CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

July-August 2003 Volume 22, Issue 4 Page 1 of 10

Contents

Forward: In this issue we'll look at a 4th Circuit Case, *United States v. Jarrett,* in which the Court set forth the standard by which it would decide whether private individuals are to be considered agents of the government in conducting private searches. Several articles are also included covering important changes to North Carolina criminal statutes, an introduction to Internal Affairs, a review of the new non-consensual towing and booting City ordinance, as well as a look at arrest affidavits and the proper charging procedures for shoplifters. Lastly, we review a useful tool to help combat domestic violence.

FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment/Warrantless Searches/Search by Private Party: *United States v. Jarrett*, 2003 WL 21744122 (4th Cir. 2003).

Highlight: In *United States v. Jarrett*, the 4th Circuit Court of Appeals considered the standard by which it should determine if a private individual had worked independently, or as an agent of the government, when that individual illegally hacked into the computer of a child pornographer and uncovered critical evidence against the pornographer.

Facts: In July of 2000, the FBI accepted evidence of child pornography from an anonymous informant that approached them via the internet. The informant was a computer hacker known only as *Unknownuser* who apparently resided in Istanbul, Turkey. The evidence provided by Unknownuser was used, along with other independent evidence, to obtain a search warrant and eventually a conviction of Dr. Bradley Steiger on child pornography charges. Dr. Steiger resided in Alabama.

During the prosecution of the case, the FBI attaché in Turkey, Agent Duffy, contacted Unknownuser via email and the telephone and informed Unknownuser that he would not be prosecuted (for computer hacking) and asked him to reveal himself. Unknownuser refused to come forward and Agent Duffy left matters by thanking him for his assistance and stating that "If you want to bring other information forward, I am available."

The next contact that was had with Unknownuser occurred in December 2001, after seven months of silence. On December 3rd, Unknownuser sent an email to the Alabama Police Department saying he had "found another child molester" and asking for an FBI contact. The FBI contacted Unknownuser and accepted new evidence on William Jarrett, a resident of Richmond, Virginia.

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Based on that evidence, the FBI obtained a search warrant for Jarrett's computer and arrested Jarrett after searching his computer. After the arrest of Jarrett, an Alabama based FBI agent, Agent Faulkner engaged in a series of emails with Unknownuser which the Court characterized as the proverbial "wink and nod".

Agent Faulkner assured Unknownuser that he would not be prosecuted for his hacking against child pornographers and thanked him repeatedly for his assistance. The Agent wrote, "I cannot ask you to search out cases such as the ones you have sent to us. That would make you an agent of the Federal Government and make how you obtain your information illegal and we could not use it against the men in the pictures you send. But if you should happen across such pictures as the ones you have sent to us and wish us to look into the matter, please feel free to send them to us…"

Jarrett pled guilty to child pornography charges, but when Agent Faulkner's emails with Unknownuser came to light, the District court struck his plea and suppressed the evidence Unknownuser had provided. The District court reasoned that the emails were evidence of an agency relationship between the Government and Unknownuser and that the evidence Unknownuser provided was thus the product of an illegal search. The Government appealed the ruling to the Court of Appeals for the Fourth Circuit

Issue: Was Unknownuser acting as an agent of the Government when he searched Jarrett's computer, making the evidence he uncovered the fruit of an illegal Government search?

Rule: No. At the time of his search, Unknownuser had not engaged in the emails with Agent Faulkner and had not yet become an agent of the government.

Discussion: The Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as instruments or agents of the Government. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2002, 29 L.Ed.2d 564 (1971). The Fourth Amendment does NOT protect against searches by private individuals acting in a PRIVATE CAPACITY. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Thus, evidence secured by private searches, even if illegal, need not be excluded from a criminal trial. *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003).

The key is whether the private individual, when that person conducted the search, was acting as an instrument or agent of a government official. The existence of the agency relationship turns upon the degree of the Government's involvement in the private party's activities in light of all the circumstances. In weighing the totality of the circumstances, Courts have adopted a two-part test in which both prongs must be met before the private party will be considered to be an agent of the government. That test is as follows:

1) Did the Government know of AND acquiesce to the private search?
2) Did the private party conduct the search with the intention of aiding law enforcement?

The courts have interpreted the "acquiescence" prong to require more than passive acquiescence on the government's part. Rather, some affirmative encouragement, initiation, or instigation of the private

action by the government is required before the agency relationship is created. What is NOT required is any written or formal offer and acceptance of the agency relationship.

In this case, the 4th Circuit found that at the time of the search of Jarrett's computer, Unknownuser was NOT an agent of the government. Up to that point, Unknownuser had only been thanked by the FBI and the Court found that Agent Duffy's statement of "If you want to bring other information forward, I am available" was diluted by time and termed toward the Steiger case, not a general encouragement, though it was an extremely close case for the Court. The Court went on to make it clear that Agent Faulkner's "wink and nod" email clearly established an agency relationship and that any future searches by Unknownuser would be attributed to government action and would have to comply with the Fourth Amendment.

Return to top

THREE IMPORTANT CHANGES TO N.C. CRIMINAL LAW

1. CONCEALED HANDGUN PERMIT RECIPROCITY

EFFECTIVE AS OF AUGUST 13, 2003

North Carolina now allows non-residents to carry a concealed handgun within North Carolina IF that non-resident holds a valid concealed carry permit from their home state AND their home state grants the same reciprocity to North Carolina permittees. The following states meet the reciprocity requirement and officers should treat a concealed carry permit from those states just as they would a North Carolina permit:

Arkansas	Florida	Michigan	Pennsylvania	Utah
Alabama	Idaho	Montana	South Dakota	Virginia
Georgia	Kentucky	Oklahoma	Tennessee	

The North Carolina Department of Justice maintains an up to date list of those states whose permits are recognized by North Carolina. That list may be accessed via the DCI network or via the internet at

http://www.jus.state.nc.us/cleframe.htm

Non-resident permittees must conform to the same carrying regulations that North Carolina permittees are restricted to. Officers are reminded that permittees may not carry a concealed handgun into any of the following areas:

- Educational property or courthouses.
- An establishment that sells alcohol for on-premise consumption.
- An establishment that charges an admission fee. (movie theatres, etc.)
- Any establishment posted with a "No Concealed Carry" notice.

Officers are also reminded that a permittee is required to notify an officer that they are carrying a concealed handgun IF that officer approaches or addresses the permittee. A failure to so notify such

an officer is an infraction for the first offense and a Class 2 misdemeanor thereafter. It is also a Class 2 misdemeanor for a permittee to carry a concealed handgun while there is alcohol or an illegal controlled substance in their blood.

Return to top

2. OFFENSE OF SEXUAL BATTERY IS CREATED

EFFECTIVE DECEMBER 1, 2003

A new type of sexual assault has been created by the North Carolina Legislature. The new assault is termed "Sexual Battery". A person is guilty of a sexual battery if that person:

1) For the purpose of sexual arousal, sexual gratification, or sexual abuse
2) engages in sexual contact with another person
3 A) by force and against the will of the other person; OR
B) 1. the victim is mentally disabled, mentally incapacitated, or physically helpless; AND
2. the defendant knows or should reasonably know of the disability

The commission of a sexual battery is a Class A1 misdemeanor. The crime defines sexual contact as follows:

Sexual contact: i) Touching the sexual organ, anus, breast, groin, or buttocks of any person; OR
ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks.

Touching: Physical contact with another person, whether accomplished directly or through clothing.

Return to top

3. CRIME OF SECRET PEEPING IS REVISED

EFFECTIVE DECEMBER 1, 2003

North Carolina General Statute 14-202 is now significantly revised to both alter the elements of the traditional offense and to add a series of new offenses designed to protect the public from "peeping" via photographic devises. The new elements of the classic offense are as follows:

A person is guilty of the Class 1 misdemeanor of secret peeping if that person:
1) Peeps secretly
2) into any room
3) occupied by another person

The old elements required the victim of the offense to be a female, regardless of the defendant's

gender. That restriction is now removed and men, as well as women, are protected by this statute. Additionally, several new elements that, if present, will enhance the offense class of secret peeping have been added. A sampling of these new additions are as follows:

- If the defendant possesses a photographic device while secretly peeping, the offense is a Class A1 misdemeanor.
- Defines "room" and "photographic image" for purposes of the statute.
- Makes it a Class I felony to use any device to create a photographic image of another person in that room for the purpose of arousing or gratifying the sexual desire of any person.
- Provides that any person who secretly uses any device to create a photographic image of another person underneath or through the clothing being worn by that other person for the purpose of viewing the body of, or the undergarments worn by, that other person without their consent is guilty of a Class I felony.
- Provides that using or installing certain devices into a room without consent is a Class I felony. Disseminating a photographic image made in violation of this statute would be Class H felony.
- Provides that knowingly possessing a photographic image that the person knows or has reason to believe, was obtained in violation of this section is a Class I felony.
- A second or subsequent felony conviction is punished one class higher. A second or subsequent conviction for a Class 1 misdemeanor shall be punished as a Class A1 misdemeanor. A second or subsequent conviction of Class A1 misdemeanor shall be punished as a Class I felony.
- Judge may require defendant to obtain a psychological evaluation and comply with treatment for a first offense. On a second or subsequent conviction, judge is required to impose that condition if probation is imposed.
- Victim whose image is captured has a civil cause of action.
- If person is convicted of a second or subsequent felony violation of this section, court may consider whether defendant is a danger to the community and require sex offender registration.
- Exempts the legal activities of private protective services or alarm systems that are legally engaged in the discharge of their official duties and not engaged in an improper purpose as described in the act.

For a discussion of these legislative changes, as well as all other 2003 legislative changes that involve law enforcement issues, please visit the legislative update maintained by the Police Attorney's Office in the CMPD's Microsoft Outlook. They can be found by "drilling down" to the following location:

1. Public Folders
2. All Public Folders
3. CMPD
4. Police Attorney
5. Legislative Issues

For a full copy of the new version of N.C.G.S. 14-202, please visit:

http://www.ncga.state.nc.us/homePage.pl

Return to top

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July-August 2003 Volume 22, Issue 4

INSIDE IA

Written by Captain Ken Miller

Internal Affairs is initiating a guest column in the Police Law Bulletin to share information on issues and trends of importance to maintaining a culture of integrity among all of our employees. Through this column, IA will provide CMPD employees with information to help them manage their conduct and decision making in a way that serves to prevent allegations of misconduct from arising and to foster the development of creative solutions to address recurring types of inappropriate behavior.

To make this column most useful for employees, IA welcomes –from any employee- suggestions for column topics or questions (and rumors) about policy, process and employee problem behaviors to help facilitate understanding among others. We also encourage those who have identified creative ways to manage recurring employee behavioral problems to share them with IA so that personnel throughout the department can benefit through learning. To help us better serve you, please forward any suggestions or questions to **kmiller@cmpd.org**

Return to top

NEW NON-CONSENSUAL TOWING AND BOOTING CITY ORDINANCE GOES INTO EFFECT SEPTEMBER 10, 2003

1. TOWING VEHICLE FROM PRIVATE LOTS BY PRIVATE COMPANIES

- The new city ordinance regulating non-consensual towing from a private lot and the booting of vehicles on private lots becomes effective September 10, 2003. Before a vehicle can be towed from a private parking lot without the permission of its owner or driver, the owner of the lot must post a conspicuous sign providing the following information:
    - The property is a private tow away zone and vehicles will be towed away at the owner's expense.
    - The telephone number of the person or company from whom the vehicle may be recovered.
    - A statement that the vehicle may be recovered from 7:00 a.m. to 7:00 p.m.
    - The sign must contain a universal symbol indicating that parking is not permitted
- The maximum rate that may be legally charged by a private towing company for towing a vehicle from a private parking lot is $120.00.
    - The $120.00 is inclusive of all charges related to towing the vehicle.
    - The fee cap applies only to tows from private parking lots, which are parking areas that charge a parking fee or for which permission is required to park there. (i.e.: private property, apartment complexes, etc.)

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- The storage fee charged shall be no more that $15.00 a day which shall accrue after the vehicle has been stored on the lot for 24 hours.

- **The $120.00 cap does not apply to any vehicle that has a gross weight over 9,000 lbs.**

- If the owner of the vehicle returns prior to the tow truck leaving the lot, then the vehicle will not be towed but will be returned to the owner without charge except in situations where the driver refuses to remove the vehicle from the private parking lot.

- Prior to leaving the lot, the owner or driver of the vehicle must provide the lot owner or their agent (tow truck driver) his or her name, address and vehicle information.

- The towing service must notify Non-Emergency Police Services of the CMPD at (704) 353-1022 within 30 minutes of the removal of the vehicle from a private parking lot.

2. BOOTING OF VEHICLES ON PRIVATE LOTS BY PRIVATE COMPANIES

- No booting shall occur on a private lot unless a sign is conspicuously posted and provides the following information:
  - Unauthorized vehicles will be booted.
  - The telephone number of the person or company that is authorized to remove the boot.
  - A statement that the boot will be removed day or night upon payment not to exceed $50.00.

- Upon being contacted by the owner or driver of the car, a representative must respond to the location within one hour.

Violations of the Ordinance are Class 3 misdemeanors and are arrestable offenses. Officers are encouraged to use arrest only as a last resort and to seek supervisor approval before making arrests based on this ordinance. Copies of the ordinance can be obtained from the City Clerk's office.

Appropriate charging language for the most likely violations are below. All violations are mandatory appearances and should be written on North Carolina Uniform Citations.

ORDINANCE LANGUAGE: (*insert the language given)* **VIOLATION OF SEC., CITY CODE OF CHARLOTTE, NC. THIS OFFENSE HAVING OCCURRED WITHIN THE CORPORATE LIMITS OF THE CITY OF CHARLOTTE.** *Strike "operate a (motor) vehicle on a (street or highway) (public vehicular area)"*

RATES FOR TRESPASS TOW: charge a fee exceeding **($120.00 for the towing) ($15.00 per day for the storage)** of a vehicle parked on a private parking lot without authorization, to wit: **(state the actual fee charged). Sec 6-182.**

CMPD POLICE LAW BULLETIN
A Police Legal Newsletter
July-August 2003 Volume 22, Issue 4 Page 8 of 10

REFUSAL TO RETURN VEHICLE: **(tow)(charge a fee to release)** a vehicle parked on a private parking lot without authorization when the vehicle's **(owner)(legal possessor)** was present and willing to remove the vehicle. **Sec 6-183(a).**

RATES FOR REMOVING BOOT: charge a fee exceeding $50.00, to wit: **(state the actual fee charged),** for the removal of a boot from a vehicle parked on a private parking lot without proper authorization. **Sec 6-188(a).**

Return to top

TRANSPORTING OFFICERS AND ARREST AFFIDAVITS

Questions continue to come up as to whether or not it is appropriate for a transporting officer to sign an arrest affidavit ("pink sheet") on behalf of the arresting officer. The transporting officer **can and should** sign the affidavit, even though the arresting officer completed the narrative portion. In addition, the transporting officer should discuss the case thoroughly with the arresting officer. The arresting officer should **not** sign the affidavit if another officer is going to transport the suspect.

The arresting officer should avoid writing the narrative in the first person (for example, "I observed the suspect . . ."). This makes it appear that the transporting officer, who signs the affidavit, is the individual who made the arrest. Instead, the arresting officer should complete the narrative using his/her name (for example, "Officer Smith of the CMPD observed the suspect . . .").

The transporting officer should print his/her name and place his/her signature on the appropriate lines on the back of the affidavit. The transporting officer should sign the affidavit in the presence of the Sheriff's Office employee, who will then notarize the signature. **NOTE:** The transporting officer should **never** leave the Intake Center without signing the arrest affidavit and having it notarized.

In order to avoid being subpoenaed for court, the transporting officer should put "C" (for "complainant") beside his/her name on the arrest worksheet. The transporting officer should designate the arresting officer as a witness ("W") on the arrest worksheet, which will ensure that the arresting officer will be subpoenaed for court.

Return to top

ARRESTING AND CHARGING SHOPLIFTERS

Officers are often called to investigate suspected shoplifters that are being detained by store security or loss prevention personnel. The two most common charges that arise from shoplifting incidents are misdemeanor larceny and unlawful concealment. Often, the elements of both offenses may be present and officers will have the option of charging suspects with either or both offenses.

Properly charging, and/or arresting suspects in these scenarios is more complicated than may be apparent at first.

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Under most circumstances, the above offenses ARE NOT COMMITTED IN THE OFFICERS PRESENCE. That is a crucial fact that affects whether officers may make a warrantless arrest of the suspect. North Carolina General Statute 15A-401 generally does not allow officers to arrest suspects for misdemeanor offenses committed outside of their presence. That is the rule for misdemeanor larceny. (NOTE: The general rule does not apply if the suspect will not be apprehended, if not immediately arrested, or if the suspect poses a danger to person or property.) Unlawful concealment, however, is a specific exception to G.S. 15A-401's general rule and officers may arrest for unlawful concealment, even when the offense is committed outside their presence, based on probable cause alone.

It is a common fact scenario for a suspect to willfully conceal goods inside a store without having paid for the item, thus committing the offense of unlawful concealment. Additionally, the suspect will then leave the store with the unpaid-for goods, establishing the "carry away" element of misdemeanor larceny and committing that crime as well. In a case such as that officers may arrest the suspect for unlawful concealment. The charging of unlawful concealment is then conducted just as any warrantless arrest would be, with the magistrate issuing a magistrate order for the offense and setting a bond on the suspect.

The difficulty arises when an officer wishes to also charge the suspect with misdemeanor larceny. It is legal for the officer to do so, however, the mechanics of how that is to be accomplished are complex because the misdemeanor larceny, unless committed in the officer's presence, is not an arrestable offense without a warrant. Officers may decide to use their discretion and not charge the suspect with misdemeanor larceny in addition to unlawful concealment. However, if the officer does wish to charge the suspect with misdemeanor larceny while arresting the suspect for unlawful concealment, that is best accomplished by merely issuing the suspect a citation for misdemeanor larceny in addition to arresting the suspect for unlawful concealment.

The magistrate's office prefers this manner of charging because the only alternative would require a separate warrant for the larceny that could result in a double arrest. The effect of issuing a citation is that the suspect will not have a bond to meet for the misdemeanor larceny, as they will for the unlawful concealment charge. Lastly, officers who decide to arrest a suspect for unlawful concealment AND issue a citation for misdemeanor larceny should keep in mind that they must have probable cause for the elements of both offenses and that it is possible that the charges will be set for trial on different court dates

Officers should turn in the citation to the magistrate with their arrest paperwork and the magistrate will do everything possible to keep the charges together. If the cases do become separated, officers should make sure their courtroom District Attorney is made aware of the situation

Return to top

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CMPD POLICE LAW BULLETIN
A Police Legal Newsletter
July-August 2003 Volume 22, Issue 4

A HELPFUL TOOL IN THE AREA OF DOMESTIC VIOLENCE

This article is a reminder of a useful statute that often has applicability in Domestic Violence situations. This statute, N.C.G.S. 14-286.2, went into effect on December 1, 2001 and created the crime of "Interfering with Emergency Communication".

- It is a Class A1 misdemeanor to:

1) Intentionally
2) interfere with emergency communication
3) being made by another person
4) knowing that it is an emergency communication
5) with the intent to prevent that communication.

- Definitions

1. Emergency communication:
   - A communication relating that an individual is or is reasonably believed to be in imminent danger of serious bodily injury or that property is reasonably believed to be in imminent danger of substantial damage.

2. Intentional interference means:
   - Forcefully removing a communications instrument or other emergency equipment from the possession of another;
   - Hiding a communications instrument or otherwise making a communications instrument unavailable to another;
   - Disconnecting a communications instrument or removing it from its connection;
   - Damaging or otherwise interfering with the communications equipment or connections;
   - Disabling an alarm system or providing false information to cancel an earlier call or otherwise indicate that emergency assistance is no longer needed.

- NOTE: Victim does not need to be connected to the emergency assistance for this statute to apply.
- This statute does not qualify as an exception to the warrantless arrest for certain Domestic Violence offenses

- Examples:
  - While victim of domestic violence is telephoning 911, defendant pulls telephone from the wall;
  - Victim places call to 911 as she is being assaulted and defendant grabs telephone and tells 911 operator that police assistance is not needed.

Return to top

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