CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue, we review the case of *State v. Johnston*, in which the North Carolina Court of Appeals held that a defendant who was ordered out of his car at gunpoint, handcuffed, placed in the back of a patrol car, and then questioned by officers, was in custody for purposes of *Miranda* at the time he gave an incriminating statement, even though the officers informed him that he was in "secure custody" rather than under arrest. A reasonable person under the circumstances would believe that he was under arrest.

Fourth Amendment /Custody/Interrogation:
In *State v. Johnston*, ___ N.C. App. ___, 572 S.E.2d 438 (2002), the North Carolina Court of Appeals held that a defendant who was ordered out of his vehicle at gunpoint, handcuffed, placed in the back of a patrol car, and questioned by officers, was in custody for purposes of *Miranda* at the time he gave an incriminating statement, even though the officers informed him that he was in "secure custody" rather than under arrest

NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Custody/Interrogation: *State v. Johnston,* ___ N.C. App. ___, 572 S.E. 2d 438 (2002)

Facts: In the early morning of April 11, 1998, officers of the Pitt County Sheriff's Department responded to a complaint that a male, driving a gray car, had fired shots into an occupied vehicle with a sawed-off shotgun. A few hours later, at the scene of the incident, officers observed a gray Nissan Maxima driving along the side of the road. With their guns drawn, the officers stopped the vehicle and asked the defendant to step out of the vehicle. The officers then handcuffed the defendant and placed him in the back of a patrol car. The officers informed the defendant that he was not under arrest, but only in "secure custody" for his safety and the safety of the officers.

When asked why he was at the scene, the defendant stated that he was looking for a pocketbook. One of the officers told the defendant that he "knew" the defendant was actually looking for the shotgun. According to the officer, the defendant "became verbal" and stated, "So what if I threw the shotgun out." The defendant was charged with discharging a firearm into occupied property and assault with a deadly weapon. The trial court denied his motion to suppress the statement on the basis that he was not "in custody" when the statement was made, and on the basis that the statement was "voluntary" rather than the product of interrogation. The defendant was convicted of both charges and appealed.

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ISSUE: Based on the circumstances in this case, did handcuffing the defendant and placing him in the back of a police car constitute "custody" for the purposes of *Miranda*?

RULE: Yes. The defendant, who was handcuffed by officers and placed in the back of a patrol car, was in custody for purposes of *Miranda*.

DISCUSSION: *Miranda* warnings are required only when a defendant is subjected to custodial interrogation. In *State v. Buchanan*, 353 N.C. 332 (2001), the North Carolina Supreme Court held that the test for determining whether or not a defendant is in "custody" for purposes of *Miranda* is whether, based on the totality of the circumstances, there was a formal arrest or a restraint on the defendant's freedom of movement of the degree associated with a formal arrest. In making that determination, a court looks to the objective circumstances of the interrogation, not the subjective views of either the interrogating officers or the person being questioned. The relevant question is how a reasonable person in the suspect's position would have understood his/her situation.

Based on the circumstances in this case, the Court of Appeals held that the defendant was in custody and, therefore, *Miranda* warnings should have been given. The defendant was ordered out of his vehicle at gunpoint, handcuffed, placed in the back of a patrol car, and questioned by officers. Although the officers informed the defendant that he was in "secure custody" rather than under arrest, the defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under the circumstances would believe that he/she was under arrest.

PASSING A STOPPED SCHOOL BUS

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Questions have come up recently about enforcing G.S. 20-217 (passing a stopped school bus) on multi-lane roadways. The statute provides that a vehicle traveling in the opposite direction of a stopped school bus does **not** have to stop if the street has been divided into two roadways with an intervening space or physical barrier. An "intervening space" includes a center lane for left turns **if** the street has at least **four** other lanes. A "physical barrier" includes a concrete or grass median.

Examples:

1. Two-lane (or four-lane) road with a concrete or grass median – an oncoming vehicle is **not** required to stop.

2. Four-lane road **plus** a center turn lane – an oncoming vehicle is **not** required to stop. However, if the vehicle is approaching the bus in the center turn lane, it **must** stop, since the turn lane is supposed to serve as the intervening space.

3. Two-lane road plus a center turn lane – an oncoming vehicle **must** stop, since there are not at least four other lanes.

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4. Four-lane road **plus** a left turn lane at an intersection – an oncoming vehicle **must** stop. The left turn lane, regardless of its length, is not the same as a center turn lane for left turns in both directions. This is true, even if there is a concrete median running the length of the left turn lane.

PLEASE NOTE: Officers who are operating emergency equipment (blue lights/siren) are advised to stop for a school bus the same as all other drivers. There is no emergency operation exception that is expressly stated in the statute. Therefore, it would be left to a court to decide whether or not such an exception is implied and whether an officer acted reasonably under the circumstances in not stopping for a school bus.

The relevant language from the statute is as follows:

G.S. 20-217(c):
"Notwithstanding the provisions of subsection (a) of this section, the driver of a vehicle traveling in the opposite direction from the school bus, upon any road, highway or city street which has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space (**including a center lane for left turns if the roadway consists of at least four more lanes**) or by a physical barrier, need not stop upon meeting and passing any school bus which has stopped in the roadway across such dividing space or physical barrier."

The statute also makes it unlawful for any school bus driver to receive or discharge passengers **or** for any school principal or superintendent to authorize a driver to do so on any roadway described above where passengers would be required to cross the street to reach their destination or to board the bus (**except** that passengers may be discharged or received at points where pedestrians and vehicular traffic are controlled by adequate stop-and-go traffic signals).

Remember, that the statute requires vehicles to stop while the bus is displaying its mechanical stop signal or flashing red stoplights and is stopped for the purpose of receiving or discharging passengers. Vehicles must remain stopped until the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has moved on. In addition, the bus must have on the front and rear a plainly visible sign with the words "school bus" in letters at least eight (8) inches high.

The statute applies to **any** vehicle (not just motor vehicles). It also applies to both public and private school buses, including school buses transporting senior citizens. A violation of the statute is a Class 2 misdemeanor with a mandatory court appearance. Under G.S. 20-16, it also carries five (5) driver's license points (eight (8) points for a commercial vehicle).

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NEW LAW – LEVEL TWO GRADUATED DRIVER'S LICENSE RESTRICTION

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On December 1, 2002, a law went into effect that provides new passenger restrictions for vehicles driven by Level 2 drivers (limited provisional licensees). These restrictions apply to Level 2 drivers **only** when driving without a supervising driver. There is no restriction on the number/ages of passengers that may occupy the vehicle if the driver is supervised.

The new restrictions are as follows. If the driver is unsupervised, there may be no more than one passenger under the age of 21 ("underage") in the vehicle. However, this limit does not apply if all of the passengers in the vehicle who are underage are members of the driver's immediate family or household. If any family or household member passenger is underage, then no other underage person, who is not a family or household member, may be in the vehicle. For example, an unsupervised Level 2 driver could transport his/her underage brother and sister at the same time. However, he/she could **not** transport one or more of their underage friends with them.

PLEASE NOTE: Because of the family/household member exception, merely observing a young driver with several young passengers in a vehicle does **not** provide reasonable suspicion for a stop, unless the officer has personal knowledge as to the age/status of the passengers. However, if the vehicle is lawfully stopped for another reason, an officer is justified in inquiring as to the age/status of the passengers.

A violation of this restriction is an infraction punishable by a $10.00 fine and the costs of court ($100.00). No driver's license or insurance points are assessed for a violation.

Charging language for the offense is as follows:

. . . While holding a limited provisional license and operating said vehicle in violation of the restrictions, to wit: more than one passenger under 21 years of age in the vehicle without a supervising driver present. G.S. 20-11(L). **[Does not apply to PVA]**

DRIVING WHILE LICENSE REVOKED: SEARCH INCIDENT TO ARREST

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Whenever an individual commits the offense of driving while license revoked ("DWLR") under G.S. 20-28, the officer has the option of placing that individual under arrest or issuing a uniform citation. If an arrest is made, the officer has the authority to conduct a search of the interior passenger compartment of the vehicle for weapons and evidence (*New York v. Belton*, 101 S.Ct. 2860 (1980)).

However, if the officer decides to issue a citation, he/she does not automatically have the authority to

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search the vehicle. There is no such thing as a "search incident to the issuance of a citation" (*Knowles v. Iowa*, 119 S.Ct. 484 (1998)). A search of the vehicle when a citation is issued must be justified on some other basis, such as consent, probable cause to believe that the vehicle contains evidence of a crime or contraband, or reasonable suspicion that there are weapons in the vehicle that are accessible.

An officer should **not** place an individual under arrest for DWLR, conduct a search incident to the arrest, and then *unarrest* the individual if the search fails to turn up anything, such as drugs or weapons, which would justify another charge. Unarresting an individual should only be done in a situation where an officer's probable cause goes away and the arrest is no longer justified. G.S. 15A-501 requires an officer to take a person who has been arrested before a judicial official (magistrate) without unnecessary delay. Telling someone they are under arrest and then unarresting them, but still charging them on a citation, is not in compliance with the statute. Of course, an officer should **not** obtain consent to search by offering the driver the option of consenting to a search and receiving a citation **or** getting arrested and having the vehicle searched if consent is not given.

An officer is permitted to use his/her discretion in deciding whether to arrest someone for DWLR or to issue a citation – an officer does **not** always have to arrest or always issue a citation. However, an officer must make sure that his/her decision of whether or not to arrest someone is not a violation of the arbitrary profiling policy (Directive 600-017). For example, an officer could not decide to arrest an individual, as opposed to issuing a citation, based on that person's race.

If an officer issues a citation for DWLR, he/she can still ask for consent to search the vehicle. Remember that, under the Arbitrary Profiling Directive 600-017 IV.D., the motivation for a request for consent cannot be based on an arbitrary profile and an officer must establish an articulable reason for requesting consent.

The best way to approach this is to ask for consent at the end of the traffic stop after the officer has returned the person's driver's license and registration, and issued the citation. Doing it that way eliminates two potential arguments that might be raised successfully at trial by the defendant's attorney:

1) the consent to search was not voluntary, since the defendant was being detained at the time consent was given – the traffic stop was not over and the defendant could not leave without a driver's license, and

2) The officer prolonged the traffic stop beyond the time necessary to investigate and issue the citation for a reason (searching the vehicle) that was not related to the initial justification for the stop.

Before asking for consent to search at the end of a traffic stop, an officer is **not** required to tell the driver that he/she is free to leave (*Ohio v. Robinette*, 117 S.Ct. 417 (1996)).

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ENFORCEMENT IN GATED COMMUNITIES

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This article deals with the responsibility for and scope of law enforcement activity in gated communities. A "gated community" is a limited access residential area that is not generally open to the public and whose streets have not been dedicated to the public use. As a result, the streets in such a community are not public streets or highways nor are they public vehicular areas, as defined in G.S. 20-4.01.

Simply because a community or apartment complex has a gate at the entrance and the streets are not dedicated, however, does not necessarily mean that those streets do not qualify as public vehicular areas. The test is whether or not the public is generally given access to the community. If the gate is generally left open to permit such access, then the community streets should be considered public vehicular areas.

There is, of course, a general obligation to provide police services to a gated community located within the CMPD's jurisdiction. However, there is no requirement that the CMPD specifically engage in preventive patrol activities. Furthermore, there is no legal liability for failure to provide police services to any particular individual in such a community, unless a special relationship is created through the promise of police protection or such services are purposely denied based on a discriminatory intent. Nor is there liability for a delayed response to a call for service, where the delay is attributable to impeded access to the community.

The extent to which preventive patrol is conducted in a gated community is dependent upon how much access that community is willing to provide to the CMPD. Information such as access codes should be kept confidential and disclosed to CMPD personnel on a "need to know" basis.

As a general rule, in responding to a call for service, officers may climb over a gate or fence to access the community and respond to the specific location, if the access code is not available. However, any damage to a gate or fence should be limited to situations where entry is authorized by a warrant or exigent circumstances exist in connection with a serious and/or dangerous offense.

Because the streets in a gated community are not public streets or public vehicular areas, motor vehicle laws **do not** apply and CMPD officers **cannot** take enforcement action for what would otherwise constitute violations. However, non-motor vehicle criminal laws apply and violations of these laws in a gated community can be investigated and enforced. A traffic stop for a motor vehicle violation is not permitted; however, an officer who has reasonable suspicion that an occupant of a vehicle is or has been involved in some other type of criminal activity may initiate a stop of that vehicle within the community. The same applies to the detention of a pedestrian in a gated community.

If an officer lawfully stops a vehicle on a street in a gated community and develops probable cause to believe the vehicle contains evidence of a crime or contraband, the officer may proceed to search the vehicle without obtaining a search warrant.

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Although it is unlikely to happen, a gated community that wanted to have its streets designated as public vehicular areas to allow for traffic enforcement could do so by following the procedure set forth in G.S. 20-219.4. Basically, it involves registering the area with the North Carolina Department of Transportation and posting signs.

There are a number of motor vehicle statutes that apply and can be enforced in public vehicular areas. A list of the most common statutes that apply is as follows:

Public Vehicular Area Statutes Return to top

1. *G.S. 20-4.01(32).* Definition.
2. *G.S. 20-10.1.* Mopeds.
3. *G.S. 20-16.2*. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.
4. *G.S. 20-16.3A*. Impaired driving checks.
5. *G.S. 20-19.* Period of suspension or revocation; conditions of restoration.
6. *G.S. 20-37.6.* Parking privileges for handicapped drivers and passengers.
7. *G.S. 20-127(b).* Windows and windshield wipers.
8. *G.S. 20-129(c) and (d).* Headlamps and rear lamps on motorcycles.
9. *G.S. 20-135.4.* Certain automobile safety standards.
10. *G.S. 20-138.1*. Impaired driving.
11. *G.S. 20-138.2.* Impaired driving in commercial vehicle.
12. *G.S. 20-138.2A*. Operating a commercial vehicle after consuming alcohol.
13. *G.S. 20-138.2B*. Operating a school bus, school activity bus, or child care vehicle after consuming alcohol.
14. *G.S. 20-138.2C.* Possession of alcoholic beverages while operating a commercial motor vehicle.
15. *G.S. 20-138.3.* Driving by person less than 21 years old after consuming alcohol or drugs.
16. *G.S. 20-138.7.* Transporting an open container of alcoholic beverage after consuming alcohol.
17. *G.S. 20-140.* Reckless driving.
18. *G.S. 20-140.2.* Overloaded or overcrowded vehicle.
19. *G.S. 20-140.4.* Special provisions for motorcycles and mopeds
20. *G.S. 20-141(a).* Speed restrictions.
21. *G.S. 20-141(j3).* Speeding in a commercial motor vehicle more than 15 mph while hauling a load requiring a permit.
22. *G.S. 20-141.5.* Speeding to elude arrest.
23. *G.S. 20-154.* Signals on starting, stopping or turning.
24. *G.S. 20-162*. Parking in front of private driveway, fire hydrant, fire station, intersection of curb lines or fire lane.
25. *G.S. 20-163.* Unattended motor vehicles.
26. *G.S. 20-183.8*. Infractions and criminal offenses for violations of inspection requirements.
27. *G.S. 20-217.* Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.

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28. *G.S. 20-218*. Standard qualifications for school bus drivers; speed limit for school buses and school activity buses.
29. *G.S. 20-218.2.* Speed limit for nonprofit activity buses.
30. *G.S. 20-219.4*. Public vehicular area designated.

Other statutes:

1. *G.S. 14-277*. Impersonation of a law-enforcement or other public officer.
2. *G.S. 14-444*. Intoxicated and disruptive in public.
3. *G.S. 136.91.* Placing glass, etc., or injurious obstructions in road.