



CMPD POLICE LAW BULLETIN

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Forward: In this issue the **United States Supreme Court** reaffirmed that an officer's subjective motivations for making an arrest are irrelevant to the Fourth Amendment. The **United States Supreme Court** also held that the scanning of the outside of a private home with a thermal imaging device is a search that requires a search warrant. The **North Carolina Court of Appeals** **WITHDREW** its opinion in *State v. Milien*, ___ N.C. App. ___ (15 May 2001). The *Milien* case had held that an arrest occurred when a suspect was handcuffed for fifteen minutes because the suspect's freedom of action was significantly restricted. The **North Carolina Court of Appeals** also reviewed the doctrine of constructive possession and what evidence is sufficient to support it.

HIGHLIGHTS:

UNITED STATES SUPREME COURT:

Fourth Amendment/Arrest/ Subjective Motivation and Pretext:

In *Arkansas v. Sullivan*, ___ S.Ct. ___ (29 May 2001), the United States Supreme Court reaffirmed that an officer's subjective motivation for making an arrest is irrelevant to the Fourth Amendment. **NOTE:** The Fourteenth Amendment **DOES** consider an officer's subjective intent if the intent regards a racial, ethnic, or gender based animus. See page 2.

Fourth Amendment/ Search/New Technology:

In *Kyllo v. United States*, ___ S.Ct. ___ (11 June 2001),

the United States Supreme Court held that the use of a thermal imaging device to scan the heat signature of a private home **IS A SEARCH** under the Fourth Amendment and therefore requires a search warrant. See page 3.

NORTH CAROLINA COURT OF APPEALS:

Fourth Amendment/ Seizure/ Factual Justification:

The North Carolina Court of Appeals **WITHDREW** its opinion in *State v. Milien*, ___ N.C. App. ___ (15 May 2001) by an order dated 25 May 2001. The Court's holding that the placing of the defendant in handcuffs for fifteen minutes constituted an

arrest is now withdrawn. Officers should not consider the opinion, as reported in the May 2001 issue of the *Police Law Bulletin*, as binding law until there is further word from the North Carolina Court of Appeals. As soon as there is further word, it will be reported in the next available *Police Law Bulletin*.

Constructive Possession/Dominion and Control/Sufficient Evidence:

In *State v. Matias*, ___ N.C. App. __ (15 May 2001), the North Carolina Court of Appeals held that the following evidence, taken together, was sufficient to support a finding of constructive possession of cocaine:

1. Odor of marijuana emanating from a vehicle.
2. Marijuana seeds found throughout the vehicle.
3. Marijuana and powder cocaine found in the same plastic bag found in an area of the car occupied solely by the defendant.
4. Evidence that the defendant had been in the vehicle for at least twenty minutes.
5. The officer's opinion that the defendant, based on his position in the vehicle, was the

only one in the vehicle that could have placed the plastic bag in the place where it was found.

BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Arrest/ Subjective Motivation and Pretext:

Arkansas v. Johnson, ___ S.Ct. ____ (29 May 2001)

FACTS: Kenneth Sullivan was stopped for speeding and for having an improperly tinted windshield. Officer Joe Taylor approached Sullivan's vehicle and requested to see Sullivan's driver's license, registration, and insurance documentation. Upon examining the driver's license, Officer Taylor realized that he was aware of "intelligence on [Sullivan] regarding narcotics."

Sullivan was continuing to search for the registration and insurance documents and opened the door of his vehicle in that search. When Sullivan opened the vehicle's door, Officer Taylor observed a hatchet on the vehicle's floorboard. The officer then arrested Sullivan and charged him with

speeding, driving without his registration and insurance documentation, carrying a weapon, and improper window tinting.

A subsequent inventory search of Sullivan's vehicle was conducted pursuant to the arrest. The search found a bag of methamphetamine hidden under the vehicle's armrest. Sullivan contended that the arrest was merely a "pretext and sham to search" that violated his Fourth Amendment rights.

Sullivan also alleged that the arrest violated his Fourteenth Amendment rights. However, Sullivan never presented any evidence or argument that Officer Taylor arrested him on the basis of a discriminatory animus. Without evidence of a discriminatory animus, the Fourteenth Amendment is not violated and the Court did not consider it.

ISSUE: Whether or not Officer Taylor's alleged subjective motivation in making the arrest violated the Fourth Amendment?

RULE: NO. An officer's subjective intentions play no role in ordinary, probable cause **Fourth Amendment** analysis. However, the **Fourteenth Amendment** is violated when a police action is taken based on a discriminatory intent.

DISCUSSION: The Defendant in this case failed to submit any evidence of a discriminatory intent on the part of Officer Taylor. For that reason, the Supreme Court only considered Sullivan's allegation that his Fourth Amendment rights were violated.

The Court reaffirmed the fact that a proper **Fourth Amendment** analysis of arrests, searches, and seizures does not consider an officer's actual or alleged motivations. Rather, Fourth Amendment analysis is entirely limited to determining whether the officer possessed the required legal justification for the arrest, search or seizure that was conducted. If the justification was present, then the officer's actions do not violate the Fourth Amendment. The legal justifications or standards required by the Fourth Amendment are:

1. Reasonable suspicion that criminal activity is afoot for an investigative detention.
2. Reasonable suspicion that a person may have a weapon for a Terry frisk.
3. Probable cause to believe a person has committed or is committing a crime for arrest. (Some arrests may be made without an arrest warrant, however all arrests must be supported by probable cause.)
4. Probable cause to believe evidence will be found in order to search. (The rule

is that searches can be conducted only with a search warrant. However, there are many exceptions to the warrant requirement.)

5. The force used in the completion of any arrest, search, or seizure must be reasonable.

Fourth Amendment/ Search/New Technology: *Kyllo v. United States*, _____ S.Ct. _____ (11 June 2001)

FACTS: Federal agents were suspicious that Danny Kyllo was growing marijuana in his home. Knowing that high-intensity lamps are often used in such marijuana operations, the agents used a thermal imaging device to scan the Kyllo home, without a search warrant to do so. The results showed that the garage roof and wall were substantially warmer than the rest of Kyllo's home or any of the other neighboring homes.

The agents then obtained a search warrant for Kyllo's home, based in part on the thermal scan. The agents then searched the home and found marijuana growing. Danny Kyllo was then arrested, charged, and convicted.

ISSUE: Was the thermal scan of Kyllo's home a search under the Fourth Amendment?

RULE: YES. When the government uses a device that is not in general public

use to explore details of a private home that would previously have been unknowable without physical intrusion, then the surveillance is a Fourth Amendment search.

DISCUSSION: The United States Supreme Court announced a new standard to guide law enforcement in its use of new and advancing technology. A search is conducted when devices are used that:

1. Are not in general public use, **and**
2. explore details of a private home, **that**
3. would previously NOT have been knowable without physical intrusion.

The decision in this case is specifically focused on "the sanctity of the home." The law of Fourth Amendment searches is ruled by the reasonability of one's expectation of privacy. No place is considered more private than a person's own home.

Officers should always remember that a person's Fourth Amendment right against unreasonable searches is the strongest in their own dwelling. What may be a reasonable search in a public place or in a vehicle, may not pass muster if it is a search of the home. The Court did not speak on whether the use of "device[s] not in public use" to scan a person or vehicle in a public

area will be considered a search. However, in using such equipment, officers should remember that if the device is revealing something that would have required a physical intrusion before the advent of the device, then it is possible that use of the device will be considered a search under the Fourth Amendment.

NORTH CAROLINA COURT OF APPEALS

Constructive Possession/Dominion and Control/Sufficient Evidence:
State v. Matias, ___ N.C. App. ___ (15 May 2001)

FACTS: On March 28, 1999, Officers Qualls and Epps were patrolling the parking lot of the Creekside Apartments in Burlington. A vehicle passed by them travelling at approximately 5 miles per hour. After the car had passed, Officer Qualls detected a moderate odor of marijuana that had not been there before the car had passed.

The vehicle proceeded to park in the parking lot and Officer Qualls approached it to question the driver. The vehicle contained the driver and three passengers. The driver was non-responsive to the officer's questions and the right rear passenger, Joel Matias, spoke up to assist in the communication.

Officer Epps also approached the vehicle and could also detect the odor of marijuana. The driver was unable to produce a driver's license and

was arrested for driving without a license. The remaining passengers were all ordered out of the vehicle and a search of the vehicle incident to arrest was conducted.

Officer Epps found marijuana seeds throughout the vehicle, a pack of rolling papers, and a plastic bag stuck in a crack on the back of the right rear passenger seat. The right rear passenger seat had been occupied by Joel Matias. The bag contained marijuana and another plastic bag containing powder cocaine.

Joel Matias was arrested and charged with possession of cocaine. At trial, he testified that he had been picked up by the driver, who he did not know, about twenty minutes previous to the encounter with the officers. He denied all knowledge of the cocaine. Officer Epps testified that Matias was the only occupant of the vehicle that could have placed the bag where it was found.

The Defendant, Joel Matias, was convicted of felony possession of cocaine on September 14th, 1999. The Defendant appealed the conviction on the grounds that there was insufficient evidence to convict him of the crime. Since the cocaine was not found directly on the person of Joel Matias, the Court examined the case in light of the doctrine of constructive possession.

ISSUE: Was the evidence presented in the case sufficient to allow a jury to find that the Defendant constructively possessed cocaine?

RULE: Yes. Under North Carolina law, constructive possession is proven if it can be shown that the defendant had the **intent** and **capability to exercise control** over the contraband. Intent and capability to control can only exist when the defendant is aware of the presence of the contraband.

DISCUSSION: The doctrine of constructive possession is the legal theory that allows a person to be convicted of possessing contraband even when the contraband is not actually found on their physical person. Several factors can be relevant to constructive possession. Examples include:

- The distance between the defendant and where the contraband is found.
- The defendant's express or inferred knowledge of the contraband.
- The amount of time the defendant was in the proximity of the contraband.
- The number of people, other than the defendant, that had access to the area where the contraband was located.

The number of people that have access to the area where the contraband is found is extremely important. If the defendant did not have exclusive possession of the area where the contraband is found, then the State must present evidence specifically incriminating the defendant in order to support

constructive possession. The mere presence of the defendant, without more, is not sufficient proof of constructive possession.

In this case, the Court focused on each piece of evidence and the inferences that could reasonably be drawn from them. The marijuana odor, rolling papers, and seeds gave rise to the inference that everyone in the vehicle was taking part in smoking marijuana. The cocaine was found in the bag of marijuana. The defendant testified that he had been in the car for at least twenty minutes. These facts gave rise to the inference that he would certainly be aware of the marijuana's presence, and hence the cocaine found in the same bag.

Next, the Court focused on the fact that the bag was found *in the defendant's seat*. That fact coupled with the officer's opinion that only the defendant was in the position to place the bag where it was found, gave rise to the key inference. The defendant not only knew about the cocaine, but intended to and exerted control over the cocaine.

It is important to note that in this case the Court only held that the evidence *did support* the inferences that led to constructive possession. That does not mean that a jury *must* make such inferences. This case is an example of what minimal evidence is

sufficient to support an allegation of constructive possession.

ABANDONED VEHICLES: WHAT TO DO???

IF A VEHICLE IS CREATING A TRAFFIC HAZARD, OR IS PARKED IN VIOLATION OF A PARKING ORDINANCE, IT MAY BE TOWED IMMEDIATELY.

The following discussion and procedures apply only to vehicles that do not present a traffic hazard nor violate a parking ordinance. This article varies slightly from prior *Police Law Bulletin* articles on this subject. To the extent that there is a difference, this article should be followed and the inconsistent portion of prior articles should be disregarded.

Vehicles that have been left abandoned or unattended on the right-of-way, yet are not creating a traffic hazard or violating a parking ordinance, should be addressed by CMPD officers in the manner that follows. Such vehicles are not regulated by any single statute and are, therefore, subject to different governmental agencies and procedures depending upon where they are located. Officers should defer to another agency when a vehicle is more properly within that

agency's jurisdiction, as described in this article.

N.C.G.S. 20-161(a) through (d) regulates the parking of vehicles in areas outside of city limits. Generally, cities have the responsibility of regulating parking within their corporate limits. However, N.C.G.S. 20-161(e) **DOES** apply within the boundaries of a city. That statute provides that if a vehicle is left upon the right-of-way of a public highway for **48 hours** or longer, then any law-enforcement officer investigating such a vehicle may have the vehicle towed.

In order to verify the time period that a vehicle has remained parked in such a manner, an officer first encountering the vehicle should affix a sticker to the vehicle. The sticker provides notice to the vehicle's owner that the vehicle will be towed if it is not timely moved, and also notes the time and date the vehicle was found by the officer. **CMPD towing stickers are available in property control.** Before towing such a vehicle, an officer should attempt to contact the registered owner of the vehicle and give them personal notice. Although 20-161(e) gives authority to tow to any law-enforcement officer, that authority and responsibility has been divided among various government agencies depending upon the geographic location of the vehicle. In addition,

the City of Charlotte and Mecklenburg County both regulate abandoned vehicles by ordinances that are enforced by the City Community Improvement Division or the Mecklenburg County Code Enforcement Division. The relevant City ordinances, 10-136 through 10-142, and the Mecklenburg County Code also regulate junked, abandoned, and hazardous vehicles located on private property, not just vehicles that are located on the right-of-way. However, the towing of abandoned vehicles under the City and County ordinances require a seven-day waiting period before the vehicle may be towed.

The agencies involved, their areas of responsibility, and the sticker types are:

- **North Carolina Highway Patrol:** Interstates I-85, I-77, and I-485. Orange 48-hour stickers.
- **Motorist Assistance Patrol:** Interstates I-85, I-77, and I-485. Yellow stickers. (**NOTE:** This agency does not get involved with towing vehicles).
- **CMPD:** I-277, John Belk Freeway, Brookshire Freeway, Independence Boulevard and the

unincorporated areas of Mecklenburg County. Green 48-hour stickers.

- **City Community Improvement:** All areas within the Charlotte City limits except I-277, John Belk Freeway, Brookshire Freeway, and Independence Boulevard. Red 7-day stickers. Contact: **704-336-2673 or send an e-mail to psloop@ci.charlotte.nc.us**
- **Mecklenburg County Code Enforcement:** All unincorporated areas of Mecklenburg County. Yellow 7-day stickers. Contact: **Tim Taylor, 704-336-3835.**

PROCEDURE

CMPD officers are solely responsible for towing abandoned vehicles on the rights-of-way of I-277, John Belk Freeway, Brookshire Freeway, and Independence Boulevard. In the unincorporated areas of Mecklenburg County, CMPD officers share responsibility with Mecklenburg County Code Enforcement, and officers may either take action on their own, or else contact Mecklenburg County Code Enforcement. In all other areas, CMPD is not the primary response agency and should immediately contact the appropriate agency, as listed above.

In towing an abandoned vehicle in CMPD areas, an officer should contact the dispatcher to obtain 10-96 numbers and request a zone wrecker. The officer should then complete a KBCOPS incident report. The registered owner of the vehicle should be listed as the victim and the officer as the reporting person. The offense to be used is "Vehicle Recovery" and the officer should complete the relevant portions of the recovery template. Upon completion, the officer should print a copy of the report directly to DCI. In addition, a standard "Tow-in" form should be completed and turned into Records.

Please note that Community Improvement does **not** tow abandoned cars along I-277, John Belk Freeway, Brookshire Freeway, and Independence Boulevard. Inspectors drive their personal vehicles on the job and are confronted with safety issues when dealing with vehicles in areas where traffic volume is heavy and vehicles travel at high speeds. In addition, their notification process and corrective period under the ordinance is not as expedient as is needed on these roads.

