



# CMPD POLICE LAW BULLETIN

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### IN THIS ISSUE

... Warrantless arrests for minor criminal offenses See page 2.

... Conducting a strip search of a person named in a search warrant. See page 2.

... Investigative detention or arrest? See page 3.

... Using audio recordings to rebut allegations of excessive force. See page 4.

... Recent legislation affecting handicapped parking. See page 5.

... Public records - Frequently Asked Questions & Answers. See page 5.



**Forward:** In this issue we review the Supreme Court's decision in *Atwater v. Lago Vista*. In *Atwater*, the Supreme Court held that the Fourth Amendment does not prohibit a warrantless arrest for a minor criminal offense. We also review two North Carolina Court of Appeals cases concerning seizures of persons and strip searches conducted during the execution of a search warrant.

### HIGHLIGHTS:

#### UNITED STATES SUPREME COURT:

**Fourth Amendment/Warrantless Arrest/Misdemeanor/ Seat Belt Violation:** In *Atwater v. Lago Vista*, \_\_\_ S.Ct. \_\_\_ (2001), the U.S. Supreme Court held that the Fourth Amendment does not prohibit a warrantless arrest for a minor criminal offense that is punishable only by a fine. The Court rejected the defendant's request to impose a new constitutional rule prohibiting custodial arrest when conviction of the underlying offense does not carry any jail time.

#### NORTH CAROLINA COURT OF APPEALS:

**Fourth Amendment/Search Warrant/Probable Cause/Strip Search/Reasonableness:** In *State v. Johnson*, \_\_\_ N.C. App. \_\_\_ (2001), the Court of Appeals held that a strip search of a

person named in a search warrant for controlled substances did not exceed the scope of the warrant.

**Fourth Amendment/Seizure/Factual Justification/ Detention or Arrest:** In *State v. Milien*, \_\_\_ N.C. App. \_\_\_ (2001), the Court of Appeals held that handcuffing a suspect while officers searched for evidence he threw out of a car window constituted a seizure requiring probable cause.



## UNITED STATES SUPREME COURT

### Warrantless Arrest/ Misdemeanor/ Seat Belt

**Violation:** *Atwater v. Lago Vista*, \_\_\_ S.Ct. \_\_\_ (2001).

**Facts:** Texas law requires front-seat passengers to wear seat belts. It also provides that the driver must secure any small children riding in the front seat. Violations of either provision are punishable by a fine, but not imprisonment. Police officers are authorized to make warrantless arrests of persons violating the seatbelt law or issue citations.

The defendant was driving her truck in Lago Vista, TX with her two young children in the front seat. Neither child was wearing a seatbelt. Officer Turek pulled the defendant over and arrested her for the seatbelt violations, driving without a license and failure to provide proof of insurance. The defendant was later released on a \$310 bond and pleaded "no contest" to the seatbelt offenses and paid a \$50 fine. The other charges were dismissed.

Thereafter, the defendant brought a §1983 claim against the officer and the City of Lago Vista alleging that the arrest violated her Fourth Amendment right to be free from unreasonable seizure.

**Issue:** Whether a warrantless arrest for a minor criminal offense that is punishable only by a fine is an unreasonable seizure in violation of the Fourth Amendment?

**Rule:** No. The Fourth Amendment does not prohibit

warrantless arrests for minor criminal offenses even if the offense is not punishable by imprisonment.

**Discussion:** The Supreme Court reasoned that the Fourth Amendment requires a balancing of individual and governmental interests. In this case, Mrs. Atwater pleaded "no contest" to the charges and admitted that neither she nor her children were wearing seatbelts. Consequently, Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. Although he was not required to do so, Texas law authorized Turek to arrest Atwater for the seatbelt violation. Therefore, absent allegations that the arrest was more harmful to her privacy interests than a normal custodial arrest, Officer Turek's actions satisfied constitutional requirements.

The Supreme Court declined to announce a new constitutional rule prohibiting an arrest if the offense is not punishable by jail time and there is no compelling governmental need for immediate detention. The Court noted that the Fourth Amendment is not served by standards requiring sensitive, case-by-case determinations of government need, "lest every discretionary judgment in the field be converted into an occasion for constitutional review."

### **\*\*CAUTION\*\***

**This case does not in any way change the fact that, in North Carolina, officers may not make arrests for infractions, including seatbelt violations.**



## NORTH CAROLINA COURT OF APPEALS

### Fourth Amendment/ Search Warrant/Probable Cause/Strip Search/ Reasonableness:

*State v. Johnson*, \_\_\_ N.C. App. \_\_\_ (2001).

**Facts:** Beginning in April 1998, Chapel Hill police began receiving information from various anonymous sources that crack cocaine was being sold from Apartment K-2 in Camelot Village Apartments. One of these tips identified the defendant, William Johnson, as one of the sellers. In all, the police received about ten calls implicating Apt. K-2 in drug activity. In addition, at least two controlled purchases were made from the apartment in March 1999. On March 15, 1999, Officer Burgess applied for and obtained a search warrant for the apartment and the defendant. During the search of the premises police discovered two shot guns and a pair of electronic scales. An initial search of the defendant uncovered \$2,000 in small bills. The police then asked the defendant to remove his clothing and bend over at the waist at which time officers observed a piece of plastic protruding from the defendant's anus. The officers instructed the defendant to remove the object and found 17 bags of

what was later determined to be crack cocaine.

The defendant was charged with possession with intent to sell and deliver and maintaining a dwelling for selling a controlled substance. Defendant moved to suppress all the evidence seized alleging that the warrant was not based on probable cause and that the strip search of his person exceeded the scope of the search warrant and was conducted in an unlawful manner. The trial court denied the defendant's motion to suppress.

**Issue 1:** Whether there was probable cause for the issuance of the search warrant?

**Rule:** Yes. Under the totality of the circumstances, there was probable cause to issue the search warrant.

**Discussion:** North Carolina has adopted the totality of the circumstances test to determine whether probable cause existed for the issuance of a search warrant. This requires a practical, common sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place or on a particular person. When the affidavit contains hearsay information, it is logical for the judicial official to consider the veracity or basis of knowledge of the informants.

In the present case, officers had received numerous anonymous complaints

regarding this apartment and this defendant. The police were able to corroborate some of the information given. More importantly, two controlled purchases had been made from this apartment, one not more than 72 hours prior to the issuance of the warrant. Thus, the Court of Appeals held that under the totality of the circumstances analysis there was a substantial basis for concluding that there was probable cause to issue the search warrant.

**Issue 2:** Whether the strip search of the defendant exceeded the scope of the warrant?

**Rule:** No. In limited circumstances officers may conduct a strip search if they have obtained a search warrant for controlled substances and the warrant describes the person(s) to be searched.

**Discussion:** The scope of a search warrant is defined by the object of the search and the place where there is probable cause to believe the object will be found. In the case of a search of a person, each case requires a "balancing of the need for the particular search against the invasion of personal rights that such a search entails."

The search warrant in this case was executed for controlled substances likely to be found on the premises or persons described in the warrant. The defendant was named in the warrant and thus, a search of his person for controlled substances was within the scope of the warrant. The Court of Appeals

noted that neither the United States Supreme Court, nor the North Carolina Supreme Court has required a heightened standard for strip searches. Thus, the test is merely whether such a search was reasonable under the totality of the circumstances. The court concluded that the object of the search could readily be concealed on the defendant's person such that it would not be discovered without a strip search. Consequently, the strip search of the defendant was reasonable. The Court also noted that the officers did not touch the defendant during the strip search. Instead they instructed him to remove his clothing and asked the defendant to remove the package himself. Thus, the strip search was conducted in a reasonable manner.

**\*\*NOTE\*\***

**A strip search is NOT the same as a body cavity search. A body cavity search requires (1) probable cause, (2) a search warrant, and (3) qualified personnel who will conduct the search in a reasonable manner.**

**Fourth Amendment/ Seizure/ Factual Justification:** *State v. Milien*, \_\_\_ N.C. App. \_\_\_ (2001).

**Facts:** On December 16, 1998, Officer Thompson was conducting surveillance in an area around a mobile home park. Thompson was positioned in the woods near a dirt path when he observed a two-tone beige Impala driven by a man wearing a brown jacket and baseball cap. Thompson saw the man exit the car and walk onto the dirt path directly in front of him.

The man took a plastic bag containing 2-3 ounces of an off-white, rocky substance from his jacket pocket, dug a hole and buried the bag. Thompson relayed this information to Agent Angela Bryan. Two days later, Thompson and another officer positioned themselves in the same location that Thompson had been two days earlier. Later that morning, Agent Bryan and three other task force officers spoke with several men at the mobile home park, including the defendant. One of the officers, Benson, told the men that he was going to get a drug dog to search the wooded area and he and the other officers left the scene. Thompson then saw the same car pull into the area and the same man come down the dirt path wearing the same jacket and baseball cap. He then dug up the bag, put it in his pocket and drove away. Thompson contacted the other officers to tell them that the suspect was leaving the mobile home park.

Benson followed the suspect's vehicle and it turned into a private drive. When Benson turned in behind the car, the suspect sped up and threw a white plastic bag out of the window. Benson activated his blue lights, but the suspect's car did not stop. The suspect finally stopped when Benson activated his siren. The officers patted down the defendant and handcuffed him although he was not formally under arrest at that time. Benson then left the defendant with Agent Bryan while he searched for the plastic bag the defendant had thrown out of the window. The plastic bag was located about 15 minutes later and the defendant was

arrested. The defendant moved to suppress the evidence. The trial court denied the motion, holding that there was reasonable suspicion to justify the stop of defendant's vehicle and that the detention was limited in scope and duration.

**Issue:** Whether the officers' conduct in handcuffing the defendant while they searched for evidence amounted to an investigatory detention or an arrest?

**Rule:** It was an arrest. An arrest occurs when law enforcement officers interrupt the activities of an individual and significantly restrict his freedom of action.

**Discussion:** In order to conduct an investigatory stop of an individual, an officer must have reasonable suspicion that criminal activity is afoot. Officers must have probable cause to justify an arrest.

The defendant conceded that the officers had reasonable suspicion to stop his vehicle. He argued that by placing him in handcuffs and detaining him for 15 minutes while officers searched for the plastic bag, the officers' conduct exceeded the limits of an investigatory stop. The Court of Appeals agreed that handcuffing the defendant and detaining him for 15 minutes was a significant restriction on the defendant's freedom of action, and therefore, constituted an arrest requiring probable cause.

Probable cause depends on the facts and circumstances

within the officers' knowledge and of which they had reasonably trustworthy information sufficient to warrant a prudent person to believe that the suspect had committed a crime. The Court listed several factors to consider in determining whether probable cause exists including, (1) the defendant's suspicious behavior; (2) flight from the officer or the area; (3) the discovery of what appears to be contraband in the possession of the defendant; and (4) the defendant's effort to conceal evidence after realizing police presence.

The Court held that Officer Thompson's observations of the defendant burying and retrieving the plastic bag together with the fact that the defendant threw a plastic bag out of the window once he became aware of the police and his failure to stop when the officers activated their blue lights were sufficient to establish probable cause to seize the defendant, and that all of these facts were known to the officers prior to the time defendant was placed in handcuffs.

**FYI . . . . .**

### **Audio Recording Rebutts Allegations of Excessive Force**

A recent case in the 6<sup>th</sup> Circuit emphasizes the importance an audio recording may have in rebutting allegations of

excessive force. In *Smith v. City of Chicago*, 242 F.3d 737 (2001) the court held that an audio tape recording of a conversation between police officers and a dispatcher made during a traffic stop was admissible in a civil case to prove that officers did not use excessive force and that the officers had their siren activated.

In order to be admissible in court, audio and video recordings must be authenticated. Essentially, the party that wants to put the recording into evidence must establish that the recording is a true and accurate depiction of the incident between the parties. Although authentication is done on a case by case basis, one of the factors considered is whether the recording captures the entire incident in question. Consequently, the decision of when to start the recording is critical. Likewise, the decision to stop recording is equally critical in establishing whether the tape is an accurate depiction of the incident in question. A videotape that contains unrecorded audio gaps may not be an accurate depiction of the complete incident between the parties.

The case cited above shows the importance of recordings in defending officers against allegations of excessive force and misconduct. In the uninterrupted recording, the dispatcher verifies that the subject had several outstanding warrants. Consequently, there was no dispute that the officers had a reason to stop the subject.

Also, the tape records the officers using their siren for an extended period of time. The court held the recording of the siren for an extended period of time established that they had reason to believe that the subject was trying to avoid arrest. Based on the above, the court ruled there was not a material dispute as to what occurred that day and that the officers actions were lawful.

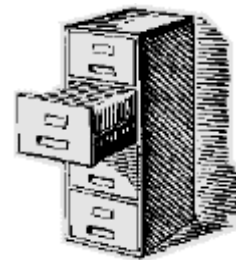
The bottom line is that, in a civil case, a video or audio recording is more likely to be admissible under circumstances where the entire event is recorded. Some have argued that the less recorded, the less likely the tape will be used against the officer. However, experience has shown that the failure to use tools that we have available to us may provide someone the opportunity not only to make false allegations but also require a lengthy trial over factual allegations.

### **ENFORCEMENT – HANDICAPPED PARKING VIOLATIONS**



Officers may write handicapped parking violations again on city parking tickets (“small tickets”). On May 17, 2001, the legislation authorizing our local handicapped parking ordinances was approved. Those two ordinances appear on the parking ticket as follows:

“13. \_\_\_ Parking in Handicapped Space \_\_\_ \$100.00”; and  
“8. \_\_\_ Blocking Curb Cut \_\_\_ \$100.00.”



### **PUBLIC RECORDS FREQUENTLY ASKED QUESTIONS & ANSWERS**

- ◆ **Q:** What is a Public Record?
- ◆ **A:** G.S. §132-1 defines a public record to mean all documents, papers, letters, maps, books, photographs, films, sound recordings, tapes, electronic data processing records, or other documentary material, regardless of form, made or received pursuant to law or ordinance in connection with the transaction of public business by a public agency.
- ◆ **Q:** Does this apply to the Charlotte-Mecklenburg Police Department?
- ◆ **A:** YES.
- ◆ **Q:** What about criminal investigations?
- ◆ **A:** Records of criminal investigations or criminal intelligence information compiled by law enforcement agencies are not public records. However, a court may order that these records be released.
- ◆ **Q:** Are there any criminal investigative files that are public record?
- ◆ **A:** Yes. G.S. 132-1.4 provides that certain criminal investigative

records are public records. These items include:

- (1) The time, date, location and nature of a violation or apparent violation of the law reported to a public law enforcement agency.
- (2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.
- (3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.
- (4) The contents of "911": and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other identifying information of the caller, victim, or witness.
- (5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.
- (6) The name, sex, age, and address of a complaining witness.

- ◆ **Q:** Is e-mail considered a public record?
- ◆ **A:** Yes, if the information

contained in the e-mail constitutes public information.

- ◆ **Q:** Does this mean I will be required to save certain e-mails?
- ◆ **A:** YES! An e-mail retention policy will be forthcoming to explain which e-mails are public record and should be retained either by printing out the e-mail or saving it. The law requires CMPD to retain certain documents, including certain e-mail communications.
- ◆ **Q:** Are there any exceptions for withholding certain information from the public?
- ◆ **A:** Yes. There are a number of exceptions provided by law including:
  - (1) Withholding the name or address of a complaining witness if release of the information is reasonably likely to pose a threat to the mental or physical health, or safety of the complaining witness or materially compromise a continuing or future criminal investigation.
  - (2) If a public law enforcement agency believes that release of information that is a public record would undermine an ongoing or future criminal investigation, the agency may request an order from the court to prevent disclosure.
- ◆ **Q:** What if the criminal case has gone to the District Attorney's Office

and has been accepted for prosecution?

- ◆ **A:** If the records have gone to the District Attorney's office when a request is made for the records, the rules of discovery apply and the requesting person should be referred to the appropriate Assistant District Attorney.
- ◆ **Q:** What if an officer or other employee receives a subpoena for documents concerning a criminal investigation or criminal intelligence matter?
- ◆ **A:** The Police Attorney's Office should be notified immediately. A subpoena may not be required for documents that are considered public records. If the investigative file contains information that should be protected, a court order may be required and the Police Attorney's Office would move to quash the subpoena or request a protective order.
- ◆ **Q:** What if the criminal case is closed but a civil attorney wants the investigative file?
- ◆ **A:** Refer the attorney to the Police Attorney's Office so that we may review the file and determine what information can be released.

