



# CMPD POLICE LAW BULLETIN

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**Forward:** In this issue we review two North Carolina Court of Appeals cases: *State v. Kincaid*, (Reasonable Suspicion) and *State v. Green*, (Plain View Doctrine). We also preview three cases pending in the United States Supreme Court. Two of the cases deal with Fourth Amendment issues. The third case involves the First Amendment. The cases are: *U.S. v. Knights*, (Probation Searches); *U.S. v. Arvizu*, (Reasonable Suspicion); *Watchtower Bible v. Stratton, Ohio*, (Door to Door Solicitation Regulation).

### HIGHLIGHTS:

#### NORTH CAROLINA COURT OF APPEALS:

##### Fourth Amendment / Search & Seizure / Reasonable Suspicion / Scope of Detention / Automobile Exception:

In *North Carolina v. Kincaid*, \_\_\_\_\_ N.C. App. \_\_\_\_ (2001), the North Carolina Court of Appeals held that an officer's personal knowledge (though in fact erroneous) that a suspect's driver's license was revoked, coupled with an observation of the suspect attempting to conceal his face while driving was a reasonable suspicion that justified a stop of the suspect's vehicle. See page 2.

**Fourth Amendment / Search & Seizure / Plain View Doctrine:** In *North Carolina v. Green*, \_\_\_\_\_ N.C. App. \_\_\_\_ (2001), the North Carolina

Court of Appeals found that an officer's observation of a portion of a plastic baggie protruding from the pocket of a suspect in a high drug area, coupled with that officer's knowledge of the usual custom of packaging controlled substances in plastic baggies, was sufficient to allow the officer to immediately seize the baggie under the plain view doctrine. See page 3.

#### BRIEFS:

#### NORTH CAROLINA COURT OF APPEALS:

**Fourth Amendment / Search & Seizure / Reasonable Suspicion / Scope of Detention / Automobile Exception:** *North Carolina v. Kincaid*, \_\_\_\_\_ N.C. App. \_\_\_\_ (2001).

**FACTS:** Sergeant Timothy Splain of the Asheville Police Department was driving on Montford Avenue in Asheville when Alvin Kincaid drove past him. As Kincaid passed, he quickly looked away from the Sergeant and raised his hand to his face in an apparent attempt to conceal his identity. The Sergeant knew Kincaid's license had been revoked for a few years and in that time the Sergeant had always seen Kincaid travel as a passenger or ride a moped.

Based on that knowledge and Kincaid's apparent attempt to conceal his identity, Sergeant Splain initiated a traffic stop of Kincaid's vehicle. Kincaid produced a driver's license and was allowed to go into a convenience store while the Sergeant ran a license check. The license was valid.

Sergeant Splain returned the license to Kincaid and asked if he could question Kincaid concerning another matter. Kincaid agreed and the Sergeant asked if he could search the vehicle for drugs since he had heard that Kincaid sold marijuana. Kincaid then answered that there was marijuana under the front seat. Sergeant Splain retrieved a bag of marijuana from under the front seat and radioed for a K-9 unit to search the vehicle.

Kincaid then stated "you don't need the dog, there is more under the other seat." Sergeant Splain recovered more marijuana from the other seat and then placed Kincaid under arrest. At trial,

Kincaid moved to suppress the marijuana on the grounds that the traffic stop was not supported by reasonable suspicion and that the detention exceeded the scope allowed for investigation of a traffic offense.

**ISSUE 1:** Was the traffic stop supported by reasonable suspicion?

**RULE 1: YES.** An officer's prior knowledge, supported by their own observations, can establish reasonable suspicion, even when the prior knowledge turns out to be erroneous.

**DISCUSSION:** The main issue regarding the suspicion in this case is whether the Sergeant's belief that the defendant's license was revoked was reasonable. The Sergeant showed his suspicion to be reasonable by articulating the following factors:

1. Kincaid had a general reputation that his license was revoked.
2. Kincaid always traveled on a moped or as a passenger.
3. Kincaid attempted to hide his identity while passing the Sergeant.

Taken together, the reputation and the factual support of it provided a reasonable suspicion. The fact that the suspicion was erroneous is irrelevant to the legality of the stop.

**ISSUE 2:** Did the detention exceed the scope allowed by the reasonable suspicion?

**RULE 2: NO.** The scope of an investigative detention must be tailored to its underlying justification.

**DISCUSSION:** Though a reasonable suspicion does give an officer the right to detain an individual, the right to detain based on a reasonable suspicion is limited. The detention must be carefully tailored to its underlying justification. If further investigation dispels the suspicion, then officers must end the detention. In this case, the check of the license dispelled Sergeant Splain's reasonable suspicion. Sergeant Splain was then required to end the detention.

The court held that in this case, returning the license was sufficient to end the detention and that a reasonable person would have felt free to leave at that point. Officers should keep in mind that merely returning a motorist's documents may not always be enough to end a detention. Other environmental factors must be taken into account. A motorist that is surrounded by six officers is unlikely to feel free to leave or refuse questioning, regardless of their document having been returned to them.

In this case, the Court found that a reasonable person would have felt free to leave when the license was returned to them. The further questioning was unrelated to the traffic stop but did not violate the Fourth Amendment

because the Court found that the defendant voluntarily submitted to it.

**ISSUE 3:** Was the warrant-less search of the vehicle legal?

**RULE 3: YES.** Automobiles in public places may be searched without a warrant so long as officers have probable cause.

**DISCUSSION:** Officers should keep in mind what has been termed the “automobile exception” to the warrant rule. If an officer has probable cause to believe that an automobile contains evidence of a crime, and that automobile is located in a public place, the officer may search the vehicle without a warrant. The search must be limited to areas where the evidence sought could be located.

In this case, the defendant voluntarily told Sergeant Splain that the vehicle contained marijuana. That statement provided the Sergeant with the probable cause necessary to allow him to search the vehicle under the automobile exception.

#### **Fourth Amendment / Search & Seizure / Plain View Doctrine:**

*North Carolina v. Green*, \_\_\_\_\_ N.C. App. \_\_\_\_ (2001).

**FACTS:** Sergeant Mozingo of the Wayne County Sheriff’s Office was on routine patrol in an area known for drug activity at

approximately 11:30 P.M. The Sergeant approached an intersection known for drug transactions and noticed three people congregated there. As he approached, the Sergeant saw Tywuan Green bend down as though setting something on the ground. Mr. Green then began to walk away from the area.

The Sergeant noticed that a open beer bottle was lying close to where Mr. Green had been standing and that beer was flowing from the bottle. Since Mr. Green appeared under-age, the Sergeant asked him to return to where the bottle was. As Mr. Green turned around to comply with the request, he put his hand into his pants pocket.

The Sergeant requested him to take his hand out of his pocket and Mr. Green complied. The Sergeant then began to question him about his age and what was in his pocket. Green replied “nothing” and Sergeant Mozingo asked him for consent to pat him down. Green raised his hands above his head in response.

At that point, Sergeant Mozingo could see a plastic baggie sticking out of Green’s pocket. The Sergeant retrieved the baggie and found that it held marijuana.

Another officer watched Mr. Green while Sergeant Mozingo retrieved his citation booklet. During that time, the Officer noticed that Green

had something in his mouth and asked him to spit it out. Green spit out several small baggies containing crack cocaine.

Green was arrested and at trial he moved to suppress the drugs on the grounds that Sergeant Mozingo lacked probable cause to seize the baggie from his pocket and thus all the evidence of controlled substances were obtained from an illegal seizure.

**ISSUE:** Was the seizure of the plastic baggie from the defendant’s pocket a violation of the Fourth Amendment?

**RULE: NO.** Officers may seize contraband if:

1. The officer was in a place that they had a right to be, **AND**
2. The contraband was inadvertently discovered, **AND**
3. It was immediately apparent to the officer that the items observed were contraband or evidence.

**DISCUSSION:** The legal principal governing this case is the “Plain View Doctrine.” At issue is whether it was immediately apparent to the Sergeant that the plastic baggie was evidence or contraband. Courts have equated “immediately apparent” with probable cause. The Sergeant testified that before seizing the baggie he believed it contained a controlled substance

“because that’s the way we find it packaged every day, in clear plastic bags.”

The Court found that the Sergeant had probable cause to believe that the baggie contained a controlled substance. The court based its finding on the following factors:

- 1) The Sergeant’s experience with how controlled substances are packaged.
- 2) The nature of the area.
- 3) The small congregation of people in the area.
- 4) The defendant began to walk away when the Sergeant approached.

The Court found that all three requirements of the Plain View Doctrine were present. The Sergeant was on a public street when he made contact with the suspect and therefore was in a place that he had the right to be. He inadvertently saw the baggie when the defendant voluntarily raised his arms in response to the Sergeant’s request for consent to pat him down. It was immediately apparent (as discussed above) to the Sergeant that the baggie contained a controlled substance.

Thus, the seizure of the baggie was justified under the plain view doctrine and the resulting evidence was admissible.

## **UNITED STATES SUPREME COURT (PENDING CASES)**

The United States Supreme

Court has before it three cases of a direct interest to law enforcement. They are:

- ***United States v. Knights, 00-1260*** (Oral Argument November 6, 2001) Fourth Amendment / Search & Seizure / Probation Searches
- ***United States v. Arvizu, 00-1519*** (Oral Argument November 27, 2001) Fourth Amendment / Search & Seizure / Reasonable Suspicion
- ***Watchtower Bible v. Stratton, Ohio, 00-1737*** (Oral Argument after January 1, 2002) First Amendment / Freedom of Speech / Permit Requirement for Door-To-Door Advocacy

*Knights* and *Arvizu* are both cases that will further refine the borders of the Fourth Amendment. *Watchtower* is a First Amendment case that will help to define the extent to which cities may regulate activity that is expressive or speech oriented. Law enforcement may be directly affected by this ruling because many city ordinances of this nature, (including the City of Charlotte) include a criminal provision that is enforced by law enforcement officers.

### ***United States v. Knights***

The United States Supreme Court will decide whether a warrant-less search by sheriff’s deputies of the dwelling a probationer who, (as a condition of probation),

had agreed to submit to suspicion-less searches by any law enforcement officer, is a violation of the Fourth Amendment.

The Court has stated before in *Whren v. U.S.*, 517 U.S. 806, 116 S. Ct. 1769 (1996) that “we have never held, outside the context of inventory search or administrative inspection that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment.” The significance of motive is once again the question before the Court. This case presents several issues that the court will have to decide.

Is a “probation search” administrative? Are any searches based on probation requirements valid under the Fourth Amendment? Does it matter if the probationer had the option of rejecting probation and serving active time? Is such a probation condition a voluntary consent to search? Can a probationer rescind the agreement to warrant-less search?

### ***United States v. Arvizu***

The United States Supreme Court will decide whether specific factors of suspicion, relied upon by law enforcement, may, as a matter of law, be excluded from the totality-of-the-circumstances test of reasonable suspicion.

The law regarding motor vehicle stops has long been settled. An officer may conduct an investigative detention of a vehicle and the people inside when an officer has a reasonable suspicion

that criminal activity is afoot. The test of reasonable suspicion is a totality of the circumstances test that is applied on a case by case basis.

In this case, the 9<sup>th</sup> Circuit Court of Appeals analyzed several factors relied on by a Border Patrol Agent in making a traffic stop individually and determined that each factor was improper for use in a reasonable suspicion analysis. In effect, the 9<sup>th</sup> Circuit greatly weakened the totality of the circumstances test by discounting the cumulative effect of the factors taken together. The Supreme Court will have to decide if this is a proper application of the totality of the circumstances test.

### ***Watchtower Bible v. Stratton, Ohio***

The United States Supreme Court will decide whether a municipal ordinance that requires one to obtain a permit prior to engaging in door-to door advocacy, and to display that permit when requested by anyone, violates the First Amendment.

Many cities nationwide have adopted ordinances that restrict the time and manner in which door-to-door solicitations may be made. Often such solicitations involve the

First Amendment right to free speech. Since the ordinances seek to regulate activity that is possibly constitutionally protected, the ordinances, and those who enforce them, can possibly violate the constitution.

This case considers the extent to which cities may regulate door-to-door solicitations. Potentially, the ruling in this case could either strike down, or legitimate, city ordinances across the nation. .

### **Law Enforcement Duty to Report to DSS**

The Police Attorney's Office has recently received questions concerning the duty of law enforcement officers to report to the Department of Social Services ("DSS") the possible abuse, neglect or dependency of children under the age of 18. It is critical that officers make these reports especially when responding to domestic violence situations. The standard is only that the officer have "cause to suspect" abuse, neglect or dependency.

Statistics reflect that 50 to 75% of male batterers also abuse their children. Additionally, 3.3 to 4.3 million children witness domestic violence in the home each year. At least 80% of runaway juveniles come from abusive homes and juveniles from abusive homes are 1000 times more likely to abuse when they become adults.

The law, which sets forth the duty to report and DSS's obligations upon receipt of such reports, is set forth below.

### **N.C.G.S. §7B-301 - DUTY TO REPORT ABUSE, NEGLECT, DEPENDENCY, OR DEATH DUE TO MALTREATMENT:**

1. Any person or institution who has cause to suspect that a juvenile is abused, neglected, or dependent or has died as a result of maltreatment, *shall* report that case to the Department of Social Services in the county in which it occurred. ("DSS")
2. The report may be made orally, by telephone or in writing.
3. The report should include any information known to the person making the report such as other juveniles in the home, names addresses, etc.
4. Refusal of the person making the report to give their name **shall not** preclude the investigation by DSS.

### **N.C.G.S. §7B-302- INVESTIGATION BY DSS; ACCESS TO CONFIDENTIAL INFORMATION; NOTIFICATION OF PERSON MAKING THE REPORT.**

1. If the report received by DSS alleges abuse, an investigation **must** be initiated no later than 24 hours after receiving the report.
2. If the report received by DSS alleges neglect or dependency, DSS **must** initiate an investigation within 72 hours after receiving the report.

3. The investigation and evaluation **shall** include a visit to the place where the juvenile resides.
4. All information received by DSS, including the identity of the reporter, **shall** be held in the strictest confidence.
5. Any public or private agency *shall* provide access to any information requested by DSS, even if confidential, including criminal investigative information.
6. Within five working days after receipt of the report of abuse, neglect, or dependency, DSS **shall** give written notice to the person making the report unless requested not to give notice, as to whether the report was accepted for investigation and whether the report was referred to the appropriate State or local law enforcement agency.
7. Within five working days after completion of the protective services investigation, DSS **shall** give an additional written notice to the person making the report, as to whether there is a finding of abuse, neglect, or dependency, whether DSS is taking action to protect the juvenile and what action it is taking.

8. The person making the report **shall** be informed of the appeal procedures necessary to request a review by the prosecutor of the DSS decision not to file a petition.

**N.C.G.S. §7B-309 –  
IMMUNITY OF PERSONS  
REPORTING &  
COOPERATING IN AN  
INVESTIGATION:**

1. Anyone making a report or cooperating with an investigation under this article is immune from criminal or civil liability **so long as** the person was acting in good faith.
2. Good faith is presumed.

**HORIZONTAL GAZE  
NYSTAGMOUS:  
WHY IS IT NOT USED IN  
DISTRICT COURT?**

The Horizontal Gaze Nystagmus is a scientific test of impairment that looks for an involuntary jerking of the human eye (nystagmus) as it follows a moving object. The test is based on the scientific premise that a strong correlation exists between impairment and nystagmus. Many law enforcement officers use the Horizontal Gaze Nystagmus (HGN) test as one of several field sobriety tests to determine if there is probable cause to arrest a suspect for the offense of Driving While Impaired.

However, officers often note that they are not called upon to, nor even allowed to, testify regarding the results of the HGN test in court. Why is that? In order for the test to be admissible, the North Carolina Supreme Court has held that a foundation for the test must be laid by “the testimony of scientists who are expert in the subject matter.”

The case which held that is *State v. Helms*, 348 N.C. 578, 504 S.E. 2d 293 (1998). In that case, the North Carolina Supreme Court adopted the view that the HGN test, unlike other field sobriety tests, was a scientific test outside the common experience of jurors or judges. The case was not precisely clear if an officer could be qualified as an expert to lay the foundation for the test; though the officer in the Helms case was trained in the HGN. Keeping that in mind, how should officers use the HGN test?

Officers trained in HGN may freely use it as part of their field sobriety tests. However, Officers should never rely on HGN alone to establish probable cause for arrest. Officers should always be sure that they have conducted sufficient field sobriety tests to establish probable cause to arrest wholly independent of the HGN test.