



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November 2003

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Forward: In this issue, we review cases from the North Carolina Supreme Court and the North Carolina Court of Appeals. In *State v. Marcopolos*, the North Carolina Supreme Court affirmed a decision of the Court of Appeals holding that the defendants committed second degree trespass when they refused to leave privately owned property that was open to the public, after they had no legitimate reason to be on the property and were asked to leave. In *State v. Harper*, the North Carolina Court of Appeals held that the defendant consented to an officer's entry into a hotel room, even though he did not give verbal consent. The court also upheld a limited search of the hotel room before the arrival of a search warrant, based on the plain view doctrine and exigent circumstances.

HIGHLIGHTS:

NORTH CAROLINA SUPREME COURT

Criminal Law/Elements/Trespass:

In *State v. Marcopolos*, 357 N.C. 245 (2003), *affirming*, 154 N.C. App. 581 (2002), the North Carolina Supreme Court affirmed a decision of the Court of Appeals holding that the defendants committed second degree trespass when they refused to leave privately owned property that was open to the public, after they had no legitimate reason to be on the property and were asked to leave.

NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Search/Consent/Plain View/Exigent Circumstances:

In *State v. Harper*, ___ N.C. App. ___, 582 S.E.2d 62 (2003), the North Carolina Court of Appeals held that the defendant consented to an officer's entry into a hotel room, even though he did not give verbal consent. The court also upheld a limited search of the hotel room before the arrival of a search warrant, based on the plain view doctrine and exigent circumstances.

BRIEFS:

NORTH CAROLINA SUPREME COURT

Criminal Law/Elements/Trespass: *State v. Marcopolos*, 357 N.C. 245 (2003), *affirming*, 154 N.C. App. 581 (2002).

Facts: The defendants, part of an organized group of demonstrators, went to the CP & L Building located in Raleigh. Their purpose in going was to demand a meeting with the CEO of Carolina Power and Light in order to



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protest the lack of open hearings on the company's storage of used nuclear fuel at a nuclear power plant. The group had contacted the Raleigh Police Department prior to going to the building. The lobby of the building was open during business hours to allow public access to stores and restaurants, as well as to CP & L's offices, which were located on other floors of the building.

The group was met by a company representative outside of the building. He agreed to hear their requests and accept any documents, but stated that the group would not be able to meet with the CEO of the company. A group of approximately 25 demonstrators then entered the lobby of the building. Also inside the lobby were 12 Raleigh police officers. The seven defendants then separated themselves from the rest of the group and were met by manager of the security company for CP & L. When they asked to meet with the CEO, the security manager told them they could not meet with him and then asked them to leave. They repeated their demand. Eventually, the defendants were told three more times, once by the security manager and twice by a police sergeant, that they could not see the CEO and were asked to leave. They refused and were arrested.

At trial, the defendants were convicted of second degree trespass. On appeal, the North Carolina Court of Appeals, with one judge dissenting, upheld the convictions. On further appeal, the North Carolina Supreme Court also upheld the convictions.

Issue: Did the defendants commit second degree trespass by refusing to leave privately owned property, once they no longer had a legitimate purpose on the premises and were asked to leave by a proper authority?

Rule: Yes. The defendants committed second degree trespass by refusing to leave the building upon request, after they no longer had a legitimate reason to be on the property.

Discussion: An individual is guilty of second degree trespass if without authorization, he/she enters or remains on the premises of another after he/she has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person (G.S. 14-159.13). If, however, the premises are open to the public, the occupants have the implied consent of the owner/ lessee/ possessor to be on the premises.

Under G.S. 14-159.13, a person who lawfully enters a place may be subject to conviction for trespass if he/she remains after being asked to leave by someone with authority. Therefore, a person who remains on privately owned property, without a legitimate purpose, after being asked to leave by someone with authority, may be convicted of second degree trespass.

In this case, the defendants argued that because they were peaceful and were in an area open to the public, the security manager did not have sufficient justification for asking them to leave. However, although the lobby contained several businesses, CP & L retained control over the lobby and held it open to the public for certain legitimate purposes, which included patronizing the businesses.

Assuming that the defendants had implied consent to enter the lobby area, once they were told they could not meet with the CEO and because they did not have any intention of patronizing the other businesses, they no longer had a legitimate purpose for being in the lobby. Although the defendants



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were peaceful, their continued presence disrupted the business atmosphere of the building. In summary, the court held that one with lawful authority may order a person to leave the premises of a privately owned business held open to the public when that person no longer has a legitimate purpose for being on the premises. **PLEASE NOTE:** Although the defendants in this case were charged with and convicted of second degree trespass, all of the elements of first degree trespass were also present, because the prohibited activity occurred inside the building.

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Search/Consent/Plain View/Exigent Circumstances: *State v. Harper*, ___ N.C. App. ___, 582 S.E.2d 62 (2003).

Facts: On March 3, 2001, Detective Wilson of the New Hanover County Sheriff's Department's Vice and Narcotics Unit was notified by a dispatcher of an anonymous call stating there was a large quantity of crack cocaine and heroin in Room 210 of a certain hotel in Wilmington. Detective Wilson unsuccessfully attempted to contact the source of the tip. He then went to the hotel, spoke with the desk clerk, and examined the log book, which contained an entry from the clerk who worked the previous night stating, "I think Room 210 is on drugs." The log book also showed that the occupant paid cash and "checked in as a single and then changed it to a double."

The hotel registry indicated that the room was registered to "George Davis." Detective Wilson checked the vehicle registration information for the room and it came back to a utility trailer registered to "Nick Lionudakis" from Escalon, California. Detective Wilson checked the parking lot but did not find the trailer on the premises. He then called for backup from the Wilmington Police Department and positioned his car in the parking lot where he could observe Room 210.

Detective Wilson observed the defendant, Brian Jackie Harper, wearing a towel and brushing his teeth, step outside of the room for a few seconds and then re-enter. Shortly thereafter, a car entered the parking lot and parked near Room 210. An individual, later identified as Bryan Maurice Brailford, got out of the car, knocked on the door of the room, and entered.

After approximately thirty to forty-five seconds, Brailford returned to the car and leaned down to talk to the driver and occupants of the car. Detective Wilson observed some hand motions back and forth that led him to believe that Brailford was engaged in a transaction with the car's occupants that, based on his training and experience, was consistent with a possible drug sale. Brailford then re-entered Room 210 and shut the door.

Within five minutes, Officer Robinson of the Wilmington Police Department arrived in uniform and approached Detective Wilson's car. At the same time, Brailford opened the door to the room and looked around. Fearing the Brailford had observed the uniformed officer, Detective Wilson and Officer Robinson hurried across the parking lot towards Room 210. The car then sped away from the parking lot.



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Detective Wilson knocked on the door to Room 210. Harper, who was now dressed, "opened the door slightly, a crack." Detective Wilson identified himself and asked to speak to George Davis. Harper initially denied that George Davis stayed there, but when Detective Wilson stated that the room was registered to Davis, Harper started "stuttering a little bit" and said that Davis had stepped out and he didn't know when he would be back.

During the conversation, Harper opened the door "a little bit more, probably about halfway open just for his body" and Detective Wilson could see Brailford inside the room. In Detective Wilson's opinion, Harper was blocking his access to the room and he could tell that Harper did not want him to come into the room at that point by his body language.

Detective Wilson then asked Harper if he could step inside the room to see if George Davis was in. At that time, Harper stepped back from the threshold of the door and opened the door almost to its full extension. Based on the sequence of events, it was evident to Detective Wilson that Harper wanted the officers to come inside the room and had given them consent to enter. Harper did not say anything, but stepped back and "kind of hung his head down."

While standing at the threshold, Detective Wilson observed a set of electronic scales on the night stand between the two beds. He and Officer Robinson then entered the room, where they observed Brailford holding a cup and a lit cigarette. Brailford became hostile when Detective Wilson asked him to put the items down, so Detective Wilson took them from him. Detective Wilson became concerned for his safety when Brailford began moving around the room and became increasingly agitated, so he handcuffed Brailford and told him to sit on one of the beds. When Brailford refused to remain seated, Officer Robinson patted him down and was stuck in hand by a hypodermic needle located in Brailford's pocket.

Detective Wilson continued to talk with Harper, who initially gave false information when asked for his name and date of birth. Harper refused to give consent for the officers to search the room, so Detective Wilson "froze" the room, meaning no one could leave or enter the room while backup officers applied for a search warrant. When Harper refused to remain seated on the bed as instructed, he too was handcuffed.

When Harper and Brailford still refused to remain seated, Detective Wilson moved them into the kitchen area and did a "quick frisk" of the "lunge area" near where Harper had been seated. The frisk consisted of lifting the mattresses of both beds, opening a drawer in the night stand between the beds, and lifting the cushion of a chair next to one of the beds. Detective Wilson searched the "lunge area" because he was concerned that Harper "was trying to get to that area of the room to retrieve something . . . my feeling was he was going to get a weapon, maybe from under a mattress, maybe from inside the drawer."

Detective Wilson found seven hundred dollars in cash under the mattress of the bed on which Brailford had been seated, more cash under the chair cushion, and crack cocaine and one hundred and fifty dollars in cash in the night stand drawer. The officers did not seize the cash or drugs at that time, nor did they conduct any additional search of the room until a search warrant had been issued.



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When the warrant was executed, heroin was discovered behind the television and underneath a chest of drawers. Harper and Brailford were then placed under arrest.

Harper was charged with a number of drug offenses in connection with the incident, including trafficking in cocaine and possession with intent to sell and deliver heroin. He made a motion before trial to suppress the evidence seized from the hotel room. The motion was denied and Harper appealed the decision to the North Carolina Court of Appeals. On appeal, the Court of Appeals upheld the decision of the trial court and held that the evidence was admissible.

Issue 1: Did Harper give valid consent to the officers' entry into the hotel room?

Rule: Yes. The officers' entry into the hotel room was obtained through Harper's consent.

Discussion: The U.S. Supreme Court has held that warrantless searches conducted after obtaining lawful consent are reasonable under the Fourth Amendment. *Schneckloth v. Bustamonte*, 93 S.Ct. 2041 (1973). In addition, G.S. 15A-221(a) authorizes warrantless searches and seizures if consent to the search is given. G.S. 15A-221(b) defines "consent" as "a statement to the officer, made voluntarily . . ., giving the officer permission to make a search."

The issue in this case was whether Harper's nonverbal conduct alone, without any words evidencing consent, constituted valid consent to enter the hotel room. The court held that a "statement", under the statute, can consist of a verbal assertion (oral or written) or nonverbal conduct intended as an assertion.

In *State v. Graham*, 149 N.C. App. 215 (2002), *disc. reviewed denied*, 356 N.C. 685 (2003), the court held that the defendant voluntarily consented to a warrantless search of his person where, after being asked by an officer if she could search his pants pocket, the defendant did not reply verbally but "stood up and raised his hands away from his body accompanied by a gesture that the officer took to mean consent."

In this case, Harper's nonverbal response after Detective Wilson knocked on the hotel room door, identified himself as a police officer, engaged in conversation, and asked to come in constituted valid consent for the officers to enter. When Detective Wilson asked if he could step into the room, Harper stepped back from the threshold and opened the door to its full extension. Under the totality of the circumstances, Harper consented to the entry.

Issue 2: Was the officers' search for and seizure of the electronic scales in the hotel room lawful?

Rule: Yes. The officers conducted a lawful search for and seizure of the scales based on the plain view doctrine.

Discussion: The plain view doctrine authorizes the seizure of evidence without a warrant when the officer is in a place where he/she has a right to be, it is immediately obvious (i.e., probable cause exists) that the items are evidence of a crime, and the discovery is inadvertent.*



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Here, Detective Wilson was at the threshold of the door when he observed the scales and was, therefore, in a place where he had a right to be. Even if he had observed the scales after he entered the room, it would have followed a consensual entry. Based on his training and experience, Detective Wilson knew that such scales were used by drug dealers. In addition, he had received information that the occupants of the room possessed drugs and had observed behavior by the room's occupants that was consistent with drug-related activity. Based on the totality of the circumstances, it was immediately obvious to Detective Wilson that the scales were evidence of a drug crime. Finally, since the officers had no reason to know that they would observe scales when they asked to enter the room, their discovery was inadvertent.

***Please Note:** In interpreting the plain view doctrine, the U.S. Supreme Court has held that an inadvertent discovery is not required under the Fourth Amendment. *Horton v. California*, 110 S.Ct. 2301 (1990). G.S. 15A-253 does require that the discovery of evidence be inadvertent, but only during the execution of a search warrant. The discovery of the scales in this case did not occur during the execution of a search warrant.

Issue 3: Did the officers conduct a lawful search by lifting the mattresses and chair cushion and opening the night stand drawer before obtaining a search warrant?

Rule: Yes. The warrantless search of the occupants' "lunge area" was justified by exigent circumstances and the scope of the search was proper.

Discussion: After entering the room, the officers, under the totality of the circumstances, had probable cause to believe that a drug crime was being committed and were justified in "freezing" the scene pending the arrival of a search warrant. Harper and Brailford repeatedly moved toward the area of the room around the night stand between the beds. The officers were concerned that weapons might be hidden in this area and feared that waiting for a warrant before searching the area placed them in danger. Their search was limited to those places where they could have reasonably expected weapons to be concealed – under mattresses and seat cushions and inside a drawer. The drugs and money found during the search were left in place and were not seized until a search warrant was obtained. The officers' warrantless search of the "lunge area" was justified by exigent circumstances and the scope of the search was permissible.

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CONSUMPTION OF BEER AND WINE ON SIDEWALKS AND PARKING LOTS

Section 15-3(b) of the City Code prohibits the consumption of beer ("malt beverage") and wine ("unfortified wine") on any public street or sidewalk in the city. Section 15-3(d) of the Code also prohibits the possession of an open container of beer or wine on a public street or sidewalk. Under these sections of the ordinance, "public sidewalk" refers to sidewalks maintained by the city and located adjacent to public streets. It does **not** include sidewalks that are privately owned and maintained, such as those located in shopping centers and apartment complexes.



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Section 15-3(c) of the Code prohibits the consumption of beer and wine on the private business premises of another without permission of the owner or person in control of such premises, and Section 15-3(e) makes it unlawful to drop, throw, cast, or deposit a used container of beer or wine on a public street or sidewalk, or on private business premises, without permission. Under these sections of the ordinance, enforcement action can be taken on private business premises (including sidewalks and parking lots) only if the consumption or container disposal is done without permission and the owner or person in control of the premises is willing to come to court and testify as to lack of permission.

PLEASE NOTE that apartment complex parking lots are not private business premises for the purposes of this ordinance. Apartment complexes that prohibit public consumption in common areas are solely responsible for enforcing such regulations.

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TEEN CAR POOLS – LEVEL 2 GRADUATED DRIVER'S LICENSE RESTRICTIONS

A law that has received publicity recently involves the 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]

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DWI VEHICLE SEIZURES: PROCEDURE

1. Determine if the vehicle is subject to seizure for possible forfeiture. Vehicles are subject to forfeiture if the driver is charged with Driving While Impaired (G.S. 20-138.1 and/or 20-138.2) **AND** his/her driving privilege is subject to an impaired driving revocation (See G.S. 20-28.2 for the definition of "impaired driving revocation").
2. Have the vehicle towed by the appropriate zone wrecker company to the **zone wrecker company's storage lot**.
3. Fill out a CMPD tow-in form. The "Hold/Seizure" check-block must be checked "DWI".
4. Present the Magistrate with an "Officer's Affidavit For Seizure And Impoundment And Magistrate's Order". (AOC Form # CR-323, available on the AOC web-site at www.nccourts.org, or at CMPD Property Control).
5. Fill out DMV Form ENF-176 (Available at CMPD Property Control).
6. Turn in both the CMPD tow-in form **AND** DMV Form ENF-176 to CMPD Records **AS SOON AS POSSIBLE**, but at least within twenty-four (24) hours.

DMV Form ENF-176 is transmitted by CMPD Records to DMV, as required by G.S. 20-28.3, and allows DMV to notify any owners of the vehicle of the potential forfeiture. DMV Form ENF-176 is no longer accepted via fax by DMV and **MUST** be sent to DMV by CMPD Records via the DCI network. Delay in sending DMV Form ENF-176 can result in storage fee liability for CMPD.

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EMPLOYEE E-MAIL PUBLIC RECORDS REQUESTS

E-mail messages between City employees can be the subject of a request for public records under the North Carolina Public Records Act (N.C.G.S. Chapter 132). Public records are broadly defined under the statute as those materials "made or received pursuant to law or ordinance in connection with the transaction of public business." If the substance of an e-mail message pertains to the work of the City, it is a public record and subject to disclosure upon request. If an employee receives a public records request for e-mail, he/she should contact a supervisor before responding.

The City Attorney's Office has prepared a memorandum that discusses the legal issues associated with employee e-mail public records requests. This memorandum is available on the Police Attorney's Office Public Folder (Public Folders/All Public Folders/ CMPD/ Police Attorney/General Information). Officers are encouraged to review this memorandum. Our thanks to Mac McCarley, Bob Hagemann, and Hope Root of the City Attorney's Office for making it available to us.

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