Recent Developments in D.C. Law

D.C. Court of Appeals & Select U.S. Supreme Court Criminal Decisions
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First Amendment

Mashaud v. Boone, 295 A.3d 1139 (D.C. 2023) (en banc): Because the stalking statute is a content-based restriction on speech that is not narrowly tailored to advance a compelling state interest, it must be subjected to a narrowing interpretation based on its savings clause. This clause, which provides that the stalking statute "does not apply to constitutionally protected activity," D.C. Code § 22-3133(b), must be read to limit the statute's applicability to those narrow categories of speech that the First Amendment does not protect—true threats, obscenity, fraud, incitement, and speech integral to criminal conduct. The alternate interpretation—that this statute applies whenever it would not give rise to a successful as-applied challenge under the First Amendment—fails to provide meaningful notice of the kinds of activity that are prohibited under the statute.

Counterman v. Colorado, 600 U.S. 66 (2023): To establish a "true threat" beyond First Amendment protection, the government must prove not only that a reasonable person would have understood a communication to be threatening, but further that the defendant consciously disregarded a substantial risk that the communication would be understood as threatening. Such conscious disregard requires proof that the defendant was subjectively aware of the threatening nature of his statements. However, the government need not prove a purpose to threaten or knowledge (near certainty) that the messages would be perceived as a threat.

Second Amendment

Epps v. United States, No. CF-23-06 (pending in DCCA): Whether FIP, CPWL, UF, UA, and PLCFD statutes violate the Second Amendment (on plain error review) under *NY State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111.

United States v. Rahimi, No. 22-915 (cert. granted June 30, 2023; to be argued Nov. 7, 2023): "Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face."

Fourth Amendment

T.W. v. United States, 292 A.3d 790 (D.C. 2023): Appellant was seized within the meaning of the Fourth Amendment when multiple armed officers in two police cars pulled up to him and partially surrounded him, two of them immediately got out of the car and asked repeatedly if he had a gun, and when he said he did not have a gun, asked to pat him down "just to make sure." No reasonable innocent person in these circumstances would feel free to deny the request for a pat-down and walk away, when police have signaled through their actions and words that they

suspect the person is armed and will not terminate their investigation until they can confirm or dispel their suspicions for themselves.

Mayo v. United States, No. 18-CF-1132 (argued en banc June 6, 2023): Whether a person's flight from the MPD's Gun Recovery Unit in an alleged "high crime area" gives rise to a reasonable articulable suspicion sufficient to justify a seizure under the Fourth Amendment.

In re J.F.S., 300 A.3d 748 (2023):

1. Detectives did not unreasonably seize J.F.S.'s phone by taking it with his mother's consent. She had apparent authority to consent to the seizure because J.F.S. was a minor living in her home, because she had purchased the phone, because it was in her name, and because she had asserted authority to confiscate it in the officers' presence.
2. Insofar as the affidavit underlying the warrant to search J.F.S.'s phone lacked sufficient particularity under *Burns v. United States,* 235 A.3d 758 (D.C. 2020), this defect was covered by the good faith exception. *Burns* held that good faith was lacking because the warrant listed only "generic categories" of information and "imposed no meaningful limitations" on the scope of the search. By contrast, in *Abney v. United States*, 273 A.3d 852 (D.C. 2022), the Court held that good faith had been established where the warrant affidavit set forth probable cause to believe the phone contained evidence of a specific crime that its user committed. The *Abney* Court's rationale was that no greater standard of particularity had been required before *Burns*. Here, assuming the warrant and supporting affidavit did not live up to the standard of particularity set forth in *Burns*, they nevertheless meet the standard for good faith recognized in *Abney*.

Fifth Amendment

Kinney v. United States, 286 A.3d 1027 (D.C. 2022): Police deliberately used "question-first, warn-later" two-step interrogation strategy, requiring suppression of post-warning statements under *Missouri v. Seibert*, 542 U.S. 600 (2004), when they asked appellant about an address linked to the crime and urged him to "tell his side of the story" prior to administering *Miranda* warnings.

Sixth Amendment Confrontation Clause

Samia v. United States, 599 U.S. 635 (2023): Admission of a non-testifying codefendant's confession does not violate the Confrontation Clause where the confession, as modified, does not directly inculpate the defendant and was subject to a proper limiting instruction. *Bruton's* "narrow exception" to the rule that jurors are presumed to follow limiting instructions yields only when a non-testifying codefendant's confession is "directly accusatory," in that it refers to the defendant unambiguously, for instance, by name. Although *Bruton* also applies to "obviously" inculpatory statements, which "refer directly to someone," whom the jury would "immediately" infer was the defendant, even in the absence of other evidence, the redacted confession does not fall into this category because it referred to Samia as "the other person," making the fact of redaction less obvious to the jury.

Sixth Amendment Right to Jury Trial

Fallen v. United States, 290 A.3d 486 (D.C. 2023): Ten years of sex offender registration and community notification is a "severe penalty" for misdemeanor child sexual abuse that triggers the Sixth Amendment right to a jury trial.

IAC/Post-Conviction

Dugger v. United States, 295 A.3d 1102 (D.C. 2023): Misrepresentations regarding an attorney's qualifications to try a case may dispel any presumption that their conduct at trial was strategic or in the extreme, warrant a finding of per se ineffectiveness. Dugger's counsel rendered ineffective assistance by failing to strike prejudicial testimony about Dugger's criminal history background, by failing to impeach the complainant with his prior convictions, and by failing to object to instructing the jurors that it could consider evidence of the complainant's peaceable character, when no such evidence had been presented.

Shepherd v. United States, 296 A.3d 389 (D.C. 2023): The trial court erred in summarily denying Shepherd's 23-110 motion. Under § 23-110, relief may not be summarily denied unless the record "*conclusively* show[s] that the prisoner is entitled to no relief." Only three kinds of claims warrant summary disposition on this basis: those that are (1) vague and conclusory, (2) palpably incredible, or (3) would merit no relief even if they were true. Contrary to the trial court's determination, there is no fourth, catch-all category for claims that "can otherwise be disposed of" on the existing record.

Detention

Peyton v. United States, 299 A.3d 552 (D.C. 2023): Under the Due Process Clause, the trial court may not order detention pending civil commitment pursuant to D.C. Code 24-531.07(a)(2), unless it finds (1) that the defendant has a mental illness; (2) that, because of that mental illness, the defendant would be a danger to self or others if not immediately detained; and (3) that inpatient treatment is the least restrictive means of addressing dangerousness. The defendant is entitled to an evidentiary hearing on these issues unless they are uncontested. *NB: Peyton* does not resolve whether these constitutional requirements can be read into D.C. Code 24-531.07(a)(2) or, alternatively, it is facially unconstitutional. *Peyton* further does not resolve whether the burden of proof is probable cause or something higher.

(Saphire) Johnson v. United States, --- A.3d ---, 2023 WL 6300018 (D.C. Sept. 28, 2023) (published judgment): Rebuttable presumption of dangerousness in D.C. § 23-1322(c) is governed by the standard in *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985), under which the defendant bears only the burden of producing "some evidence" of non-dangerousness (such as no criminal history and/or good social factors), and the rebutted presumption then becomes "but one factor among many" that the court must consider in determining whether the government has met its burden to prove by clear and convincing evidence that no combination of conditions will reasonably assure the safety of any other person and the community.

Government Appeal

United States v. Facon, 288 A.3d 317 (D.C. 2023): Order granting compassionate release under D.C. Code § 24-403.04 is "sufficiently independent of and collateral to the main course of the criminal prosecution" to be appealable by the government under the collateral order doctrine and D.C. Code § 11-721(a)(1).

Evidence

Stringer v. United States, --- A.3d. ---, 2023 WL 6152109 (D.C. Sept. 19, 2023): Although credibility determinations are reviewed for clear error, the Court of Appeals will accord greater deference to those that are rooted in factors like demeanor, which do not appear on the cold record. Where a credibility determination is based on seemingly innocuous inconsistencies between witness testimony and other parts of the record, a remand would be required for the trial court to reconsider the significance of those inconsistencies.

Waters v. United States, --- A.3d. ---, 2023 WL 6300310 (D.C. Sept. 29, 2023): Interview summaries prepared by his defense investigators are protected by work-product privilege. Contrary to the trial court's reasoning, such summaries are not reverse-*Jencks* material, as they only purported to summarize what each witness said during their interviews with investigators, rather than providing a "substantially verbatim, contemporaneous" record of their statements. Further, although these summaries had been disclosed to the government in the course of Waters' 23-110 litigation, such disclosure did not constitute a waiver of work-product privilege. To rule otherwise would put the defendant to an unfair choice between vindicating the right to effective assistance of counsel and maintaining work-product privilege.

Torney v. United States, 300 A.3d 760 (D.C. 2023): Sexual Assault Nurse Examiners (SANE) are part of the prosecution team for purposes of Rule 16. Admission of "report of rape" to SANE generally obviates admission of further prior consistent statements under *Battle v. United States*, 630 A.2d 211 (D.C. 1993).

(Carlton) Henderson v. United States, --- A.3d ---, 2003 WL 6628638 (D.C. Oct. 12, 2023): Repeated acts of government negligence in failing to preserve and produce obvious Jencks material amounted to gross negligence, requiring the court to strike the witness's entire testimony.

Moore v. United States, No. 19-CF-687 (pending en banc in DCCA): Whether a criminal defendant's threat to kill the prosecutor assigned to his case is protected by attorney-client privilege when it was conveyed to appointed counsel during a consultation in the courthouse hallway, the purpose of which was to discuss recent unfavorable developments in the case.

Elements

Perez Hernandez v. United States, 286 A.3d 990 (D.C. 2022) (en banc): To prove simple assault based on offensive touching, the government must prove that the defendant touched another person and did so purposely, not by accident; that the touching offended the other person's

reasonable sense of personal dignity; and that the defendant acted with the purpose or knowledge that the touching would be offensive.

(Victor) Parker v. United States, 298 A.3d 785 (D.C. 2023): Participation in a robbery with another person who uses a weapon during the robbery does not inevitably prove the "advance knowledge" necessary to support accomplice liability for a "while armed" enhancement, especially where there is no evidence of the relationship between the participants and no evidence of advance planning.

Gordon v. United States, 285 A.3d 199 (D.C. 2022): "[T]he doctrine of transferred intent is inapplicable to sustain a conviction of AWIK[W]A when there is no physical injury to an unintended victim." On the other hand, a concurrent intent instruction may be appropriately given where a defendant is charged with assaulting "an unintended, uninjured victim."

McKinney v. United States, --- A.3d. ---, 2023 WL 5439140 (D.C. Aug. 24, 2023): Evidence that a car was taken from a parking lot 80- to 100-feet away from where the owner was standing, at a time when the car was not visible to the owner, was not sufficient to establish the owner's "immediate actual possession" of the car for purposes of carjacking.

Cardozo v. United States, 17-CF-774 (argued en banc March 2023): Whether a momentary detention on a public street that is incidental to another offense constitutes a kidnapping under D.C. Code § 22-2001, punishable by up to 30 years in prison.