CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue, we look at a 4th Circuit case in which the Court placed its stamp of approval on the tactics used by an officer to establish that his encounter with a driver of a car became and remained consensual. In addition, we review an opinion by the North Carolina Supreme Court that reminds lower courts to pay "great deference" to a Magistrate's finding of probable cause to execute a search warrant. Furthermore, we discuss an opinion by the North Carolina Court of Appeals that found a Driver's License Checkpoint unlawful because it was being conducted for an impermissible purpose. Finally, in this issue we review some "FAQ's" concerning HOV lane enforcement, off duty officers banning person's from the employer's property, Civil No-Contact Orders, seatbelt enforcement and issues related to Medic transports.

BRIEFS:

UNITED STATES COURT OF APPEALS

4th Amendment/Traffic Stop/Consensual Encounter: *United States v. Meikle*, 407 F.3d 670 (4th Cir.2005).

FACTS: On the afternoon of September 24, 2003, a South Carolina trooper observed Meikle driving north on Interstate 95 and noticed that Meikle was weaving back and forth onto the shoulder of the highway. After stopping Meikle, the trooper asked him for his driver's license and registration and noticed that Meikle was so nervous that his arms were shaking and his voice was stuttering. The trooper asked Meikle why he was nervous and Meikle responded that he was driving from Miami to Baltimore for a job interview with a trucking company. The trooper continued to question Meikle and asked whether the company had offices in Florida and Meikle responded "yes, not really" and then added that if you lived north of Interstate 4 you had to interview in Baltimore. The trooper was familiar with the geography of Florida and noted that Meikle's response was inconsistent because Miami was actually south of Interstate 4. During this brief conversation the trooper advised Meikle that he was only going to receive a warning citation.

The trooper retuned to his car and conducted a driver's license check. While waiting for a response, the trooper continued to chat about Meikle's job interview and then asked him if he had any illegal substances in the car. The trooper noted that Meikle's nervousness continued to escalate. While completing the warning citation, the trooper received a response from his dispatcher that Meikle possessed a valid driver's license. The trooper immediately returned Meikle's license to him and shook his hand,

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while telling Meikle that he was free to leave. The entire encounter up to this point had taken only eleven minutes. Meikle turned and started walking back to his car when the trooper asked if he could talk to him again. Meikle responded "yes". At that time, the trooper again asked him if there were any drugs in the car and Meikle stuttered "no". Next, the trooper asked if he could search the car and Meikle responded "yes". The trooper immediately asked for the assistance of another officer and a drug dog and upon searching the car found three kilograms of heroin.

After Meikle was indicted in federal district court for possession with intent to distribute heroin he filed a motion to suppress, alleging that traffic stop violated *Terry v. Ohio* because the second encounter with the trooper unlawfully exceeded the scope of the original stop. Meikle's motion to suppress was denied and he was convicted. He then appealed his conviction to the 4th Circuit Court of Appeals on the same grounds.

Issue: Was the second encounter initiated by the trooper lawful?

Rule: Yes, a consensual encounter is lawful if, upon reviewing the totality of the circumstances, a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter.

Discussion: The Court agreed that *Terry v. Ohio* controlled in determining whether the initial traffic stop was lawful. An initial stop is lawful if it is "justified at its inception" and it is "reasonably related in scope to the circumstances which justified the interference in the first place." However, in this case, the court noted that the second encounter was consensual and therefore should not be reviewed under *Terry*. Instead, the validity of the second encounter should be assessed under the test established in *Florida v. Bostick* because a consensual encounter does not "trigger Fourth Amendment scrutiny." As stated in *Bostick*, in order for the encounter to be consensual, the police by their words and conduct must indicate that a reasonable person must feel free to decline the officer's requests or otherwise terminate the encounter.

Here, the initial stop was completed when the trooper returned Meikle's drivers license, shook his hand, said he was free to go and allowed Meikle to begin walking back to his car. At that point, in order for the encounter to be lawful, it must be consensual. By returning his license, shaking his hand, telling him that he was free to go, and letting him begin to walk away, the trooper established that the encounter was consensual. Therefore, it was permissible for him to begin asking questions about narcotics and seeking permission to search the car. "When a stop is over and its purpose served . . . mere questioning by officers without some indicated restraint, does not amount . . . to . . . a seizure under the Fourth Amendment." Moreover "circumstances where the citizen would feel free to go, but stays and has a dialogue with the officer are considered consensual."

Practical Pointers: The keystone to establishing a lawful consensual encounter after a traffic stop is concluded is whether your (police) conduct would communicate to a reasonable person that they are free to walk away or terminate the encounter at any time. Below, are some of the factors a court will review in determining the totality of the circumstances:

- Returning to the citizen his or her driver's license, registration, insurance or other items belonging to the citizen, as well as the citation, if one is issued;

- Telling the citizen that he or she is free to leave. A citizen does not have a legal right to be informed that they are free to leave but, advising he citizen that they are free to leave is one of the factors that a court will review.
- Allowing the citizen to, in fact, leave, even if it is only for a few steps.
- In the event CMPD officers are seeking consent to search, the consent must be in compliance with CMPD Directive 600-017 IV. C. and D. which permits voluntary contacts, so long as the motivation for the contact is not based on an arbitrary profile and the officer has established an articulable reason for the request. (In the above case, the citizen's extreme nervousness and inconsistent answers would be sufficient to establish an articulable reason.) The articulable reason must be recorded on the stop data form.

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NORTH CAROLINA SUPREME COURT

4th Amendment/Probable Cause/Deference to Magistrate's Finding: *State v. Sinapi*, 359 N.C. 394, 610 S.E. 2d 362 (2005).

Facts: Detectives from the Raleigh Police Department submitted an affidavit for a search warrant to a magistrate. In the affidavit, officers stated that they had recovered a single garbage bag containing eight wilted marijuana plants. The bag containing the plants was retrieved from the from yard/curb line area in front of the suspect's residence. In addition, the officers stated that Sinapi was known to have been involved with a previous incident where he sold and delivered heroin and that he had prior arrests for marijuana and methaqualone. After the magistrate determined that probable cause existed to issue the search warrant, the officers executed the warrant and seized several types of illegal substances from Sinapi's residence.

Sinapi was indicted for possession with intent to distribute controlled substances and for maintaining a dwelling for keeping and selling controlled substances. Sinapi filed a motion to suppress in Superior Court which was granted because, according the Superior Court judge, the officers failed to provide any documentation linking the bag to the defendant's residence and the affidavit failed to provide sufficient facts that contraband would be found in the residence. The North Carolina Court of Appeals affirmed the Superior Court's ruling; however, the North Carolina Supreme Court overturned the Court of Appeals and upheld the magistrate's finding of probable cause.

Issue: What is the proper standard that a reviewing court should use to determine if an affidavit for a search warrant is supported by probable cause?

Rule: In determining whether a search warrant is supported by probable cause, the reviewing court must consider the "totality of the circumstances."

Discussion: In applying the totality of the circumstances test, "this court has stated that an affidavit is sufficient if it establishes reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive

cause nor import absolute certainty. Thus, under the totality of the circumstances, a reviewing court must determine whether evidence as a whole provides a substantial basis for concluding that probable cause exists."

Issue: What deference should a reviewing court pay to a magistrate's determination of probable cause?

Rule: "Great deference should be paid to a magistrate's determination of probable cause and the after-the-fact scrutiny should not take the form of a de novo (new) review."

Discussion: "A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense manner. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

In this case, the local magistrate was entitled to rely on his practical and common sense knowledge concerning the practice of curbside collection and that the marijuana found inside the bags likely came from the house closest to the curb. These commonsense inferences, taken in conjunction with the homeowner's past criminal record, were sufficient to establish the requisite "fair probability" that contraband would be found inside the residence. For these reasons, it was improper for the superior court to overturn the magistrate's finding of probable cause.

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NORTH CAROLINA COURT OF APPEALS

4th Amendment/Vehicle Checkpoint/Primary Purpose: *State v. Rose*, 612 S.E.2d 336 (2005).

Facts: On April 24, 2003 five deputies of the Onslow County Sheriff's Department participated in a checkpoint (four of the deputies were assigned to the Sheriff's drug interdiction team). A car driven by Rose, and also occupied by Davis and Wilson, was stopped at the checkpoint. Two deputies immediately approached the car; Deputy Horne approached the driver's side and asked Rose for his license and registration. At the same time, Deputy Baumgarner approached the driver's side and scanned the interior of the car with his flashlight and looked into the back seat area. Deputy Baumgarner observed Davis sitting in the back with his feet on top of a green backpack. Davis "seemed nervous" and appeared to be hiding the bag with his feet. Deputy Baumgarner asked Davis what was in the bag and, according to him, Davis did not answer, but simply turned his head away.

At that point, Deputy Baumgarner walked around to the rear passenger side of the car where Davis was sitting, told him to roll down the window and again asked him what was in the pack. This time Rose interjected and stated, "dirty clothes." Davis, after hearing Rose's response, confirmed that the pack contained dirty clothes. When Deputy Baumgarner asked permission to check the pack, Rose replied that they "had to get going" because Wilson, who was a paraplegic, needed to use the restroom. Deputy Baumgarner responded, "This will only take a second . . . Can I see what is in the

pack?" Davis reluctantly opened the pack, which contained 1½ pounds of marijuana and a loaded .38 caliber handgun. A search of Rose's pants yielded a small amount of marijuana, rolling papers and over $800.00 in cash. A search of the vehicle yielded another back pack, which contained Rose's passport and driver's license, along with several bags of marijuana seeds.

Rose was indicted for possession with intent to manufacture, sell, and deliver marijuana, possession of a firearm by a felon, manufacturing marijuana, possession of drug paraphernalia, maintaining a vehicle for keeping and selling controlled substances, and carrying a concealed weapon. Rose's motion to suppress was denied and he was tried, convicted and sentenced to 16 to 20 months imprisonment. Rose appealed his conviction on the grounds that the trial court erred in denying his motion to suppress. On appeal, Rose asserted that the checkpoint was unconstitutional because it deprived him of his 4th Amendment right to be free from an unreasonable search and seizure.

Issue: Was the checkpoint constitutional?

Rule: No, a checkpoint, in order to be lawful, must have as its primary purpose something other than the "ordinary enterprise of investigating crimes."

Discussion: Generally, when an officer seizes a person, the officer must have at least an individualized suspicion of criminal behavior. However, in limited "special needs" circumstances, the United States Supreme Court has permitted roadside checkpoints without an individualized suspicion so long as the purpose for the checkpoint is for something other than the "ordinary enterprise of investigating crimes." In *Indianapolis v. Edmond*, the Supreme Court discussed the rationale supporting limited roadside checkpoints and stated, "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in *Prouse* that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety."

In this case, the North Carolina Court of Appeals found that the checkpoint conducted by the deputies was similar to the one conducted in *Indianapolis v. Edmond*, in that the officers could not establish that the "primary purpose" of the checkpoint was not for investigating crimes. The court noted that four of the five officers at the checkpoint were, in fact, members of the Sheriff's narcotics interdiction team. Furthermore, there was not a written plan and the decision to set up the checkpoint was "spontaneous." Finally, the court stressed that there was no testimony explaining the need for the checkpoint.

The court in *Rose* went on to discuss the proper analysis to be used in determining the primary purpose of a checkpoint. According to the court, it is essential to "examine the available evidence to determine the primary purpose of the checkpoint program . . . a court may not simply accept the State's invocation of a proper purpose but instead must carry out a close review of the scheme at issue [and] consider all of the available evidence in order to determine the relevant primary purpose."

The name or label attached to the checkpoint is insufficient. Likewise, establishing that the checkpoint had a least one lawful purpose is inadequate to establish the primary purpose.

Practical Pointers:

- Impaired Driving Checkpoint: An impaired driving checkpoint must be conducted in accordance with Directive 600-009 and N.C.G.S. §20-16.3A. State law requires an agency to comply with the following:
  - Develop a systematic plan in advance that takes into account the likelihood of detecting impaired driver, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public.
  - Designate in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests. The plan may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to submit to an alcohol screening test.
  - Mark the area in which checks are conducted to advise the public that an authorized impaired driving check is being made.
  - Note the plan should be in writing and approved by a supervisor. The plan should contain a specific explanation why this particular location and time would in all likelihood promote roadway safety.
- Driver's License Checkpoint:
  - Must comply with Directive 600-009.
  - The checkpoint should not be spontaneous but conducted pursuant to a plan for the overall purpose of promoting roadside safety. The plan should be approved by a supervisor.
  - Officers must be prepared to establish in court the need for conducting the checkpoint. (roadway safety)
- Information Checkpoint:
  - Must be conducted to obtain information about a crime in all likelihood not committed by the vehicle occupants.
  - The crime for which the police are seeking information must be grave (serious).
  - The checkpoint must only interfere minimally with those who are stopped.
- Checkpoints cannot be conducted in whole or in part for the specific purpose of determining whether the driver or passengers are in violation of specific criminal laws, such as possession of drugs or illegal weapons. The use of a drug sniffing dog at a checkpoint is not appropriate, as its use may convert the legitimate purpose of the checkpoint to an overall investigation of a criminal enterprise. However, if officers develop reasonable suspicion of criminal activity, then a dog could be deployed while the driver is being detained, so long as officers do not unreasonably extend the time of the detention beyond the period needed to conduct the investigation.

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HIGH OCCUPANCY VEHICLE ("HOV") LANES – I-77

The following is a summary of the regulations that apply to the High Occupancy Vehicle ("HOV") lanes on I-77:

- 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

PLEASE NOTE: CMPD officers should travel in the HOV lanes **only** when responding to an emergency with blue lights and siren activated (unless more than one officer is in the vehicle).

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. A bill has been introduced in the State legislature to raise the fine to $100.00, but it has not passed yet.

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).

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 Axles: by traveling in a designated and marked high occupancy vehicle lane in a vehicle with more than three-axles. G.S. 20-146.2(a).

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OFF-DUTY OFFICERS – BANNING FROM EMPLOYER'S PROPERTY

The Police Attorney's Office has received questions recently about the authority of an off-duty officer to ban individuals from the property of the off-duty employer. This situation often arises with officers working security at an apartment complex or a business.

The secondary employment directive (300-007) provides that officers should not enforce the rules and regulations of an employer which are not otherwise violations of the law. Therefore, an off-duty officer

should **not** ban an individual from the employer's property simply because the employer wants the person banned or the person has violated a rule or regulation of the employer (loitering on the premises, violation of dress code, etc). In those situations, the employer or his/her representative is responsible for banning the individual. However, an off-duty officer **may** ban an individual who commits a criminal offense while on the employer's property.

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CIVIL NO-CONTACT AND WORKPLACE VIOLENCE PROTECTIVE ORDERS

Effective December 1, 2004, two new types of protective orders became available in North Carolina, in addition to the 50B domestic violence protective order. The purpose of these orders is to provide protection in situations where the parties are not in a "personal relationship," as is necessary in order to qualify for a 50B order.

The first type of order is a civil no-contact order, which is covered in Chapter 50C of the General Statutes. This order may be obtained in situations where a person has committed an act of: 1) nonconsensual sexual conduct, or 2) stalking. Sexual conduct includes any intentional or knowing touching, fondling, or sexual penetration by a person, either directly or through clothing, of the sexual organs, anus, or breast of another for the purpose of sexual gratification or arousal. Stalking has the same definition as the criminal offense of stalking in G.S. 14-277.3.

In filing the action in District Court, the victim is not required to pay court costs and may omit his/her address from all court documents and, instead, provide an alternative address at which to receive notices and pleadings. The sheriff is responsible for serving the summons and complaint but, if the sheriff is unable to do so, the complainant may serve the defendant by publication.

The statute provides for temporary ("ex parte") orders, which can be issued by a District Court judge (or, after hours, by a magistrate, with a judge's approval) and are valid for ten (10) days, unless extended. Permanent orders are valid for one year.

A violation of a no-contact order is punishable as contempt of court and the process must be initiated by a show cause order issued by a judge, clerk, or magistrate. A violation of the order is **not** a separate crime like violating a 50B order and officers should **not** make an arrest or advise the complainant to obtain an arrest warrant.

The second type of order is a workplace violence order, which is covered in Article 23 of Chapter 95 of the General Statutes. This no-contact order may be obtained by an employer on behalf of an employee who has suffered unlawful conduct at the employer's workplace. Unlawful conduct includes attempting to cause or intentionally causing bodily injury to, stalking, or communicating threats to the employee. The employer must consult with the employee before obtaining the order to determine if there are safety concerns for the employee in participating in the process; however, the employee's consent is not required.

The procedure for obtaining the order is almost identical to that of the civil no-contact order, except that payment of court costs is required. Temporary orders are valid for (10) days and permanent orders are valid for one year.

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Like the civil no-contact order, a violation of a workplace violence order is punishable by contempt of court and is **not** a separate crime for which an arrest can be made or a warrant issued.

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MEDIC TRANSPORTS

Questions come up periodically about how officers should handle situations where an individual refuses to be transported by Medic. In many cases, the individual may have consumed some quantity of alcohol. Often, in the officer's opinion, the person still appears capable of making an informed decision not to be transported. However, Medic personnel may insist that the person needs immediate medical care and request that the officer force the person to get into the ambulance.

Medic has a "Patient Refusal" Protocol that provides guidelines for dealing with patients who refuse treatment or transportation. Requiring a person to be transported is based on an evaluation of the person's competency to refuse treatment. One of the factors on which that evaluation is made is whether the person is under the influence of a mind-altering substance, including alcohol.

Officers requested to assist in such a case should consult with Medic personnel, consider all of the options, and try to reach a consensus as to the best course of action. If necessary, officers should contact their supervisor. The degree to which a patient is intoxicated is a factor to be considered; however, officers should not automatically assume that everyone who has consumed alcohol is not competent to refuse medical treatment.

G.S. 122C-301 authorizes law enforcement officers to assist an intoxicated person who is found in a public place who is in need of, but apparently unable to provide, medical care for himself. The statute also provides that, in doing so, officers may use reasonable force to protect themselves, the individual, or others. "Intoxication" is defined in G.S. 122C-3(18) as "the condition of an individual whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol or other s It is recommended that officers consider the following questions when confronted with this issue

1. Is the individual's mental or physical functioning **substantially** impaired as a result of the use of alcohol or other substance? To answer this question, officers should rely on the individual's objective symptoms and information provided to them by persons on the scene, including medical personnel;

2. If the individual's mental or physical functioning is substantially impaired, is he/she in apparent need of medical care? To answer this question, officers may rely on their observations as to the person's injuries or apparent medical condition and information provided to them by medical personnel.

If both of the above conditions are satisfied, then officers may assist Medic by using reasonable means, including the use of reasonable force, to require that the individual receive medical care, Including transport by Medic. Officers should make an effort to avoid causing further injury to the individual in the process.

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If a competent person who refuses medical treatment commits an offense, such as an assault on Medic personnel, that person should be arrested.

There are several other types of situations involving injured persons and/or medical transport where officers often take a more active role and these situations are not a part of the current discussion. These include:

1. Arrest situations, in which officers are often required by jail staff to seek medical evaluation for injured arrestees and are under a statutory duty (G.S. 15A-503) to seek medical care for arrestees who are unconscious, semiconscious, or otherwise suffering from a disabling condition;

2. Situations involving serious or life-threatening injuries, in which officers are clearly justified and expected to render assistance; and

Situations involving individuals who meet the criteria for involuntary commitment (mentally ill + danger to self or others), in which statutory authority exists to transport and to use reasonable force in dealing with such individuals (G.S. 122C-251(e) and 122C-262(a1)).

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EXEMPTIONS FROM WEARING SEAT BELTS

Under G.S. 20-135.2A, there are several situations in which vehicle drivers or occupants are not required to wear seat belts. These are as follows:

1. Driver or occupant with a medical or physical condition that prevents restraint by seat belt or with a professionally certified mental phobia against wearing seat belt

2, Motor vehicle operated by rural letter carrier of the Postal Service while performing duties or by a newspaper delivery person while engaged in the delivery of newspapers

3. Driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle, if the speed of the vehicle between stops does not exceed 20 miles per hour

4. Any vehicle registered and licensed as a property-carrying vehicle under G.S. 20-88, while being used for agricultural or commercial purposes

5. Motor vehicle not required to be equipped with seat belts under federal law

Exemption #4 is worded very broadly and includes a vehicle with a “weighted” tag (7,000 to 26,000 lbs./red or green in color) that is being used for commercial purposes, even though the vehicle might not normally be considered a property-carrying vehicle (for example, a painter’s van).

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