



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

April 2001

Volume 19, Issue 4

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... **GOOD NEWS** on transporting Delinquent Juveniles! Officers serving Secure Custody Orders will now go *only* to Gatling or Gaston County Detention Facilities! See page 5.

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... **A Reminder** concerning the requirements for transporting officers and the completion of affidavits is included on page 5.

... The District Attorney's Corner returns this month with an update on the changes in Courtroom 2205. See page 6.

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**Forward:** In this issue we review two United States Supreme Court cases. In *Texas v. Cobb*, the Court addressed the applicability of the Sixth Amendment to offenses that are factually related but not yet charged. A second Supreme Court case, *Ferguson v. City of Charleston*, deals with the nonconsensual drug testing of pregnant women. We also review a NC Supreme Court case, *State v. Buchanan*, which discusses the proper standard to evaluate whether an individual is considered to be "in custody" for purposes of Miranda.

### HIGHLIGHTS:

#### UNITED STATES SUPREME COURT:

##### Confessions/Attachment of 6<sup>th</sup> Amendment Right to Counsel:

In *Texas v. Cobb*, 121 S.Ct. 1385 (2001), the United States Supreme Court ruled that the Sixth Amendment does not apply to a separate offense for which the defendant is not yet charged even though the offense may be factually related to a charge for which the defendant's Sixth Amendment right has attached.

##### Fourth Amendment/Warrantless Searches/Nonconsensual Drug Tests:

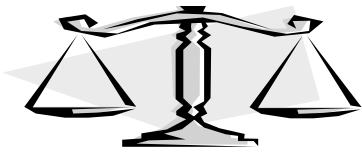
In *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001),

the United States Supreme Court held that the nonconsensual drug testing of pregnant patients was an unconstitutional search forbidden by the Fourth Amendment.

#### NORTH CAROLINA SUPREME COURT:

##### Fourth Amendment/Custody/ Interrogation:

In *State v. Buchanan*, \_\_\_NC\_\_\_(2001), the North Carolina Supreme Court found that the applicable standard upon which to evaluate whether an individual is in custody for purposes of Miranda, is whether there were restraints on the individual's freedom of movement that are normally associated with a formal arrest rather than the "free to leave" test which applies to the seizure of an individual.



## UNITED STATES SUPREME COURT

### Confessions/Attachment of 6<sup>th</sup> Amendment Right to Counsel:

*Texas v. Cobb*, 121 S.Ct. 1335 (2001).

**Facts:** In 1993, the defendant was living across the street from the Owings family in Walker County, Texas. Mr. Owings reported to police that his home had been burglarized and his wife and child were missing. The defendant was questioned in conjunction with the disappearance but denied any involvement.

A year later, while under arrest on unrelated charges, the defendant was again questioned about the incident with the Owings. At that time, he confessed to burglarizing the Owings home and gave a written statement but denied any knowledge about the missing mother and child.

After being indicted for the burglary of the Owings' home, defendant was appointed an attorney. The attorney gave investigators permission to question him about the disappearances of Mrs. Owings and her child but he denied involvement.

In 1995, the defendant was free on bond and living with his father. After confessing to his father that he was involved in the murders of Mrs. Owings and her child, his father informed police.

Upon arrest for the murders, the defendant waived his Miranda

rights and confessed. He told investigators that during the commission of the burglary, Mrs. Owings confronted him and he stabbed her with a knife then killed her child. He also admitted to burying the bodies and took the police to the burial site.

The defendant's confession was admitted at his capital murder trial and he was convicted and sentenced to death. He appealed his conviction to the Texas Court of Criminal Appeals. They reversed the trial court and remanded for a new trial finding that the burglary charge was "factually related" to the murder charge. Therefore, once the defendant's Sixth Amendment right to counsel attached to the burglary offense, it also attached to the murder charge even though he had not yet charged. The United States Supreme Court reversed.

**Issue:** Does the Sixth Amendment right to counsel extend to crimes that are factually related to those that have been charged but are **not** the same offense and are not charged?

**Rule:** No. Officers may question a subject about a separate crime that is factually related to another crime for which the subject has been charged.

**Discussion:** The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense", which includes any critical stage of the prosecution. The United States Supreme Court rejected the Texas Court's reasoning that the Sixth Amendment right to counsel applied to the murder charge as it was "factually related" to the burglary charge for which the

Sixth Amendment right to counsel had attached. The Court discussed the meaning of "offense," in an effort to determine whether or not offenses are separate or identical for Sixth Amendment purposes. The Court followed its previous rule in *Blockburger v. United States*, 284 U.S. 299 (1932) in stating that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. The Court compared the meaning of "offense" in the context of double jeopardy and the right to counsel, and found them to be identical. Under Texas law, burglary and murder are not the same offense for Sixth Amendment purposes.

In North Carolina, a defendant's Sixth Amendment right to counsel attaches at the defendant's first appearance in district court or at indictment, whichever occurs first. In this instance, the defendant's Sixth Amendment right to counsel had attached only to the burglary offense for which he had been indicted. The defendant had not been charged with murder so he had no Sixth Amendment right to counsel for that offense.

The Supreme Court also noted that a suspect must still be informed of his Miranda rights, including the right to counsel, prior to any custodial interrogation. In this instance, the police officers

“scrupulously” followed the dictates of Miranda when they questioned the defendant concerning the murder. The Court went on to note that society has an “interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.” The Supreme Court ruled that the defendant’s statement was admissible against him.

### **Fourth Amendment/ Warrantless Searches/ Nonconsensual Drug Tests:**

*Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001)

**Facts:** The Medical University of South Carolina (MUSC) developed a policy in conjunction with the local police, to identify and test pregnant patients suspected of abusing drugs. The tests were performed without the informed consent or knowledge of the patients. The policy offered treatment for substance abuse for those testing positive but also provided for criminal prosecution.

The policy dictated the type of criminal charge, which varied depending on the stage of pregnancy at the time the woman was tested. The charges increased in severity in the latter weeks of the pregnancy. According to the policy, if a woman tested positive for cocaine after labor, the police were to be notified and the patient immediately arrested. Provisions for the proper chain of custody for the urine tests were also outlined so the results would be admissible in future criminal prosecutions. Additionally, the

policy allowed police to interrogate patients to determine where, and from whom, they purchased their drugs.

Several obstetrical patients arrested after testing positive for drugs, alleged that the testing constituted an unconstitutional search in violation of their Fourth Amendment rights. The Fourth Circuit upheld the testing policy but the Supreme Court reversed.

**Issue:** Is a diagnostic test, performed without the patient’s knowledge or consent, that is used to obtain evidence of the patient’s criminal conduct, an unreasonable search in violation of the Fourth Amendment?

**Rule:** Yes. A diagnostic test performed by state hospital personnel, for the purpose of criminal prosecution, must be conducted pursuant to a warrant or an exception to the warrant requirement such as consent or exigent circumstances.

**Discussion:** The Fourth Circuit held that the searches were reasonable as “special needs” may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends. The United States Supreme Court, in reversing the Fourth Circuit’s decision, found that these warrantless searches were unconstitutional. The diagnostic tests, which were urine tests for drugs, were searches for purposes of the Fourth Amendment and the obstetrical patients were never informed of their constitutional rights prior to these tests. Additionally, hospital personnel, as employees of a state hospital, were considered state actors, subject to the requirements of the Fourth Amendment.

MUSC sought to justify its right to conduct drug tests under the “special needs” exception, which weighs the intrusion of an individual’s privacy interests against the “special needs” of the program at issue. The Court rejected this argument and distinguished its prior cases where “special needs” justified drug tests. In those cases, warrantless searches without probable cause or reasonable suspicion were justified because the purpose was separate from any general interest in crime control. These “special needs” cases involved the testing of railway employees involved in train accidents; testing certain federal employees seeking promotion to sensitive governmental positions; and testing high school athletes who participated in interscholastic sports. Those policies included specific provisions prohibiting the release of the information to third parties and law enforcement.

MUSC attempted to justify the policy as a means to deter pregnant woman from using cocaine with the threat of criminal sanctions. The intent of this policy, according to the Court, was to coerce pregnant patients into substance abuse treatment with a focus on arrest and prosecution. The purpose of the searches was “indistinguishable from the general interest in crime control.” Quoting, *Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000)

The Court found that the

hospital, as a state institution, was subject to the dictates of the Fourth Amendment. As such, only an exception to the warrant requirement could justify a nonconsensual search.

## **SUPREME COURT OF NORTH CAROLINA: Fourth Amendment/ Custody/Seizure/ Interrogation:**

*State v. Buchanan*, \_\_\_NC\_\_\_ April 6, 2001.

**Facts:** While investigating a double homicide in Gastonia, a County Police Department Sergeant spoke with the defendant about his whereabouts on the night of the murders. Several days later, the Sergeant arrived at the defendant's work site and asked if he would come to the station to answer some questions. The defendant agreed and rode to the station with the Sergeant although he was given the opportunity to follow in his own vehicle. He rode in the front seat of the unmarked vehicle and was never searched or patted down. He was told that he was not under arrest and was free to leave.

Upon arrival at the station, the defendant was allowed to get a drink of water and use the rest room alone. Prior to the interview, the defendant was again informed that he was not under arrest and was free to leave at any time. The interview was conducted in an office in which the door was open for the majority of the interview. Ultimately, the defendant confessed to the murders and his statement was

reduced to writing and signed by the defendant. At that time, he was placed under arrest for the murders and given his Miranda warnings, which he waived.

The defendant filed a motion to suppress his statement, which the trial court granted. The trial court applied the "free to leave" test as the standard to determine if an individual was "in custody" for Miranda purposes. The Supreme Court reversed, finding that this was the incorrect test. The case was remanded for further hearing using the correct standard of whether there was restraint of movement that is associated with a formal arrest.

**Issue:** Whether or not the defendant was in custody for purposes of Miranda when officers informed defendant he was not under arrest, regardless of their subjective intent to arrest him.

**Rule:** No. A defendant is in custody for purposes of Miranda if based on the totality of circumstances there was restraint on the defendant's freedom of movement to the degree associated with a formal arrest.

**Discussion:** The Supreme Court found that the trial court applied the incorrect and broader test of "free to leave" as the legal principle to suppress the defendant's statement. The proper standard to determine if a defendant is "in custody" is that, based on the totality of the circumstances, whether or not there was restraint on the defendant's freedom of movement to the degree associated with a formal arrest. The "free to leave" test is used to determine whether or not a person has been "seized" for purposes of the Fourth Amendment. The trial court's analysis focused on the Sergeant's "subjective" view

that he did not intend to allow the defendant to leave the station. Therefore, the defendant could not actually be "free to leave." The Supreme Court, however, stated definitively that the custody determination depends on the *objective* factors surrounding an interview not an officer's unspoken intention to arrest the defendant. The Court noted the objective of Miranda is to protect against coerced confessions, not to suppress voluntary confessions. Therefore, the officer's intent to elicit incriminating responses through means other than coercion is not relevant to the custody determination, unless this intention is communicated to the defendant.



### **FOR YOUR INFORMATION:**

#### **REASONABLE SUSPICION FOR DWLR:**

Reasonable suspicion for a traffic stop *may* exist when an officer runs a vehicle tag and learns that the owner/driver is driving with a revoked license. However, the officer *should not* conduct a traffic stop unless the owner's description matches the appearance of the driver as to race, sex and approximate age.

#### **OUT OF STATE DOMESTIC VIOLENCE ORDERS:**

Out of state domestic violence orders must be enforced by NC law enforcement agencies *even if the order has not been registered*. Officers may rely on a copy of the order and

a statement by the person protected that the order remains in effect. The advantage to registering the order is that it will be placed into NCIC.

**REMINDER:  
TRANSPORTING  
OFFICERS &  
AFFIDAVITS:**

In certain cases the officer who transports an arrestee may not have been the arresting officer. In these situations, the transporting officer is the one who swears to the statement contained on the back of the arrest affidavit (pink sheet). This is a sworn statement so the transporting officer should be familiar with the facts of the case and that the facts establish probable cause. The transporting officer should thoroughly discuss the case with the arresting officer.

The transporting officer should not submit an arrest affidavit to court services for notarization that has been signed only by the arresting officer, who is not present. A notary cannot lawfully authenticate the signature of an officer who does not appear before him. While the transporting officer may identify himself as such on the arrest affidavit form, he should not be reluctant to sign an affidavit for fear of a magistrate finding there was no probable cause for the arrest, or because he may be called to testify at trial. A transporting officer should not sign or swear to statements he has not read or does not believe are accurate. The arresting officer is the main prosecution witness on

matters relating to the arrest and the transporting officer would testify at trial only to establish chain of custody or to describe any incriminating statements made during transport.



**TRANSPORTING  
JUVENILES to DETENTION  
FACILITIES:**

The Department of Juvenile Justice and Delinquency Prevention, (DJJDP) recently responded to complaints from local law enforcement concerning the travel distance required to locate juvenile detention beds. The **new procedure** provides that CMPD will only be required to transport a juvenile with a secure custody order to Gatling or to Gaston County. (Gaston is the closest state facility.) The DJJDP in Raleigh will then be responsible for the juvenile.

Officers will still contact our local DJJDP when serving a SCO but the **maximum distance required to be traveled is the closest state facility.** This policy is in effect regardless of space availability in the Gaston Detention Facility.

**OPTIONS FOR 16 & 17  
YEAR OLD JUVENILES:**

Juveniles who are 16 or 17 who have not committed a criminal offense may be “undisciplined” and appear in Juvenile Court. Undisciplined 16 & 17 year olds are juveniles who are regularly disobedient to and beyond the disciplinary control of their parents, or are regularly found in places where it is unlawful for

a juvenile to be, or have runaway from home for more than 24 hours. The parent may go directly to the local DJJDP office to request a juvenile petition. (No police report is needed.)

The officer may take the juvenile into temporary custody if there are reasonable grounds to believe the juvenile is undisciplined. If the officer takes the juvenile into temporary custody, the officer may release the juvenile with or without first counseling the juvenile; release the juvenile to the parent or guardian; refer the juvenile to community resources; seek a juvenile petition; seek a petition and a secure custody order. There is no time requirement for a missing juvenile/person prior to filing a report.



**PROCEDURES for  
UNAUTHORIZED USE OF  
MOTOR VEHICLE  
CASES:**

The offense of unauthorized use of a motor-propelled conveyance (“unauthorized use”), a violation of G.S. 14-72.2, is committed when an individual willfully takes or operates a motor-propelled conveyance of another without the consent of the owner or other person in lawful possession. It is a Class 1 misdemeanor unless the conveyance is an aircraft, which is a Class H felony.

The offense usually occurs when there is a relationship

between the victim and the suspect and the suspect takes the vehicle without permission, but without the intent to permanently deprive. The victim may place specific limitations on the use of the vehicle, such as limiting the use to a specified purpose or for a specified period of time, and the suspect goes beyond those limitations.

Victims filing unauthorized use reports must wait twenty-four (24) hours before attempting to obtain an arrest warrant from the Magistrate's Office. The 24-hour period begins at the time the report is filed. This waiting period provides an opportunity for the vehicle to be returned and to better ensure that the victim is willing to prosecute the suspect.

A victim who files a report with NEPS must appear in person. The only exception is when the victim is disabled and has no transportation. In that case, NEPS will take the report by phone; however, the victim must obtain the arrest warrant, either on his own or with the assistance of the officer assigned the report. The victim should be given the phone number for the district where the case will be assigned.

When the report is filed in NEPS, a copy of the report and a yellow slip will be given to the victim to take to the Magistrate's Office after the 24-hour period has expired. The yellow slip is used for the APB broadcast and NCIC entry, after a warrant has been issued. When a warrant is issued, after leaving the

Magistrate's Office, the victim should bring the yellow slip, with the repository number, to NEPS. An APB will be entered and the slip will go to Records for entry of the vehicle into NCIC. When an officer in the field takes an unauthorized use report, the victim must obtain a copy of the report from Records, and a yellow slip from NEPS, before going to the Magistrate's Office. NEPS will advise the victim to return with the yellow slip if a warrant is issued.

The 24-hour waiting period does not apply to cases involving failure to return rental vehicle. However, the victim must still obtain an arrest warrant before the vehicle is entered into NCIC.

## **“THE DISTRICT ATTORNEY'S CORNER”**

*By Steve Ward, DA Liaison*

### **CHANGES IN COURTROOM 2205:**

Major changes went into effect in Courtroom 2205 on January 1, 2001. With the addition of two district court judges for Mecklenburg County, an additional position was allocated to Courtroom 2205. Judge David Cayer is presiding in 2205 for the first six months of its operation with the goal of handling cases the first time defendant's appear. An additional goal is to focus the regular district courtrooms on conducting trials rather than administrative matters.

In order to help the process flow smoothly, officers should note the following:

1. 2205 is no longer a “drop in”

court and defendants are expected to be there at 0900 for A session or 1330 for B session.

2. Officers need to set citations in 2205 on their court day and session so that ADA's may speak with officers if necessary to resolve cases in 2205.
3. Please be as thorough as possible in completing your pink arrest affidavit as that is all the information we will have to go on in resolving cases.
4. DO NOT tell people that the ADA will always reduce their speeding citation to allow them to go to the Traffic School. They may go to the school if the posted speed is 35 or less and they are driving no more than 20 mph over it, and they can go if the speed is 40 or more and they are speeding no more than 15 mph over that limit.

The DA's Office no longer screens out and dismisses arrested cases before court. We had begun taking dismissals in certain categories of offenses several years ago when shortages of court time and personnel were so severe that we could not reach all the DWI's much less other, less serious cases. We discontinued this practice last September and now all cases are set for court. Over the years some officers who understood the procedure but wanted a particular case to avoid the screening process and go to court issued citations for misdemeanors and did not make arrests. Cases are now resolved through the process I have outlined above and not simply dismissed because of court overcrowding.

