CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

June-July 2005 **Volume 24, Issue 3** **Page 1 of 10**

Contents

Forward: In this issue we will review a case in which the 4th Circuit Court of Appeals ruled on the reasonableness of deadly force used by officers to stop a fleeing motor vehicle. We will also review another 4th Circuit case that found the search of a motor vehicle glove box at a crash scene to be justified under the Community Caretaking Doctrine. Additionally, we will discuss a North Carolina Court of Appeals case in which the court ruled that police officers, during a lawful traffic stop, may order a passenger to stay inside the car temporarily. Lastly, we will take a look at the proper use of the CMPD Authorization to Act as Agent form and we'll have a comprehensive review of handicapped parking regulations in Charlotte.

BRIEFS:

UNITED STATES COURT OF APPEALS

Fourth Amendment/Use of Force/Fleeing Vehicle: *Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005).*

Facts: Farrow, a police officer for the Baltimore International Airport, observed Waterman driving 51 mph in a 25 mph zone. Farrow turned on his emergency equipment in an attempt to stop Waterman. However, Waterman refused to stop and sped away. Farrow and other officers began to chase Waterman. At one point in the pursuit, Farrow advised other officers via the radio that Waterman had "just tried to run me off the road . . . he's trying to take us off the road."

Waterman continued to flee and entered a tunnel. Upon emerging from the tunnel, Waterman was faced with a toll booth plaza and drove towards lane 12 of the plaza. As Waterman continued towards the toll plaza at a slow speed, 5 additional officers stepped out from the concrete island between lanes 11 and 12 with their weapons drawn and began to approach Waterman's vehicle from the front and back. Waterman slowed his vehicle to approximately 11 miles per hour due to traffic in front of him. When the traffic cleared, he accelerated and his vehicle "lurched forward" towards the officers.

At the moment that Waterman's vehicle lurched forward, there were four officers standing in front of him at distances ranging from 16 to 71 feet. Although none of the officers were standing directly in front of Waterman's vehicle, the officers were in a position that each was only a few feet away from the passenger side of Waterman's projected path. Three of the officers fired at Waterman as soon as Waterman accelerated.

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Waterman drove past all of the officers and temporarily stopped behind another car. All three officers continued to fire at Waterman from the passenger side of his car ***and from behind***. As the car rolled past the toll both, it ran over stop sticks that the officers had placed there. At that moment, another officer rammed Waterman with his police cruiser which finally brought Waterman to a stop. Waterman suffered a fatal wound to the front right side of his neck in addition to other gun shot wounds to his right arm, right thigh, and left thigh.

Waterman's estate sued the officers under several causes of action including a claim under 42 USC § 1983 for deprivation of Waterman's Fourth Amendment right to be free from excessive force. The officers sought summary judgment on the grounds that they were entitled to qualified immunity. The District Court denied the motion and on appeal the 4th Circuit Court of Appeals concluded that ***although the shots from behind were unconstitutional***, the officers were entitled to qualified immunity in this case.

Issue #1: Is it relevant that the officers may have created the dangerous situation by positioning themselves in front of the on-coming vehicle?

Rule: No. The reasonableness of the officers' actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officers at the moment that force is employed.

Discussion: The court, relying on the language found in the Supreme Court case of *Graham v. Conner* opined that the reasonableness of the officers' actions must take into account that officers are "often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving." For this reason, "the facts must be evaluated from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided." The reasonableness or excessiveness of the force employed is analyzed based solely on the facts taken at the moment force is used, not on the myriad of events and decisions that lead up to a situation wherein force is used.

Issue #2: Is force that is justified at the beginning of an encounter automatically justified for the entire encounter?

Rule: No. "Force justified at the beginning of the encounter is not justified, even seconds later, if the justification for the initial force has been eliminated."

Discussion: In support of the above holding the court reasoned that "It is established in this Circuit that the reasonableness of an officer's actions is determined based on the information possessed by the officer at the moment that force is employed. To simply view all of the force employed in light of only the information possessed by the officer when he began to employ force would limit, for no good reason, the relevant circumstances to be considered in judging the constitutionality of the officer's actions."

NOTE: Although placing oneself into the path of a moving vehicle may not be a violation of the Fourth Amendment, it certainly is a violation of CMPD Directive 600-018 IV. C. 2., which states, "When confronted with an oncoming vehicle, an officer will not position him or herself into the path of the vehicle, but will take all reasonable steps to move out of the way." That directive also forbids

officers from discharging his or her firearm at or from a moving vehicle unless no other option is reasonably available and deadly force is justified.

Practical Point: While this case is helpful to law enforcement and stands for the fact that force will be judged solely on the legal justification(s) existing at the moment force is used, officers must carefully note that the Fourth Circuit did hold that ***the shots fired from behind were unconstitutional***. The officers were entitled to qualified immunity on those shots because the court felt that the law had not given the officers sufficient notice that those shots from behind would be unconstitutional. The *Waterman* case has now put law enforcement officers on notice that shots fired from behind under the circumstances illustrated in the *Waterman* case are unconstitutional. Officers in future cases will not receive qualified immunity for similar force under similar circumstances.

Return to top

Fourth Amendment/Vehicle Search/Community Caretaking Doctrine: *United States v. Johnson, ___F.3d ___ (4th Cir. 2005).*

Facts: On July 22nd 2003, U.S. Park Police Officer Ken Bentivegna responded to a vehicle accident scene on the Baltimore-Washington Parkway. On arrival at the scene, Officer Bentivegna found a Toyota vehicle severely damaged and sitting in the roadway. Another vehicle sat on the shoulder of the road a short distance ahead. Officer Bentivegna went to the Toyota and discovered that Johnson, the driver and sole occupant of the Toyota, was conscious but unresponsive.

Officer Bentivegna asked Johnson "if he was okay, if he had been injured, if anything hurt." Johnson merely stared straight ahead and did not respond. After continued questioning still resulted in no response, Officer Bentivegna called for an ambulance and began looking around the vehicle. The officer thought that he might get a response from Johnson if he could call him by name, so Officer Bentivegna looked in the glove box for the vehicle registration.

When the officer opened the glove box, he found a handgun. The officer confiscated the weapon and then removed Johnson from the car and arrested and handcuffed him for possessing a gun on federal property. Johnson was transported to a hospital for treatment. While awaiting treatment, Johnson spontaneously stated to Officer Bentivegna that the gun was his and that he carried it for protection. Officer Bentivegna then began questioning Johnson without giving *Miranda* warnings, and learned that Johnson had smoked a "dipper" prior to the accident. (A "dipper" being a cigarette dipped in PCP).

At his trial for possessing a gun on federal property and impaired driving, Johnson sought to suppress the handgun alleging that Officer Bentivegna's search of the glove box violated the Fourth Amendment. The trial court refused to suppress the handgun finding that the search was justified as a search for registration/identification that the driver was unable to provide. Johnson appealed to the Fourth Circuit Court of Appeals.

Issue: Was the search of the glove box a violation of the Fourth Amendment?

Rule: No. The search was justified by the Community Caretaking Doctrine.

Discussion: The Supreme Court has found that people possess a reasonable expectation of privacy

in vehicles they own or are legally in control of. Accordingly, searches of automobiles must comply with the Fourth Amendment. Generally, the Fourth Amendment requires that law enforcement obtain a warrant from a judicial official before conducting a search. Automobiles however, are subject to the "automobile exception" which holds that officers may search vehicles that they legally have access to without a warrant so long as the officers do possess probable cause to believe the vehicle contains contraband or evidence of illegal activity. In this case, Officer Bentivegna ***did not*** have probable cause to search Johnson's vehicle. The District Court attempted to craft a special exception that would allow officers to search vehicles without probable cause in order to locate registration/ identification when the driver of the vehicle did not readily provide such at an accident scene. (It should be noted that the United States Supreme Court has created a special and extremely limited exception for officers looking for the VIN solely on the dashboard or doorjamb of stopped vehicles.) *See New York v. Class,* 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

The 4th Circuit rejected the District Court's extension of the automobile exception and found that the search of the glove box could not be justified by any special registration/identification search exception. However, the court also found that the search was justified under the Community Caretaking Doctrine.

The Community Caretaking Doctrine was first announced by the Supreme Court in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The Doctrine stands for the idea that police officers function for public safety in general, which includes aspects of service separate from enforcing the criminal laws. When officers are performing services that are not law enforcement in nature, those services sometimes require officers to search or seize property.

Such non-criminal searches and seizures are still subject to the Fourth Amendment's requirement of reasonableness, but are difficult to analyze under the court's normal individualized suspicion standards. If an officer stops a vehicle because it is on fire, that stop is imminently reasonable, but the concepts of reasonable suspicion or probable cause are simply inapplicable. For that reason, the Supreme Court recognized the Community Caretaking Doctrine.

The requirements of the Community Caretaking Doctrine are:

1. Police actions must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal law.
2. Police intent must also be divorced from the enforcement of criminal law.
3. The search or seizure must be reasonable under the circumstances.

If the above three requirements are met, then the search or seizure is not a violation of the Fourth Amendment. In this case, the court found that Officer Bentivegna arrived at the accident scene with the intention of providing emergency assistance. The officer found a driver that was unresponsive and likely injured. It was reasonable for the officer to look in the glove box in hopes of finding some information as to the driver's identity and improving communication with him. The officer's search of the glove box was a genuine community caretaking effort, and not a pre-textual search for criminal evidence. Thus the search was justified under the Community Caretaking Doctrine.

NOTE: The statements made by Johnson at the hospital were made while he was in custody. Hence, those statements that were the product of police questioning (the drug related statements) were

suppressed as a violation of Miranda. The spontaneous statement related to the gun that Johnson made before any questioning was done, was not suppressed.

Return to top

NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Vehicle Stop/Control of Passenger: *State v. Shearin*, ___N.C.App. ___, 612 S.E. 2d 371 (2005)

Facts: Roy Shearin was a passenger in a vehicle that was stopped by a sheriff's deputy on September 3rd 2002, at approximately 10:45 p.m., because the license plate light was not working. The deputy smelled alcohol on the driver and began administering sobriety tests. Roanoke Rapids Police Officer Norton was patrolling in the area, saw the deputy's emergency lights, and drove up to assist the deputy.

The vehicle was stopped in an area that was lit only by a single street light. Standing about twenty-five feet away from the stopped vehicle, Officer Norton used a flashlight to observe Shearin, who remained in the passenger seat of the vehicle. Shearin asked Officer Norton if he could leave. Officer Norton told Shearin to stay in the vehicle for a few more minutes. Shearin again asked Officer Norton whether he could leave, and Officer Norton approached the vehicle.

Officer Norton testified that Shearin "was very agitated and appeared intoxicated at the time." Officer Norton smelled alcohol on Shearin and saw a black plastic bag at Shearin 's feet, with what the officer believed to be a beer bottle, sticking out of the bag. Officer Norton asked Shearin what was in the bag, and Shearin tried to push the bag under the seat with his foot.

Officer Norton asked Shearin to exit the vehicle. He then asked Shearin if he had any weapons. Shearin did not respond. Officer Norton asked Shearin three more times if he had any weapons. Shearin finally responded that he did not. Officer Norton testified that Shearin was originally calm when first asked to exit the vehicle, but again became agitated and boisterous after being asked if he had any weapons. Shearin asked why he was being held. Officer Norton told him to move his hands away from his pockets so Officer Norton could frisk him. Shearin refused, and "took off running."

Officer Norton chased him into an enclosed parking lot. He told Shearin to come out of hiding. Shearin complied and the officer ordered him onto the ground. Officer Norton handcuffed and patted him down. Officer Norton found marijuana, cocaine, scales for measuring drugs, and a pocket knife on Shearin.

At trial, Shearin was convicted on all charges after the trial court refused to suppress any of the evidence. He appealed the verdict to the North Carolina Court of Appeals arguing that the trial court should have suppressed the narcotics and scales as the fruit of an illegal seizure and illegal frisk.

Issue 1: Was the seizure of Shearin a violation of the Fourth Amendment?

Rule 1: No. The original seizure was *de minimis* and hence reasonable when weighed against the officer's right to control the traffic stop.

CMPD POLICE LAW BULLETIN
A Police Legal Newsletter
June-July 2005 Volume 24, Issue 3

Discussion 1: The Supreme Court held in *Maryland v. Wilson,* 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) that an officer who has lawfully stopped a vehicle may order the passengers out of the vehicle without showing any reason to do so under the Fourth Amendment. The Court characterized the intrusion represented by the order to exit the vehicle as minimal. Until the *Shearin* case, neither the United States Supreme Court nor the courts of North Carolina had specifically addressed whether an officer may command a passenger to remain in a vehicle that has been lawfully stopped. The Court of Appeals in *Shearin* recognized that a police officer "needs to be able to keep reasonable control over a situation". That need for control simply outweighs the minimal intrusion of requiring a person to temporarily remain in a vehicle. Hence, officers may not only order a passenger out of a vehicle pursuant to a lawful vehicle stop, but may also order such a passenger to remain in the vehicle temporarily, in their discretion.

Issue 2: Was the attempted frisk of Shearin a violation of the Fourth Amendment?

Rule: No. The frisk was supported by a reasonable, articulable suspicion that Shearin may be armed and dangerous.

Discussion: The Supreme Court held in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that an officer may "stop and frisk" a person when the officer reasonably believes that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous. In this case, Officer Norton noted that Shearin seemed agitated and smelled of alcohol while he was seated in the stopped vehicle. The officer also saw what appeared to be an open beer bottle on the floor board of the vehicle which Shearin attempted to hide when asked about it. Once Shearin stepped from the vehicle, he refused to tell the officer whether he had any weapons on him, and then after being asked repeatedly, said that he did not. When the officer told Shearin to move his hands away from his pockets so that he could be frisked, Shearin fled on foot. The Court held that taking all of the above factors together and weighing the totality of the circumstances, it was reasonable for Officer Norton to suspect that criminal activity was afoot and that Shearin may be armed and dangerous.

Note: Under California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) a mere show of police authority is not sufficient to constitute a seizure. There must also be submission to that authority, whether voluntarily given or accomplished by physical force. In this case, Officer Norton was not able to actually frisk Shearin until after Shearin had fled and been chased down. Thus, the Court considered Shearin's flight in determining whether there was reasonable suspicion to frisk him.

Return to top

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June-July 2005 Volume 24, Issue 3

AUTHORIZATION TO ACT AS AGENT

An Authorization to Act as Agent ("ATAAA") gives the CMPD the authority to order a person to leave the premises of another during times when no one is allowed on the property. The person may be arrested for trespass if he/she does not leave or returns to the property after having been forbidden to do so. An ATAAA is not a Power of Attorney and should not be referred to as such.
In determining whether an ATAAA is appropriate for a particular property, officers should keep the following factors in mind:

1. The property must be non-residential unless it is vacant. For example, the common areas of an apartment complex do not qualify. However, the pool area of an apartment complex can qualify if: it is enclosed by a fence, "No Trespassing" signs are posted, and the ATAAA is in effect during times when no one, including residents, is allowed in the pool area. Other types of residential property, such as single family homes, duplexes, and triplexes, do not qualify unless they are completely vacant.

2. A shopping center or business complex does not qualify for an ATAAA unless all of the businesses/offices are closed and all of the tenants agree on certain hours when no one, including the owners and employees, is allowed on the property.

3. Commercial property that is open to the public 24-hours a day does not qualify (including locations with public telephones, ATM's, etc.).

4. The property must be clearly posted with "No Trespassing" signs. In addition to providing notice that no one is allowed on the property, the sign fulfills an element of the second degree trespass charge. For larger properties (properties with acreage, wooded lots, etc.), signs should be posted at commonly used entrances or pathways to the property. In addition, a reasonable number of signs should be posted (depending on the size of the property) to provide notice that trespassing is forbidden. If an officer encounters an individual who claims not to have seen a sign, the officer should direct that person to the nearest sign, inform him/her as to what area is covered, and make it clear that he/she is not allowed on the property.

5. Police authority may be exercised only during the hours that the ATAAA is in effect.

6. The property owner or other authorized person must appear in court on the trespass case to testify about the defendant's unauthorized presence on the property.

Officers should not advise property owners to obtain an ATAAA if their property does not qualify under the above guidelines. If an officer has a question as to the suitability of a particular property for an ATAAA, he/she should contact the Police Attorney's Office.

ATAAA forms must be completed fully and accurately. Both day and night telephone numbers for the owner/authorized person must be included. In addition to a street address, a description of the

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property should also be included (vacant house, vacant lot, company name, etc.). Finally, the form must be signed by the owner/authorized person in the presence of a Notary Public.
property should also be included (vacant house, vacant lot, company name, etc.). Finally, the form must be signed by the owner/authorized person in the presence of a Notary Public.
ATAAA's must be approved (signed) by a Police Attorney and are effective for one year, unless terminated earlier. A new form must be completed if ownership of the property changes and/or to renew the ATAAA. The original of each ATAAA is maintained in a notebook in the Police Attorney's Office and a copy should be kept in the appropriate district office. A master list (divided by districts) of all of the current ATAAA's is also kept in the Police Attorney's Office. If a representative from a district would like to receive this list by e-mail (including updates), he/she should contact the Police Attorney's Office at (704) 336-2406.

Copies of the form and the cover letter are available in the Police Attorney's Office and may also be printed from the "Police Law Bulletins" section of the Directives folder and/or from the Police Attorney's folder.

The list of ATAAA's is also provided to Communications. Each location (except those without a specific street address) is flagged in the CAD system and the fact that an ATAAA is in effect is included when an officer is dispatched on a call for service.

Return to top

HANDICAPPED PARKING

Enforcement Guidelines

Within the Charlotte city limits:

- North Carolina Uniform Citations as well as City Civil Citations (small ticket book) may be used.
    - It is recommended that City Civil Citations be used in all but the most aggravated of violations.

Outside the Charlotte city limits:

- North Carolina Uniform Citations should be used exclusively.

Vehicles left within the "access aisle" (*see below for discussion*) of a properly designated handicap parking space that do not display a handicap placard or tag, constitute a handicap parking violation, and should be cited using the guidelines above. Vehicles that protrude into an "access aisle', but not so as to prevent the use of the aisle by a wheelchair bound person in loading or unloading from an accessible vehicle, should not be cited.

Background

Handicapped parking spaces receive special protection in North Carolina, and that is doubly so in Charlotte. Not only is there a North Carolina Statute (G.S. 20-37.6(e)) that forbids anyone not

CMPD POLICE LAW BULLETIN
A Police Legal Newsletter
June-July 2005 Volume 24, Issue 3

displaying a handicap placard or tage from parking in such a space, there is also a special City Code section (CC §14-216(a)(2)) that applies. The reason there is a city ordinance in addition to a state handicap parking statute is that the city ordinance is enforced civilly and hence civilian volunteers may enforce the city code via city civil citations. Civilians may not enforce the state statute.

The elements of the two offenses are the same, and are as follows:

1. No person shall;
2. park or leave standing;
3. any vehicle;
4. in a space;
5. designated by a proper sign;
6. without displaying a handicap placard or tag.

- In order to be proper, the sign must:
    i. Be at least 12" X 16";
    ii. Be rectangular in shape;
    iii. Include the universal handicap symbol; and
    iv. State "Reserved Parking" and the maximum fine "$250.00".

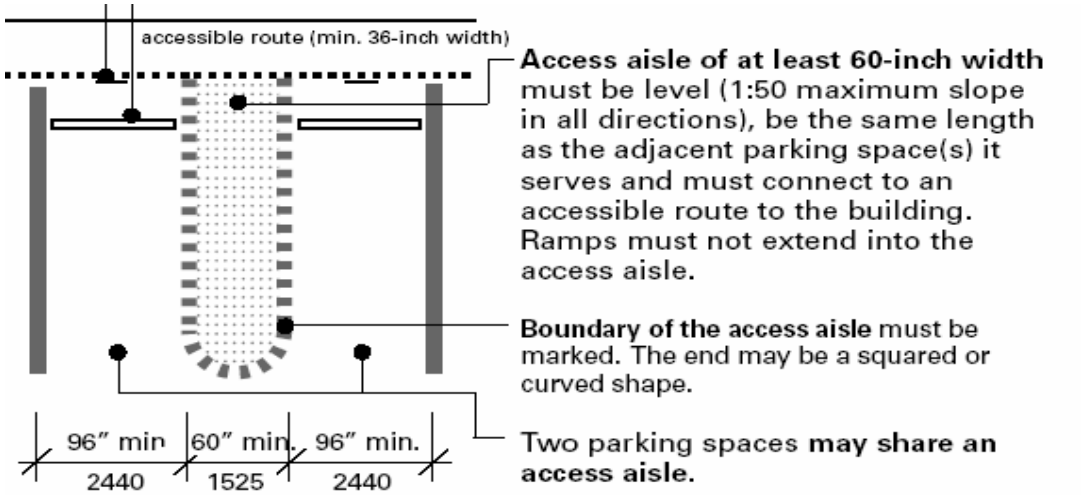
(Figure 1.)

The sign may be of any color scheme or made of any material (metal, wood, etc.).

There is a significant issue regarding handicap spaces that officers should be aware of. Neither the above state law nor city ordinance defines the term "space", and there is no requirement that a space be designated by pavement "space" markings. While one may take the common meaning of parking space to be only the area encompassed on three sides by a borderline in which a vehicle is to be parked, there is more to the definition of "space" than that. The Americans with Disabilities Act ("ADA") is a comprehensive federal regulation that, among other things, sets forth strict requirements for handicap spaces. Part of the ADA requirement for a handicap space is that the space must include a feature known as an "access aisle". (*See figure 2., below)*.

CMPD POLICE LAW BULLETIN
A Police Legal Newsletter

June-July 2005 Volume 24, Issue 3 Page 10 of 10



(*Figure 2.*)

The term "access aisle" is a construction of the ADA, and as the above figure depicts, access aisles are an essential part of every handicap parking space. ADA regulations require that parking lots include handicap spaces, and that each handicap space include as a feature an access aisle. (Handicap spaces must be adjacent to an access aisle and two such spaces may share a single aisle.) The purpose of an access aisle is to allow disabled individuals that utilize wheelchairs to load or disembark from accessible vehicles parked in the handicap space. The ADA categorizes handicap spaces into two types, car or van accessible spaces. The main difference between the car spaces and the van spaces is the required size of the access aisle feature: 60" for car, 96" for van. The ADA also requires that access aisle boundaries be marked and to be squared or rounded at the end. Handicap spaces and their access aisle features should be indicated with arrows located on the handicapped parking sign and should also be labeled if "Van Accessible". However, the arrows and van accessible markings are not required before a handicap parking citation may be issued.

The result of the interplay of G.S. 20-37.6(e)(1) and the ADA is this: the entirety of properly marked handicap spaces that include proper access aisles under the ADA are protected by 20-37.6. Thus, if a person not displaying a handicap placard or tag were to park within an access aisle so as to preclude the proper use of the space, then that person may be cited for a violation of 20-37.6 or City Code 14-216(a)(2). The proper charging language for the state handicap parking offense may be found in the January 1st, 2004 edition of the CMPD *Citation Language Booklet* at page 8, # 26. The city charge is checkbox #13 on the city parking ticket.

Note: The CMPD does not enforce the ADA and officers should not attempt to do so. The ADA is relevant to handicap parking enforcement only in that it provides a practical definition of "space".

Return to top

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