



CMPD POLICE LAW BULLETIN

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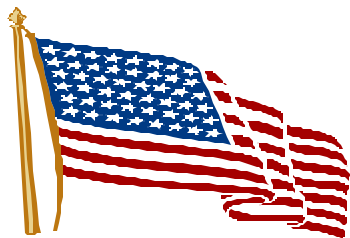
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Forward: In this issue we review four North Carolina Court of Appeals cases. In *Kroh v. Kroh*, the Court discusses non-consensual audio recordings by one spouse of the other in the family home. In *State v. Dickerson*, the Court discusses maintaining a vehicle for the purpose of sale or delivery of cocaine. In *State v. Randell*, the Court discusses criminal contempt and specifically the failure to rise as a judge is exiting the courtroom. In *State v. Castellon*, the Court discusses a traffic stop and the circumstances that justified continued detention beyond what was necessary for resolution of the traffic matter.

HIGHLIGHTS:

Electronic Surveillance/ Vicarious Consent:

In *Kroh v. Kroh*, ___ N.C. App. ___, 567 S.E. 2d 760 (2002), the Court discusses the North Carolina Electronic Surveillance Act and finds that the nonconsensual recording by one spouse of the other in the family home was a violation of this statute. Videotaping without sound recording was not "interception." The Court also found that parents may vicariously consent to the interception of oral communications on behalf of their minor children.

Maintaining Vehicle/Sale of Cocaine:

In *State v. Dickerson*, ___ N.C. App. ___, 568 S.E. 2d 281 (2002) the Court of Appeals found that evidence of the sale of cocaine from a vehicle on only one occasion was insufficient evidence to show that the vehicle was kept and maintained for the sale and delivery of cocaine. A

vehicle must be used for keeping or selling cocaine over a period of time.

Criminal Contempt/ Courtroom Decorum:

In *State v. Randell*, ___ N.C.App. ___, 567 S.E. 2d 814 (2002), the Court of Appeals discussed criminal contempt. Although they found that the judge failed to provide the required opportunity for the defendant to respond to the contempt charge, the behavior of failing to stand for a judge is contemptuous behavior in North Carolina.

Fourth Amendment/ Traffic Stop/Detention:

In *State v. Castellon*, ___ N.C. App. ___, 566 S.E. 2d 696 (2002), the Court of Appeals found that a twenty-five minute detention for a minor traffic violation was lawful. Reasonable suspicion of drug activity that developed during that time justified further detention.

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BRIEFS

NORTH CAROLINA COURT OF APPEALS

Electronic Surveillance/ Vicarious Consent:

Kroh v. Kroh, ___ N.C. App. ___, 567 S.E.2d 760 (2002).

Facts: Plaintiff/Husband filed a civil action against his wife for alleged violations of North Carolina's Electronic Surveillance Act. The wife, who suspected her husband of having an affair and abusing her children, placed tape recorders and a video camera in the family home. As a result, she obtained various audio and video recordings of her husband and minor children without her husband or children's knowledge.

Issue 1: Does North Carolina's Electronic Surveillance Act apply to non-consensual recordings by one spouse of the other in the family home?

Rule 1: Yes. The Electronic Surveillance Act prohibits nonconsensual recordings by one spouse of the other even within their family home. A recording or the endeavoring to record a person's private conversations without the consent of a party to the conversation is a violation of this Act.

Issue 2: Does videotaping, without sound recording, violate the Electronic Surveillance Act?

Rule 2: No. The conversation must be "intercepted" to violate the statute and the videotaping

in this situation did not involve sound recordings so there was no violation for the videotape recording.

Issue 3: May a parent vicariously consent on behalf of minor children to the interceptions of oral communications of their children?

RULE 3: Yes. A custodial parent may vicariously consent to the recording of a minor child's conversations so long as the parent has a good faith, objectively reasonable belief that the interception of the conversations is necessary for the best interests of the child.

Discussion: The Electronic Surveillance Act, N.C.G.S. §15A-286 prohibits conduct whereby a person, without the consent of at least one party to the communication, willfully intercepts or endeavors to intercept, any oral communication. The term "intercept" means acquisition of the contents of any oral communication through the use of any electronic or mechanical device. A violation of this provision is a Class H felony. N.C.G.S. §15A-296 provides a civil cause of action for persons whose communications are intercepted, disclosed or used in violation of the Electronic Surveillance Act. The civil provision requires the actual interception of the communications, while the criminal provision includes merely endeavoring to intercept communications.

In this factual situation, the

Court found that the wife did not violate the Act by videotaping her husband and children, as there was no sound recording. The wife's tape recording of her husband, however, was an interception of an oral communication. The Court further adopted the federal doctrine of "vicarious consent." This doctrine states that a custodial parent can "vicariously consent" to the recording of a minor child's conversations if the parent has a good faith, objectively reasonable belief, that the interception of the conversation is necessary for the best interest of the child. In this case, the mother believed the father was molesting the children and was concerned for their welfare.

Maintaining Vehicle/Sale of Cocaine:

State v. Dickerson, ___ N.C. App. ___, 568 S.E. 2d 281 (2002).

Facts: A confidential informant (CI) arranged an undercover drug purchase of crack cocaine between the defendant and a deputy sheriff. The CI took the deputy to a parking lot where the defendant was seated in the passenger seat of a vehicle, which was registered to the defendant. Another individual was seated in the driver's seat. The deputy and CI approached the vehicle and the defendant asked the deputy to place the money on the dashboard directly in front of him and the deputy complied. The defendant then handed the deputy a bag of crack cocaine.

The defendant was subsequently arrested, charged and convicted of possession of cocaine with intent to sell and/or deliver, sale and delivery of cocaine and keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine.

Issue 1: Was the evidence sufficient to support a charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine?

Rule 1: No. In order to violate this statute, the vehicle must be used for keeping or selling cocaine over a period of time.

Issue 2: Could the defendant be sentenced for both the sale and delivery of cocaine and possession of cocaine with intent to sell and deliver?

Rule 2: Yes. The two crimes are set out as separate offenses by the General Assembly and are distinct crimes and the defendant was properly sentenced on both counts.

DISCUSSION: The Court found that the evidence showed the sale of cocaine from the vehicle on only one occasion and the state did not present any evidence other than the defendant sitting in the vehicle while selling cocaine. That was insufficient evidence to demonstrate that the vehicle was kept or maintained to sell a controlled substance. The word “keep” means not just

mere possession but possession that occurs over a period of time.

Criminal Contempt/ Courtroom Decorum:

State v. Randell, ___ N.C. App. ___, 567 S.E. 2d. 814 (2002)

Facts: During a recess in Superior Court in Yadkin County, the judge called for a recess and the bailiff asked for all to rise while the judge exited the courtroom. An individual in the courtroom remained seated and the **judge** then called for all to rise. This individual, the defendant in the instant case, was called to the bench by the judge. The judge informed him he was being placed in custody for 30 days. When the defendant asked why, the judge said, “You didn’t stand up.” The judge did not allow defendant to respond at that time but indicated he would hear from him later.

Later that same day, the defendant was brought back to court and allowed to be heard on the contempt of court charge. The defendant stated that he did not believe he was in contempt of court as there is no law requiring him to stand. The defendant was subsequently released for time served, after spending several days in jail, although the judge continued to find him in contempt.

Issue: Did the judge allow defendant a summary opportunity to respond to the charge of criminal contempt before being found guilty?

Rule: No. The defendant in

this instance was not provided with an opportunity to respond to the charge of criminal contempt prior to the judge’s finding, which is a statutory requirement.

Discussion: The requirement of a summary opportunity to respond to a charge of criminal contempt is intended to allow an individual the opportunity to present reasons not to impose a sanction. In this instance, the judge provided the defendant with ample opportunity to explain himself *after the fact*, which did not correct the previous error.

The Court of Appeals went on to note “that the defendant’s actions were indeed contemptuous.” The Court stated that “our trial judges must be allowed to maintain order, respect and proper function in their courtrooms. Failure to stand when one is capable of doing so is indeed a contemptuous act in North Carolina.”

Fourth Amendment/Traffic Stop/Detention:

State v. Castellon, ___ N.C. App. ___, 566 S.E. 2d 696 (2002)

Facts: Defendant was stopped on Interstate 95 for failing to wear a seat belt. While preparing to issue a warning ticket, the officer used his mobile data computer to verify defendant’s license. The computer responded slowly and in the meantime, another officer arrived on the scene. Both officers observed activity that they found to be suspicious and possibly indicative of criminal behavior. These factors included the defendant providing a different

story about travel plans from the story told by the passenger; the vehicle was rented in a third person's name; the vehicle was rented on a short-term basis and was rented in New York with a return in Miami; the officers knew from experience that New York and Miami are source cities for narcotics.

After a twenty-five minute time period, the officer determined defendant's license was valid. The officer gave him a warning ticket and returned the defendant's driver's license and the rental agreement. The officer then asked defendant if he could search his vehicle after the defendant answered that he had no weapons, drugs or currency in the vehicle. The officer asked if the defendant was sure that he could search the vehicle and the defendant again answered in the affirmative.

While searching the vehicle's trunk, the officer located a television set and observed through the back of the television, what appeared to be a bundle wrapped in saran wrap. The officer recognized this packaging as similar to the method that drugs are packaged. The officer opened the back of the television set and located approximately 3000 grams of cocaine. Defendant was arrested and convicted.

Issue 1: Was the detention for twenty-five minutes for a minor traffic violation unreasonable under the Fourth Amendment?

Rule 1: No. The detention for

the purpose of determining the validity of the defendant's license was not unreasonable. During the time required to issue the warning ticket, the officer developed reasonable and articulable suspicion that the defendant was involved in illegal drug activity, which justified asking for permission to search the vehicle and justified the further detention.

Issue 2: Was defendant's consent to search his vehicle voluntary given and the officers' search within the scope of that consent?

Rule 2: Yes. The defendant's original seizure was lawful and under the totality of the circumstances the defendant voluntarily gave consent to search the vehicle. The plain view search of the television set in the trunk did not exceed the scope of that consent.

Discussion: The Court reviewed the defendant's contention that the detention for over twenty-five minutes for a minor traffic violation was unreasonable. The Court found that the length of time for the mobile computer to respond was not out of the ordinary and was not a condition that the officer could control. The Court found that the discrepancies in the driver and passengers stories, the rental agreement in a third parties name, the short-term rental and the Miami destination, were sufficient for reasonable suspicion of criminal activity to justify further detention. Therefore, the officer was justified in requesting permission to search the vehicle and continuing to detain the

defendant.

The Court further found that the scope of the search was justified under the plain view doctrine as the officers observed through the back of the television set, saran wrap packaging that is consistent with the packaging of narcotics. Therefore, the officers were justified in opening the back of the television set and seizing the cocaine. The officers did not exceed the scope of the consent.

EXEMPTIONS FROM REQUIREMENTS FOR DRIVER'S LICENSE

North Carolina statute N.C.G.S. § 20-8 provides several exceptions to the driver's license requirement. The following categories of persons under the following circumstances are **not** required to have a driver's license.

1. Non-residents who are at least 16 years of age and have in their immediate possession a valid driver's license from their home state or country and they are operating within any restrictions or conditions imposed by that state or country.
2. Any non-resident military spouse who is temporarily residing in N.C. due to the active duty military orders of their spouse.
3. Any person operating a motor vehicle that is property of, and in the service of, the armed forces.
4. Any person driving

or operating road machinery, farm tractor, or implement of husbandry temporarily operated or moved on a highway.

- 5. Any person who is at least 16 years of age and while operating a moped.

PLEASE NOTE: Under this statute, a person who resides in a foreign country **can** drive in North Carolina if they have in their immediate possession a valid driver's license from that country. However, international drivers' permit does **not**, by itself, allow a resident of a foreign country to drive in the United States. The person still must have in their possession a valid driver's license from their home country.

JUVENILES AND TEMPORARY CUSTODY

Law enforcement officers may take a juvenile into temporary custody **without** a court order under several circumstances.

“Temporary custody” means the taking of physical custody and providing care and supervision until the officer elects to release the juvenile or seek a custody order.

Officers may take this population into custody when there are reasonable grounds to believe at least one of the following: the juvenile has runaway for more than 24 hours; the juvenile is unlawfully absent

from school; the juvenile is beyond the disciplinary control of their parents or is regularly found in places where it is unlawful for a juvenile to be. Temporary custody applies equally to 16 and 17 year olds who may be undisciplined. *(Note: With the exception that there is no requirement that 16 or 17 year olds attend school.)*

Officers may select the most appropriate course of action after taking a juvenile into temporary custody, which may simply mean that the officer releases the juvenile to the parent.

N.C.G.S. §7B-1900 lists the following circumstances under which a law enforcement officer **may** take a juvenile into temporary custody without a court order:

- 1. If grounds exist for the arrest of an adult in identical circumstances under G.S. §15A-401(b). (Misdemeanor in officer's presence, felony, etc.)
- 2. If there are reasonable grounds to believe that the juvenile is an undisciplined juvenile. (Runaway, truant, beyond the disciplinary control of the parents, found in places where it is unlawful for a juvenile to be.)
- 3. If there are reasonable grounds to believe the juvenile is an absconder from training school or a detention facility.

N.C.G.S. §7B-2100 lists the options for a law enforcement officer who takes a juvenile into temporary custody without a court order. The officer **may** choose to:

- 1. Release the juvenile, with or without first counseling the juvenile; or
- 2. Release the juvenile to the parent, guardian or custodian; or
- 3. Refer the juvenile to community resources; or
- 4. Seek a juvenile petition; or
- 5. Seek a juvenile petition and request a secure custody order. (If juvenile's criminal behavior fits the statutory qualifications for secure custody.)

Temporary custody for juveniles may last for a longer period of time than an investigative detention for adults. Although the law states that juveniles may remain in temporary custody for up to 12 hours without a court order, it is preferable to either release the juvenile or seek a court order in a shorter amount of time.

A DOMESTIC VIOLENCE LAW REFRESHER:

WHAT IS A “PERSONAL RELATIONSHIP” FOR DOMESTIC VIOLENCE?

North Carolina law defines the type of underlying relationship between the parties that is necessary for a criminal act to qualify as “domestic violence.”

For purposes of Chapter 50B, “personal relationship” is defined as a relationship where the parties meet one of the following criteria:

- 1. Current or former spouses; (Such as ex-wives or ex-husbands or separated

- spouses.)
- 2. Persons of the opposite sex who live together or have lived together;
- 3. Related as parents or children or act as a parent to minor children such as grandparents.
- 4. Have a child in common. (The parties do not need to have been married.)
- 5. Are current or former household members; (This includes roommates or other family members and does not require a "romantic relationship." This **applies** to same-sex individuals.)
- 6. Persons of the opposite sex who are in or have been in a dating relationship. Dating relationship means that parties are romantically involved over a period of time and on a continuous basis. (This means more than just a few dates or a casual relationship.)

WHEN MAY AN OFFICER MAKE A WARRANTLESS MISDEMEANOR ARREST FOR DOMESTIC VIOLENCE?

Officers **may** arrest without a warrant for certain misdemeanors when the alleged victim has a personal relationship with the suspect. (Personal relationship as defined above.) The law provides discretion in this context as the law says "may" and not "shall."

Pursuant to N.C.G.S. §15A-401(b) these misdemeanors are the following:

- 1. Simple Assault
- 2. Simple Affray

- 3. Assault inflicting serious injury upon another or with a deadly weapon.
- 4. Assault on a Female
- 5. Assault by Pointing a Gun
- 6. Violation of a valid protective order.

WHEN IS AN OFFICER REQUIRED TO MAKE A WARRANTLESS ARREST IN THE CONTEXT OF DOMESTIC VIOLENCE?

The **only** instance in which an officer is required by law to take a person into custody **without** a warrant is under the following circumstance: (Otherwise, it is in the officer's discretion.)

- 1. The officer has probable cause to believe that the person knowingly violated a valid protective order, **and**
- 2. The protective order included one of the following:
 - Excluded the person from the residence or the household of the victim.
 - Ordered the person from threatening, abusing or following victim.
 - Ordered the person to refrain from harassing the victim either by phone, visiting the home or workplace or any other method.
 - Ordered the person to refrain from otherwise interfering with the victim.

Other provisions in a 50B protective order that may be violated **do not** require a mandatory arrest. Such requirements as paying child support or returning items of

personal property do not require a mandatory arrest.

Officers should **always** ask the dispatcher to verify that a protective order exists **and** the specific conditions and requirements of that order before making a warrantless arrest. If the condition violated does not fit into the mandatory requirements, then a warrantless arrest is not required by law.

Depending on the circumstances, an officer may wish to make a warrantless arrest but it is within the officer's discretion.

POLICE ATTORNEY'S OFFICE & PERSONAL LEGAL ADVICE

In the past, our office has been asked by CMPD employees to provide legal advice on personal matters. Due to the large demand, our professional and ethical rules, and the potential conflict of interest with the City, we regret that we are no longer able to assist in this manner.

