



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

March-April 2003

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New Law On Orders For Arrest

Forward: In this issue we review a Fourth Circuit case that discusses the search of a vehicle after the arrest of the defendant and the scope of the search. We also review a N.C. Court of Appeals decision in which prior 50B orders were admitted into evidence against the defendant. We also include numerous “reminders” from the Magistrate’s Office in addition to some general reminders in response to officer’s requests.

LEGAL BRIEFS

Fourth Circuit Court of Appeals:

Scope of Search/Automobile Occupant/Incident to Arrest: *United States v. Thornton*, No. 02-4382 (4th Cir. 2003).

Facts: A Norfolk, VA police officer observed a vehicle that was bearing tags that were issued to another vehicle. The officer began following the vehicle, intending to pull it over. Before he had a chance to do so, the driver entered a parking lot, parked and exited the vehicle. The officer pulled in behind him and asked for his driver’s license and informed him the tags did not match the vehicle.

The driver appeared nervous, was sweating excessively, and was rambling in his conversation. The officer asked the driver if he had any narcotics or weapons on him or in the vehicle. The driver replied no to each question. The officer then patted the driver down after asking him if he could do so. The officer then located several bags of marijuana and crack cocaine.

The driver was placed under arrest. The officer then proceeded to search the driver’s vehicle and located a 9-millimeter handgun under the driver’s seat. The driver was arrested on the drug charges and for possession of a firearm by a convicted felon and possession of a firearm in furtherance of a drug trafficking crime.

The defendant’s motion to suppress the drugs and the weapon were denied by the trial judge and the defendant was convicted. On appeal, the defendant challenges the denial of his motion to suppress the firearm.

Issue: Under the search incident to arrest doctrine as applied to vehicles, was the officer required to initiate contact with the defendant while the



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defendant was still in his vehicle?

Rule: No. The officer is not required to initiate contact with the defendant while he is in the vehicle in order to conduct a search incident to arrest. A sufficient link between the arrest and the vehicle must exist.

Discussion: The Court rejected the defendant's argument that an officer must initiate contact with the defendant while the defendant is still in the vehicle in order to conduct a search incident to arrest. The Court examined the justification for a search incident to arrest situation where a vehicle is involved and is in close proximity to the arrestee.

The Court distinguished the ability of officers to search a vehicle incident to arrest from that of an investigative detention. The Court emphasized that an investigative detention situation *does not* automatically allow officers to search a vehicle and other factors would need to be considered on a case by case basis.

Under the analysis of the search incident to the arrest of an occupant or recent occupant of a vehicle, the Court found that when officer makes a custodial arrest, the officer may search the vehicle incident to that arrest, even when the defendant has exited the vehicle. The vehicle must, however, have some connection to the arrest.

The Court discussed the rationale behind the search incident to arrest doctrine including the preservation of evidence and the possible danger to an officer. The Court reiterated this historical rationale and emphasized that requiring an officer to initiate a confrontation with an arrestee while the arrestee remains in the vehicle would endanger the officer. In this case, the Court noted that the defendant was in close proximity to his vehicle when the officer approached him. Additionally, the officer observed the defendant drive, park and exit the vehicle only minutes before he confronted the defendant, which established a sufficient link to the vehicle to fall within the search incident to arrest justification.

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North Carolina Court of Appeals:

Domestic Violence/Prior Bad Acts: *State v. Morgan*, _____ N.C. App. ____ (2003)

Facts: The victim and her husband separated after a violent relationship during which the victim had obtained multiple 50B orders against her husband.

The husband continued to threaten his estranged wife with bodily harm after their separation. On the day of the assaults, the victim was home with her children and a male friend. The defendant burst into the house and after grabbing a thick glass bottle from the kitchen, struck the male friend with the



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bottle. The bottle broke and the defendant then struck his wife with broken pieces of the bottle. The wife received cuts to her face, head, arms, legs and back and suffered permanent nerve damage and disfigurement as a result of the assault.

At trial, the state introduced evidence of prior 50B orders and evidence of prior bad acts leading up to the restraining orders under the North Carolina Rules of Evidence Rule 404(b). The defendant was convicted on two assault with a deadly weapon inflicting serious injury charges.

Issue: Were the prior 50B orders properly admitted at trial?

Rule: Yes. The prior acts tended to show the defendant's intent to kill which is an element of the charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury.

Discussion: Rule 404(b) of the North Carolina Rules of Evidence provides that evidence of other crimes may be admitted to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident but may not be used to prove character. The Court found that the state properly admitted evidence of the prior 50B orders to show that the defendant had the requisite intent to kill his wife. Intent to kill is an element of the crime and the state was required to prove that element and could properly use the prior 50B orders. [Return to top](#)

REMINDERS FROM THE MAGISTRATE

1. Domestic Violence Protection (50B) Orders

From 6:00 p.m. until 10:00 p.m., Monday through Friday, magistrates at the Intake Center can issue ex parte 50B orders that are valid for ten (10) days. However, after 10:00 p.m., the magistrates can only issue ex parte orders that are valid for seventy-two (72) hours. This is because G.S. 50B-2(c1) only authorizes magistrates to issue 50B orders that are valid for 72 hours. During the hours mentioned above, the magistrates have access to district court judges who can approve the ten-day orders. On weekends, officers should check with the Magistrate's Office to see if a judge is available. If a judge is not available, the magistrate can only issue 72-hour orders.

2. Arrest Sheets (Per the Magistrates)

Officers should check over arrest sheets carefully after they are printed out to make sure all of the information is correct. Officers should pay particular attention to the offense(s) the defendant is charged with, as well as the officer information on the arrest sheet.



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Some common errors occur in connection with vehicle break-ins: 1) charging a defendant with burglary under G.S. 14-51, instead of breaking or entering a vehicle under G.S. 14-56, and 2) automatically charging a defendant with felony larceny pursuant to a vehicle break-in, regardless of the value of the property taken (a larceny pursuant to the breaking or entering of a building is a felony, regardless of the value of the property).

In addition, errors are sometimes made in connection with damage to property cases. Real property includes the land and anything fixed to it or a part of it, such as buildings (including doors and windows), fences, water, growing things, and minerals in the ground, while personal property is any property other than real property

3. Citations/Arrests (Per the Magistrates)

Whenever officers issue citations in connection with an incident in which an individual is arrested, they should give all of the citations for that individual to Arrest Processing personnel. This will help to ensure that the person is not charged twice for the same offense. In addition, officers should not put a court date on the citation(s), as the case(s) may go to Courtroom 1101, instead of Courtroom 2205, if the defendant is not released from jail.

4. DWI Vehicle Seizures (Per the Magistrates)

Whenever an officer makes an arrest for DWI and seizes the suspect's vehicle, the officer needs to personally bring the case before the magistrate, so that the case can be scheduled for Courtroom 1101, instead of Courtroom 2205. The officer should make the magistrate aware that a vehicle has been seized in connection with the case.

5. Juvenile Petitions

The third shift magistrates have indicated to us that citizens are requesting juvenile petitions during the time period of 11:00-7:00am and on weekends. Magistrates will issue juvenile petitions and secure custody orders to law enforcement officers ONLY during these time periods. Parents of juveniles or other citizens cannot obtain a juvenile petition from the magistrate at anytime. The magistrates will also need an offense report which will accompany the petition for the District Attorney.

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REMINDER ON MEDIC TRANSPORTS

Questions come up periodically about how officers should handle situations where an individual refuses to be transported by Medic. In many cases, the individual may have consumed some quantity



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of alcohol. Often, in the officer's opinion, the person still appears capable of making an informed decision not to be transported. However, Medic personnel may insist that the person needs immediate medical care and request that the officer force the person to get into the ambulance.

Medic has a "Patient Refusal" Protocol that provides guidelines for dealing with patients who refuse treatment or transportation. Requiring a person to be transported is based on an evaluation of the person's competency to refuse treatment. One of the factors on which that evaluation is made is whether the person is under the influence of a mind-altering substance, including alcohol.

Officers requested to assist in such a case should consult with Medic personnel, consider all of the options, and try to reach a consensus as to the best course of action. If necessary, officers should contact their supervisor. The degree to which a patient is intoxicated is a factor to be considered; however, officers should not automatically assume that everyone who has consumed alcohol is not competent to refuse medical treatment.

G.S. 122C-301 authorizes law enforcement officers to assist an intoxicated person who is found in a public place who is in need of, but apparently unable to provide, medical care for himself. The statute also provides that, in doing so, officers may use reasonable force to protect themselves, the individual, or others. "Intoxication" is defined in G.S. 122C-3(18) as "the condition of an individual whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol or other substances."

It is recommended that officers consider the following questions when confronted with this issue:

1. Is the individual's mental or physical functioning **substantially** impaired as a result of the use of alcohol or other substance? To answer this question, officers should rely on the individual's objective symptoms and information provided to them by persons on the scene, including medical personnel;
2. If the individual's mental or physical functioning is substantially impaired, is he/she in apparent need of medical care? To answer this question, officers may rely on their observations as to the person's injuries or apparent medical condition and information provided to them by medical personnel.

If both of the above conditions are satisfied, then officers may assist Medic by using reasonable means, including the use of reasonable force, to require that the individual receive medical care, including transport by Medic. Officers should make an effort to avoid causing further injury to the individual in the process.

If a competent person who refuses medical treatment commits an offense, such as an assault on Medic personnel, that person should be arrested.



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There are several other types of situations involving injured persons and/or medical transport where officers often take a more active role and these situations are not a part of the current discussion. These include:

1. Arrest situations, in which officers are often required by jail staff to seek medical evaluation for injured arrestees and are under a statutory duty (G.S. 15A-503) to seek medical care for arrestees who are unconscious, semiconscious, or otherwise suffering from a disabling condition;
2. Situations involving serious or life-threatening injuries, in which officers are clearly justified and expected to render assistance; and
3. Situations involving individuals who meet the criteria for involuntary commitment (mentally ill + danger to self or others), in which statutory authority exists to transport and to use reasonable force in dealing with such individuals (G.S. 122C-251(e) and 122C-262(a1)).

CMPD and Medic are currently studying this issue and the above guidelines should be followed in the interim. Officers will be provided with additional information in the future.

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MISCELLANEOUS REMINDERS:

DOMESTIC VIOLENCE-HOW TO RESPOND TO A 10-82 CALL "MEET COMPLAINANT AT..." WITH DOMESTIC VIOLENCE IMPLICATIONS.

Background: The Police Attorney's Office receives many questions concerning the responsibilities of law enforcement with regard to the 10-82 call for service, which usually have domestic implications. We have set forth below some general guidelines which are not intended to cover all possible situations. Officers should continue to exercise their discretion when learning of the nature of the complainant's request and not automatically accompany the complainant in every situation.

Absent a court order directing an officer to assist the complainant with obtaining personal property, the officer has no legal authority to assist or require the other party to allow the complainant into a home to obtain their own personal property.

Factual Scenario: After receiving such a call, the officer responds to a location and locates a man who is requesting assistance from the officers. The man explains that he wants officers to accompany him to his home to retrieve some of his personal belongings as his wife has kicked him out of the house. What should an officer do?



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1. Determine if a 50B Domestic Violence Protection Order exists by contacting Communications. It is also necessary to determine what specific provisions are included in the order. Specifically, is the man excluded from the residence or household or ordered not to threaten abuse or harass the wife?
2. If a 50B exists, is in effect, and specifies that the man is excluded from the residence or household and is ordered not to threaten, abuse or harass the wife, then the officer *should not* accompany the man to the home and should warn the man that a violation of the 50B order will result in a warrantless arrest. If the officer has probable cause to believe the man has violated this provision of a valid 50B, then the officer *shall* arrest the man without a warrant.
3. If no 50B or other order exists, then the officer should attempt to determine if the parties are living apart. If they are living apart, then the determination must be made as to whether the wife has requested the man to stay away from the home. If so, then a domestic criminal trespass situation may exist.
4. The preferred practice would be for the officer to make contact with the wife, out of the presence of the man, to determine the status of the parties. The officer should explain to the woman that she is not required to allow the man inside the residence and that the officer is there to prevent a breach of the peace not, to demand or imply that she must allow him to enter.
5. The officer should also explain to the wife that if she allows the man inside, she may also request that the officer remain inside during this process.
6. If there is no crime and no threatened crime, then an officer's authority is limited to preventing a breach of the peace, much like a repossession situation.

Reminder: The emergency assistance provisions of 50B that allows officers to escort an individual to their residence to remove food, clothing, medication or other personal property applies only to the *victim*, not the defendant.

Prohibitions:

1. Officers cannot require a wife or other individual to let the estranged spouse into the home to retrieve property. Officers should not use their authority to imply that the wife must allow the other party into the home. Officers may enter a home only with consent, a warrant or exigent circumstances. (An exigent circumstance generally means an emergency situation, such as an individual suffering physical harm that is in need of immediate aid.)
2. Officers are generally not in a position to decide who should remain in the home and should advise the man to obtain legal advice if there are issues as to who has the right to live in the residence.



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3. If there is no court order that governs the situation and no crime is being committed or threatened, then officers' involvement should be very limited. The officer may stand by inside the residence, with the woman's permission, to prevent a breach of the peace or take appropriate action if a crime occurs.
4. Officers should not become involved in resolving disputes over personal property. If a dispute arises over which items of property the man will be allowed to take, then the officer should inform the man that he will need to go to civil court and request him to leave the home.

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FIRE LANE ORDINANCE

The City of Charlotte has a fire lane ordinance (C.O. 14-179(18)). A violation of the ordinance is a \$100.00 civil penalty that must be written on a parking ticket (# 20 on the ticket). CMPD volunteers and personnel of the Charlotte Fire Department are also authorized to issue parking tickets. The violation must have occurred in an approved fire lane in the city limits.

The state statute (G.S. 20-162) remains in effect for approved fire lanes in the county and can be enforced only by the issuance of a uniform citation, which is waivable upon payment of the costs of court (\$100.00).

Officers should not issue tickets or citations to persons who are loading or unloading supplies or merchandise and are parked temporarily in a fire lane located in a shopping center or mall parking lot, as long as the vehicle is not left unattended. Such conduct is not a violation of the ordinance or the statute. In addition, whenever a vehicle is parked in a fire lane and the driver is present, it is probably a good policy to not issue a ticket or citation unless the vehicle is parked unlawfully and the driver has failed to move the vehicle after having been requested to do so.

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DRIVERS LICENSE REVOCATION

When an individual's drivers license has been taken for medical reasons under G.S. § 20-9.1, the appropriate charge is Driving while License Revoked under G.S. § 20-28, rather than No Operator's License.

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DWI VEHICLE SEIZURE CASE-SPECIAL COURT DATES

- N.C.G.S. 20-28.3 (m): “District court trials of impaired driving offenses involving forfeitures of motor vehicles pursuant to G.S. 20-28.2 SHALL be scheduled on the arresting officer’s NEXT court date OR within 30 days of the offense, WHICHEVER COMES FIRST.”
- The DA’s office has now arranged for every DWI vehicle seizure first appearance to be scheduled in Courtroom 1101A immediately following pre-trial release. (As opposed to a 2205 setting a few weeks later). The D.A. in Courtroom 1101 will then set a trial date not more than 30 days from the offense date. The D.A.’s will accommodate officer’s scheduled court dates as much as possible, BUT it is likely that officers will have to appear off of their court dates from time to time.
- The 1101 D.A.’s will be providing notice of DWI vehicle seizure cases to court liaison. Court liaison will then contact officers with notice of the trial date if there is not sufficient time for a subpoena to issue. Officers should treat notice from court liaison just as they would a subpoena.
- Officers MUST seize vehicles when they charge a person with DWI and that person’s license is revoked at that time for an implied consent offense. Officer court dates will be respected to the extent that the scheduling will allow.

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NEW LAW ON ORDER FOR ARREST

On April 1, 2003, new legislation went into effect that allows a judge to issue an order for arrest when a defendant fails to appear in court after being charged on a uniform citation with a misdemeanor offense. The legislation, which involved amendments to G.S. 15A-302(f) and 15A-305(b), closes a gap that existed in the previous law. Until now, only an arrest warrant or a criminal summons could be issued under such circumstances, with the officer being responsible for obtaining the warrant or summons.

- Please note: The legislation does not apply when a person fails to appear on a uniform citation charging an infraction. Only a criminal summons can be issued in that situation or, as is the case with most traffic offenses, the Clerk’s Office will notify DMV and the person’s license will be suspended.

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