



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 1 of 10

Contents

United States Supreme Court:

1. **Fourth Amendment/ Probable Cause/Unlawful Arrest**
2. **Use of Deadly Force/Fleeing Felon**

Tenant or Guest – Eviction or Trespass

High Occupancy Vehicle (“HOV”) Lanes – I-77

Magistrate Office Reminders

Transporting Officers and Arrest Affidavits

Charlotte City Code Available Online

Reminder: Possession of a Firearm on School Grounds

Selling Food From Vehicles

Reminder: New Laws Effective December 1, 2004

Forward: In this issue we review two recent U.S. Supreme Court cases, one dealing with an arrest for the wrong charge when a suspect impersonated a police officer and the other pertaining to the use of deadly force when a suspect, with outstanding felony warrants, was shot in the back while fleeing in a vehicle. Various situations involving landlord/tenant and motel/guest will be explained. We summarize the regulations concerning the new High Occupancy Vehicle Lanes on I-77. The Magistrate’s Office has a couple of reminders about arrest warrants and citations. The issues of transporting officers signing arrest affidavits on behalf of arresting officers, possession of a firearm on school grounds and selling food from vehicles will be examined. We’ll show you how to find the Charlotte Municipal Code online. And finally, we’ll review new North Carolina laws that went into effect on December 1, 2004.

BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Probable Cause/Unlawful Arrest: *Devenpeck v. Alford*, ___ U.S. ___, 125 S.Ct. 588 (December 13, 2004)

FACTS: Officers had probable cause to believe the Plaintiff was impersonating an officer but chose instead to charge a violation of a State Privacy Act. The charge was subsequently dismissed as not being a valid charge. Plaintiff sues under § 1983 claiming a violation of his Fourth Amendment rights by an unlawful arrest.

ISSUE: Is an arrest lawful under the Fourth Amendment when the criminal offense charged without probable cause is not closely related to the uncharged offenses in which the officer did have probable cause?

CONCLUSION: Yes, as long as there is probable cause to arrest for **some** offense, the arrest comports with the Fourth Amendment.

DISCUSSION: The Supreme Court held there is no Fourth Amendment violation as long as probable cause to arrest on some charge exists, even if officers pick the wrong charge when arresting a suspect. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. This case emphasizes the importance of officers taking accurate notes setting out possible charges considered in addition to those actually charged.



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 2 of 10

Use of Force/Fleeing Felon/Deadly Force: *Brosseau v. Haugen*, ___ U.S. ___, 125 S.Ct. 596 (December 13, 2004)

FACTS: Officer shot a fleeing felon in the back as he was reversing his Jeep toward occupied vehicles in order to escape from the officer who had unsuccessfully tried to stop him. The suspect was wanted on felony drug charges and had eluded law enforcement and dogs for thirty minutes prior to jumping in his Jeep. The suspect had not responded to the officer's verbal commands, the officer's shattering the driver's side window or the officer hitting suspect with the butt of her gun. As the Jeep started or shortly after it began to move, the officer jumped back and fired one shot through the rear driver's side window hitting the suspect in the back.

ISSUE: Was the officer's use of deadly force clearly unreasonable?

CONCLUSION: No, the use of force fell in between excessive and acceptable force and therefore was not clearly unreasonable.

DISCUSSION: Although the Supreme Court held that the Officer's use of force under these circumstances did not result in civil liability, the Officer's action would, in all likelihood, be a violation of CMPD Directive 600-018. Under 600-018, Section IV. C. 2. , "an officer **will not** discharge his or her firearm at ... a moving vehicle, unless deadly force is being used against the officer or another person **and** the officer reasonably believes that no other option is reasonably available. Discharging a firearm in this circumstance is never authorized when it is ... reasonably apparent that the vehicle may careen out of control and injure an innocent bystander."

The Supreme Court did not change the rule concerning the use of deadly force at a fleeing felon. **The rule established in *Tennessee v. Garner* remains in place. An officer may use deadly force to prevent the escape of fleeing felon if the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others. "Thus if the suspect threatens the officer with a weapon or there is probable cause to believe the he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."**

It is imperative that all officers review Directive 600-018 on the appropriate use of deadly force.

[Return to top](#)

TENANT OR GUEST – EVICTION OR TRESPASS?

This article deals with the topic of how to respond to situations involving landlord/tenant and motel/guest relationships. Over the years, the Police Attorney's Office has developed the following examples in order to provide guidance to officers in dealing with such situations. Other factual situations may also arise in which the principles discussed below may be helpful. Officers are encouraged to contact the Police Attorney's Office with any questions they may have in this area.



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 3 of 10

SITUATION #1 – Motel vs. Overnight or Short-Term Guest

The manager of a motel attempts to remove a guest for a violation of the rooming agreement, such as non-payment, noise, too many people in the room, etc. (The rooming agreement will often provide that the guest is not entitled to a refund under such circumstances). However, the guest refuses to leave the property even after the manager has offered to return or has returned the guest's money and ordered him to leave the premises. Officers of the Charlotte-Mecklenburg Police Department can make a warrantless arrest for trespassing if the manager has offered to return (and the guest refuses to accept the refund) or has returned the money to the guest and the guest refuses to leave after having been ordered to do so. Of course, the guest also should be given an opportunity to retrieve personal belongings. If the manager has refused to return the money, the officer should advise the manager to go to the Magistrate's Office and attempt to obtain a trespassing warrant.

SITUATION #2 – Motel vs. Long-term Guest

An individual has been renting a motel room on a week-to-week basis and has stayed in the same room for several months. He is employed as a construction worker by a contractor that is working on a new building uptown and according to the motel manager, the individual occasionally goes back on weekends to his permanent home in West Virginia, where he intends to return after the job is finished. The room consists of one room with no kitchen facilities. The motel provides daily maid service and all the furnishings in the room are the property of the motel. In addition, many of the people who stay at the motel are transient guests. The manager decides he does not want the individual staying in the room any longer simply because he is obnoxious and unpleasant. The manager attempts to remove him but the guest refuses to leave, stating that the motel is his home. This does not appear to be a landlord/tenant relationship because of the room set-up (one room, no kitchen, daily maid service, furnishings belong to the motel), because the individual is staying in the motel on a temporary basis and has a permanent residence elsewhere, and because many of the guests rent the rooms on a day-to-day basis. Therefore, if the manager orders the individual to leave in the officer's presence, and he refuses to do so, the officer could arrest the individual without a warrant for trespassing. Before doing so, the officer should attempt to verify with the individual the fact that he has a permanent residence elsewhere, rather than simply relying on the manager's statement. In addition, before the officer makes an arrest, if the guest has paid for the week in advance, the motel manager must refund to the guest any portion of the money that applies to the remainder of the week that the guest will not be on the premises. If the officer is unsure whether the relationship is that of landlord/tenant or motel/guest, the officer should advise the manager to go to the Magistrate's Office and attempt to obtain a trespassing warrant.

SITUATION #3 – Motel vs. Tenant

A property owner converts his efficiency apartments into a motel by obtaining a motel license. The property owner does not make any other changes in the living arrangements with the residents. The



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 4 of 10

residents pay what is referred to as “rent” on a weekly basis, there is no daily maid service, and all of the units have a kitchen, a separate sitting area, and a separate bedroom. The property owner has twelve units and the majority of the units are occupied by residents who have lived on the premises for over a year. The property owner decides that he wants to remove one of the residents who has been living in the motel for six weeks because the resident has been late in paying his weekly “rent.” The resident refuses to leave the unit claiming that the owner must evict him because he has a week-to-week tenancy. The property owner calls for police assistance in removing the resident. The responding officer should not assist the property owner in removing the resident. Based on the factors listed above, the relationship appears to be that of landlord/tenant which requires formal eviction procedures. No warrantless arrest should be made by the officer.

SITUATION #4 – Tenant vs. Freeloader Guest

One individual has his name on the lease (the “tenant”); the other individual does not. The other individual is simply living there and is not paying anything such as rent or utilities, nor is there any other type of agreement between the parties. The tenant can put the other one out of the dwelling without going through formal eviction procedures. If the officer concludes that the other individual is merely a non-paying guest of the tenant and the tenant orders the guest off the premises in the officer’s presence, the officer may make a warrantless arrest for trespassing if the guest refuses to leave. The person whose name is on the lease should allow the guest to retrieve his personal property before the officer takes any enforcement action. Officers should not become involved in the division of personal property between the individuals. On the other hand, if the officer is unsure whether the individual is a guest or a tenant, the officer should complete an offense report and advise the person whose name is on the lease to go to the Magistrate’s Office and attempt to obtain a trespassing warrant. No warrantless arrest should be made under these circumstances, unless it is otherwise justified under N.C.G.S. §15A-401(b).

SITUATION #5 – Homeowner vs. Paying Guest/Occupant

Two individuals are living together in a house. One person is the owner of the house and is paying the mortgage. The other person helps out by paying the utilities, etc. The owner of the house wants the other individual put out of the house. This is an implied lease/tenancy situation. The owner of the house should be advised to go through formal eviction procedures. (*Note:* The same rule would apply if the parties were living in an apartment or some dwelling other than a house).

SITUATION #6 – Homeowner vs. Paying Occupant – No Probable Cause for Warrant

The owner of a house has obtained an arrest warrant for trespassing or misdemeanor breaking or entering against an individual who is living in the house pursuant to some type of rental agreement. The officer has knowledge that this is, in fact, a landlord/tenant situation and the address for the



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 5 of 10

defendant on the warrant is the same as the owner's address. In this situation, the officer should not serve the warrant because the officer does not have probable cause to support the offense set forth in the warrant. Instead, he or she should contact the District Attorney's Office and request that the warrant be dismissed. Note that the officer is not protected from civil liability simply because an arrest warrant has been issued

SITUATION #7 – Landlord vs. Leftover Occupant

An individual who is renting an apartment or house has another person living there whose name is not on the lease. The lease agreement provides that only those individuals whose names are on the lease are authorized to occupy the premises. In addition, the agreement prohibits the tenant from assigning or subletting the lease. The individual whose name is on the lease moves out and the other individual remains there. The landlord has ordered the remaining person to leave and he has refused to do so. Officers responding to this type of situation should complete an offense report for trespassing if the leftover occupant refuses to leave the premises or leaves and returns without the permission of the landlord. The landlord should be advised to go to the Magistrate's Office and attempt to obtain a trespassing warrant.

SITUATION #8 – Landlord vs. Banned Guest

As a general rule, a lawful guest of a tenant under a standard lease agreement is not a trespasser even if the landlord does not want the guest visiting the tenant. However, some lease agreements have a provision that gives the landlord the right to control the guests invited onto the property by the tenant. If that is the case, the landlord may, in effect, ban the guest from the premises. Officers responding to this type of situation should complete an offense report for trespassing if the guest refuses to leave the premises or leaves and returns without the permission of the landlord. The landlord should be advised to go to the Magistrate's Office and attempt to obtain a trespassing warrant.

SITUATION #9 – Domestic Situation

The husband/boyfriend has been put out of the apartment through a 50B Order, some other type of court order, a separation agreement, or by mutual agreement. The husband/boyfriend comes back to the parking lot or other common area of the apartment complex and is causing problems. However, assume in this case that his mere presence there does not violate the terms of the 50B Order. What options does the officer have? If the husband/boyfriend is intoxicated and causing a disturbance by cursing, etc., he could possibly be charged with intoxicated and disruptive in public. If he is not intoxicated, but is causing a disturbance that meets the elements of disorderly conduct, he could be charged with that offense. In such a situation, it is preferable, but not necessary, to have a complaint by a resident of the complex. If possible, the apartment representative or resident manager should ban the husband/boyfriend from the property. If that occurs, he may then be charged with trespassing



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 6 of 10

if he refuses to leave or returns after having been banned. However, the husband/boyfriend is not a trespasser if he is on the premises to visit another tenant or to visit his children pursuant to the terms of the 50B Order, separation agreement, or other court order.

SITUATION #10 – Domestic Situation

The husband/boyfriend has been removed from the dwelling through a 50B Order, some other type of court order, a separation agreement, or by mutual agreement. It is permissible for the husband/boyfriend to go and visit (or even live) with the wife/girlfriend's relatives at a different location, if they permit him to do so, as long as the wife/girlfriend is not living there. If the husband/boyfriend is at the relatives' house and the wife/girlfriend comes over, she is the one creating the contact and the officer should take no enforcement action against the husband/boyfriend simply because of his presence there.

SITUATION #11 – Parent vs. 17-Year Old Child

Parents contact the police wanting assistance in putting their 17-year old deadbeat child out of the house. Parents are obligated to support their children until age 18. Therefore, the child's presence at the home does not constitute trespassing and no enforcement action should be taken. However, if the child is 18 or older and is not paying anything to the parents, such as rent or utilities, or there is no other agreement between the parties, then the parents may treat the child as a trespasser.

SITUATION #12 – Landlord vs. Tenant – Eviction Pending

The tenant moves the majority of his belongings out of the leased premises and lives elsewhere prior to the expiration of the lease. The tenant also stops paying rent. The landlord takes steps to have the tenant formally evicted and obtains an order of eviction from the magistrate. The tenant then attempts to move back into the premises during the ten days he has in which to appeal the eviction order. Can the landlord keep him out? Should the police get involved? No, the tenant has a right to stay until the eviction order is final and the sheriff has padlocked the premises. Thus, the tenant's presence on the premises during the ten-day period does not constitute trespassing.

SITUATION #13 – Forcible Entry by Tenant

The landlord has obtained a judgment of eviction against the tenant, but the judgment has not been executed on and the sheriff has not yet padlocked the premises. The landlord decides to change the lock on the apartment door since he has already been to court, even though the tenant still has



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 7 of 10

personal belongings in the apartment and still has the right to possession of the premises (See Situation #12, above). The tenant comes back to the apartment and breaks the lock on the door in order to retrieve his personal property. The landlord calls the police and wants the tenant arrested for breaking or entering, trespassing, and/or damage to property. In this situation, the tenant has the right to re-enter because the eviction order is not final and the sheriff has not padlocked the premises. Therefore, a criminal charge against the tenant (for breaking or entering, trespassing, and/or damage to property) is not appropriate. Of course, the tenant does not have the right to damage the premises to a degree beyond that necessary to gain entry.

SITUATION #14 – New Owner vs. Tenant

A tenant is living in a house and paying rent to the owner pursuant to an oral lease. The owner eventually sells the house to another party. The new owner wants the tenant to leave, but the tenant refuses to do so. The new owner then calls the police and wants the tenant arrested for trespassing, claiming that there is no lease agreement between the parties. In this situation, officers should not take enforcement action and should advise the new owner that he will need to initiate formal eviction procedures to remove the tenant. Although the new owner may not have entered into a lease agreement, he purchased the property subject to the oral lease between the tenant and the previous owner and must, therefore, legally evict the tenant.

[Return to top](#)

HIGH OCCUPANCY VEHICLE (“HOV”) LANES – I-77

The High Occupancy Vehicle (“HOV”) lanes opened on I-77 on Friday, December 17, 2004. The following is a summary of the regulations:

- At least **two** people must be present in the vehicle
- The following vehicles may use the HOV lanes, regardless of the number of occupants:
 - Motorcycles
 - Buses
 - Vehicles designed to transport 15 or more passengers
 - Emergency vehicles (law enforcement, fire, police, other government vehicle, ambulance), **when responding to an emergency**
- Vehicles with more than three axles (commercial) are prohibited, regardless of the number of occupants
- The lanes are marked with a diamond-shaped symbol on the pavement and overhead signs
- Qualified vehicles may move into and out of the HOV lanes, **except** in areas that are marked with solid white lines

Below is the charging language to be used for violations. All of the violations are infractions (two driver’s license points) and can be waived on payment of a \$10.00 fine and the costs of court.

Number of Passengers: in a designated and marked high occupancy vehicle lane with less than the specified number of passengers. G.S. 20-146.2(a).



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 8 of 10

Changing Lanes: by crossing (into)(out of) a designated and marked high occupancy vehicle lane at other than a designated opening. G.S. 20-146.2(a).

Vehicle with More Than Three-axes: by traveling in a designated and marked high occupancy vehicle lane in a vehicle with more than three-axes. G.S. 20-146.2(a).

[Return to top](#)

MAGISTRATE'S OFFICE REMINDERS

Serving Warrants

The Magistrate's Office has requested that officers be reminded that they need to serve the defendant with the pink copy of the arrest warrant. When officers fill out the return of service on an arrest warrant, they should remove the pink copy of the warrant and give it to the defendant. The pink copy is labeled at the bottom, "Defendant's Copy".

Citations/Arrests

Whenever officers issue citations in connection with an incident in which an individual is arrested, they should give **all** of the citations for that individual to the personnel in Arrest Processing. This will help to ensure that the person is not charged twice for the same offense. In addition, officers should **not** put a court date on the citation(s), as the case(s) may go to Courtroom 1101, instead of Courtroom 2205, if the defendant is not released from jail. Finally, in these situations, officers should put only **one** charge on each citation.

[Return to top](#)

TRANSPORTING OFFICERS AND ARREST AFFIDAVITS

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

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

The transporting officer should print his/her name and place his/her signature on the appropriate line on the back of the affidavit. The transporting officer should sign the affidavit in the presence of



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 9 of 10

the Sheriff's Office employee, who will then notarize the signature. **NOTE:** The transporting officer should **never** leave the Intake Center without signing the arrest affidavit and having it notarized.

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

[Return to top](#)

CHARLOTTE CITY CODE AVAILABLE ONLINE

The Charlotte City Code, which is published by Municipal Code Corporation can be accessed on the internet. The website is www.municode.com. Click on "Online Library" in the column labeled "Frequently Used". A map of the United States will appear. Click on the State of North Carolina. A list of cities/counties will appear. Click on "Charlotte Code of Ordinances". An index of the Code will appear. Click on the appropriate Chapter and Section of the Code. Code provisions can be copied and pasted from the website.

[Return to top](#)

REMINDER: POSSESSION OF A FIREARM ON SCHOOL GROUNDS

When making an arrest for Possession of Weapons on School Grounds (G.S. 14-269.2) in which a **firearm** is involved, please remember that the charge is a **felony, not** a misdemeanor, unless: (i) the person is not a student or an employee of the school, **and** (ii) the firearm is not loaded, it is inside a motor vehicle, **and** it is in a locked container or a locked firearm rack. BB guns, stun guns, air rifles, knives, etc. are always misdemeanor offenses under the statute. There have been occasions where misdemeanor warrants have been obtained for firearms on campus and defendants have pled guilty to the lesser charge.

[Return to top](#)

SELLING FOOD FROM VEHICLES

When an individual sells food from a vehicle within the city limits, he/she is required, under the City Code, to have a business license and, under state law, a permit from the Health Department.

The charging language for the business license violation can be found on page 19 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. It is a Class 3 misdemeanor and has a mandatory court appearance.



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

November-December 2004

Volume 23, Issue 6

Page 10 of 10

The charging language for the permit violation is as follows: "operate an establishment without a permit issued by the Health Department. G.S. 130A-248(b)." It is a Class 1 misdemeanor and has a mandatory court appearance.

An officer who encounters an individual selling food from a vehicle is encouraged to contact Nadine Ford, an inspector for the Health Department. She can be reached at 704-336-5524 (office) or 704-621-2294 (cell phone).

[Return to top](#)

REMINDER: NEW LAWS EFFECTIVE ON DECEMBER 1, 2004

Several laws that were passed by the General Assembly in 2004 became effective December 1, 2004. For a complete list of the legislation and a brief summary of these laws, please go to the "Police Law Bulletins" section of the CMPD Directives and Information icon on the computer, and then to the "2004 Legislative Update."

1. Possession of Firearm by a Convicted Felon – Eliminates the exception that allowed a convicted felon to possess a firearm at home or business. Conforms state law to federal law.
2. Aggressive Driving – Creates a new Class 1 misdemeanor.
3. Passenger Vehicle Towing other Vehicles to Keep Right – Amends G.S. 20-147.1.
4. Discharging Firearm on School Property – Makes it a Class F felony to willfully discharge a firearm on educational property.
5. Transit Operator Assault – Makes it an offense to assault a transit operator.
6. Increase Methamphetamine Penalties – Includes providing that the unlawful distribution of methamphetamine that proximately results in death is second degree murder, along with other changes that enhance punishments.
7. Create Civil No-Contact Protective Orders – Provides for civil no-contact protective orders when the victim does not have a personal relationship as defined under domestic violence law.
8. Strengthen Domestic Violence Laws – Creates a new Class H felony for assault by strangulation, allows for cross warrants, includes required training for BLET and in-service in DV, as well as many other changes.
9. Prevent Workplace Violence – Provides that an employer may obtain a civil no-contact protective order for an employee if the conduct occurred at the workplace.

Reminder: On January 1, 2005, the new Child Restraint System law went into effect which changes the age from less than five (5) to less than eight (8) years of age. The weight requirement is changed from less than 40 pounds to less than 80 pounds. A child who is over either of those thresholds is not required to be in a child passenger restraint system.

[Return to top](#)