CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

October 2000 **Volume 18, Issue 10**

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Reminder…

…If you are served with a subpoena, civil or criminal, you cannot ignore it! If the subpoena requests RECORDS of any type, contact the Police Attorney's Office immediately. Attorneys will often subpoena privileged information. Please do not hesitate to call the Police Attorneys if you have any question about a subpoena.

Forward: In this issue, we take a look at five cases pending in the Supreme Court. These cases all deal with Fourth Amendment issues of great interest to Law Enforcement. They are: *Indianapolis v. Edmond*, (Drug Checkpoints); *Ferguson v. Charleston*, (Urine Tests); *Illinois v. McArthur*, (Securing of Dwellings); *Atwater v. Lago Vista*, (Traffic Arrests); *Kyllo v. U.S.,* (Thermal Imaging). We also review a North Carolina Court of Appeals case, *North Carolina v. Young*, a decision that is likely to severely hamper the prosecution of many sex offenders for failure to register.

HIGHLIGHTS:

UNITED STATES SUPREME COURT (PENDING CASES):

Fourth Amendment / Search & Seizure / Drug Roadblocks:
In *Indianapolis v. Edmond*, 99-1030 (Oral Argument October 3, 2000) the U.S. Supreme Court will decide whether stopping motorists at checkpoints for the purpose of having a K-9 sniff the car's exterior to detect illegal drugs is a violation of the Fourth Amendment. See page 2.

Fourth Amendment / Search & Privacy/ Hospital Urine Tests:
In *Ferguson v. City of Charleston*, 99-0936 (Oral Argument October 4, 2000) the U.S. Supreme Court will decide whether covert drug testing of urine from pregnant women by a state hospital for the purpose of reporting positive results to police for arrest of the patient for distributing illegal drugs to a minor, (the fetus), is a violation of the Fourth Amendment. See page 2.

Fourth Amendment / Seizure/Securing of Search Areas:
In *Illinois v. McArthur*, 99-1132 (Oral Argument November 1, 2000) the U.S. Supreme Court will decide whether requiring a property owner to remain outside his own premises unless accompanied by an officer for two hours while a search warrant was obtained for those premises violated the Fourth Amendment. See page 3.

Fourth Amendment / Custodial Arrest/ Minor Traffic Offenses:
In *Atwater v. Lago Vista*, Texas, 99-1408 (Oral Argument December 4, 2000) the U.S. Supreme Court will decide if the Fourth Amendment limits custodial arrest from use in cases

Published by Office of the Police Attorney
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of minor traffic offenses punishable by fine only. See page 3.

Fourth Amendment / Searches/Thermal Imaging:
In *Kyllo v. U.S.*, 99-8508 (Oral Argument not yet scheduled) the U.S. Supreme Court will decide if the use of a thermal imaging device to monitor the heat emissions of a private residence is a search which triggers Fourth Amendment protections. See page 4.

NORTH CAROLINA COURT OF APPEALS:

Fifth Amendment/Due Process/Incompetence:
In *North Carolina v. Young*, __N.C.App.__ (2000) the North Carolina Court of Appeals found that as applied specifically to the defendant in that case, N.C.G.S. 14-208.11, (Sex Offender Registration), was in violation of the Fifth Amendment right to due process of law and therefore unconstitutional. The ruling expressly limited itself to only that case and did not strike down the statute as wholly unconstitutional. See page 5.

BRIEFS:

UNITED STATES SUPREME COURT:

Fourth Amendment / Search & Seizure/Drug Roadblocks:
Indianapolis v. Edmond, 99-1030, Oral Argument October 3, 2000.

FACTS: On six occasions between August and November, 1998, the Indianapolis Police Department used roadblocks to screen motorists in order to apprehend drug offenders. Motorists passing through the roadblocks were asked for their license and registration while an officer lead a drug-sniffing dog around the vehicle. Vehicles were detained for no more than five minutes unless the dogs alerted on them, in which case they were searched. 55 drug arrests were made and 49 arrests for other offenses including traffic violations were made.

ISSUE: Do police officers need a reasonable suspicion to detain someone at a drug checkpoint?

DISCUSSION: The law regarding checkpoints is revisited by the Supreme Court for the first time in 10 years. In 1979, the Supreme Court in *Delaware v. Prouse,* 440 U.S. 648, held that officers may detain someone at a vehicle checkpoint for the purpose of determining whether the driver had a valid driver's license. Officers were not required to have a reasonable suspicion that the driver was operating a vehicle in violation of the law so long as officers stopped vehicles at a checkpoint according to a pre-set pattern. Later, in *Michigan v. Sitz*, 496 U.S. 444 (1990), the Supreme Court held that citizens may be briefly detained at a roadblock for the limited purpose of examining the driver for signs of intoxication. The Court relied on a balancing test and said that when: 1) a special governmental need outside the normal need for law enforcement, **OUTWEIGHS** 2) the individual's privacy expectations, **AND** 3) a reasonable method to advance that end is employed, **THEN** the Court may allow such without violating the Fourth Amendment. Up until now, most roadblock issues have dealt with driving offenses. The question is will the Court extend its logic to allow drug checkpoints? The 7th Circuit said "no" and struck down the checkpoint. This case will likely answer many questions such as: Are drugs a special government interest? Does the use of drug dogs significantly increase the intrusiveness of roadblocks? Is there a higher expectation of privacy in vehicles if the crime sought is not vehicle related? How much will roadblocks reasonably advance the government's interest in drug interdiction? On municipal roads as opposed to highways?

Fourth Amendment / Search & Privacy/Hospital Urine Tests:
Ferguson v. City of Charleston, 99-0936, Oral Argument October 4, 2000.

FACTS: In 1989, the Medical University of South Carolina began testing the urine of pregnant women for illegal drugs. The women had come voluntarily to the hospital for pregnancy care and had no knowledge that their urine would be tested. The testing was done if the woman showed signs of drug abuse. Originally, if a woman tested positive, she was arrested. The charge was distributing an illegal drug to a minor, the fetus. Under South Carolina law, a fetus is a person upon the 24th week of pregnancy. After the first six months of the testing, women who tested positive were given their choice of drug treatment

or jail. The women were always allowed to exchange drug treatment for dismissal of their charges even when arrested.

ISSUE: Is the testing of urine by State Hospitals an unconstitutional search or invasion of privacy?

DISCUSSION: This case presents the Supreme Court with the opportunity to refine the "special needs" doctrine of the Fourth Amendment as well as the chance to further define exactly what constitutes a search under the Fourth Amendment. The "special needs" doctrine allows license and D.W.I. checkpoints, also under scrutiny in this session of the Supreme Court. If the Court analyzes this case as a "special needs" situation, then it will weigh the governmental interest in detecting the drug use versus the patient's expectation of privacy. If the government has the greater interest, and if the method used reasonably advances that interest, then the testing will be upheld.

The Court of Appeals expressly decided that the reason for the testing was medical, not law enforcement. If the Supreme Court agrees, that will leave unanswered the question of whether this type of testing is legal if the purpose is crime prevention or prosecution. Also, the Court will have to decide if the testing, as done here, truly was a search that triggers Fourth Amendment protections. If it is found to not be a search, then the door to large amounts of evidence through cooperation with medical professionals just may open.

Fourth Amendment/Seizure/ Securing of Search Area:
Illinois v.McArthur, 99-1132, Oral Argument November 1, 2000.

FACTS: On April 2, 1997, police accompanied Mrs. Tera McArthur to her home where she intended to remove her possessions. Her estranged husband, John McArthur was home but did not interfere with his wife while she removed her possessions and the officers waited outside. When Mrs. McArthur exited the home, she informed the officers that Mr. McArthur had marijuana under the couch in the living room. The officers then knocked on the door and asked Mr. McArthur for consent to search, which he denied. During the discussion, Mr. McArthur stepped outside of his dwelling. The officers informed him that they were going to obtain a search warrant, and while they were doing that, Mr. McArthur would have to wait outside his home or he could go in accompanied by Officer Love who stayed behind to secure the home. It took between 1 and 2 hours for the warrant to be obtained. During that time Mr. McArthur was allowed back in 2-3 times for cigarettes while Officer Love stood just inside the door and watched him. Once the warrant was present, Mr. McArthur led the officers to the marijuana and was arrested. Both the trial Court and the Court of Appeals suppressed the marijuana as obtained in violation of the Fourth Amendment.

ISSUE: May police secure a dwelling against its owner while awaiting a warrant in order to prevent the destruction of evidence?

DISCUSSION: This case is of obvious importance to law enforcement. We know that the Courts and Constitution prefer the use of warrants. We also know that the Court has carved out strict exceptions to the general requirement of a warrant. This case focuses on exactly what officers should do in the middle ground between exceptions and warrants. The facts of this case clearly set it outside of the normal exigent circumstances that would allow a warrantless entry. The crime itself, marijuana possession would not, on these facts, be serious or dangerous enough to make exigent circumstances possible. Even if it were, the only possible basis would be to prevent the destruction of evidence. That basis, standing alone, is generally disfavored by the courts and the evidence is required to be absolutely critical to support the exigency. The issues before the Court are: Was the defendant seized when he was denied access to his home? If so, was that seizure too long? When the officer stood inside the door, was that an unlawful entry? Search? Was that entry implicitly consensual?

Fourth Amendment / Custodial Arrest/ Minor Traffic Offenses:
Atwater v. Lago Vista, Texas, 99-148, Oral Argument December 4, 2000.

FACTS: On March 26,1997, Gail Atwater was pulled over by Officer Barton Turek of the Lago Vista, Texas Police Department. Neither she nor her two young children were wearing their seatbelts, which was the basis for the stop.

Though the exact conversation between Ms. Atwater and Officer Turek is unclear, the Courts seemed to generally accept that Officer Turek was verbally abusive during the encounter. Ms. Atwater was arrested, taken to jail, and charged with the seatbelt violations, driving without her license and without proof of insurance. None of the charges carried a maximum punishment of more than a $50 fine. She was released from custody by a Magistrate after spending 1 hour in a jail cell. She pled No Contest to the seatbelt charges and the other charges were dismissed.

ISSUE: Is a full custodial arrest constitutionally unreasonable for minor traffic violations punishable only by a small fine.

DISCUSSION: This case illustrates the judicial ire that can be raised by police behavior that is perceived as vindictive or heavy-handed. While the trial court and eventually the entire Fifth Circuit sitting *en banc* found the arrest valid, an intervening Fifth Circuit panel including the Chief Judge of the Fifth Circuit held the arrest was unreasonable. The Fourth Amendment sets a reasonableness requirement for all searches and seizures. Arrests, being a seizure, must be reasonable to be legal. Generally, arrests supported by Probable Cause to believe that that person committed a crime are reasonable. At issue in this case is whether it is reasonable to arrest someone for a minor traffic violation. The contention of Ms. Atwater is that simply weighing the level of evidence needed before an officer may arrest is insufficient. Ms. Atwater is requesting the Court to balance the societal interest in the enforcement of a particular violation of the law versus the individual's right to be free from unreasonable seizures to the test of reasonability. That concept is certainly not foreign to American law. North Carolina does not define infractions as criminal and does not allow an arrest in such cases. In special infraction cases, some non-residents may be required to post appearance bonds.

Fourth Amendment/ Searches/Thermal Imaging: *Kyllo v. U.S.,* 99-8508, Oral Argument Not Yet Scheduled.

FACTS: In mid-January, at 3:20 a.m. the police used a thermal imaging device to "view" Danny Kyllo's home. The police "viewed" his home from a vehicle parked on a public street. The Thermal imaging device used was the Agema 210. That device only receives and interprets heat signature and does not emit any type of radiation nor see through walls. The viewing was part of an investigation by federal agents into a suspected indoor marijuana growing operation. The thermal device showed a much larger than normal level of waste heat being emitted from the garage roof and one wall. That level of heat loss is consistent with the lamps needed to grow marijuana indoors. The viewing was done without a warrant. Based on other information and the information revealed by the thermal imager, a warrant was obtained to search the premises. Once searched, an indoor marijuana growing operation was discovered.

ISSUE: Does Thermal imaging of the type used in this case amount to a search that triggers the protections of the Fourth Amendment?

DISCUSSION: Before the requirements of the Fourth Amendment are triggered, their must be some intrusion into the areas of an individual's liberties protected by the Fourth Amendment. We commonly refer to those intrusions as searches or seizures. For an act to be termed a search, it must intrude into an area of life where there is an actual expectation of privacy and that actual expectation is one that society recognizes as objectively reasonable. Generally, the things that are open to public view are not considered to be within any expectation of privacy. Thus, a person's appearance or objects readily viewable from a public street, are not protected from surveillance. When technology is applied, the things viewable from public areas expand. With proper equipment, it may be possible to pierce fences, walls, or any number of structures that traditionally have been used to protect privacy. Courts consider technology aided acts to

be searches if they revealed the "intimate details" of private areas. In this case, the question is whether radiant heat is an intimate detail? Thermal imagers may very well be of great use to law enforcement. This case will likely decide how much they may be used.

NORTH CAROLINA COURT OF APPEALS:

Fifth Amendment / Due Process, Incompetence: *North Carolina v. Young.,* ____ N.C. App___ (2000)

FACTS: Ricky Young was adjudicated incompetent in 1989. In 1991 he was charged with taking indecent liberties with a minor child and found to be incompetent to stand trial. Later in 1998, he was found to finally be competent for trial, and pled guilty to the Indecent Liberties Charge. Having already been held for the intervening 7 years, he was released on parole and sent to the Country Village Home. He registered his change of address with the Sheriff of the county as he was required to do by law as a convicted sex offender. Later, he was committed to Broughton. After release from that institution, he went to live with his mother. Testimony seemed to indicate that she drove him to the Sheriff's office to register that change of address and that he spoke to someone inside. However, the change of address was never registered and he was eventually arrested, tried, and convicted for failure to do so.

ISSUE: May an incompetent be found guilty of a strict liability offense that requires such person to perform an affirmative act?

RULE: NO. Unless it can be shown that the incompetent received actual notice tailored to their capacity and circumstances, no conviction will stand.

DISCUSSION: The Court of Appeals carefully limited its ruling only to this specific case, therefore the entire statute has not been found unconstitutional. However, this case will still be binding precedent for other incompetents in similar circumstances. Given the nature of the offenses that trigger this statute, it is likely that there will be a significant number of similarly situated defendants. The Court based its ruling on Fifth Amendment Due Process, which requires that a defendant be given the fair notice and knowledge needed to avoid violation of the law. Here, the Court decided that due to his incompetence, the notice given to the defendant was not sufficient to satisfy the Fifth Amendment. The Court noted that in any other dealings with minors or incompetents, notice to the guardian as well as the incompetent is required.

The Court's ruling creates a substantial problem for law enforcement. Are guardians to be held criminally liable if their ward fails to register? Are there going to be a large number of sex offenders, a crime that often results from mental illness, that are effectively immune from prosecution for failure to register? This case raises as many questions as it answered. Until and unless it is reviewed by a higher court, each case involving incompetent sex offenders will be prone to review by the courts to determine the sufficiency of notice! Sheriffs and prison officials will now need to attempt to craft their notice to the offender, and likely their guardian, if any.

ILLEGALLY PARKED CARS AND WHEEL BOOTS

On September 11, 2000, the Charlotte City Council enacted three new ordinances that directly impact parking violations within the City. These are Sections 14-82, 14-83, and 14-84. This article reviews Sections 14-82 and 14-83 (Section 14-84 deals with parking ticket appeals and is not relevant for officers). Section 14-82 provides that any vehicle parked illegally (in violation of state law or city ordinance) may be towed. It is important to note that this ordinance section DOES NOT give police officers the authority to tow a vehicle that is parked on private premises without the permission of the property owner. Rather, the ordinance applies ONLY to vehicles parked on the public streets or on city property. Generally, a vehicle parked on a PRIVATE lot will not be in violation of a state law or city ordinance. The private lot owner is responsible for deciding whether to have the vehicle towed.

Section 14-83 addresses the City's use of wheel locks, or

"boots," which are an alternative to towing. Again, this code section ONLY applies to ILLEGALLY parked vehicles (on public streets or city property). Additionally, ONLY illegally parked vehicles for which there are three or more unpaid and overdue parking tickets may be booted. When a vehicle is immobilized in this fashion, a notice will be affixed to the windshield notifying the owner of what has been done and how the boot may be removed. If an officer encounters a vehicle that has been booted on a public street or on city property, he or she should not attempt to remove the boot or intervene on behalf of the vehicle owner.

Private parking lots are a different matter. Recently, many business owners and private lot owners have begun having vehicles booted, as opposed to having them towed. This is often done by the owner contracting with a company that will respond to the business or parking lot and put a boot on a vehicle that is parked there without permission. If an officer is called to respond to a dispute between a vehicle owner and a parking lot owner or a representative of a "boot" company, the officer should:

1.) Ensure that a breach of the peace does not occur. That is the officer's reason for being present.

2.) Remain neutral as long as is reasonably possible. Remember that this is a civil matter.

3.) If the parties cannot reach an agreement, then the officer should require that the boot be removed IF THE EMPLOYEE OF THE BOOT COMPANY IS STILL PRESENT. If the employee refuses to remove the boot, the officer should warn the employee that he/she may be issued a uniform citation for resisting, delaying, or obstructing. Arrests should be avoided, if at all possible.

4.) If the boot company employee has already left the scene, the officer should NOT attempt to contact the employee and require him/her to return.

5.) Enforce all laws, as normal. If a vehicle owner can remove the boot without damaging it, no law has been violated. If the vehicle owner damages the boot, that constitutes the offense of damage to personal property.

The private boot companies have instructed their employees to leave the scene as soon as possible, and not to return if an officer is present. CMPD officers have no authority to require the employees to return and should not order or request them to. CMPD has requested that the companies ensure that their employees carry identification to reassure the public of their employment status.

HALLOWEEN MASKS

Halloween is right around the corner and many people will begin to ask, "is it legal to wear masks?" A surprising question to some, but the general answer is it is illegal for adults to wear masks in public in North Carolina. That is generally speaking. Practically it is rarely illegal because there is a huge exemption that allows traditional holiday costumes in season. General Statutes 14-12.7 through 12.10 makes it illegal for people 16 and older to wear masks that disguise the wearer's identity in public or in the homes of others or at private meetings.

These statutes are part of the legislation against secret societies and stem both from the prohibition of sedition and the civil rights era. Each of those statutes, 14-12.7 through 12.10 are specifically made to exempt wearer's of traditional costumes at the correct season, or even as part of valid employment, (clowns).

The bottom line is that Halloween costumes are legal around Halloween and masked party-goers are not in violation of the law.