



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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**Forward:** In this issue we review the U.S. Supreme Court's recent ruling an officer is entitled to qualified immunity from a federal suit when the officer makes a reasonable mistake concerning the amount of force that is permissible under the law. We also take a look at a 6<sup>th</sup> Circuit case that identifies several constitutional issues concerning a Department's assistance with a public housing development's ban program. We also review the requisite elements of premeditation and deliberation for a 1<sup>st</sup> degree homicide case.

### HIGHLIGHTS:

#### UNITED STATES SUPREME COURT:

##### Use of Force/

##### Qualified Immunity:

The United States Supreme Court in a favorable ruling for police held in *Saucier v. Katz*, 121 S.Ct. 2151 (2001) that an officer is entitled to qualified immunity if the officer makes a reasonable mistake concerning his or her understanding on the amount of force permitted by law.

#### UNITED STATES COURT OF APPEALS

##### Trespassing/Banning/ 1<sup>st</sup> Amendment:

In *Thompson v. Ashe*, 250 F.3d 399 (6<sup>th</sup> Cir. 2001) the 6<sup>th</sup> Circuit Court of Appeals held that officers' enforcement of public

housing authority's no trespassing program did not violate the suspect's constitutional rights.

#### NORTH CAROLINA COURT OF APPEALS

##### Fourth Amendment/ Exigent Circumstances

The North Carolina Court of Appeals in *State v. Nowell*, \_\_ N.C. App.\_\_ (July 17, 2001) held officers did not have exigent circumstances to make warrantless entry to prevent destruction of one joint of marijuana.

##### 1<sup>st</sup> Degree Homicide/Elements

The North Carolina Court of Appeals held that suspect lacked the requisite elements of premeditation and deliberation in *State v. Williams*, \_\_ N.C. App.\_\_ (July 3, 2001).

## **BRIEFS:**

### **Use of Force/**

#### **Qualified Immunity:**

*Saucier v. Katz*, 121 S.Ct. 2151 (2001)

**Facts:** Military police seized Katz, a demonstrator, as he attempted to unfurl a banner on a military base where former Vice President Gore was making a speech. Katz alleged the officers used excessive force in violation of the Fourth Amendment when they physically escorted him from the area and “shoved” him into a police van. The lower court refused to grant the officer’s request for qualified immunity.

**Issue #1:** What is qualified immunity?

**Rule:** Qualified immunity is entitlement held by the defendant not to stand trial or face the burdens of litigation.

**Discussion:** Qualified immunity, like absolute immunity, is a bar against having to respond to allegations contained in a federal lawsuit. Unlike absolute immunity, there are certain conditions that must be fulfilled before it attaches to a defendant in a civil rights case.

**Issue #2:** When does qualified immunity attach?

**Rule:** Qualified immunity attaches to an officer's actions where the law is not clearly established.

**Discussion:** There are two essential steps a court must take in determining whether an officer is entitled to qualified

immunity. First, the court reviews the case in a light most favorable to the plaintiff and asks the question: do the facts alleged show the officer's conduct violated a constitutional right? If the answer to this question is that no constitutional right has been violated, then there is no need to proceed further. The case should be dismissed.

However, if a case can be made that a constitutional right may have been violated, the analysis proceeds to the next step. Here, the plaintiff must establish that the alleged constitutional right was clearly established at the time the incident occurred. The dimension to this inquiry is particularly important to issues concerning use of force. It acknowledges that “reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . An officer might correctly perceive all of the relevant elements and facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense . . . .”

“Qualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.”

This case should not be interpreted that officers will always be immune from suit whenever they are sued in

federal court for excessive force. However, it does provide a bar from suit where an officer reasonably used force in a situation where the law is not clearly established.

### **Trespassing/Banning/ 1<sup>st</sup> Amendment:**

*Thompson v. Ashe*, 250 F.3d 399 (6<sup>th</sup> Cir. 2001)

**Facts:** Thompson was arrested for trespassing when he was located inside the residence of person who was residing in a public housing unit. Thompson advised police that he entered public housing property looking for his brother and had asked the tenant if he could use the phone. The tenant, an acquaintance, invited him into the apartment. Prior to his arrest, Thompson's name was placed on a “no trespassing” list and he was personally advised that he was banned from the public housing project after police advised the authority that Thompson had been arrested for selling cocaine.

In establishing the ban list, the management of the housing project did not adopt a formal set of criteria to determine whose name was placed on the list. Rather, it relied upon information received from the police and other tenants. Moreover, there was not a process in place that routinely reviewed the list to determine if a person's name should be removed.

Thompson sued the housing authority along with the police alleging the no-trespass policy deprived him of the following constitutional rights: the right to privacy, the right to be free from unreasonable searches and seizures, the right to equal protection and due process.

**Issue #1:** Did the no-trespass policy infringe upon Thompson's 14<sup>th</sup> Amendment right to freedom of movement?

**Rule:** No, the right to travel protects a citizen's right to travel from one state to another or to be treated as a welcome visitor from another state or when temporally present in another state.

**Issue #2:** Did the policy infringe upon Thompson's right to enter into and maintain intimate or private relationships?

**Rule:** No, visiting a family member is not a fundamental right protected by either the 14<sup>th</sup> Amendment or the 1<sup>st</sup> Amendment.

**Discussion:** Only certain intimate associations are constitutionally protected; for example, the bearing of children, child rearing and the cohabitation with relatives. Here, Thompson did not live with his relatives but merely was attempting to visit his brother.

Consequently, he was not deprived of a fundamental right.

Since Thompson was not deprived of a fundamental

right, then the policy was not subject to strict scrutiny by the Court. The policy clearly promoted the legitimate governmental interest of preventing criminals from entering a public housing development.

Thompson argued that he should have been provided a hearing before he was denied access to the property. A person has a constitutional right to a "hearing" only if the government is depriving him of a property or liberty interest. Here, the Court noted that Thompson was neither living with his brother or an invited guest. Consequently, he had neither a property nor a liberty interest.

**NOTE:** Ban lists are a valuable tool in curtailing criminal activity and by no means are officers discouraged from taking advantage of this technique.

Officers should be aware of the constitutional issues that exist whenever a public agency participates in a ban program. Take some time to meet with the management and review their policy before the need for arrest arises.

A good ban policy will have a system that provides criteria for the ban and insures that notice has been provided to the undesirable individual. In limited circumstances the individual may have the right to challenge the ban. Most public housing agencies have specific guidelines concerning trespassing and banning. Likewise, the lease may control who is permitted

on the property. Officers who have concerns or questions about banning should not hesitate to contact our office for assistance.



## NORTH CAROLINA COURT OF APPEALS

**Fourth Amendment/  
Exigent Circumstances**  
*State v. Nowell*, \_\_ N.C.  
App. \_\_ (July 17, 2001)

**Facts:** Police stopped Strickland for a traffic violation. After receiving consent to search, police found in the trunk of Strickland's car two suitcases containing approximately fifty pounds of marijuana. Strickland agreed to wear a wire and to participate in a controlled sale of the marijuana to Nowell, the person Strickland intended to sell the marijuana to in the first place. Strickland entered Nowell's home and Nowell eventually tendered money for the marijuana. Either Nowell or one of his partners was overheard saying, "let's roll one." The officers overheard this conversation and made an immediate entry into Strickland's residence.

Once inside the residence, officers asked for and

received consent to search Nowell's residence and found drug paraphernalia and cash.

**Issue #1:** Did the potential loss of one joint justify a warrantless entry into Nowell's residence?

**Rule:** No, A "warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary."

**Discussion:** Although probable destruction or disappearance of evidence may become an exigent circumstance, the determination of whether exigent circumstances are present "must be based on the totality of the circumstances." The phrase "totality of the circumstances" is so often heard when there is a discussion concerning Fourth Amendment issues that we may forget to weigh its meaning. It requires that officers not focus on one particular element or fact that is confronting them. Rather, officers must take into consideration all of the facts or circumstances known to them at that time. Here the officer knew that Nowell had just purchased fifty pounds of marijuana and that someone suggested that they light up only one joint.

Based on the facts known by the officers, at that time, it was unreasonable for the officers to believe that the entire fifty pounds of evidence was being destroyed. The rationale for making destruction of evidence an exigency is the

need to prevent the destruction of evidence that, if lost, would prevent the prosecution of the case.

**Issue #2:** Was the evidence seized after Nowell consented admissible?

**Rule:** No, evidence seized pursuant to an unlawful search may not be admitted into evidence.

**Discussion:** Nowell consented to the search **after** the officers made a warrantless entry into his residence. If the initial entry was illegal, then all items discovered as a result of the illegal search were inadmissible. Nowell's consent to search immediately after the illegal entry was "tainted" by the illegal entry.



### **1<sup>st</sup> Degree Homicide/Elements**

*State v. Williams*, \_\_ N.C. App. \_\_ (July 3, 2001)

**Facts:** Gregory and Jackson went to a club and while inside the club Jackson had an altercation with another patron. After the club closed, Jackson went after the man he previously argued with and a fight occurred outside the club. Several people attempted to break up the fight but were pushed back

by Williams who told people that this was a "one on one" fight. Gregory approached the fight and was pushed back by Williams. Gregory punched Williams in the jaw. Williams pulled out a handgun and shot Gregory in the neck killing him. Williams was indicted and convicted for 1<sup>st</sup> degree murder. Williams challenged his conviction on several grounds including an assertion that there was insufficient evidence to charge him with 1<sup>st</sup> degree murder.

**Issue:** Was there sufficient evidence to charge William's with 1<sup>st</sup> degree murder?

**Rule:** Yes, first degree murder consists of the unlawful killing of another with malice, premeditation and deliberation.

**Discussion:** "Premeditation means that the defendant thought about killing for some length of time, however short."

"Deliberation means that the intent to kill was formulated in a 'cool state of blood' one not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. . . . The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. "

In this case the court provided a non-exclusive

list of factors to consider in determining whether a defendant committed a crime after premeditation and deliberation. The Court looked at: (1) lack of provocation by the victim; (2) the conduct and statements of the defendant before and after the killing; (3) threats and statements made by the defendant before and during the course of the killing; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. In this case the court found there was insufficient evidence to convict the defendant of 1<sup>st</sup> degree murder.

There was not evidence of previous contact between the defendant and the suspect. Furthermore the defendant was provoked by Gregory's previous assault. Also the defendant did not show any planning or forethought about committing the crime. In light of the above, the court found that Williams lacked a "cool state of blood" and therefore lacked the requisite elements of premeditation and deliberation.

## **ARBITRARY PROFILING UPDATE**

The proposed arbitrary profiling policy is drawing closer to completion. Work is continuing on three main components:

1. **The Policy.** Twenty-one meetings with

various police and community groups will be held during the month of September. The purpose of these meetings is to inform the community of the policy and to garner feedback from them to improve the policy further still.

2. **Data Collection.** CTS is designing and evaluating a laptop-based system that will make data collection easier than with paper forms. Included in the technology will be an electronic field interview form. Hand-held computers are being considered for motorcycle and permanent bicycle patrol officers.

3. **Analysis.** A methodology for analyzing the data to be collected has been written and will be presented to the community as well as the police. The methodology takes into account many factors including the demographics of the area an officer patrols. The methodology will also be the basis for a grant proposal that could bring a \$200,000 federal grant to CMPD to aid in implementing the data collection system.

The target effective date for the policy and data collection is still January 1, 2002. The remaining months of 2001 will see all of the above components revised and finalized, as well as training

for all CMPD officers and a pilot-program to troubleshoot prior to 2002. Any questions regarding the issue or the policy may be directed to John Joye via email at: [jjoye@cmpd.org](mailto:jjoye@cmpd.org)



