# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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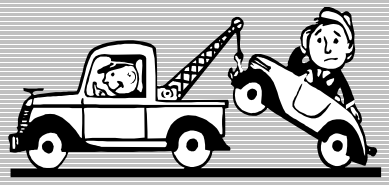

## UNITED STATES SUPREME COURT

**Fourth Amendment / Anonymous Tip / Frisk**
*Florida v. J. L.*, 120 S. Ct. ___ (28 March 2000)

**FACTS:** An anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Two officers responded to the bus stop and observed three black males, one of whom was wearing a plaid shirt. One of the officers immediately approached J. L., a 15-year old, who was the individual with the plaid shirt. The officer conducted a frisk of J. L. and seized a gun from his pocket. Before conducting the frisk, the officer did not see a firearm on J. L. nor did the officer observe him make any threatening or unusual movements. J. L. was charged with carrying a concealed firearm without a license and possessing a firearm while under the age of 18.

**ISSUE:** Whether the officer's frisk of J. L. was supported by reasonable suspicion?

**RULE:** No. The officer's action in frisking J. L. was a violation of the Fourth Amendment.

**DISCUSSION:** An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. In the case of *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that an officer, for the protection of himself/herself and others, may conduct a carefully limited search for weapons in the outer clothing of persons the officer observes engaging in unusual conduct where the officer reasonably concludes in the light of his/her experience that criminal activity may be occurring and that the persons with whom he/she is dealing may be armed and dangerous. In this case, the officers' suspicion that J. L. was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The tip was not sufficiently reliable to provide the reasonable suspicion necessary to justify a *Terry* stop. It did not contain any information predicting future activity or movement on the part of J. L. As a result, the police did not have any way in which to test the reliability or credibility of the informant. Although the tip was reliable in the sense that it enabled the police to correctly identify an individual, it did not provide a basis for the tipster's knowledge of the criminal activity engaged in by that individual. The Supreme Court declined to adopt a "firearm exception" to the *Terry* standard.

**NOTE:** This case did not hold that a police officer can never use an anonymous tip or that such a


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tip by itself, can never amount to reasonable suspicion or probable cause. Rather, the information contained in the tip in this case was not sufficient to establish reasonable suspicion that the suspect was armed.

## REPOSSESSION AND TOWING OF VEHICLES

The Police Attorney's Office receives questions periodically as to the manner in which officers should respond to calls for service involving the repossession of vehicles or the towing of vehicles from private property.

In North Carolina, a repossession of a vehicle can be accomplished lawfully in either of two ways: 1) judicial process, by way of a claim and delivery order of seizure or writ of possession for personal property, which are executed by the Sheriff, or 2) private repossession by the lienholder (creditor) or his agent (a.k.a. "the Repo man"), which is sometimes referred to as a "self-help repossession."

State law authorizes a private repossession only if the repossession can be accomplished without a breach of the peace. The law provides that the creditor has the right to take possession of the collateral (the vehicle), without notice, when the owner of the vehicle has defaulted under the contract for purchase. In taking possession of the vehicle, however, a creditor may proceed without judicial process only if this can be done without a breach of the peace.

When an officer is called to the scene of a vehicle repossession, he/she should first determine whether the wrecker driver has some evidence that he is acting on behalf of a creditor after a default by the purchaser. No specific paperwork is required, but the wrecker driver should be able to satisfy the officer that he is repossessing the vehicle and not stealing it.

If no breach of the peace exists, the officer should allow the repossession to take place. However, the officer is normally responding as a result of a call by the vehicle purchaser/ owner, who is present and objects to the repossession. In that situation, the peace has been breached and the officer should not allow the vehicle to be repossessed without a claim and delivery order or writ of possession. The officer should explain to the wrecker driver that State law prohibits "self-help repossession" unless it can be accomplished without a breach of the peace and that the officer's action in preventing the repossession at that time does not mean that the driver may not attempt to repossess the vehicle at some later time.

There is no breach of the peace if the wrecker driver merely goes onto private property to obtain the vehicle to be repossessed. The wrecker driver may not, however, break and enter into a garage or make a forcible entry onto private property to obtain the vehicle.

Sometimes, an officer is asked to be present before an attempted repossession is to begin. The officer may not "assist" in a repossession in any way but may stand by only to prevent a breach of the peace or to take appropriate action if a crime occurs. The officer should take whatever lawful actions are necessary to prevent injury or unlawful damage to property.

In addition to repossessions, officers are often called to respond to situations involving the towing of vehicles from private property. If no breach of the peace exists, the officer should allow the vehicle to be towed. Again, however, the vehicle owner/operator will often be present and object to the towing of the vehicle. Initially, the responding officer may attempt to resolve the matter, for example, by encouraging the parties to negotiate the payment of a cancellation fee. If the parties are unable to reach an agreement, then the officer should treat the situation in much the same manner as a repossession. In that case, the officer should not allow the vehicle to be towed, even if it means that the wrecker driver has to "unhook" or "drop" the vehicle. The officer should explain to the wrecker driver that the vehicle owner/operator may owe money to the driver and that the driver may want to pursue a small claims action, but that the officer's responsibility is to prevent a breach of the peace.

If the officer arrives at the same time or right after the wrecker driver is departing the scene, the officer should not attempt to pursue or stop the wrecker at the request of the owner/operator.

There is one exception to the above-mentioned procedure related to vehicles being towed from private parking lots. Pursuant to N.C.G.S. §20-219.2, it is a Class 3 misdemeanor for a person to park a vehicle in a privately owned or leased parking space without the permission of the owner or lessee, provided that the parking lot is designated as such by a sign (at least 24 inches by 24 inches) that is

prominently displayed at the entrance to the lot and the parking spaces are clearly marked by signs with the names of the individual lessees or owners. A vehicle parked in violation of this statute may be removed upon the written request of the owner or lessee of the parking space. In this type of situation, the officer should not interfere when the vehicle is towed because a criminal offense is involved and there is statutory authority for the tow.

Another situation an officer may encounter occurs when a parking lot employee puts a wheel lock or "boot" on a vehicle and thereby makes it impossible for the owner/operator of the vehicle to leave the lot without paying a fee for whatever violation may have occurred. The responding officer should handle this situation in a similar fashion to a towing situation. If the parties cannot resolve the matter, the officer should require the employee to remove the device, if necessary, in order to prevent a breach of the peace.

In each of the above-described situations, an officer should avoid making a custodial arrest of any of the parties, unless a criminal offense such as an assault, disorderly conduct, or communicating threats is committed in the officer's presence. If a wrecker driver or a parking lot employee refuses to comply with the officer's requests, the officer should, as a last resort, warn the individual that he/she may be issued a uniform citation for the offense of resisting, delaying, or obstructing for his/her continued failure to cooperate.

Both repossessions and the towing of vehicles from private property are to be distinguished from situations involving vehicles being towed for violations of city parking ordinances. City ordinance 14-47 specifically provides that vehicles may be towed in such circumstances. Therefore, an officer responding to a situation of this type should allow the vehicle to be towed, even over the owner's objection, unless the owner is willing to pay the cancellation fee and/or any applicable fine.

## WARRANTLESS ARRESTS: UNLAWFUL CONCEALMENT AND LARCENY

An issue that generates frequent questions concerns an officer's authority to make warrantless arrests for the offenses of unlawful concealment (including price tag switching) and misdemeanor larceny.

When a misdemeanor offense is not committed in the officer's presence, the general rule is that the officer may not make a custodial arrest for that offense. However, N.C.G.S. §15A-401(b)(2) provides a number of exceptions to the general rule. Included among those exceptions is the offense of unlawful concealment (N.C.G.S. §14-72.1).

Basically, unlawful concealment occurs when an individual, without authority, conceals the merchandise of a store while still on the store premises and without having purchased the merchandise. It also occurs when an individual switches price tags or puts a false price tag on merchandise and then presents the merchandise to the cashier.

Both of these types of violations are often referred to as "shoplifting" and should not be confused with misdemeanor larceny (N.C.G.S. §14-72). The offense of misdemeanor larceny does not require that the defendant conceal the merchandise, but it does require that the defendant intend to permanently deprive the owner of possession of the merchandise. The intent to permanently deprive is often proven by the fact that the defendant left the store with the merchandise. As inconsistent as it may seem in this situation, N.C.G.S. §15A-401(b)(2) does not automatically authorize a warrantless arrest for a larceny that is not committed in the officer's presence.

N.C.G.S. §15A-401(b)(2) also contains a general exception, which permits a warrantless arrest for a misdemeanor offense not committed in the officer's presence if the officer has probable cause to believe that the suspect committed the offense and probable cause to believe that the suspect: (1) will not be apprehended; or 2) may cause physical injury to himself/herself or others; or (3) may cause damage to property unless he/she is immediately arrested.

Depending on the circumstances, a warrantless arrest for misdemeanor larceny may be appropriate if one of the above conditions exists. Examples of situations where such an arrest may be justified include a suspect who does not have proper identification, a suspect from another state, or a suspect who has not returned, or refuses to return, the property taken from the store.

Therefore, by statute, an officer may always make a warrantless arrest for the offense of unlawful concealment, regardless of whether or not the offense was committed in his/her presence. However, when a misdemeanor larceny is committed outside of the officer's presence, the officer may only make a warrantless arrest if he/she has probable cause to believe that the suspect will not be apprehended, may cause physical injury to himself/herself

or others, or may cause damage to property unless immediately arrested.

An officer who responds to a call where a misdemeanor larceny has occurred may consider other options if a warrantless arrest for that offense is clearly not authorized based on the circumstances.

If the suspect concealed the merchandise while on the store premises and was apprehended outside the store, the officer could still arrest the individual and charge him/her with unlawful concealment, assuming that all of the elements of that offense are present. The officer should explain to the store personnel the basis for the charge and why the suspect cannot be arrested for misdemeanor larceny.

If the store employees insist that the suspect be arrested for larceny in that situation, the officer should instruct them that it will be necessary for them to go to the magistrate's office and attempt to obtain an arrest warrant. Another option would be for the officer to issue the suspect a uniform citation charging him/her with misdemeanor larceny. In order to issue a citation, it is not necessary that the offense have been committed in the officer's presence, only that the officer have probable cause to believe that the suspect committed the offense.

However, please note that if the defendant fails to appear in court in response to a citation (for a non-motor vehicle offense), an order for arrest will <u>not</u> be issued. This is because the statute that deals with orders for arrest (N.C.G.S. §15A-305) does not provide for the issuance of such an order when a defendant fails to appear in court pursuant to a uniform citation. In this situation, the officer will have to follow through with the case and if the defendant fails to appear in court, the officer should request that the case be dismissed and then obtain an arrest warrant for the defendant, charging him/her with the original offense.

In addition to unlawful concealment, N.C.G.S. §15A-401(b)(2) provides that warrantless arrests are automatically authorized for a number of other misdemeanor offenses. Those offenses are:

- Domestic criminal trespass--N.C.G.S. §14-134.3
- Impaired driving--N.C.G.S. §20-138.1
- Impaired driving in a commercial vehicle--N.C.G.S. §20-138.2
- Domestic assaults committed by an individual who has a personal relationship with the victim (current or former spouses, persons of the opposite sex who live or have lived together, parents and children, other individuals acting in loco parentis, grandparents and grandchildren, persons who have a child in common, current or former household members, persons of the opposite sex who are or have been in a dating relationship)

a) Simple assault--N.C.G.S. §14-33(a)
b) Assault inflicting serious injury/assault with a deadly weapon--N.C.G.S. §14-33 (c)(1)
c) Assault on a female--N.C.G.S. §14-33(c)(2)
d) Assault by pointing a gun--N.C.G.S. §14-34

- Violation of a domestic violence (50B) order--N.C.G.S. §50B-4.1(a)

Of course, an officer may <u>always</u> make an arrest for a felony offense, regardless of whether or not the offense is committed in his/her presence, as long as the officer has probable cause to believe the suspect committed the offense.

## SHOW-UP IDENTIFICATIONS – MULTIPLE WITNESSES/VICTIMS

A show-up identification is the presentation of a single suspect to a witness or victim. Such a procedure is appropriate when one of the following circumstances exists:
1) a witness/victim is in the hospital and an immediate identification is needed, or
2) the crime has recently occurred and an immediate identification is justified by the need to solve the crime quickly and release an innocent suspect. When a show-up is necessary, the witnesses/victims should <u>not</u> be told that a "suspect" is in custody; they should merely be advised that they should look at the subject and see if they recognize him/her. If possible, a description of the suspect should be obtained from the witnesses/victims involved in the show-up before the show-up is conducted, although the procedure should not be delayed for this purpose. If multiple witnesses/victims are involved, they should be transported separately to the scene of the show-up, if possible. Under no circumstances should they be allowed to view the suspect together. Conducting the show-up in this manner will help to avoid the suggestion that the witnesses/victims collaborated with or relied on each other in identifying the suspect