



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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**Forward:** In this issue, we review the case of *U.S. v. Drayton*, in which the U.S. Supreme Court held that officers did not seize the defendants while they were on a bus, because a reasonable person would have felt free to terminate the encounter. The Court also held officers were not required to advise passengers of their right not to cooperate and to refuse to give consent to search.

### HIGHLIGHTS:

#### UNITED STATES SUPREME COURT

##### Fourth Amendment/ Seizure/Consent Search:

In *U.S. v. Drayton*, 122 S.Ct. 2105 (2002), the United States Supreme Court held that officers did not seize the defendants during a drug and weapons interdiction effort on a bus because a reasonable person would have felt free to terminate the encounter. The Court also held that the Fourth Amendment does not require officers to advise bus passengers of their right not to cooperate and to refuse to give consent to search and that, in this case, the defendant's voluntarily consented to a search of their luggage and persons.

**Facts:** The defendants, Drayton and Brown, were passengers on a Greyhound bus travelling from Fort Lauderdale to Detroit. While the bus was stopped for scheduled maintenance in Tallahassee, three officers, dressed in plain clothes, carrying concealed weapons and visible badges, boarded the bus to check for drugs and weapons.

One officer knelt on the driver's seat, facing the rear of the bus, without obstructing the aisle or exit. Another officer stayed in the rear of the bus, facing forward. The third officer (Lang) started at the back of the bus and worked his way forward, speaking to passengers as he went. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

### BRIEFS

##### Fourth Amendment/ Seizure/Consent Search:

*U.S. v. Drayton*, 122 S.Ct. 2105 (2002).

Speaking in a low tone of voice, Lang identified himself to each passenger (including the defendants) and informed them that the officers were conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. He did not inform any of the passengers of their right to refuse to cooperate.

Drayton and Brown were seated together on the bus. They identified a single bag belonging to them in the overhead bin. After receiving consent from Brown, Lang searched the bag but did not find any contraband in it.

Lang observed that both defendants were wearing heavy jackets and baggy pants, in spite of the warm weather, and, based on his experience, suspected that they may have been concealing weapons or drugs. He asked Brown, "Do you mind if I check your person?" and Brown answered, "Sure," and leaned up in his seat and opened up his jacket. Lang conducted a pat-down and detected hard objects similar to drug packages in both thigh areas. Brown was then placed under arrest, handcuffed, and escorted from the bus by another officer.

Lang then asked Drayton, "Mind if I check you?" Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a pat-down of Drayton's thighs and detected hard objects similar to those found on Brown. He

then arrested Drayton and escorted him from the bus. A further search revealed that the defendants had duct-taped plastic bundles of powder cocaine between several pairs of boxer shorts. Brown had three bundles containing 483 grams and Drayton had two bundles containing 295 grams. They were both charged with conspiring to distribute cocaine and possessing cocaine with intent to distribute.

**Issue 1:** Did the officer's actions constitute a seizure of the defendants under the Fourth Amendment?

**Rule 1:** No. The officer's actions did not constitute a seizure of the defendants. Under the circumstances, a reasonable person would have felt free to terminate the encounter.

**Discussion:** In this case, the Court held that the officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Lang approached the defendants, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that the defendants could exit the bus. In addition, he spoke to the passengers individually and in a polite, quiet voice, and did not make any threats or commands. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or

otherwise terminating the encounter. Furthermore, the Court held that Lang was not required to advise the passengers of their right to refuse to cooperate.

The Court also stated that there was no doubt that had this encounter occurred on the street, it would be constitutional. Simply because an encounter takes place on a bus does not, by itself, transform standard police questioning of citizens into an illegal seizure.

The Court also rejected Drayton's argument that even if Brown's cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter after Brown had been arrested. The arrest of one person does not mean that everyone around him has been seized. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after he arrested Brown, Lang spoke to Drayton in a polite manner and gave him no indication that he was required to answer questions.

**Issue 2:** Was the search of the defendants reasonable under the Fourth Amendment?

**Rule 2:** Yes. Under the totality of the circumstances, the defendant's consent to

search was voluntary and, therefore, the search was reasonable under the Fourth Amendment.

**Discussion:** The same facts that led the Court to conclude that the encounter was not a seizure also supported its finding that the consent to search was voluntary. Nothing Lang said indicated a command to consent to the search. When the defendants informed Lang they had a bag on the bus, he asked for permission to search it. And when Lang requested to search the defendants' persons, he asked first if they objected, which would indicate to a reasonable person that he or she was free to refuse. Even after he arrested Brown, Lang gave Drayton no indication that the was required to consent to search. Rather, he asked for permission to search ("Mind if I check you?") and Drayton agreed.

The Court concluded that, although Lang did not inform the defendants of their right to refuse the search, he did request their permission, and the totality of the circumstances indicated that their consent was voluntary; therefore, the searches were reasonable under the Fourth Amendment.

## REGULATION OF BB GUNS

Questions have been raised recently about statutes or ordinances that regulate the possession and use of BB guns.

City ordinance 15-22(b) makes it unlawful for any person, in the city, to shoot missiles of any description from instruments of any kind. The language of the ordinance is certainly broad enough to include BB guns.

Note that the ordinance prohibits shooting a missile from the instrument and not mere possession of the instrument itself. Therefore, it is not unlawful for an individual (of any age) to possess a BB gun, only to discharge it within the city limits. A violation of the ordinance is a Class 3 misdemeanor and involves a mandatory court appearance.

There is no corresponding prohibition against discharging BB guns in the Mecklenburg County firearms ordinance. The county ordinance only regulates the discharge of "firearms," which are defined as weapons or instruments from which projectiles are discharged by means of the explosion of gunpowder. Obviously, BB guns are not included within this definition. Therefore, it is not unlawful for an individual (of any age) to possess or discharge a BB gun in the county.

G.S. 14-316 makes it unlawful for any parent, guardian or person in loco parentis (has the status and obligation of a parent, but not legal custody) to knowingly permit his child under the age of 12 years (not yet reached 12th birthday) to have the possession, custody or use of any gun, pistol or other dangerous

firearm. In Mecklenburg County (along with 16 other counties), BB guns, air rifles and air pistols are considered to be "dangerous firearms." To constitute a violation of the statute, it is not necessary that the weapon be loaded. However, the statute does not apply when the child is under the supervision of the parent, guardian or person in loco parentis. The statute also makes it unlawful for any other person to knowingly furnish a child under 12 any such weapon. A violation of the statute is a Class 2 misdemeanor and also involves a mandatory court appearance.

Note that this statute does not make it unlawful for a child under the age of 12 to possess a BB gun. Therefore, it is possible for such a child to lawfully possess a BB gun, while the individual who permitted the possession of or furnished the gun would be in violation of the statute.



## PROCEDURE FOR UNAUTHORIZED USE OF MOTOR VEHICLE CASES

The offense of unauthorized use of a motor-propelled conveyance ("unauthorized use"), a violation of G.S. 14-72.2, is committed when

an individual willfully takes or operates a motor-propelled conveyance of another without the consent of the owner or other person in lawful possession. The offense is a Class 1 misdemeanor unless an aircraft is involved, in which case it is a Class H felony.

Typically, the offense occurs when there is some type of relationship between the suspect and the victim and the suspect takes the vehicle without permission, but there is no evidence that the suspect intended to permanently deprive the victim of the use of the vehicle (which is required for larceny of auto). Or, it may involve a situation where the victim places specific limitations on the use of the vehicle, such as allowing the suspect to use the vehicle for a specified purpose or for a specified period of time, and the suspect goes beyond those limitations in using the vehicle.

Victims who are filing unauthorized use reports should be informed that they will have to wait twenty-four (24) hours before attempting to obtain an arrest warrant for the suspect from the Magistrate's Office. The twenty-four (24) hour period begins at the time the victim files the report. The purpose of the waiting period is to provide an additional opportunity for the vehicle to be returned to the victim, which often occurs, and to better ensure that the victim is willing to have the suspect arrested and prosecuted for the offense.

If the report is filed with Non-Emergency Police Services ("NEPS"), the victim is required to come to the NEPS office in person. The only exception is when the victim is physically disabled and has no transportation. In that case, the report will be taken by NEPS over the telephone; however, the victim is still responsible for attempting to obtain the arrest warrant. The disabled person can either attempt to obtain the warrant himself/herself, or ask the officer who is assigned the report to attempt to obtain the warrant. The victim should be provided with the telephone number for the district where the case will be assigned.

When the report is filed in NEPS, the victim will be given a copy of the report, along with a yellow slip to take to the Magistrate's Office after the twenty-four (24) hour period has expired. The yellow slip is used to have an APB broadcast and to enter the vehicle into NCIC; however, this is not done until after a warrant has been issued. When a warrant is issued, after leaving the Magistrate's Office, the victim should bring the yellow slip, which contains the repository number, to NEPS. NEPS personnel will then enter an APB, do a supplemental report, and send the report to Records so that the vehicle can be entered into NCIC.

If an officer in the field takes an unauthorized use report, he/she should instruct the victim to obtain a copy of the report from Records, as well

as a yellow slip from NEPS, before going to the Magistrate's Office for a warrant. NEPS personnel will then advise the victim to return with the yellow slip if a warrant is issued.

Please note that the twenty-four (24) waiting period does not apply to cases involving failure to return rental vehicles. However, the victim must still obtain an arrest warrant before the vehicle is entered into NCIC.

### **OPEN CONTAINERS IN VEHICLES**

The Clerk's Office has requested that the following information be given to all officers regarding the use of the uniform traffic citation:

**Charge #14** on the citation should **only** be used for charging the **infraction of possessing** an open container of **or consuming** an alcoholic beverage in the passenger area of a motor vehicle under **G.S. 20-138.7(a1)**. That offense is waivable on payment of a \$10.00 fine and the costs of court. The Clerk's Office computers are programmed to automatically enter the infraction whenever Charge #14 is checked on the citation.

**Charge #14** should **not** be used to charge the **misdemeanor of operating** a motor vehicle with an open container of an alcoholic beverage in the passenger area **after drinking** under **G.S. 20-138.7(a)**, which involves a mandatory court appearance. Rather, officers should **write in** that particular charge under the blank

**Charge #15** on the citation. The charging language for the offense is: "operate a motor vehicle on a (street or highway) (right-of-way of a highway) with an open container of an alcoholic beverage in the passenger area after drinking. G.S. 20-138.7(a)"

The problem most often occurs in an arrest situation (such as DWI) when an officer uses Charge #14 for the misdemeanor offense. The magistrate will assign the case a CR#, but when the citation is entered at the Clerk's Office, the CR# has to be deleted and changed to an infraction. Apparently, this creates further problems when the case reaches Courtroom 2205.

**PLEASE NOTE** that G.S. 20-138.7(a1) **and** G.S. 20-138.7(a) **do not** apply to public vehicular areas. However, G.S. 18B-401, which prohibits the consumption of a malt beverage or unfortified wine while driving, applies to public streets and highways and public vehicular areas. That charge is a misdemeanor and is waivable upon payment of a fine of \$25.00 and the costs of court.

### **NEW MECKLENBURG COUNTY NOISE ORDINANCE**

On July 1, 2002, a new noise ordinance went into effect for the unincorporated areas of Mecklenburg County, as well as for all County-operated parks, including those parks that are located within the city limits.

The provisions of the new ordinance are almost identical to the current city noise ordinance. The only major difference is that the county ordinance has an exemption for agricultural operations and farms.

The County may develop a civil penalty ticket ("small ticket") for enforcement of the ordinance. In the meantime, the ordinance may be enforced by using the city parking ticket (#'s 14 and 15 on the ticket) or by issuing a uniform citation (Class 3 misdemeanor/mandatory court appearance). A uniform citation, rather than a parking ticket, would normally be used in situations involving repeat violations.

The following is an example of charging language to be used for a uniform citation:

. . . the named defendant did unlawfully and willfully create unreasonably loud and disturbing noise, in violation of Section 1 of the Mecklenburg County Noise Ordinance. This violation having occurred within (the unincorporated area of Mecklenburg County) (a Mecklenburg County Park, to wit: name of park). . .

A copy of the ordinance was sent by e-mail to all sworn personnel. Printed copies of the ordinance are also available in the Police Attorney's Office.

### **TOW-IN AND STORAGE REPORT FORM**

The "Hold/Seizure" section of the CMPD Tow-In and Storage Report Form contains three (3) boxes. Those boxes are:

- YES:** This box should be checked whenever the vehicle is to be held for non-DWI forfeiture purposes. For example, towing a stolen vehicle or a vehicle to be held as evidence.
- NO:** This box should be checked for a regular tow that is simply to clear the roadway. For example, a disabled vehicle, a vehicle involved in an accident, or a non-forfeiture DWI.
- DWI:** This box should be checked **ONLY** for a **DWI FORFEITURE HOLD** (not a regular DWI)

Please be careful in checking the correct box. Several incidents have occurred where vehicles towed on non-forfeiture DWI's were held and later transported to the State storage facility in error.

### **SIGN ORDINANCE--- CITY OF CHARLOTTE**

City Code Section 10-79 makes it unlawful for any person to attach, place, paint, write, stamp or paste any sign or advertisement or other matter within eleven (11) feet of the edge of any public right-of-way, or upon any post, pole, tree, tree stake or guard, shrub, fire hydrant, or upon anything else within eleven (11) feet of the public right-of-way or upon any bridge or overpass within the city limits.

The ordinance is enforced primarily by Community Improvement inspectors, who remove illegal signs and issue civil citations. However, a violation of the ordinance is also a Class 3 misdemeanor (mandatory court appearance) and may be enforced by CMPD officers issuing a uniform citation. In addition, as provided by Section 10-79(c), CMPD officers have been given the authority to summarily remove and dispose of any signs posted in violation of the ordinance, even if no one is charged with the violation.

The ordinance does not apply to the following types of signs:

1. signs regulating traffic;
2. signs required to be posted by law;
3. warning/no trespassing signs;
4. signs for bus stops, taxi stands, etc.;
5. off-street parking or loading/unloading signs not larger than four (4) square feet;
6. governmental agency signs;
7. temporary decorative signs as permitted by the zoning ordinance;
8. signs permitted by the State DOT;
9. house numbers painted on curbs; or
10. plaques, statues or monuments approved by city council.

On the other hand, the ordinance does apply to real estate and political signs.

Please note that an officer should only issue a uniform citation for a violation of the ordinance when he/she observes the violator posting

the sign, when an individual admits to having posted the sign, or when a Community Improvement inspector provides the officer with probable cause for the violation on the basis of personal observation or knowledge.

For example, it would not be appropriate to charge a business owner with a violation based solely on the fact that a sign advertising the business was posted on a utility pole. Additional evidence, as described above, would be needed in order to charge the owner or other responsible party. However, the sign could be removed and disposed of even if no one was charged or notified.

An example of charging language for a uniform citation is as follows:

. . . the named defendant did unlawfully and willfully (attach) (place) (paint) (stamp) (paste) a sign or advertisement or other matter [within 11 feet of the edge of a public right-of-way] or [upon a (post) (pole) (tree) (tree stake or guard) (fire hydrant) within 11 feet of the edge of a public right-of-way] or [upon a bridge or overpass], in violation of Section 10-79 of the City Code of Charlotte, NC. This offense having occurred within the corporate limits of the City of Charlotte. . .

If you have questions about enforcement of the ordinance, please contact Patti Sloop (704-336-4211) or Walter Abernethy (704-336-4213) of Community Improvement, or the Police Attorney's Office (704-336-2406).

## CLAIMS AGAINST THE CITY OF CHARLOTTE

An officer may encounter a situation where a citizen claims that property was damaged or a financial loss was suffered as a result of an action taken by the officer or other Department personnel. This often occurs in the context of damage to a residence, a vehicle, or items of personal property during the course of a search, as well as in connection with vehicle towing and storage fees.

An officer should not inform or promise a citizen making such a claim that the CMPD or the City of Charlotte will pay for the damage or make reimbursement. All claims against the City are processed and evaluated by the Risk Management Division ("RMD"). The claim process is initiated by the individual filing a standard claim form with RMD, which will then investigate, normally by requesting information from CMPD regarding the incident. After the investigation is completed, RMD will make a decision on whether or not to pay the claim. Dissatisfied claimants may pursue legal action against the City.

An officer should refer a citizen with a claim to RMD. It is located at 400 East 2<sup>nd</sup> Street (the old Mecklenburg County ABC building) and the telephone number is (704) 336-3301.

