CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

March-April 2004 Volume 23, Issue 2 Page 1 of 8

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Forward: In this issue we review a recent U.S. Supreme Court case, *Groh v. Ramirez,* in which a search warrant was found invalid on its face as it failed to describe the persons or things to be seized although the application for the warrant detailed the items. In that same case, the Court found that the ATF agent was not entitled to qualified immunity as the defect in the warrant should have been apparent to a reasonable officer. We also discuss a Fourth Circuit case, *U.S. v. Mayo*, which provides a review of reasonable suspicion for a *Terry* stop and pat down searches when officers believe the suspect they stopped is armed.

We also include a few updates concerning children left unattended in vehicles, territorial restrictions as a condition of probation, soliciting from a PVA, reasonable suspicion for DWLR, the procedures for enforcing the new city ordinance that prohibits parking on front lawns, a correction to the Citation Booklet and a review of procedures for dealing with 16 and 17 year old juveniles.

BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Search Warrant/Particularity of Description: *Groh v. Ramirez,* 124 S. Ct. 1284 (2004)

Facts: Special Agent Jeff Groh of the Bureau of Alcohol, Tobacco and Firearms (ATF) received information from a concerned citizen who stated that he had observed a large stock of weapons at a ranch in Montana owned by Joseph Ramirez. The weapons on the ranch allegedly included an automatic rifle, grenades, a grenade launcher, and a rocket launcher. Agent Groh prepared and signed an application for a search warrant for the ranch. The application included a list of the suspected weapons as well as "receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."

Agent Groh also supported the application with a detailed affidavit setting

forth the reasons he believed the items were concealed on the ranch. He also completed a warrant form and presented all these documents to the Magistrate. The Magistrate found probable cause and signed the warrant form. The section of the warrant form that called for a description of the "person or property" to be seized, however, listed a description of the Ramirez's property rather than the firearms. The warrant also failed to "incorporate by reference" the detailed list of items to be seized that was contained in the application.

A search was conducted at the ranch and Agent Groh orally described to Mrs. Ramirez the objects for which they were searching. He also left a copy of the warrant with her, but not the application. The search failed to reveal illegal weapons or explosives and no charges were filed against the Ramirez's.

The Ramirez's sued Agent Groh and other officers alleging violations of the Fourth Amendment, among other claims. The Ramirez's allege that the warrant was invalid by failing to describe with particularity the place to be searched and the items to be seized and therefore, the search was unconstitutional. The United States Supreme Court accepted the case on a writ of certiorari to address the Fourth Amendment claim against Agent Groh.

Issue 1: Was the warrant invalid and the resulting search a violation of the Fourth Amendment?

Rule 1: Yes. The warrant was invalid on its face as it failed to particularly describe the evidence sought.

Discussion: The Fourth Amendment, in part, requires that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case, although the ***application*** contained the necessary particularity, it was not incorporated by reference into the warrant. The Court stated that the Fourth Amendment "requires particularity in the ***warrant***, not in the supporting documents." Agent Groh argued that even though the warrant was invalid, the search still met the Fourth Amendment requirement of reasonableness as the Magistrate authorized the search based on probable cause, Groh orally described the items to be seized to Mrs. Ramirez, and the search remained within the limits set by the Magistrate. The Court rejected this argument and stated that "the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of case law." The Court noted that the purposes of the particularity requirement include providing notice to the individual whose property is to be searched of the executing officer's lawful authority, as well as the need to search and the limits of that search.

Issue 2: Was Agent Groh entitled to qualified immunity for the constitutional violation?

Rule 2: No. Agent Groh is not entitled to qualified immunity as no reasonable officer could believe that a warrant that did not comply with the particularity requirement was valid.

Discussion: The officer executing the search warrant is required to ensure that the search is lawfully authorized and lawfully conducted. In this case, Groh was both the affiant and the officer executing the warrant. The Court stated that "no reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional."

The Court also rejected Groh's contention that he was entitled to qualified immunity based on the fact that the Magistrate relied on the affidavit and application, which satisfied the particularity requirement, in finding probable cause to search. The Court was not persuaded by Groh's argument that any constitutional error was committed by the Magistrate, rather than Groh. The Court noted that it would not have been reasonable for Groh to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency.

NOTE: The loss of qualified immunity means that Groh may be personally liable for monetary damages to the Ramirez's. Additionally, he violated an ATF Directive on the execution of search warrants.

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FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment/Stop and Frisk/Reasonable Suspicion/Pat Down Search: *U.S. v. Mayo,* 361 F.3d 802 (4th Cir. 2004)

Facts: Richmond police officers Cornett and Johnson were patrolling a high-crime neighborhood that had recently become a police target area in an attempt to address community problems stemming from drug dealing. Officer Cornett had also recently recovered firearms and drugs in three separate incidents in the same neighborhood.

The officers observed Mayo standing in the middle of the street talking to someone on the side of the street. When Mayo observed the officers' vehicle, he "put his left hand into his left hand jacket pocket, turned 180 degrees, walked out of the street and onto the (apartment) complex property that is posted no trespassing and through that property between two buildings."

Officer Cornett also observed that Mayo "either…had something heavy in (his) pocket or he was pushing his hand down" into the pocket. This movement appeared to Officer Cornett to be consistent with an effort to maintain control of a weapon in his pocket while moving. The officers drove around the corner and observed Mayo emerge from the other side of the apartment complex. When he observed the officers, he "immediately stopped, just froze in his tracks for a split second, then started walking along the side of the building."

Officer Cornett then approached Mayo and asked to speak to him. Officer Johnson asked Mayo to remove his left hand from his pocket and he complied. Officer Cornett then asked Mayo if he lived in the apartment complex and Mayo gave no answer but "reacted in a peculiar manner." Additionally, the officer described that Mayo's "eyes were extremely wide, his mouth was slightly agape, and it was almost like nothing registered with him. It was almost as if he was in shock." Mayo also averted his eyes when asked if he had a weapon. Officer Cornett then informed Mayo that he was going to pat him down and Mayo responded by raising his hands halfway up. The frisk revealed a semiautomatic pistol and he was arrested for carrying a concealed weapon. A search incident to arrest revealed several rocks of cocaine and marijuana.

Mayo was indicted for the drug violations and possession of a firearm in furtherance of drug trafficking. The trial court granted Mayo's Motion to Suppress the evidence as the fruit of an illegal stop. The government appealed the court's ruling. The Fourth Circuit reversed the lower court's decision.

Issue 1: Did the officers have reasonable suspicion to stop Mayo?
Rule 1: Yes. Viewing the totality of the circumstances, the officers had reasonable suspicion to believe that criminal activity was afoot and therefore, lawfully conducted a *Terry* stop based on reasonable suspicion.

Issue 2: Did the officers have reasonable suspicion to frisk Mayo?
Rule 2: Yes. The officers also had reasonable suspicion to believe that Mayo was armed and dangerous and could therefore conduct a protective pat down frisk for weapons.

Discussion: The Court initially reviewed the Fourth Amendment principles as set out in *Terry* that police may temporarily stop a citizen when they observe suspicious behavior that would cause a trained officer to suspect criminal activity is occurring or is about to occur. These factors, or additional factors, must then support reasonable suspicion to believe that the person stopped is armed and dangerous in order to conduct a pat down search. The Court noted that "absent a reasonable suspicion of criminal activity, a police officer may not simply approach a citizen, as part of a police-citizen encounter, and frisk the citizen because the officer believes that his safety is at risk."

The totality of the circumstances must be considered when evaluating the constitutionality of *Terry* stops. In this instance, the Court reviewed the many individual factors relied upon and articulated by these officers, which culminated in reasonable suspicion and probable cause for an arrest. The court noted the factors such as the high crime area, Mayo's reaction to viewing the police car, the manner in which Mayo held his hand in his pocket as if he was carrying a gun, his 180 degree sudden turn into an apartment complex and finally his nervous behavior when confronted by the officers. All these factors considered together gave the officers reasonable suspicion to stop Mayo. Because they also reasonably believed he had a weapon, based on their observations of his hand movements, they could then conduct a pat down for weapons.

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NOTE: A stop based on reasonable suspicion **does not** automatically carry with it the right to pat down a citizen. The officer must articulate factors that would cause a reasonable officer to believe that the person is armed and dangerous. It is critical to articulate the factors you relied upon at the time of the stop and to include those in your report.

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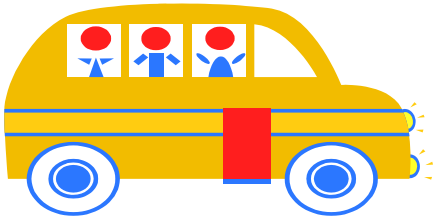
FOR YOUR INFORMATION

UNATTENDED KIDS IN CARS

The Police Attorney's Office has received many questions concerning the issue of children left unattended in vehicles and the appropriate law enforcement response under these circumstances.

Officers should always ensure that children left alone are not in immediate danger. However, simply leaving a child alone in a car is **not** automatically a crime. In order for there to be a violation of G.S. §14-316.1, a person must knowingly or willfully cause, encourage, or aid any juvenile to be in a condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected. A neglected juvenile is one who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker.

Officers should consider the totality of the circumstances when confronted with a child left in a vehicle including the length of time the parent is away from the vehicle, the type of weather conditions that could affect the child's health, as well as the age of the child. For example, a mother who leaves a nine year old child in the vehicle while she runs into the daycare center to pick up her toddler would not automatically violate this statute. However, a parent who leaves a nine year old child in a vehicle while she goes into a bar to have several rounds of drinks is likely in violation of the statute.



TERRITORIAL RESTRICTIONS AS A CONDITION OF PROBATION

The Magistrate's Office informed us that they frequently encounter situations where an officer arrests an individual for trespassing based on a district court judge's order that the individual stay away from a

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certain location, as part of a suspended sentence. The officer will tell the magistrate that the judge ordered the officer in open court to arrest the person if the officer sees them at the prohibited location.

An officer should **not** arrest an individual for trespassing under those circumstances. The judge's order is, in reality, a condition of a probationary sentence and not a ban that justifies an arrest for trespassing. If the individual violates the territorial restriction, they have violated a condition of their probation. If they are on supervised probation, the officer should notify their probation officer. If they are on unsupervised probation, the officer should notify the Clerk's Office. In either case, the person will be required to go to court for a hearing on the violation to determine if their suspended sentence should be activated.

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SOLICITING FROM A PUBLIC VEHICULAR AREA DOES NOT VIOLATE THE CITY ORDINANCE

The Police Attorney's Office has been posed the question as to whether an individual carrying a sign that reads "Will work for Food" while on the premises of a PVA may be charged with a City Code Violation under Sec. 14-282, Soliciting from street or median strip. Because the area is a PVA, this charge would **not** apply. The charge of trespass may be appropriate if the business owner or authorized person requests the individual to leave the premises and they refuse.

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REASONABLE SUSPICION FOR DWLR

Reasonable suspicion for a traffic stop may exist when an officer runs a vehicle tag and learns that the owner/driver is driving with a revoked license. However, the officer should not conduct a traffic stop unless the owner's description matches the appearance of the driver as to race, sex and approximate age.

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NEW ORDINANCE FORBIDDING PARKING IN FRONT LAWNS

On April 1, 2004, the City Council passed a new ordinance, 14-216(25) that limits parking in homeowner's front lawns. A standard operating procedure has been drafted which outlines enforcement provisions. This ordinance carries civil, rather than criminal penalties. The Field Operations Support Sergeant (currently Sergeant Bud Cesena) is the contact person if you have questions. Click here for a link to the SOP. R:\CMPD\Workgroups\SOP\SOP Word Documents\Parking on the Lawn.doc

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CORRECTION
The January 1, 2004 edition of the CMPD Citation Language Booklet contains an error. Number 18 at the top of page 8, "FAILURE TO PROPERLY PASS EMERGENCY VEHICLE" is incorrectly listed as a misdemeanor. It is actually an INFRACTION. The fine is correctly listed as $25+.

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FREQUENTLY ASKED QUESTIONS CONCERNING 16 AND 17 YEAR OLD "JUVENILES"

Question: What can an Officer do when faced with a 16 or 17 year old who has runaway but has not committed any criminal offense?
Answer: 16 or 17 year old juveniles who are regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian, or are regularly found in places where it is unlawful for a juvenile to be, or have run away from home for a period of more than 24 hours, are ***undisciplined juveniles and are subject to the jurisdiction of the juvenile court*** pursuant to G.S. §7B-1501(27)b.

NOTE: If a 16 or 17 year old is arrested for a violation of the law, they are treated as adults although they must receive the **juvenile** waiver of rights, rather than the adult waiver, if interrogated while in custody.

Question: What is an Officer allowed to do with a 16 or 17 year old who has not committed a criminal offense but may be undisciplined?
Answer: If there is no court order and the officer has reasonable grounds to believe that the juvenile is an undisciplined juvenile, the officer may take the juvenile into physical (temporary) custody.

NOTE: If the 16 or 17 year old is not in danger, the officer should use caution in taking the juvenile into custody if undisciplined behavior is the only offense involved. Although officers may use reasonable force when taking a juvenile into temporary custody, officers should be mindful that undisciplined behavior is not a criminal offense and if the juvenile refuses to go, the officer may wish to recommend to the group home or parent, that they should seek assistance from the Department of Juvenile Justice and Delinquency Prevention. (The "DJJDP" phone number is 704-347-7842 and they are located at 720 East Fourth Street.)

Question: Now that the officer has the juvenile, where does he or she take them?
Answer: When an officer takes a 16 or 17-year-old juvenile into temporary custody as an undisciplined juvenile, the officer shall do the following:

1. Notify the parent, guardian or custodian that the juvenile has been taken into temporary custody and of their right to be present with the juvenile until further determination is made as to the need for secure or nonsecure custody.
2. Release the juvenile to the juvenile's parent, guardian, or custodian if the officer decides that continued custody is unnecessary.
3. If continued custody is necessary, the officer may request a petition be drawn for an undisciplined juvenile through the Intake counselor at the Department of Juvenile Justice and Delinquency Prevention. (DJJDP)
4. A juvenile taken into temporary custody shall not be held for more than 12 hours or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday, unless a petition has been filed and an order for secure or nonsecure custody has been entered. (The court may find that a runaway juvenile may need secure custody for up to 24 hours, excluding Saturday, Sundays, and State holidays, and where circumstances require, for a period not to exceed 72 hours to evaluate the juvenile's need for medical treatment or facilitate reunion with parent or guardian.) G.S. §7B-1901, 7B-1903(b)(7).

Question: What is the role of the Law Enforcement Officer when he takes a juvenile into temporary custody?
Answer: The officer should select the most appropriate course of action to the situation, the needs of the juvenile, and the protection of the public safety. The officer may:
1. Release the juvenile, with or without first counseling the juvenile.
2. Release the juvenile to the juvenile's parent, guardian, or custodian.
3. Refer the juvenile to community resources;
4. Seek a petition; or
5. Seek a petition and request a custody order. G.S. §7B-2100.

Question: Is a runaway juvenile the same as a missing person?
Answer: No. There is no time requirement that an individual, including a juvenile, must be missing before prior to making a missing person report. A juvenile may be reported missing and also have an undisciplined petition filed against him or her. A missing person report does not allege a criminal act while an undisciplined petition alleges a "status" offense for which the juvenile may be adjudicated.

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