



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

May-June 2004

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Forward: In this issue we review four recent United States Supreme Court Cases. The first two cases concern the legality of obtaining unwarned statements and evidence during a custodial interrogation. In *Missouri v. Seibert* the court ruled that the practice of intentionally obtaining an unwarned confession rendered the second warned confession inadmissible. In *United States v. Pantane*, the court declined to extend the exclusionary rule to physical evidence obtained during an unwarned but voluntary custodial interrogation. Also, in *Hiibel v. Sixth Judicial District*, the Supreme Court upheld a state statute in which a suspect was arrested for refusing to identify himself during a *Terry* stop. In addition we review *Pennsylvania State Police v. Nancy Drew Suders*, a recent case concerning sexual harassment in the workplace. We conclude this issue with some reminders from the Magistrate Office, a short article on when *Miranda* warnings are not appropriate and the impact of a new law just passed in North Carolina dealing with the alteration of vehicle registration plates.

BRIEFS:

UNITED STATES SUPREME COURT

Highlight: *Missouri v. Seibert*, ___ S. Ct ___, 2004 WL 1431864 (U.S. Mo.) In this case the Supreme Court reviews the practice of obtaining sequential confessions where Miranda is administered only after the suspect confesses and holds that the second confession is not admissible.

Facts: Police officers decided to conduct a custodial interrogation of a murder suspect. At the onset, the detective decided to interrogate the suspect but not advise her that she had a right to remain silent and have an attorney present. The officer's goal was to first obtain a confession and then provide her with Miranda warnings whereupon the officer would ask her to repeat the previously unwarned confession. Such a practice had been sanctioned by the Department. During the initial unwarned interrogation, the suspect admitted that she intended to kill the victim. At this point, the detective ceased the interrogation, waited twenty minutes, and returned to the interrogation room to advise the suspect of his rights. The detective then questioned the suspect about his previous confession.

Issue: During a custodial interrogation, does a Miranda warning provided after officers obtain an unwarned confession function effectively to permit admission of the subsequent confession?

Rule: No, a subsequently warned custodial confession obtained during a successive interrogation close in time and similar in content is not admissible where the officer intentionally withholds Miranda warnings for the purpose of obtaining an unwarned confession.



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Discussion: The Court noted that any intentional and conscious deviation from *Miranda* for the purpose of interfering with the suspect's rights is an unacceptable police practice. In order for any confession (custodial or otherwise) to be admissible, it must be voluntary. Specifically, custodial interrogations are inherently coercive and heighten the risk that the suspect will be denied his privilege against self incrimination. As such, *Miranda* requires "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored" in order to overcome the presumption that the statements were obtained under an impermissible coercive atmosphere. In this case, the Court emphasized that "it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." For this reason the practice of successive interrogations under circumstance described above should not be utilized by the Department. In addition, unwarned "warm up" interviews intentionally designed to illicit confessions are clearly impermissible based upon the holding of this case.

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Highlight: *United States v. Patane*, ___ S. Ct. ___ 2004 WL 1431768 (U.S.) Physical evidence that was obtained as a result of statements made during an unwarned custodial interrogation is admissible according to the United States Supreme Court. Neither *Miranda* nor the right against compelled incrimination requires non-testimonial evidence, such as a gun, be suppressed when the gun was located based on information obtained through an unwarned but voluntary statement made by a suspect.

Facts: Officer Fox received information that Patane had violated a domestic order. At about the same time he received additional information that Patane was an ex-felon and illegally possessed a .40 Glock pistol. Officers went to Patane's residence and arrested him for violating the order. Detective Benner attempted to read Patane his rights but Patane interrupted the officer and insisted that he knew his rights. Detective Benner, taking Patane up on his word, did not continue to read him his rights and continued to question Patane concerning the Glock. Patane responded "I am not sure I should tell you anything about the Glock because I don't want you take it away from me." Detective Benner persisted and eventually Patane told the officers that the gun was in his bedroom and gave officers permission to retrieve the pistol. Patane was indicted for possession of a firearm by a convicted felon. At issue on appeal is whether the gun should have been suppressed as fruit of an unwarned statement.

Issue: Should the gun have been suppressed as fruit of an unwarned statement?

Rule: No, the Fifth Amendment right not to incriminate oneself does not require non-testimonial evidence be suppressed when the evidence is derived from an unwarned voluntary statement.

Discussion: *Miranda* warnings are designed to guard and protect the Fifth Amendment's prohibition against self incrimination which states no person shall "be compelled in any criminal case to be a witness against himself." The warnings required by *Miranda* guard against the erosion of this right by ensuring that a person subjected to a custodial interrogation understands his or her rights and freely and voluntarily chooses to waive these rights. In the event an **unwarned** statement is obtained during



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a custodial interrogation, the decision of the person to talk is presumptively the result of coercion and, for this reason, the statement is treated as compelled and will be suppressed. Although the Court did not specifically approve of the practice of obtaining custodial unwarned statements, the Court decided not to extend the exclusionary rule to physical **evidence** obtained from an unwarned but **voluntary** statement. The Court reasoned that the right against self incrimination only applies to statements and not to non-testimonial evidence. As previously mentioned, intentionally deviating from Miranda will result in suppression of unwarned statements. The Court, by allowing admission of physical evidence, is by no means placing its stamp of approval on a routine practice of obtaining unwarned statements in hopes of locating physical evidence.

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Highlight: In *Hiibel v. Sixth Judicial District*, ___ S.Ct. ___ 2004 WL1373207 (U.S. Nev.) the Supreme Court, upon reviewing Nevada's stop and identify statute, held that neither the Fourth Amendment prohibition against unreasonable searches and seizures nor the Fifth Amendment's right against self incrimination were violated when Hiibel was arrested and convicted for refusing to identify himself as required under Nevada state law.

Facts: An officer received reliable information that a man was assaulting a woman in a red and silver GMC truck. Upon arrival the officer found a truck matching the description provided by the caller. The officer saw a man standing outside of the truck and a woman sitting in the passenger side of the truck. There were skid marks on the gravel just behind the truck's rear tires. The man appeared to be intoxicated and upon being asked to identify himself, he refused to cooperate. Hiibel was asked some eleven times to identify himself but refused and taunted the officer by telling him to come and arrest him. The officer accepted Hiibel's "offer" and arrested him. Hiibel was charged with "willfully resisting, delaying or obstructing a public officer in discharging or attempting to discharge any legal duty of his office" in violation of Nevada State law. The law that Hiibel obstructed was Nevada's "stop and identify" statute which states: "The officer may detain the person pursuant to this section only to ascertain his identify, and the circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." Hiibel was convicted of violating this statute and appealed asserting that the state statute, by compelling him to identify himself, deprived of the Fourth and Fifth Amendment rights.

Issue: Does the Fourth Amendment prohibit a state statute from compelling a suspect to disclose his name to police during the course of a *Terry* stop?

Rule: No, "A state law specifically requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures."

Discussion: The Nevada statute in question provides: "The officer may detain the person pursuant to this section only to ascertain his identity, and the circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

Questions posed to a suspect about his identity are a "routine and accepted" practice performed by officers during a *Terry* stop. Although the Court has stated that the Fourth Amendment does not



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permit police to arrest a suspect detained under *Terry* for failure to answer questions, it has never answered the question of whether **state law** could constitutionally impose a duty to identify oneself upon a suspect that was being lawfully detained under *Terry*. Here, the Court held the Nevada state statute did not violate the Fourth Amendment because the request for the suspect's name was "reasonably related in scope to the circumstances which justified the initial stop."

How does this effect the application of North Carolina's state law making it a crime for a person to delay, obstruct or resist an officer performing his or her duty? Unless our current state law is amended with specific stop and identify language similar to Nevada's, officers should not arrest someone during a *Terry* stop simply because the person refuses to provide the officer with his name. The Fourth Amendment does not, by itself, place a duty on a person to answer an officer's questions posed to him during a *Terry* stop and, in addition, North Carolina courts have been reluctant to find an explicit "duty to identify oneself" within our current state law.

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Highlight: In *Pennsylvania State Police v. Nancy Drew Suders*, 124 S.Ct. 2342(2004) an employee's reasonable decision to resign because of unendurable working conditions is treated as a discharge by the employer.

Facts: Suders was a police communications operator who asserted that her male supervisors constantly subjected her to a salvo of sexually explicit comments and gestures. She reported this problem to her Equal Employment Opportunity Officer (EEO) but neither the officer nor Suders followed up on the complaint. The harassment continued and after two months went by, Suders contacted the EEO officer and told her she was being harassed and that she was afraid. The EEO officer told her to file a complaint but did not provide her with a complaint form. Two days later, Suder was arrested for theft of her own computer-skills exam papers. Suder's admitted that she removed the papers but did so because she found the papers in an unsecured area and feared that her supervisors were falsifying her test scores to show a failing grade. After being interrogated and charged she resigned from the force and sued her employer, the Pennsylvania State Police, under Title VII for sexual harassment.

Issue: Is a constructive discharge ("I had enough – I quit") a tangible employment action under Title VII?

Rule: Yes, an employee's reasonable decision to resign because of unendurable working conditions is treated as a discharge by the employer.

Discussion: Under Title VII, an employer may be held liable for sexual harassment perpetrated by a supervisor. In situations where the supervisor harasses an employee, but the harassment is unaccompanied by an adverse official act (tangible employment action), the employer may avail itself of an affirmative defense. However, in circumstances where the supervisor harasses an employee and takes a tangible employment action, the employer is strictly liable to the employee for the harassment. A tangible employment action is defined as an act such as "a discharge, demotion, or undesirable reassignment." The Court noted that the level of harassment for a constructive discharge



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is higher than that for "ordinary" sexual harassment. "Although there may be evidence from which a jury could find sexual harassment . . . the facts alleged for constructive discharge must be **so** intolerable that a **reasonable** person would be forced to quit. In addition, an employer will be able to avail itself of an affirmative defense in a situation involving a constructive discharge".

It is important to note that the issues concerning harassment in the workplace continue to surface even though employers have been on notice since 1986 that a hostile environment is actionable under Title VII. For this reason, supervisors should be resolute in ensuring a productive workplace free from behavior that creates a hostile environment. In addition all complaints should be promptly investigated pursuant to our Directive 300-017.

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REMINDERS FROM THE MAGISTRATE'S OFFICE

1. Felony Case Rejected at Papering by the District Attorney's Office

When an officer papers a felony case with the District Attorney's Office and the case is rejected for prosecution, the officer should contact the victim and let him/her know of the disposition. The officer should **not** advise the victim to go to the Magistrate's Office and attempt to obtain a warrant after the case has been rejected.

2. Felony Case Accepted as a Misdemeanor by the District Attorney's Office

When an officer papers a felony case with the District Attorney's Office and the case is accepted for prosecution as a misdemeanor, the officer should obtain the misdemeanor warrant from the Magistrate's Office. The officer should **not** advise the victim to obtain the warrant, as the information provided to the magistrate by the victim will relate to a felony charge, when the case has only been accepted for prosecution as a misdemeanor. Magistrates will **not** issue felony warrants for citizens.

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WHEN MIRANDA WARNINGS SHOULD NOT BE GIVEN

SITUATION: A patrol officer arrests an individual on a felony charge. The officer decides, just to be safe, to advise the suspect of his *Miranda* rights. The suspect tells the officer that he wants a lawyer. The officer then transports the suspect and turns him over to a detective.

In the above situation, any opportunity that the detective would have had to interview the suspect was eliminated by the suspect asserting his 5th Amendment right to counsel. Once that right has been asserted by a suspect who is in custody, interrogation by **any** officer on **any** crime is not allowed unless an attorney is present, the suspect initiates further discussion, or the suspect leaves custody



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(although, once a suspect has been formally charged with an offense, the **6th Amendment** right to counsel applies to that offense, regardless of whether or not the suspect is in custody). In addition, advising the suspect of his rights in the above situation was unnecessary, since the arresting officer did not intend to interrogate him.

An officer does not have to advise a suspect of his *Miranda* rights in order to make sure that any spontaneous statements the suspect might make while in the officer's presence are admissible in court. Such statements are admissible without *Miranda* warnings, since they are not made in response to interrogation. An officer may also ask very limited, clarifying questions when spontaneous statements are made. For example in *Anderson v. Thieret*, 903 F.2d 526 (7th Cir. 1990), while the defendant was in custody, he blurted out, "I stabbed her!" The court held that the officer's question, "Who?" was not interrogation because it was a neutral response, intended to clarify the defendant's statement.

In addition, an officer is not required to advise an arrestee of his *Miranda* rights prior to asking routine booking questions that relate to information such as his name, address, height, weight, eye color, date of birth, current age, employment, etc., as long as the questions are not intended to elicit an incriminating response (for example, asking the age or date of birth of an arrestee in a statutory rape case without *Miranda* warnings would be a violation, since the arrestee's response would constitute an element of the offense). Routine booking questions may even be asked if the arrestee has been advised of his *Miranda* rights and has asserted the right to remain silent and/or the right to counsel. In either case, his responses are admissible against him in court.

If an officer, for whatever reason, does advise a suspect or arrestee of his *Miranda* rights, the officer should communicate that information, along with the person's response, to the detective and should also document it.

Miranda warnings are only required when a person is in custody, which is defined as a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). *Miranda* warnings are not required during voluntary contacts or investigative detentions where a reasonable person under the circumstances would not feel like he was under arrest.

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ALTERING, DISGUIISING, OR CONCEALING VEHICLE TAGS

With the use of red light cameras and photo-radar in Charlotte, it is important for officers to review the law related to altering registration plates. Most importantly, Officers should note that the law has been recently amended with an effective date of October 1st, 2004.

Under N.C.G.S. 20-63(g), it is a class 2 misdemeanor, with a mandatory court appearance, for the operator of a motor vehicle to willfully do any of the following:



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- 1) mutilate, bend, or twist a registration plate; or
- 2) cover a registration plate or cause one to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device; or
- 3) paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any portion of a registration plate or the figures or letters on the plate; or
- 4) place or deposit any oil, grease, or other substance on a registration plate for the purpose of making dust adhere to the plate; or
- 5) deface, disfigure, change, or attempt to change any letter or figure on a registration plate.

Charging language for the above offense may be found in the CMPD Citation Language Booklet, January 1, 2004 edition, on page 1, listing 2. Charging language for dust gathering substances (number 4, above) does not appear in the Citation Language Booklet, but is as follows:

ALTERATION, DISGUISE, OR CONCEALMENT OF TAG NUMBERS: by (placing)(depositing)(causing to be placed)(causing to be deposited) any (oil)(grease)(substance) upon a registration plate for the purpose of making dust adhere thereto. **GS 20-63(g).**

An operator of a motor vehicle who otherwise intentionally covers any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction (\$25.00 fine plus court costs). Charging language for this offense may be found in Citation Language Booklet on page 1, listing 8.

With regard to this violation, officers should note that at least two devices designed to defeat red light cameras and photo-radar have been advertised. One is a clear tag cover that makes the tag illegible when it is viewed at an angle. Clear tag covers generally do not violate N.C.G.S. 20-63(g), but a cover that makes the tag illegible when viewed at an angle will likely be considered a violation by the courts and officers can issue citations for the infraction accordingly.

The other device is a liquid spray that is allegedly capable of disrupting flash photography of the tag. A clear liquid that does not gather dust or impede the naked eye from a normal view of a license plate does not **currently** violate N.C.G.S. 20-63(g) and no citations should be issued.

However, **EFFECTIVE October 1, 2004**, it will be an infraction (\$25.00 fine plus court costs) under N.C.G.S. 20-63(g) for a vehicle operator to willfully cover a registration plate or any part thereof by **any** device designed or intended to interfere with the taking of a clear photograph of the plate by a traffic control system camera. Charging language for photo disrupting devices obviously does not appear in the current Citation Language Booklet, but is as follows:

ALTERATION, DISGUISE, OR CONCEALMENT OF TAG NUMBERS:
by (covering)(causing to be covered) any part or portion of the registration plate of the vehicle by any device (designed)(intended) to (prevent)(interfere) with the taking of a clear photograph of the plate by a traffic control system camera. **GS 20-63(g).**

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