CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

July-August 2004 **Volume 23, Issue 4** **Page 1 of 9**

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Forward: In this issue we examine a Fourth Circuit Court of Appeals case, *U.S. v. Holmes,* in which the legal requirements for a *Terry* search of a vehicle are reviewed. We will also review two cases from the North Carolina Court of Appeals. In *State v. Villeda,* the North Carolina Court of Appeals wrestles with suspected racial profiling on the part of a State Trooper and the effect it has upon the Trooper's credibility. In *State v. McQueen*, we'll explore the Doctrine of Recently Stolen Property and how much time can pass before "recency" is exceeded.

We also include a review of the new federal law that exempts qualified law enforcement officers from state laws which ban the carrying of concealed weapons. Additionally, we include some updates on how the Charlotte City Code regulates motor vehicles, changes in the forms used to transport emergency commitments from hospital emergency rooms, and the "Drug Tax". We conclude with Reminders from the Magistrate's Office.

BRIEFS:

FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment/Terry Search of Vehicles/Reasonable Suspicion of Armed or Dangerous: *U.S. v. Holmes,* 376 F.3d 270 (4th Cir. 2004)

FACTS: In the late 1990's, South Carolina Law Enforcement Division (SLED) agents identified a particularly dangerous criminal gang that routinely committed armed robberies, burglaries, and targeted drug dealers. The agents obtained arrest warrants for three members of the gang that could be identified by both their gang names and their real names. The SLED agents publicized the gang and their dangerousness to several local South Carolina law enforcement agencies including the Myrtle Beach Police Department.

SLED agents specifically informed the local police in Myrtle Beach that the gang routinely used a Green Lincoln Navigator and associated with a local drug dealer named Timothy Gadsen, when in town. On January 21, 2000, in Myrtle Beach, a confidential informant passed along information that two of the gang-members, known by the nicknames "Six" and "Troop", along with Gadsen, had arrived at a local apartment complex in a green Navigator.

Agents and officers set up a surveillance of the complex and verified the presence of a green Navigator. Due to the suspected dangerousness of Six and Troop, the officers decided to wait until the men left the apartment complex before attempting to arrest them. Once the men left in the Navigator, officers pulled over the vehicle using "felony stop" tactics.

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The two men that were in the Navigator were hand-cuffed, frisked, and placed in the back of separate patrol cars. The officers then performed a "Terry" frisk of the passenger portion of the Navigator and located a 9mm pistol with ammunition. After conducting the search, the officers obtained the identification of the two men and determined that neither of them were Six or Troop.

However, the officers also determined that one of the men, Benjamin Holmes, was a convicted felon. Holmes was arrested for being a felon in possession of a firearm and the other man was released. It is worth noting that Benjamin Holmes was in fact the gang-member known as Six. SLED agents had incorrectly identified Six as another person at the time of the stop.

At trial, Holmes moved to suppress the 9mm pistol as the fruit of an illegal search. The District Court denied the motion and Holmes was eventually sentenced to 260 months in prison. Holmes appealed the conviction to the Fourth Circuit Court of Appeals and again challenged the search of the Navigator.

Issue: Was the search of the passenger area of the vehicle legal?

Rule: Yes. The officers reasonably suspected that the suspects might have been dangerous and that there might have been readily-accessible weapons in the vehicle that the suspects might have gained access to at a time that would endanger the officers.

Discussion: The United States Supreme Court in *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), held that "...the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons". Thus, the "Terry" search of vehicles was authorized. Such "Terry" searches often result in the discovery of evidence, and thus are often scrutinized closely by Courts and attorneys.

In this matter, there was little doubt that it was reasonable for officers to consider the individuals in the Navigator as dangerous. The officers clearly had a reasonable basis to believe that the vehicle was occupied by men wanted for armed robbery and burglary. The Fourth Circuit made it clear that it was completely reasonable for officers to consider not just the suspect's behavior at the time of the stop, but also "the suspect's commission of violent crimes in the past – especially when those crimes indicate a high likelihood that the suspect will be armed and dangerous when encountered in the future." *U.S. v. Holmes,* 376 F.3d 270 (4th Cir. 2004).

The true issue in the *Holmes* case arises from the "suspect may gain immediate control of weapons" language from the *Long* case. The argument put forth was that both Holmes and the other suspect were hand-cuffed and in locked patrol cars at the time of the search, and thus, could not possibly have gained ***immediate*** control of a weapon from the Navigator. Since there was no way that the suspects could have gained ***immediate*** access to weapons possibly in the Navigator, the search of that vehicle was not authorized by *Long*.

That argument was found faulty by the Fourth Circuit because of the definition of ***immediate***. The Court, relying heavily on language from the *Long* case, explained that immediate does not mean times

only prior to or during the stop. It also includes the time after the stop and before officers have departed. So long as officers have a reasonable belief that the suspect may gain access to the vehicle at a time when that access would endanger the safety of the officers, the ***immediacy*** requirement of *Long* is met.

In this case, with the suspects as of yet unidentified and not under arrest, it was perfectly reasonable for the officers to believe that it was possible that one or both of the suspects would not be arrested, but released back to the Navigator. Thus the search was permissible in this case.

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Investigative Stop of Vehicles/Probable Cause or Reasonable Suspicion Fourteenth Amendment/Equal Protection/Racial Profiling: *State v. Villeda,* __ N.C.App. ___, 599 S.E.2d 62 (2004)

FACTS: At 2:40 a.m. on 11 August 2001, Trooper C.J. Carroll stopped the vehicle driven by Juan Villeda, a Hispanic male, for a seatbelt violation. The stop occurred on a section of Highway 70, known as Hillsborough Road in Durham, North Carolina. The Trooper arrested Villeda for Driving While Impaired and Villeda was convicted of that charge in District Court. Villeda appealed his conviction to Superior Court and moved to suppress the stop and dismiss the case based on the 4th, 5th, and 14th Amendments.

Three attorneys and a State Highway Patrol Internal Affairs official, Lieutenant Vuncannon, were called to testify at the hearing on Villeda's motions. The attorneys related several statements allegedly made by Trooper Carroll regarding his opinions regarding Hispanic people. "If they're Hispanic and they're driving, they're probably drunk", and "[e]veryone knows that a Hispanic male buying liquor on a Friday or a Saturday night is probably already drunk" were just two of the comments attributed to the Trooper.

Further, Lieutenant Vuncannon testified that in his investigation of possible racial profiling on the part of theTrooper, the Trooper stated "Hispanics are more prone than other races to get in a car after they have been drinking." Most importantly to the case, the Lieutenant testified that Trooper Carroll had told him, regarding the stretch of road in which Villeda was stopped, "...the streetlights glare off the windows, its almost like a mirror on the window" and that he could not see into vehicles in front of him.

Trooper Carroll denied making any of the statements reported by the attorneys and maintained that he could see that Villeda was not wearing his seatbelt and that was the reason for the stop. The Superior Court found that the Trooper had indeed made all of the statements and that he could not see inside of Villeda's vehicle and that the Trooper's assertion that the reason for the stop was a seat-belt violation was incredible. The Superior Court then dismissed the case holding that the stop was not supported by a reasonable, articuable suspicion and that Villeda had made a *prima facie* showing of racial profiling. The State appealed to the North Carolina Court of Appeals.

Issue 1: Was the stop of the Villeda's vehicle legal?

Rule 1: No. There was no credible evidence of a particularized, reasonable suspicion to justify the traffic stop, and thus the stop was not supported by probable cause.

Issue 2: Did Trooper Carroll engage in racial profiling?

Rule 2: Not reached by the court since the dismissal was upheld based on the lack of probable cause for the stop.

Discussion: This case, though decided purely on a routine Fourth Amendment issue and the credibility of the Trooper, contains several aspects that should be noted by law enforcement officials around the State. As indicated above, the Court of Appeals rested its holding purely on the Fourth Amendment and the legal justification required to legally stop a vehicle for a traffic violation. It should be noted that the Court followed an earlier, questionable, opinion by the Court of Appeals, *State v. Wilson,* 155 N.C. App. 89, 574 S.E.2d 93 (2002).

In *Wilson*, the Court of Appeals held (implicitly if not expressly) that while some traffic stops are justified by the lower standard of reasonable suspicion, vehicle stops for ***readily observable traffic*** violations (such as seatbelt violations) can only be justified by probable cause. The holding in *Wilson* is at odds with several earlier North Carolina decisions and is likely to be overturned. For a discussion of *Wilson*, see Arrest, Search, and Investigation in North Carolina, 3rd Edition, Farb (2003).

However, as the decision in *Villeda* shows, *Wilson's* probable cause standard is currently being applied by the North Carolina Court of Appeals and officers should be cognizant of it whenever conducting a vehicle stop for a "readily observable traffic violation". In most cases, probable cause will be easily developed. Officers should simply be sure to properly document their observations of "readily observable traffic violations" before the vehicle stop and be ready to articulate their entire basis for the stop.

The *Villeda* case should be viewed as an example of a complete loss of credibility on the part of an officer. The Trooper's statements to three defense attorneys as well as his agency's own Internal Affairs unit were not only offensive, but also evidenced a lack of thought and invalid investigatory practices on the Trooper's part. CMPD's Arbitrary Profiling policy (600-017) makes it clear that such practices and statements are not tolerated by the department. Despite the *Villeda* Court not reaching the racial profiling issue in the case, *Villeda* is also a clear admonishment that the North Carolina Court's will not accept such behavior.

This case should serve as a warning bell to all North Carolina Law Enforcement as to just how damaging allegations of racial or arbitrary profiling are. The Court found that the Trooper's alleged statements were facts and thus the Trooper's credibility with the Court was terribly damaged, causing the case to be dismissed and ending the prosecution of a person that may have been guilty. While race is valid as a descriptive characteristic of a particular person suspected of a particular crime, arbitrary stereotypes regarding race are neither useful investigative tools nor valid police practices.

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N.C.G.S. §14-71.1/Felony Possession of Stolen Goods/Doctrine of Recently Stolen Property:
State v. McQueen, ___ N.C.App. ___, 598 S.E.2d 672 (2004)

FACTS: On 29 September 2001, at approximately 6:00 p.m., Alfred Mott finished his work for the day and placed his 5200-watt generator in his storage shed in Atkinson, North Carolina. Mr. Mott locked his shed and went home for the night. He returned the next morning and discovered that his shed had been entered via a set of double doors that do not lock (they are secured via a board placed inside the shed) and that his generator had been taken.

Mr. Mott noted markings on the ground outside his shed where it appeared that the generator had been dragged to a vehicle and then loaded onto the vehicle. Mott stated that he was "puzzled in [his] mind how in the world one man [could] pick that big generator up and tote it that far..." Mott reported the generator stolen and several days later the local Sheriff's office located the generator with the assistance of Mr. Noel Brooks.

Mr. Brooks had the generator in his possession and reported that he had obtained it on the morning of September 30th when the defendant, David McQueen brought it to Brooks' residence. Apparently, McQueen arrived at Brooks' residence that morning (the morning after the theft) unbidden and asked if he could use the generator as security for a $100.00 loan from Brooks. Brooks agreed and gave McQueen $100.00 and took the generator. Brooks reported the matter to the Sheriff's office several days later.

McQueen was tried for felony larceny and felony possession of stolen goods. McQueen argued that there was no evidence that he stole the generator or that he knew or should have known that the generator had been stolen via a breaking or entering of the shed. Based on the Doctrine of Recently Stolen Property, the jury convicted him of both felony larceny and felony possession of stolen goods.

The trial court arrested judgment on the larceny and sentenced McQueen to 80-105 months incarceration for the felony possession of stolen goods conviction (as well as his habitual felon status). McQueen appealed his conviction to the North Carolina Court of Appeals, which upheld his conviction.

Issue: Was the Doctrine of Recently Stolen Property applicable?

Rule: Yes. When a defendant is found in exclusive control and possession of stolen goods shortly after the theft of those goods, the Doctrine of Recently Stolen Property is applicable.

Discussion: The Doctrine of Recently Stolen Property is a legal concept that is extremely valuable to law enforcement. The doctrine is a rule of law that presumes that a person in possession of recently stolen property is guilty of the actual unlawful taking of that property, as well as any unlawful entry associated with such a taking. In order for the doctrine to apply, three conditions must be present. They are:

1) property was stolen;
2) defendant had exclusive control and possession of the property;
3) defendant's possession of the property was recent enough after the unlawful taking so as to reasonably support a presumption of guilt.

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In this case the only issue with the application of the doctrine was regarding the recency of McQueen's possession of the stolen generator. Based on the evidence in the case, the earliest that McQueen could be found to have been in possession of the generator was at some undetermined time on the morning after the theft. The theft had to have occurred the evening before at some time later than 6:00 p.m. Is the morning after recent enough for the doctrine to apply? In the case of this generator, the answer is yes.

The North Carolina Supreme Court has weighed in regarding the recency requirement of the doctrine. "[A]lthough the passage of time...is a prime consideration...the nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt." *State v. Hamlet,* 316 N.C. 41, 340 S.E.2d 418 (1986). The Court of Appeals found that quote instructive and held that the doctrine applied.

Though not expressly stated in the opinion, the key to the doctrine is the size and unusual nature of the generator. Obviously, the difficulty in moving a large and heavy machine, coupled with the limited availability of a market for such an item, make possession of such a generator uncommon. Difficulty of movement and lack of market are two factors that lengthen the time that will qualify as "recent" under the Doctrine of Recently Stolen Property.

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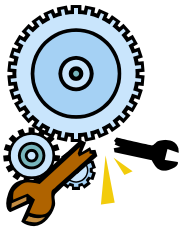

EXEMPTION OF QUALIFIED LAW ENFORCEMENT OFFICERS FROM STATE LAWS PROHIBITING THE CARRYING OF CONCEALED FIREARMS.

Congress recently amended Title 18 of the United States Code to exempt qualified current and retired law enforcement officers from State laws prohibiting the carrying of concealed weapons. The effect of the amendment is that qualified current and retired law enforcement officers may, subject to qualifications set forth below, carry a concealed firearm nationwide. Below, is a short discussion concerning the highlights of the amendment.

- **Who is a qualified law enforcement officer? (QLEO)**
  - An employee of a governmental agency who:
    - Is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for any violation of law and has statutory powers of arrest;
    - Is authorized by the agency to carry a firearm;
    - Is not the subject of any disciplinary action by the agency;

- Meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
- Is not under influence of alcohol or another intoxicating or hallucinatory drug or substance;
- Is not prohibited by Federal law from receiving a firearm.

- **Does a QLEO have to meet any additional training standards concerning firearms?**
  - No, a QLEO need only meet the standards established by his or her agency.

- **What identification must the QLEO carry?**
  - Photographic identification is required and must be issued by the governmental agency for which the individual is employed as a law enforcement officer.

- **Can QLEO carry the firearm anywhere?**
  - No, a QLEO may not carry:
    - Where restrictions are imposed by a private persons or entities to prohibit or restrict the possession of concealed firearms on their property, or
    - Where prohibitions or restrictions are imposed on the possession of firearms on any State or local governmental property, installation, building, base, or park;
    - In violation of FAA requirements;
    - In violation of Federal law.

- **What type of firearm may be carried nationwide?**
  - CMPD officers are only permitted to carry a firearm approved by the Department.

- **Are CMPD Reserve officers permitted to carry a concealed firearm nationwide?**
  - No, unless they are a qualified retired law enforcement officer.

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NEW CITY CODE PROVISION – OPERATING A VEHICLE ON THE SIDEWALK

On August 23, 2004, the City Council amended the City Code to add a new provision (Section 14-130) that prohibits the operation of **vehicles** on sidewalks within the city limits. State law (G.S. 20-160) **only** prohibits the operation of **motor vehicles** on sidewalks.

The primary effect of the new ordinance is to prohibit mopeds/razor scooters (which by definition are "vehicles," but not "motor vehicles") from being operated on the sidewalks. A violation of the ordinance can be enforced by issuing a uniform citation for an infraction (waivable on payment of a $10.00 fine and the costs of court) **or** by issuing a parking ticket with a fine of $25.00 (the parking ticket should be completed as follows: 20. X OTHER C.O. 14-130 – Vehicle on Sidewalk__ $25.00.) The charging language for the infraction is as follows:

"Operate a vehicle on a sidewalk in violation of Section 14-130 of the 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)")

Please note that if an officer wishes to charge a juvenile (under the age of 16) with a violation of the ordinance, the charge must be pursued in juvenile court. Also, there is an exception in the ordinance for non-motorized bicycles, which are permitted on city sidewalks except those in the congested business district.

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CHARLOTTE CITY CODE – ELIMINATION OF MOTOR VEHICLE OFFENSES

A new version of the City Code went into effect on January 1, 2004. Chapter 14 of the Code, which deals with motor vehicle offenses, was changed significantly in the process. Perhaps the greatest change was the elimination of a number of offenses dealing with the operation of motor vehicles which were also covered under Chapter 20 of the North Carolina General Statutes. In the past, officers may have charged an individual with a motor vehicle violation under the City Code instead of the state statute, in order to avoid insurance consequences.

The only major motor vehicle violations that remain in the current City Code are operating a commercial truck in a residential district (C.O. 14-157), cutting across property abutting a street in order to avoid an intersection (C.O. 14-128), and operating a vehicle on the sidewalk (C.O. 14-130).

The first two offenses can be found on page 17 of the Citation Language booklet prepared by the Police Attorney's Office, which is available under the "Police Law Bulletins" section of the CMPD Directives and Information icon on the computer. The offense of operating a vehicle on the sidewalk is dealt with in the above article.

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TRANSPORTING INVOLUNTARY COMMITMENTS FROM HOSPITAL EMERGENCY ROOMS

An officer who is requested to transport an individual from a hospital emergency room to the Behavioral Health Clinic/CMC Randolph on Billingsley Road ("Mental Health") may encounter a new set of forms that are different from the usual Petition and Custody Order signed by a magistrate. When a physician or eligible psychologist determines that, based on an examination, an individual is in need of immediate hospitalization, he/she may complete an Examination and Recommendation for Involuntary Commitment ("ERIC") form (Form DMH 5-72-01), along with a notarized Certificate form (Form DMH 5-72-01-A). In that situation, the Certificate form serves as the Custody Order and authorizes the officer to transport the individual to Mental Health. No other paperwork is required and the magistrate is not involved in the process. After transporting the individual, the officer should complete the Return of Service located on the back of the Certificate form and should leave all of the paperwork at Mental Health.

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"DRUG TAX"

The Police Attorney's Office has recently received questions concerning the collection of the "Unauthorized Substance Taxes," more commonly known as the "drug tax." This tax is an excise tax levied on controlled substances, including marijuana, cocaine, illicit spirituous liquor and mash. This is not a criminal penalty but is a tax collected by the Department of Revenue pursuant to a tax warrant. The statute has been significantly modified from its pre-1995 version and in its current form, has been upheld by the Fourth Circuit as a civil tax rather than a criminal penalty. CMPD has ***no*** authority to collect the tax or any outstanding balance owed to the Department of Revenue.

Typically, if an individual is arrested on drug charges and has a significant amount of currency on their person, that currency may be seized by CMPD as evidence of the crime and placed into property control. The Department of Revenue may then serve a tax warrant on the CMPD, which is based on a statutory rate according to the weight of the drugs seized.

Consequently, if an officer makes a voluntary contact with an individual and discovers the individual is in possession of currency and has an outstanding tax liability, the officer ***may not seize*** any currency or detain that individual for the sheriff or the Department of Revenue solely for the purpose of seizing the currency.

Please feel free to contact the Police Attorney's Office, or the Asset Forfeiture Unit, if you have questions about this tax.

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REMINDERS FROM THE MAGISTRATE:

DWLR AFFIDAVITS:

The Magistrate's Office has requested that officers include an arrestee's driving history when submitting an arrest affidavit for those charged with Driving While License/Privilege Revoked. The information will be useful to the Magistrates in properly setting an appropriate band amount.

DWI VEHICLE SEIZURE FORMS:

The Magistrate's Office would also like to remind officers that **three (3)** copies of the DWI Vehicle Seizure form, AOC CR 323 "Officers Affidavit for Seizure and Impoundment and Magistrate's Order", are needed when a vehicle is seized for possible forfeiture due to a Driving While Impaired arrest. Officers are also reminded that when seizing a vehicle for the above reason, officers must also complete DMV form ENF-176 and turn the same into CMPD Records immediately.

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