# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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**IN THIS ISSUE**



**Forward:** In this issue, we review the Fourth Circuit Court of Appeals' recent decision in the case of *United States v. Gwinn*. In *Gwinn*, the court held that an arrestee's partially clothed condition may constitute an exigent circumstance justifying a temporary reentry without a warrant into a home to retrieve clothing reasonably calculated to lessen the risk of injury to the arrestee. We also review a North Carolina Court of Appeals case, *State v. Covington*, concerning the reasonableness of a vehicle stop conducted by an officer in an area where a break-in had been reported.

## HIGHLIGHTS:

## FOURTH CIRCUIT COURT OF APPEALS:

**Fourth Amendment / Warrantless Reentry / "Clothing Exception":**
In *United States v. Gwinn,* ____ F.3d ____ (13 July 2000), the Fourth Circuit Court of Appeals held that the safety risk created by an arrestee's partially clothed condition created an exigent circumstance justifying a warrantless reentry into the home in order to retrieve clothing. See page 1.

## NORTH CAROLINA COURT OF APPEALS:

**Fourth Amendment / Investigatory Stop / Reasonableness:**
In *State v. Covington*, ____ N.C. App. ____ (5 July 2000), the North Carolina Court of Appeals held that an officer acted reasonably when he stopped a vehicle late at night in an area where a break-in had been reported. See page 3.

## BRIEFS:

## FOURTH CIRCUIT COURT OF APPEALS:

**Fourth Amendment / Warrantless Reentry / "Clothing Exception":**
*United States v. Gwinn,* ____ F.3d ____ (13 July 2000)

**FACTS:** During the early evening hours of May 10, 1998, West Virginia State Police responded to a 911 dispatch concerning a domestic altercation in progress with weapons involved. The troopers arrived at the location (a "single-wide" trailer) and yelled for the suspect to come out. The defendant, Dennis Gwinn, exited the trailer, wearing only a pair of blue jeans.


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One of the troopers conducted a patdown search of Gwinn, handcuffed him, and placed him in the back of the patrol car. The troopers then entered the trailer, where they discovered the defendant's girlfriend, Diane Harrah, crying and holding her baby. She told the troopers that the defendant was drunk and had threatened her with a handgun. Ms. Harrah stated that she did not know where Gwinn had put the gun and the troopers were unable to find it after searching the trailer

The troopers left the trailer and prepared to transport Gwinn to jail. Because Gwinn was not wearing a shirt or shoes, one of the troopers went back into the trailer and asked Harrah, "Where's his shoes? And we need to get a shirt for him." Harrah directed the trooper to Gwinn's boots in the living room and went to the bedroom to get a shirt. The trooper picked up Gwinn's mid-calf work boots, which "seemed awfully heavy," and heard something "flop inside." He then opened one of the boots, looked inside, and discovered a .38 revolver. Harrah identified it as the weapon Gwinn had used to threaten her earlier.

Gwinn was charged under federal law (18 U.S.C. 922) as a felon in possession of a firearm. He moved to suppress the evidence of the revolver because it was obtained by the trooper pursuant to a warrantless search of the trailer. The district court denied the motion; Gwinn pled guilty, and then appealed.

**ISSUE 1:** Was the trooper's warrantless reentry into the trailer to obtain clothing for the arrestee justified by exigent circumstances?

**RULE:** Yes. Under the facts of this case, the trooper's reentry into the trailer to obtain clothing for the arrestee was justified by exigent circumstances.

**DISCUSSION:** The trooper's reentry into the trailer is governed by the Fourth Amendment, which generally requires that a law enforcement officer must have a warrant in order to enter a person's home. Exceptions to the warrant requirement include when a responsible party gives consent to the entry or when exigent circumstances exist that justify a warrantless entry. In this case, the trooper's reentry was not justified by consent, because Gwinn did not ask the trooper to retrieve his clothes for him nor did the trooper ask Harrah, who was in the trailer, for permission to reenter. Therefore, the reentry could only be justified by exigent circumstances.

The court first noted that there was no evidence that the trooper's reentry into the trailer was a pretext or was for any purpose other than securing clothing for Gwinn. The trooper did not proceed past the living room area where he announced to Harrah the need to retrieve Gwinn's shoes and a shirt. When Harrah directed the trooper to the boots in the corner, he immediately proceeded to their location and picked them up.

With regard to exigent circumstances, the court found that Gwinn faced a substantial risk of injury if he were to be transported and processed following arrest without shoes and a shirt. He was arrested in a remote area during the evening hours in early May. Wherever he might walk while in the trooper's custody, he would face "the substantial hazards of sustaining cuts or other injuries to his feet, as well as the increasing chill during the evening hours of an early May day." The court concluded that, under circumstances similar to those present in this case, an officer is authorized to take reasonable steps to address the safety of the arrestee and the arrestee's partially clothed status may constitute an exigent circumstance justifying a temporary reentry into the home to retrieve clothing reasonably calculated to lessen the risk of injury to the arrestee.

The court cautioned against using a clothing exception as a cover for entries made for other purposes and reiterated that an essential factor in this case was the absence of any evidence that the reentry was pretextual or that the trooper acted in bad faith. In order to invoke the clothing exception to the warrant requirement, the government bears the burden of demonstrating that the arrestee had a substantial need for the clothing and that the response was limited strictly to meeting that need.

**ISSUE 2:** Was the trooper's search of the boots a violation of the Fourth Amendment?

**RULE:** No. The trooper's search of the boots did not violate the Fourth Amendment.

**DISCUSSION:** The court stated that police officers are clearly justified in searching any item before they give it to a person in their custody in order to protect their safety and to deny the person access to any contraband.

## NORTH CAROLINA COURT OF APPEALS

**Fourth Amendment / Investigatory Stop / Reasonableness:**
*State v. Covington*, ____ N.C. App. ____ (5 July 2000)

**FACTS:** On December 23, 1996, at approximately 3:00 a.m., Officers Maness and Messenger of the Asheboro Police Department received a call reporting that two males had broken into an apartment building and were leaving the scene. The officers drove to an intersection approximately 300 yards from the reported break-in. Officer Messenger then proceeded to the apartment building, while Officer Maness remained at the intersection with instructions to stop any pedestrians or vehicles entering the area.
Two vehicles entered the area and Officer Maness stopped them both by waving his flashlight. Officer Maness asked the driver of the first vehicle for his license, spoke with the driver and his passengers briefly, and then allowed them to leave. The defendant's vehicle then approached the intersection and Officer Maness again waved his flashlight. The defendant stopped and rolled down his window. Officer Maness explained that he was investigating a possible breaking and entering in the area and was stopping all pedestrians and vehicles as part of the investigation. The defendant, without being asked by Officer Maness, exited the vehicle. He was staggering and Officer Maness detected an odor of alcohol on him. The defendant was given a breath test that revealed an alcohol concentration of .19. He was then arrested for DWI. At trial, the defendant moved to suppress the evidence obtained from the stop of his vehicle on the grounds that the stop was illegal.

**ISSUE:** Was the stop of the defendant's vehicle reasonable under the Fourth Amendment?

**RULE:** Yes. The stop of the defendant's vehicle was reasonable under the Fourth Amendment.

**DISCUSSION:** North Carolina courts have established that a law enforcement officer may be justified in making an investigatory stop and detaining the occupants of a vehicle when the facts indicate an articulable and reasonable suspicion that the occupants may be engaged in or connected with some form of criminal activity. The relevant standard for judging the officer's conduct is that he/she must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. In this case, the evidence showed that the stop of defendant's vehicle was based on the fact that a break-in had been reported recently in the area. It was approximately 3:00 a.m. and there were very few cars in the area. These facts and the natural inferences arising from them demonstrate that the vehicle stop was based on reasonable and articulable facts. Therefore, it was reasonable for Officer Maness to stop and detain the defendant briefly in order to determine his identity and his possible involvement in criminal activity or to warn him as a resident.

## NEW OPEN CONTAINER LAW EFFECTIVE SEPTEMBER 1, 2000

Effective September 1, 2000, a new open container law becomes effective. **None** of the current open container laws have been repealed. The new law, N.C.G.S. 20-138.7(a1), is an infraction. The current laws are all misdemeanors and should be used when

applicable. The new law provides that it is unlawful for a person:

1. to possess
2. an alcoholic beverage
3. other than in the unopened manufacturer's original container
4. in the passenger area of a motor vehicle.
5. while the motor vehicle is on the highway or highway right-of-way.

The new law also makes it unlawful to:

1. consume
2. an alcoholic beverage
3. in the passenger area of a motor vehicle
4. while the motor vehicle is on the highway or highway right-of-way

The motor vehicle need not be in operation in order for there to be a violation of the statute. It is illegal to possess or consume an alcoholic beverage even if the motor vehicle is parked on the highway. The new law applies only to highways (or streets) and highway rights-of-way. It does **not** apply to public vehicular areas. The law applies to both the driver and the passenger(s). Officers should issue a citation to the driver or passenger(s), whoever is in possession of or whoever is consuming the alcoholic beverage(s).

The new law does **not** apply to the following types of vehicles:

1. Passenger area of a motor vehicle designed, manufactured, or used **primarily** for the transportation of persons for compensation (buses, taxi cabs, etc.).
2. Living quarters of a motor home or *home* car (as defined in N.C.G.S. 20-4.01(1)).
3. House trailer (as defined in N.C.G.S. 20-4.01(14))

The charging language is contained in N.C.G.S. 20-138.7(g). For **possession**, officers should charge on the uniform citation using the following format:

> possess an open container of alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a (street or highway)(right-of-way of a highway). N.C.G.S. 20-138.7(a1).
> [Strike: "operate a (motor) vehicle on a (street or highway)(public vehicular area)"]

For **consumption**, officers should charge on the uniform citation using the following format:

> consume an alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a (street or highway)(right-of-way of a highway). N.C.G.S. 20-138.7(a1).
> [Strike: "operate a (motor) vehicle on a (street or highway)(public vehicular area)"]

**Punishment**: This offense is an infraction and is not considered a moving violation. It may be waived upon payment of court costs ($90.00) plus a fine of $10.00 for a total of $100.00.

The following other laws relating to transporting alcohol can also be enforced:

1. Driving a motor vehicle with an open container after consuming alcohol. N.C.G.S. 20-138.7.
2. Transporting an open container of spirituous liquor, mixed beverage or fortified wine. N.C.G.S. 18B-401.
3. Beer drinking by the driver. N.C.G.S. 18B-401.
4. Possession of an **unopened** alcoholic beverage in a commercial motor vehicle. N.C.G.S. 20-138.2C.

If you have any questions, please do not hesitate to contact the Police Attorney's Office at 336-2406.

## HANDICAPPED PARKING ENFORCEMENT

Handicapped parking violations can be enforced either under the State statute (N.C.G.S. 20-37.6) or the Charlotte City Code (C.O. 14-179(a)(16)). The State statute applies throughout the City and the County, while the ordinance can only be used for violations that occur within the City limits.

Officers using the statute should write the violation on a uniform citation ("big ticket"). The statutory offense is waivable upon

payment of a $100.00 fine and the costs of court (now $90.00), for a total of $190.00. City Code violations should be written on a parking ticket ("small ticket" - # 13) and are punishable by a civil penalty of $100.00.

The maximum penalty allowed by law for handicapped parking violations under both the statute and the ordinance is now $250.00. However, officers should not alter the uniform citation or the parking ticket in an attempt to charge that amount, but should follow the penalties set forth in the previous paragraph.

Street Park, Inc. ("Park-It") requested that this information be provided to CMPD officers. Please contact the Police Attorney's Office at 336-2406 if you have any questions.

## ISSUANCE OF UNIFORM CITATIONS FOR COMMUNITY IMPROVEMENT VIOLATIONS

Officers are authorized to issue uniform citations for violations of Chapter 10, Health and Sanitation, of the Charlotte City Code. Community improvement inspectors enforce these types of violations and the cases are prosecuted in the Environmental Court. The Environmental Court is a district court that is designed to handle criminal cases involving violations of local ordinances and state statutes, regulating areas such as housing, health, fire, community improvement, zoning, environmental protection, and animal control. The court is held once a month in District Court 207 in the Civil Courts Building. The issuance of a uniform citation, as opposed to a criminal summons, expedites the process whereby a defendant is brought to court.

Officers can issue uniform citations for community improvement violations under the following conditions:

1. The community improvement inspector investigating the case provides the charging officer with the probable cause necessary to support the charge;
2. The community improvement inspector investigating the case is able to visually identify the individual to be charged;
3. The community improvement inspector investigating the case accompanies the officer at the time the citation is issued; and
4. The community improvement inspector investigating the case provides the charging officer with the correct charging language to be placed on the uniform citation

An officer who issues a uniform citation pursuant to the above-described procedure should place the notation **"ENV"** on each side of the defendant's name on the citation. This will alert the magistrate in Courtroom 2205 to set the case for trial in the Environmental Court. In addition, the charging officer must list the community improvement inspector as a witness on the back of the uniform citation.

Please note that if the defendant fails to appear in court in response to a uniform citation for a community improvement violation, an order for arrest will not 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.

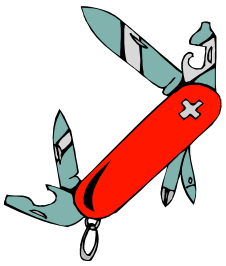
## LOCKBLADE KNIVES AND POCKETKNIVES: CONCEALED WEAPONS?

A person is prohibited from carrying a concealed weapon when off his or her own premises by N.C.G.S. 14-269. Questions have been raised as whether or not this statute applies to lockblade knives and/or pocketknives.

A lockblade knife is a folding knife that has a blade that locks into position when fully opened. A release button or lever located on the handle unlocks the blade and allows the knife to be folded. A lockblade knife is not a switchblade knife which opens automatically when a button on the handle is pressed. A switchblade knife cannot be considered an ordinary pocketknife or lawfully concealed.

The statute provides that it is lawful to carry concealed an ordinary pocketknife in a closed position. An ordinary pocketknife is defined in the statute as "a small knife, designed for carrying in a pocket or purse, that has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive, or spring action." The North Carolina Court of Appeals has interpreted an ordinary pocketknife to include a knife measuring four and one-half (4½) inches in overall length when folded (i.e., closed). *In the Matter of Dale B.*, 96 N.C. App. 375 (1989). It is not known whether the court would classify a knife that exceeds 4½ inches in length as an ordinary pocketknife.

A lockblade knife that otherwise fits the definition of an ordinary pocketknife under the statute can be concealed lawfully and officers should not automatically charge an individual in possession of such a knife. A small lockblade knife with an overall length of about 4½ inches when folded should not be considered a concealed weapon.



## SOLICITING: "WILL WORK FOR FOOD"

Questions have come up recently concerning the lawfulness of standing in public holding a sign stating "Will work for food" or similar language. It is not unlawful for an individual to display this type of sign and request or accept contributions while sitting or standing on a sidewalk. This is true as long as the individual is not impeding the passage of pedestrians on the sidewalk (in violation of Section 19-26 of the City Code) or accosting another person or forcing himself upon the company of another person (in violation of Section 15-24 of the City Code – please consult the July 2000 issue of the *Police Law Bulletin* for violations of this ordinance). In addition, such an individual is not required to have a business license or a peddler's license in order to engage in the activity.

Section 14-155(c) of the City Code does prohibit soliciting from the street or median strip. A person standing or sitting in the median strip, shoulder of the roadway, or in any street or highway is prohibited from soliciting or accepting contributions from the occupant of any stopped vehicle. A violation of this ordinance is a Class 3 misdemeanor and requires a mandatory court appearance. The charge code for this offense is "859922."

## COURT COSTS INCREASED TO $90.00

The court costs in District Court were recently increased from $86.00 to $90.00. The change was effective for any costs assessed or paid on or after July 15, 2000.