CMPD POLICE LAW BULLETIN

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Forward: In this issue we review the North Carolina Supreme Court's decision in *State v. Jackson*, in which the court held that a handgun does not have to be operable in order to charge an individual with possession of a firearm by a convicted felon under G.S. 14-415.1. We also review a North Carolina Court of Appeals case, *State v. Milien*, in which the court held that, based on all of the circumstances, officers had probable cause to arrest the defendant at the time they placed him in handcuffs.

HIGHLIGHTS:

NORTH CAROLINA SUPREME COURT:

Criminal Law/ Elements/ Possession of Firearm by Felon:
In *State v. Jackson,* ___ N.C. ___ (8 June 2001), the North Carolina Supreme Court held that a handgun does not need to be operable in order to charge an individual with possession of a firearm by a convicted felon under G.S. 14-415.1.

NORTH CAROLINA COURT OF APPEALS:

Fourth Amendment/ Seizure/Factual Justification:
In *State v. Milien,* ___ N.C. App. ___ (19 June 2001), the North Carolina Court of Appeals held that, based on all of the circumstances, officers had probable cause to arrest the defendant at the time they placed him in handcuffs.

BRIEFS:

NORTH CAROLINA SUPREME COURT:

Criminal Law/Elements/ Possession of Firearm by Felon:
State v. Jackson, ___ N.C. ___ (8 June 2001)

FACTS: On March 24, 1998, Officers Jeff Troyer and Robert Garrett of the Charlotte-Mecklenburg Police Department responded to a call at a public housing project that an individual was waving a gun in the air. Upon arrival, the officers approached the defendant, who matched the description given by the complainant. Officer (now Sergeant) Garrett asked for and received consent to search the defendant. During the search, Officer Troyer found a loaded

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handgun tucked in the waistband of the defendant's pants. When the officers attempted to arrest the defendant for carrying a concealed weapon, he broke free and ran. The officers apprehended and arrested him after a brief chase. The defendant had a prior conviction for voluntary manslaughter and was also charged with possession of a firearm by a convicted felon under G.S. 14-415.1.

At trial, Todd Nordhoff of the Charlotte-Mecklenburg Crime Laboratory testified that the gun taken from the defendant did not have an internal pin and spring. In Nordhoff's opinion, without the spring the gun "was not normally operable." He also testified that the gun could be fired by removing the grip and manually tripping the internal mechanism and could possibly be fired by hitting it hard on the top of the weapon

The defendant moved to dismiss the possession of a firearm charge on the grounds that there was insufficient evidence that the gun was operable. The trial court denied the motion and the defendant was convicted and sentenced to an active term of imprisonment.

ISSUE: Must a handgun be operable in order to charge an individual with possession of a firearm by a convicted felon under G.S. 14-415.1?

RULE: No. A handgun need not be operable in order to charge an individual with possession of a firearm by a convicted felon under G.S. 14-415.1.

DISCUSSION: The North Carolina Supreme Court held that the focus of the language of G.S. 14-415.1 ("purchase, own, possess, or have in custody, care, or control") is on the felon's access to the firearm and not the firearm's operability at any given point in time. In addition, the objective of the statute is to prevent a show of force by felons, either real or apparent. An unloaded or inoperable firearm has the same effect when it is pointed or displayed as an operational weapon. The display of a gun instills fear in the average citizen and creates an immediate danger that a violent response will occur. Therefore, the inoperability of a handgun is not a defense to the charge of possession of a firearm by a felon.

NORTH CAROLINA COURT OF APPEALS:

NOTE: The following case was originally reported in the May 2001 issue of the *Police Law Bulletin*. In its first opinion, the North Carolina Court of Appeals held that placing the defendant in handcuffs for fifteen (15) minutes constituted an arrest. That opinion was withdrawn and the court issued a second opinion, which is summarized below.

Fourth Amendment/ Seizure/Factual Justification:
State v. Milien, ___ N.C. App. ___ (19 June 2001).

FACTS: On December 16, 1998, Investigator Thompson was conducting surveillance in an area around a mobile home park located in Johnston County. 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 fifteen (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: Did the officers have probable cause to arrest the defendant at the time they stopped him and placed him in handcuffs?

RULE: Yes. Based on all of the circumstances, the officers had probable cause to arrest the defendant at the time they stopped him and placed him in handcuffs.

DISCUSSION: In order to conduct an investigatory stop of an individual, an officer must have reasonable suspicion that criminal activity is afoot. An officer must have probable cause in order 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 fifteen (15) minutes while officers searched for the plastic bag, the officers conduct exceeded the limits of an investigatory stop.

The Court of Appeals stated that it was unnecessary to determine whether the seizure of the defendant was an investigative detention or an arrest because the officers had probable cause to arrest the defendant at the time they stopped him and placed him in handcuffs.

Probable cause depends on the facts and circumstances within the officer's knowledge and of which he/she has reasonably trustworthy information sufficient to warrant a prudent person to believe that the suspect has 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 the following factors established probable cause to support an arrest of the defendant: (1) the defendant was observed burying a plastic bag containing an rocky, off-white substance; (2) two days later, immediately after being told by drug agents that a drug dog would be brought to the area, the defendant was seen digging up the plastic bag and leaving the mobile home park with the bag in his pocket; (3) when the defendant realized he was being followed, he sped up and threw a white plastic bag out of the car window; and (4) the defendant did not respond when the drug agents turned on their blue light and only stopped after they turned on their siren.

Therefore, at the time the defendant was handcuffed, the facts and circumstances within the drug agents' knowledge and of which they had reasonably trustworthy information were sufficient to warrant the reasonable belief that the defendant had committed or was committing an offense.

PUBLIC CONSUMPTION OF BEER AND WINE ON STREETS AND SIDEWALKS

Section 15-3(b) of the City Code prohibits the consumption of beer ("malt beverage") and wine ("unfortified wine") on any public street or sidewalk in the city. Section 15-3(d) of the Code also prohibits the possession of an open container of beer or wine on a public street or sidewalk.

Under these sections of the ordinance, public sidewalk refers to sidewalks maintained by the city and located adjacent to public streets. It does not include sidewalks that are privately owned and maintained, such as those located in shopping centers and apartment complexes.

Section 15-3(c) of the Code prohibits the consumption of beer and wine on the private business premises of another without permission of the owner or person in control of such premises, and Section 15-3(e) makes it unlawful to drop, throw, cast, or deposit a used container of beer or wine on a public street or sidewalk, or on private business premises without permission.

Under these sections of the ordinance, enforcement action can be taken on **private business premises** (including sidewalks and parking lots) **only** if the consumption or container disposal is done without permission **and** the owner or person in control of the premises is willing to come to court and testify as to lack of permission. Please note that **apartment complex parking lots** are **not** private business premises for the purposes of this ordinance. Apartment complexes that prohibit public consumption in common areas are solely responsible for enforcing such regulations.

COMMUNITY IMPROVEMENT—TOWING PROCEDURES

Under the City Code, Community Improvement inspectors are responsible for the removal and disposition of abandoned, junked, and hazardous motor vehicles. Section 10-140 of the City Code provides that any such vehicle found to be in violation of the Code may be removed to a storage area.

Prior to removal, the Community Improvement inspector will place a reddish-orange sticker on the vehicle that provides notice of the violation and specifies the time for compliance, which is seven (7) days. In addition, if the vehicle is located on private property, a copy of the sticker will be sent by certified mail to the property owner. If a number of vehicles are involved, the inspector will not place stickers on the vehicles, but will leave a notice of violation that includes all of the vehicles. The inspector will also send a copy of the notice of violation by certified mail to the property owner.

Officers of the CMPD may be dispatched to the scene of a vehicle tow by a Community Improvement inspector in order to stand by in the event a crime occurs in their presence. Normally, the inspector will not be present initially at the scene of a tow. The contract wrecker operator should have in his/her possession a document from Community Improvement ordering the tow.

Occasionally, a wrecker operator will encounter a vehicle owner who objects to the tow. If that occurs, the officer should inform the vehicle owner that the wrecker operator has received authorization to make the tow. In addition, the officer should inform the owner that an inspector will be brought to the scene and if the owner persists in preventing the tow at that time, he/she will be subject to arrest, as described below. If the vehicle owner is still uncooperative, the wrecker operator will contact an inspector and request that he/she come to the scene.

Under Section 10-18 of the City Code, it is unlawful for any person to interfere, harass, or otherwise impede a Community Improvement inspector who is carrying out or acting within the scope of his/her duties, and law enforcement officers are authorized to make an arrest in such circumstances. A violation of this Code provision is a Class 3 misdemeanor. Officers should use this Code section (C.O. 10-18) when charging violators who interfere with, harass, or otherwise impede a Community Improvement inspector at the scene of a vehicle tow. The charging language to be used is as follows:

. . . did unlawfully and willfully interfere, harass, or otherwise impede (Insert

name), a city Community Improvement inspector, who was carrying out or acting within the scope of his/her duties, to wit: towing a(n) (abandoned) (junked) (hazardous) motor vehicle, in violation of Sec. 10-18(a), City Code of Charlotte, N.C. This offense having occurred within the corporate limits of the City of Charlotte.

NOTE: The towing of a vehicle by a Community Improvement inspector is for a violation of law and, therefore, is different from a repossession or towing of a vehicle from a private parking lot. In those situations, an officer's responsibility is to prevent a breach of the peace and if the owner of the vehicle is present and objects to the tow, the officer should not allow the vehicle to be towed (See the April and October 2000 issues of the *Police Law Bulletin*). In a towing situation involving Community Improvement, an officer should follow the procedures set forth in this article, and an owner's objection should not prevent the vehicle(s) from being towed.

IGNITION INTERLOCKS: WHAT DOES IT MEAN?

North Carolina now requires many people convicted of DWI to install and use ignition interlocks on their vehicles, as well as to comply with lower blood-alcohol limits, as a part of re-gaining their privilege to drive. The laws governing the new requirements went into effect July 1, 2000.

Ignition interlocks are devices that require the driver of a car to blow into a nozzle that checks the breath for alcohol. The car will not start if alcohol, or too much alcohol, is detected. Now that a year has passed the first offenders under the new scheme have completed their standard one year license revocation (limited privileges are available during that year to some offenders), officers may begin to see new driver's licenses with special restrictions.

There are three (3) types of driving privileges affected by the new laws. They are:

1. Limited Driving Privileges (issued by the courts)
2. License Restorations (issued by the DMV)
3. Conditional License Restorations (issued by the DMV)

Limited driving privileges are available to less serious DWI offenders during the one-year mandatory revocation that all DWI's require. As of July 1, 2000, any limited privilege issued to a person convicted of DWI who had an intoxilyzer reading of .16 or higher, **MUST** contain both an ignition interlock and a 0.00 blood-alcohol content (BAC) requirement. Violations are treated and charged as DWLR.

License restorations occur when DWI offenders complete the one-year mandatory revocation, and then seek to have their driver's licenses restored. If an offender had an intoxilyzer reading of .16 or higher, or had a prior DWI within seven (7) years, the restored license carries restrictions that require both an ignition interlock and lower BAC limits. The ignition interlock and the lower BAC requirements may last for different time periods. If both are in effect, the violations are treated and charged as DWLR. If both are not in effect, violations are treated as NOL.

Conditional license restorations are given to DWI offenders with multiple prior convictions or a prior conviction within three (3) years. These restorations are only given after at least two (2) years of no driving. Any violation of the terms of the restoration are treated and charged as an NOL. Each individual restoree's DMV issued form will detail the terms.

An enforcement chart that details how the law works is printed on the following page. Officers will receive further roll call training on these laws in the near future.