE CASE

On September 30th, 2019, Officers with a Greensboro Police Department [GPD] Tactical Narcotics Team [TNT], a "street level narcotics suppression" unit, were all driving unmarked vehicles in the area of Gate City Blvd looking for

"anything suspicious". (CAJA47)[1] GPD Ofc. Goughnour observed a black male with dreadlocks exit a car and walk into a home. (CAJA 51) The officer ran the tags to the car and determined that both the driver, the Defendant Quinton Cuthbertson, and the owner of the car, Ms. Dalton, had criminal records for narcotics offenses. (CAJA 53) After about 20 minutes the Defendant and Ms. Dalton exited the home and got in the car. (CAJA 64) Ofc. Goughnour and other unmarked TNT squad vehicles then followed the Defendant as he traveled without incident to I-40 East. (CAJA 55-58). The officers testified that they followed Defendant for no other reason than because they ran his license plate and found he had a prior drug conviction. (CAJA 51-56) What happened next is in high dispute and is central to this case.

The Defendant testified that he traveled on I-40 for several miles without incident or any awareness that he was being followed. Suddenly a gray-blue car entered the interstate and began driving recklessly around him. The car made a dangerous initial merge, then moved to the left lane, slowed to get behind Defendant's car, then quickly and abruptly pulled in dangerously close behind him. It began tailgating the Defendant and had to hit its brakes to avoid rear ending

[1] Citations to "CAJA" are to the Court of Appeals Joint Appendix filed in the underlying 4th Circuit case, 4COA No. 21-4069.

Defendant. Defendant, afraid of this strange and dangerous vehicle, accelerated to try to get away from it. (CAJA 135-144)

The officers testified that shortly after entering the interstate the Defendant's car accelerated to a high speed. They testified that they followed the Defendant as he sped for several miles down I-40 East without activating their blue lights or sirens, but that they were in regular contact over their police radios, and that audio recordings and CAD records of that radio traffic were recorded by the police department. (CAJA 86-97; CAJA 66 – 69; CAJA 72; CAJA 118) They also testified that none of them activated their body worn cameras ["BWC"s] until approximately the time they made the decision to turn on their blue lights. (CAJA 90 – 94; CAJA 102; *see* CAJA 300 "Government's Exhibit #1).

The Defendant immediately stopped his vehicle when the blue lights were activated. (CAJA 104) A search of the vehicle uncovered drugs and a firearm. Defendant was ultimately charged with Possession of a Firearm by a Felon, Possession with Intent to Distribute Cocaine, and Possession of a Firearm in Connection with Drug Trafficking. (CAJA 9, 27) The Defendant moved to suppress evidence resulting from the stop, arguing that his 4th amendment constitutional rights had been violated when the police provoked the very behavior, to wit a speeding violation, upon which they then justified the stop.

During the suppression hearing, evidence was presented that the Greensboro police department has a policy that all officers must activate their body worn cameras (BWC) "in anticipation of a self-initiated police activity" and "during police/citizen encounters related to the law-enforcement function" "whichever is earliest". (Def. Ex.#1, CAJA 166) The Defendant argued that only activating the BWCs moments before hitting their blue lights was a direct violation of the BWC policy and deprived the Defendant of critical material evidence of the disputed events leading up to the stop. What's more, the police and the Government's attorney stated that none of the police radio recordings, the records of those recordings, or the dispatch records, were preserved. They were all lost, apparently deleted, or otherwise destroyed. (CAJA 66-69, 72, 109-114, 118, 157) Without those records, the Defendant had no means, other than his testimony, to establish the facts leading up to the stop of the car.

The District Court found no Due Process or Spoliation violations related to the unproduced recordings and records, found that the police did not violate their own BWC policy, made all disputed findings of fact in the favor of the police, and denied the suppression motion. (CAJA 160-163)

The Fourth Circuit Court of Appeals, in a Per Curium Unpublished Opinion, found no error because the Defendant "offer[ed] no argument on appeal grounded in North Carolina state law supporting the inducement and justification

theory". Basically, the Appeal Court held that even if the police provoked the speeding violation, there's no federal constitutional prohibition against that. (COA Dkt 24 and Appendix A pp. 2a-3a) The opinion also held that the issues of due process violations and spoliation were subject to plain error review, in direct contradiction to the position taken by both parties that *de novo* review was the proper standard. (COA Dkt. 24 and Appendix A pp. 3a-4a; Def. Brief 4COA Dkt. 13 p. 21; Gov. Brief 4COA Dkt. 22, p. 13) Finally the opinion held that even if the requirements of plain error review were met there was no error because there was no miscarriage of justice. (COA Dkt. 24 and Appendix A p. 4a)

REASONS FOR GRANTING THE PETITION

This case presents two important questions that the Court should resolve by granting the following petition.

I: DO POLICE VIOLATE A PERSON'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEIZURE WHEN THEY PROVOKE, THROUGH SUBTERFUGE AND INTIMIDATION, A PERSON TO FLEE AND THEN RELY UPON THAT FLIGHT AS THE BASIS FOR A STOP?

Most people would be shocked at the thought that it is not illegal for the police to pretend to be some sort of assailant, scare them into fleeing, and then use

their flight as the basis to infringe their rights. If that were the case, then unmarked police could stop anybody, anytime, by simply scaring them into running away. The three Circuit Courts (6th, 7th, and 11th) that have formally addressed this issue have all held that the police may not intimidate a person into fleeing from them, and then depend upon that flight as the basis to seize the person. Here, however, the 4th Circuit has essentially taken the opposite position, holding that there is no federal constitutional prohibition preventing law enforcement from, through subterfuge and intimidation, provoking flight and then stopping and seizing a person based upon that very flight which they themselves provoked. Thus, there is now a CIRCUIT SPLIT between the 4th Circuit and the other three circuits that have addressed the issue.

The stopping of an automobile is a "seizure" of "persons" within the meaning of the Fourth Amendment's guaranteed protections. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 809-810 (1996).

The 6th, 7th, and 11th Circuit Courts of Appeal have all stated that the police violate Fourth Amendment protections against unreasonable seizures when they provoke the flight which they then rely upon to justify the seizure. Marshall ex. rel. Gossens v. Teske, 284 F. 3d 765 (7th Cir. 2002) (Seizure unconstitutional where

young black male fled from plain clothed officers, wearing masks and carrying guns, because he believed they are robbers); U.S. v Franklin, 323 F.3d 1298 (11th Cir. 2003) ("[O]fficers cannot improperly provoke — for example, by fraud — a person into fleeing and use the flight to justify a stop"); U.S. v Jeter, 721 F.3d 746 (6th Cir. 2013) ("[W]e recognize that there are situations in which flight is provoked and thus cannot be the basis for a Terry stop"). While most such cases do not arise in the context of an automobile speeding to flee apparent danger, but rather when the police provoke flight on foot, the same rational and prohibitions hold. The police may not provoke, through subterfuge and intimidation, the very behavior upon which they then seek to justify a seizure.

The Marshall case is the most closely factually related to the case at bar, and thus the most instructive. In Marshall the police were planning to execute a search warrant on a home for suspicion of narcotics sales. The police were informed that a young black male had been spotted sitting on the front steps of the house acting as a lookout. Three police officers in plain clothes, wearing masks, and carrying firearms, came around the side of the house. Marshall, a young black male, was near the base of the steps of the house. He looked at the gunmen, perceived them to be armed robbers, and took off running. Marshall was arrested and charged with resisting arrest for fleeing from the police.

Like in Marshall, in this case the Defendant reasonably perceived a threat from unknown assailants and fled. As in Marshall, there was no justification for a 4th amendment seizure of the Defendant prior to the police frightened him into fleeing. In this case the police were in an unmarked car, similar to how in Marshall the police were in plain clothes. Here, the unmarked car drives dangerously and aggressively around the Defendant, quickly merges onto the interstate, starts to pass Defendant but then slows and pulls in behind him, gets dangerously close to his bumper, and almost rear ends him – behaviors typical of a road-rage driver. At that point the Defendant, understandably afraid of the dangerous unmarked vehicle, flees to escape the danger. (CAJA 138-143). This is very similar to Marshall, wherein that young man saw three men with masks and guns come around the side of a house, looking for all the world like armed robbers, and takes off running from the apparent threat. The 11th Circuit held that Marshall's flight was provoked by the actions of the police presenting themselves in that way, in spite of the fact that those officers yelled, "Stop! Police!". Marshall at 768. In finding the seizure unconstitutional, the 11th Circuit stated, "it's doubtful that the officers had even reasonable suspicion to stop Marshall, given that his flight was not 'unprovoked.' Marshall did what any sane person would do if he saw masked men with guns running toward him: he ran like hell." at 771.

Indeed, the facts in this case make a stronger case for provoked flight then does the Marshall case. In Marshall the police had a plausible argument that they did not *intend* to appear to be dangerous assailants and that they even announcing themselves to be the police. In this case however, the police apparently intended to appear to be a dangerous and threatening driver. What's more, in this case we know that the police followed the Defendant for a significant period of time looking for a reason to stop him. The Defendant only came to their attention because they had pulled his criminal record after seeing him in the neighborhood.[2] While the police don't need a reason to pull up anyone's record, the fact that they had no reason to do so here, that they were simply driving around the community looking for "anything suspicious", and that they followed him through town for no other reason, indicates their desire to find a reason to stop the Defendant, even if they had to create that reason. As in the Marshall case, this Defendant's flight was provoked by the police themselves and so cannot then form the legal basis for the 4th amendment seizure that is the traffic stop.

[2] The police could not have legally stopped Defendant just because of his criminal record. U.S. v. Sprinkle, 106 F. 3d 613, 617-19 (4th Cir. 1997).

II: WHAT REMEDIES SHOULD BE IMPOSED IN A SUPPRESSION HEARING FOR DUE PROCESS AND SPOLIATION VIOLATIONS WHEN MATERIAL EVIDENCE IS DESTROYED OR OTHERWISE NOT PRESERVED?

In a suppression hearing, without access to the recordings and other records, this criminal defendant simply had no realistic ability to convince the District Court of disputed facts. If there is no remedy for these violations, then there is no reason for the police to preserve and produce records favorable to the Defendant.

The Due Process and Spoliation violations are the heart of Defendant's appeal. This is a "he said/she said" case. The Defendant claims he was intimidated into fleeing from an unmarked, aggressively driven vehicle. The police say they did no such thing. What is clear is that the District Court ought to have had certain evidence, recordings and other contemporaneously made records, that would have objectively settled this dispute, but that the evidence wasn't available because the police deleted, destroyed, or otherwise didn't preserve it.

The Greensboro Police Department's Body Worn Camera policy clearly dictates that officers **must** activate[3] their BWC in certain situations, including "in

[3] The term "activate" is something of a misnomer. The cameras are always active and recording video without audio, but they are also always deleting that video after 30 seconds. When an officer hits the button, he is turning off the video auto-

anticipation of a self-initiated police activity" and "during police/citizen encounters related to the law-enforcement function", "whichever is earliest." (Def. Ex. 1, GPD BWC policy §15.11.5(A), CAJA 166). The fact that they did not do that here is undeniable. The several members of the TNT squad clearly intended to "self-initiate police activity" (i.e., stop the Defendant's vehicle and investigate for narcotics) from the moment they started following the Defendant through the city based on nothing more than his criminal record. Further, when it came time for the suppression hearing, they no longer had the audio recordings from the police radios, which would have established whose time-line was accurate. Nor did they have the Computer Assisted Dispatch ("CAD") records which would have had time codes and also could have proven the disputed timeline. These records and recordings, which would have revealed the truth, were rendered unavailable to the Defense because the government and law enforcement, through various acts and omissions, made them unavailable.

Under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, the Government and law enforcement have a duty to preserve all evidence subject to disclosure. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires the timely disclosure to the defense of information "favorable

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deleting function and turning on the audio recording function. Nevertheless, the term "activate" is used for ease of understanding. (CAJA 95)

to an accused," Brady at 87. This includes evidence that tends to impeach the credibility of important prosecution witnesses. United States v. Abdullah, 911 F.3d 201, 217 (4th Cir. 2018). Brady disclosure obligations apply to material that would be helpful to the defense in suppression hearings. *See*, United States v. Gamez–Orduno, 235 F.3d 453, 461 (9th Cir.2000), Smith v. Black, 904 F.2d 950, 965–66 (5th Cir.1990), Biles v. United States, 101 A.3d 1012 (D.C. 2014). Generally, the government is required to preserve all evidence subject to disclosure under the Federal Rules of Criminal Procedure and Brady, and its progeny. *See, e.g.*, Chavis v. North Carlina, 637 F.2d 213, 224 (4th Cir. 1980).

The evidence was clear that the CAD records and audio recordings were generated, but weren't persevered by the police, and thus not provided to the defense. These records unquestionably meet the Brady standards, and the violation in failing to preserve and produce them was "clear or obvious" error. Thus, the error is reversible even under plain error review. Puckett v. United States, 556 U.S. 129, 135 (2009). Further, when the officers failed to activate their BWCs until just before activating their blue lights – in contravention of the BWC policy – they ensured that recordings of the activities leading up to the stop would not be available for review, effectively destroying them by not following the policy to create them in the first place. After all, there is no practical difference between a police officer hitting the delete button to erase a video versus him not hitting the

activate button to preserve it. In either event the video doesn't exists. Whether the act is commission or omission, the outcome is the same and should be treated as such.

Though more common in civil cases, sanctions for Spoliation violations are available in criminal cases as well. "Even absent a due process violation, a criminal defendant may be entitled to [a remedy] pursuant to the spoliation of evidence rule … against a party that [loses or] destroys relevant evidence … [T]here must be a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction." United States v. Johnson, 2021 U.S. App. LEXIS 12964, *11-12, 996 F.3d 200 (4th Cir., decided April 30, 2021), *quoting,* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155-156 (4th Cir. 1995) (internal quotes omitted). Proof of bad faith by the spoliating party is not required. "[T]here simply needs to be a showing that the party's intentional conduct contribute[d] to the loss or destruction of [the] evidence." Id at *40, *quoting* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (internal quotation marks omitted).

In this case, law enforcement would have known that the BWC recordings, radio recordings, and CAD records would be relevant to issues at trial. These records are frequently introduced in criminal trials, and the primary reason for the very existence of the Body Worn Cameras is to create objective, unbiased

recordings for use in criminal and civil litigation. Law enforcement's willful conduct contributing to the destruction of these records is plainly shown here by the wholesale failure of the entire TNT squad to properly record the critical disputed events leading up to the stop of Defendant's car. It is remarkable that every single TNT squad member failed to follow the clear directives of the BWC policy. This, along with the failure to preserve and produce the CAD records or the radio recordings, rises above mere negligence or carelessness. Thus, the Spoliation violation here is plainly evident.

The effect of the District Court's failure to find and remedy the Due Process and Spoliation violations in this case cannot be overstated. Because the factual dispute boiled down to a "he said/she said", if due process or spoliation violations had been found by the District Court then it would have been compelled to remedy those violations. The proper remedy, at a minimum, would have been to resolve the disputed material facts in Defendant's favor, but could have been outright dismissal of the case. The typical remedy for a due process violation is reversal of the conviction and remand for new trial, but this is not always the case. In Brady itself the Court found that the proper remedy for that due process violation was remand for a new sentencing. In this case, the due process violation is the failure to preserve and produce evidence regarding an alleged illegal seizure. Since such evidence is relevant to suppression hearings, ordering a new trial would be

illogical. An appropriate remedy must be meaningful, keeping in mind that the purpose of the rule is to ensure that the accused is not denied a fair trial, and thus must, at a minimum, compensate the accused by placing him in a strategic position that is no worse than he would have had but for the violation. Any uncertainty in the appropriate remedy ought to be resolved in favor of the aggrieved defendant and against the offending prosecution.

While a court may order outright dismissal, at a minimum, an appropriate remedy for this Due Process violation should be a mandatory inference in favor of the Defense regarding the disputed facts. In this case, that would include a legally mandated finding of fact that the Defendant only began speeding after being provoked by an unmarked police car being driven in an unlawful, dangerous, and intimidating manner.

The proper sanction for Spoliation Violations in this situation is similarly, at the least, an inference in favor of the defendant's preferred facts, and at the most, outright dismissal of the case. King v. Am. Power Conversion Corp., 181 Fed. Appx. 373, 376 (2006) (sanction of dismissal justified "if the spoliation of evidence effectively renders the defendant unable to defend its case" even in absence of bad faith); Vodusek, at 156 (to determine remedy a court should consider the twin purposes of leveling the evidentiary playing field and sanctioning the improper conduct.)

The Fourth Circuit's opinion did not address these issues. Instead, the opinion held that the Due Process and Spoliation issues are reviewed for plain error and then simply stated that they "discern no error qualifying as plain". (COA Opinion, Dkt. 24, p. 3-4) The Fourth Circuit's ruling here is in error for two reasons. First, as **both parties** stated, the proper standard of review for these legal rulings is *de novo*, not *plain error*. (Appellee's Brief, Dkt. 22, pp. 18 and 22,; and Appellant's Brief, Dkt. 13, pp. 13 and 28). Second, even if the correct standard of review were plain error, such error exists here. Under plain error review there must be three things: (1) an error, (2) that is plain and (3) that affects substantial rights. (Dkt. 24, p. 3-4, citing United States v. Barringer, 25 F.4th 239, 253 (4th Cir. 2022)). In this case, all three requirements are fulfilled. There is error, which was certainly plain to the District Court as the issues of the missing records and recordings was discussed *ad nauseum* in the suppression hearing, and Defendant's substantial rights were affected, causing a miscarriage of justice, as the error allowed findings of fact that totally undermined Defendant's suppression motion, and completely changed the outcome of the case.

CONCLUSION

Given the apparent circuit split created by the first issue, and the importance of the second, which the Fourth Circuit failed to meaningfully address, this case

presents compelling questions which should motivate this court to grant this petition.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted, this the __ day of April, 2023.

Peter D. Zellmer
Counsel of Record
Peter D. Zellmer, PLLC
421 N. Edgeworth St.
Greensboro, NC 27401
(336) 274-1168
Peter.zellmer@zellmerlegal.com

Counsel for Petitioner

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4069

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

QUINTON MARKIS CUTHBERTSON, a/k/a Quinton Marquis Cuthbertson,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:20-cr-00028-CCE-1)

Submitted: November 7, 2022 Decided: January 4, 2023

Before DIAZ and RICHARDSON, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Peter D. Zellmer, PETER D. ZELLMER, PLLC, Greensboro, North Carolina, for Appellant. Sandra J. Hairston, Acting United States Attorney, Nicole R. Dupre, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Quinton Markis Cuthbertson appeals his conviction following entry of a conditional guilty plea to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), challenging the denial of his motion to suppress evidence seized and statements made during a stop of the vehicle he was driving. We affirm.

"When examining the denial of a motion to suppress, this [c]ourt reviews the district court's legal determinations de novo and its factual conclusions for clear error." *United States v. Runner*, 43 F.4th 417, 421 (4th Cir. 2022) (internal quotation marks omitted), *petition for cert. filed*, No. 22-5996 (U.S. Nov. 4, 2022). "In conducting this review, th[is] [c]ourt evaluates the evidence in the light most favorable to the [G]overnment." *Id.* (internal quotation marks omitted).

Cuthbertson asserts that the district court erred in not granting the motion to suppress because the stop was unlawful. A traffic stop of a vehicle constitutes a seizure under the Fourth Amendment and is permissible if the officer has probable cause to believe that a traffic violation occurred. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Accordingly, when an officer observes even a minor traffic offense, a stop of the vehicle is permitted. *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993); *see United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008). We conclude that the district court did not err in determining that the officer had probable cause to stop the vehicle Cuthbertson was driving. The evidence the district court credited established that the vehicle was driven on the Interstate at speeds well over the posted limit, matters Cuthbertson does not dispute.

Rather, Cuthbertson argues that his speeding was induced by law enforcement, and the stop was therefore unlawful based on lack of supporting probable cause, because he reasonably believed the driver behind him intended to harm him based on his aggressive pursuit and he was thus justified in exceeding the speed limit to flee the driver. He cites to the Supreme Court of Wisconsin's decision in *State v. Brown*, 318 N.W.2d 370 (Wis. 1982), to support this contention. *Brown*—which addresses the availability of defenses in a prosecution for speeding under Wisconsin state law—does not apply to Cuthbertson's speeding in North Carolina, and Cuthbertson offers no argument on appeal grounded in North Carolina state law supporting the inducement and justification theory he advances. He thus fails to show reversible error in the district court's conclusion that probable cause existed for the traffic stop.

Cuthbertson's remaining appellate arguments fare no better in establishing reversible error in the district court's denial of the motion to suppress. He claims that the district court clearly erred in finding that the officers here did not violate the Greensboro Police Department's body worn camera policy. We reject this contention because, even if the district court erred in finding no violation of the policy, Cuthbertson proffers neither argument nor supporting legal authority connecting any such violation standing alone with the remedy of suppression.

Cuthbertson further argues that the district court erred in failing to find a due process violation or spoliation where computer assisted dispatch records, police radio recordings, and full body worn camera recordings were not preserved and produced. We review these claims for plain error. *United States v. Barringer*, 25 F.4th 239, 253 (4th Cir. 2022). To

establish plain error, Cuthbertson must show there has been (1) an error, (2) that is plain and (3) that affects his substantial rights. *Id.* Even if these three requirements are met, our "authority to recognize plain error is permissive, not mandatory, and should be employed only to prevent a miscarriage of justice." *Id.* (internal quotation marks omitted). We discern no error qualifying as plain in the district court's failure to find a due process violation or spoliation.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

QUINTON MARKIS CUTHBERTSON,
Defendant.

_____/

Criminal Action
No. 1:20CR28-1

Greensboro, North Carolina
August 17, 2020

TRANSCRIPT OF MOTION TO SUPPRESS PROCEEDINGS
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: NICOLE DuPRE, AUSA
TANNER KROEGER, AUSA
Office of the U.S. Attorney
101 S. Edgeworth Street
Fourth Floor
Greensboro, North Carolina 27402

For the Defendant: MARK JONES, ESQUIRE
Bell Davis and Pitt
POB 21029
Winston-Salem, North Carolina 27120

Court Reporter: J. Calhoun, RPR
Room 122, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401
(336) 332-6033

Proceedings reported by stenotype reporter.
Transcript produced by computer-aided transcription.

should deny the motion.

MR. JONES: Just briefly, I didn't want to suggest that the Government had records that they didn't give to me.

THE COURT: You did suggest that.

MR. JONES: Well -- okay. Then let me clarify that for the Court, because I don't want to leave the Court with that impression. My understanding is that these records did not exist, but they had been destroyed or purged or deleted by the time I made my request. So, yes, they were requested. No, they weren't provided. The understanding is that they were gone, so I really -- if the Court took from that that the Government in any way was hiding the ball on that, I did not mean to plead that. We believe there were records, and they were gone by the time the request was made for them.

THE COURT: Okay. All right. Let me make the following findings of fact.

On September 30th, 2019, members of the Tactical Narcotics Team B or Bravo, were on duty at approximately 6:30 in the evening in the area of Gate City Boulevard near Immanuel Street. Corporal Goughnour noticed a white Kia near the intersection of Immanuel and Rowe Street and saw a man later identified as the Defendant get out of that car and go into a house there.

Some minutes later, 20 minutes later or so he and a woman later identified as Gabrielle Dalton came out of the

house and got into the Kia.

In the meantime, Officer Goughnour had run the tags on the key Kia, and had learned that it was registered to Ms. Dalton, and had learned that Ms. Dalton and Mr. Cuthbertson had been charged with a drug crime at some time in the past.

He asked other members of the team to follow the Kia, and he himself turned around to catch up with the Kia. The Kia turned from Immanuel onto Gate City Boulevard.

Let's see. Officer Lytle and Officer Kroh, I think maybe some of them might have been detectives -- no, they were both officers at the time, were in a gray Honda Accord, unmarked. They had the Kia in sight, as did Corporal Goughnour, who was in a Silverado pickup truck.

They followed the Kia onto Interstate 40 going east. Other members of the team were in the vicinity, but did not witness any of the -- did not witness the Kia driving and only saw the Kia after it had been stopped later on.

So initially Corporal Goughnour was behind the Kia, and the Honda driven by Officer Kroh was behind the pickup. The Kia accelerated and began driving above the speed limit, reached a speed of close to -- above 89 miles per hour and -- excuse me, Corporal Goughnour could not keep up. He radioed Officer Kroh, who sped up and fell in behind or near the Kia.

They drove through several exits on I-40 going east, and about the point around Highway 29 exit or MLK exit, not

completely clear to me if they are the same or different exits, but around in there, soon after that the speed limit increases, officers decided to stop the Kia.

Officer Kroh, in the gray Honda Accord, attempted to pass the Kia so he could be in front of the Kia when the traffic stop was initiated, but he was unable to go fast enough to do that. The Kia kept -- it looks from the video he did get even with the Kia at some point, and then the Kia pulled on ahead and Officer Kroh turned his blue lights and siren on.

The Kia pulled off very promptly to the side of the road, and Officer Kroh got out and proceeded with the traffic stop.

Throughout the time members of the bravo team were communicating with each other on the radio. They were all wearing body-worn cameras, but nobody turned on the body-worn camera until about the time that the blue lights were initiated.

I think I have affirmative evidence that Officer Goughnour and Kroh turned theirs on about that time. Yes, I do, and I will so find.

Officer Lytle, I think he was the one that forgot to turn his on. You all are nodding. Officer Lytle never turned his on, but the other two did, and then the other officers who were involved, officers with the stop, came upon the Kia after it had already been stopped. That would be Officers Bryant,

Rakes, and Mendez. I don't know exactly when they turned their cameras on, but they didn't turn them on while they were driving down the interstate.

There is no evidence that they were involved in any chase or ever had the Kia in their sight, and I will so find.

Have I left out any important facts from the Government's perspective?

MS. DUPRE: No.

THE COURT: Mr. Jones, any important facts I neglected to address? I tried to include the fact about the body-worn camera, the radio communications.

MR. JONES: No. I mean, I don't know if the Court has left facts out.

THE COURT: That's what I am asking. Are there any important facts that I have not addressed that you would ask me to include in my findings of fact?

MR. JONES: Not unless the Court is inclined to find other facts about Mr. Cuthbertson and his testimony of being afraid or what he perceived.

THE COURT: Oh. Well, you know, I don't know if he was afraid or not, but certainly when the car -- if he's driving down the road at 90 miles per hour and somebody else is driving down the road at 90 miles an hour, it is reasonable to be concerned about that. But that happened fairly late in the driving down the interstate, but I have no reason to doubt that

he was afraid, so I will find that he was concerned and afraid after it became apparent to him that he was being followed by another vehicle going close to 90 miles an hour. Yes.

Any other facts I failed to address? No. All right.

So the Court concludes as well -- let me -- I forgot a fact that I realize has some bearing on things, so let me add a finding of fact that it was, I believe, about 6 miles between the Gate City Boulevard exit where the Kia and all the law enforcement got on to I-40, it was about 6 miles from there to the Lee Street exit, which is approximately where the stop was. It looked to me like from the video it was actually right before that exit, if I was interpreting it correctly. So about 6 miles.

In that space, there was testimony that there was Freeman Mill Road, Randleman Road, South Elm Eugene, Highway 29, and then it wasn't clear to me if Highway 29 and MLK were one exit or two -- at least four exits, and maybe five, before the fifth or sixth exit, which would be the Lee Street exit. I believe the officer said that in that same space, I-85 merges in with I-40. Those may be business I-40 and business 85 from my personal knowledge, but they didn't say that. In any event, they call it 85 and 40. There was a merger there, congested area. I believe the officer called it death valley with lots of traffic. So I'll add those to my findings of fact.

So the Court finds and concludes that there was

probable cause to stop the Kia based on his speeding for several miles, well above the speed limit. And, you know, the fact that they didn't stop him immediately upon his speeding is perfectly understandable, given the traffic situation there and efforts to try to avoid stopping him on the interstate.

So to the extent there is argument that they should have turned their body-worn cameras on, it doesn't look to me like they violated the policy, but even if they did, that doesn't make it unreasonable or unconstitutional, and you could see from the part that was shown, if they turned on their body-worn camera, you wouldn't have seen anything but the steering wheel or front of the dashboard, at least from the one we saw. Possibly we would have had some audio. I guess we would have had audio based from all the testimony, but that doesn't make it unreasonable to not turn it on, and certainly doesn't make the stop unreasonable; that was based on the speeding, which certainly there was probable cause and the Fourth Amendment rights were not violated and the motion to suppress is denied.

Did I neglect to address any arguments that were made? I think I covered it all.

MS. DUPRE: Nothing from the government.

THE COURT: I don't mind being reversed for being wrong. I don't like being reversed for something that I could have done. I always like to be sure. Okay.

FILED: February 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4069
(1:20-cr-00028-CCE-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

QUINTON MARKIS CUTHBERTSON, a/k/a Quinton Marquis Cuthbertson

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Richardson, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk