



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

October-November 2005

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**Forward:** In this issue we inform officers of a case argued before the U.S. Supreme Court dealing with a consent to search issue. We discuss whether an officer can restrict the use of a cell phone by the driver or passenger while the officer is conducting a traffic stop. We also review the administrative inspection process including the role that CMPD officers have in this procedure. In addition, we provide some practical pointers on how to conduct a knock and talk.

### **BRIEFS:**

#### **U.S. SUPREME COURT PREVIEW**

Georgia v. Randolph, Docket No.: 04-1067

Oral argument: November 8, 2005

Issue: Does a wife's consent to search a residence override the husband's refusal to give consent when both spouses are present at the residence?

The U.S. Supreme Court will answer the question this term in a Georgia case where the lower appellate courts ruled the officer could not search the residence and, therefore, the cocaine found was not admissible at trial against the husband.

Officers arrived at the Randolph residence in response to a domestic call where Mrs. Randolph accused her husband of trying to take their son from her. The couple had been separated for two months and Mrs. Randolph had actually moved to Canada with her son for a month. She returned home to retrieve some of her property when her husband left with their son. During discussions with the officers, Mrs. Randolph said her husband used large amounts of cocaine.

Mr. Randolph returned to the house while the officers were talking to his wife. An officer asked for Mr. Randolph's consent to search the residence for cocaine and he refused. The officer then turned to Mrs. Randolph who gave her consent and took the officer to an upstairs bedroom where a cut straw with cocaine residue was found. The officer called the district attorney who advised him to stop the search and obtain a search warrant. Several other drug related items were found after the warrant was obtained. Mr. Randolph was charged with possession of cocaine. The Court must determine if his Fourth Amendment rights were violated by the initial search of the bedroom over his objection.

The U.S. Supreme Court has previously ruled that the consent of one occupant to search areas of common control is valid when the other



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occupant is absent. However, this is the first time the Court has dealt with an objecting occupant who is present. A decision is expected in the next few months.

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### CELL PHONE USE DURING TRAFFIC STOPS

An issue has arisen regarding whether an officer is legally justified in restricting the use of cell phones by a driver or passengers during a traffic stop. There is very little case law in this area and this article is meant to provide guidance to officers.

The United States Supreme Court has held that police officers, as a matter of course, may order both the driver and passengers of a vehicle that has been legally stopped to exit the vehicle. The cases that established that rule relied upon the justification of officer safety, as compared to the minor intrusion of having a person exit a vehicle that has already been stopped. *Pennsylvania v. Mimms*, 98 S.Ct. 330 (1977), *Maryland v. Wilson*, 117 S.Ct. 882 (1997).

The North Carolina Court of Appeals, following and extending the above cases, recently ruled that officers may also order a passenger of a legally stopped vehicle to temporarily remain in the vehicle. *State v. Shearin*, \_\_\_ N.C. App. \_\_\_, 612 S.E. 2d 371 (2005). The *Shearin* case recognized that “a police officer needs to be able to keep reasonable control over a situation [traffic stop]” and held that ordering a passenger of a stopped vehicle to remain in the vehicle is reasonable.

The two major issues raised by cell phone use at traffic stops are as follows:

- 1) Officer safety: the motorist may be calling someone to come to the scene and disrupt the traffic stop; and
- 2) Compliance: the use of the cell phone may delay the motorist from complying with the officer’s lawful commands.

Neither the North Carolina nor federal courts have dealt with whether officers may either seize or restrict the use of cell phones by drivers or passengers. However, based on the courts’ analysis and holdings in the *Mimms*, *Wilson*, and *Shearin* cases, it is our opinion that an officer may reasonably seize cell phones or restrict their use under limited circumstances. Until an appellate court holds otherwise, we believe the best course of action is as follows: An officer may restrict a person’s use of a cell phone if the officer can establish that the use of the phone delays or obstructs the officer from discharging a duty. In addition, an officer may restrict a person’s use of a cell phone if the officer has affirmative and objective evidence that the person is summoning other individuals to the stop for the specific purpose of either assaulting the officer or otherwise unlawfully interfering with the stop.

The following scenarios are intended to provide officers with guidance in circumstances they may be likely to face.



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### **SCENARIO 1**

After stopping a vehicle for DWI, the officer approaches the driver and orders him to step out of the car. The driver is on his cell phone and holds up a finger to the officer, indicating that the officer should wait. After waiting a few seconds, the officer again orders the driver out of the car. The driver again signals that the officer should wait.

In this situation, the officer is justified in opening the car door and seizing the cell phone. The driver's use of the phone is delaying him from complying with the officer's lawful commands.

### **SCENARIO 2**

After stopping a vehicle for speeding, the officer obtains the driver's license and registration. While she is writing a citation in her patrol car, the officer notices that the driver is talking on his cell phone.

In this situation, the officer can approach the driver and listen to the conversation. The officer is justified in asking the driver who he/she is talking to and whether the driver is requesting someone to come to the scene. If the officer develops a reason to believe that the person is summoning someone to the scene for the purpose of interfering with, delaying or obstructing the officer, then the officer may seize the cell phone for the duration of the stop.

### **SCENARIO 3**

After stopping a vehicle for speeding, the officer obtains the driver's license and registration. While she is writing a citation in her patrol car, the officer notices that the driver is talking on his cell phone. The officer approaches the vehicle and overhears the driver speaking to his lawyer and asking, "What should I do?"

In this situation, the officer should not seize the phone or even restrict the call, until such time as the officer needs the cooperation of the driver to complete the traffic stop, such as accepting the citation.

### **SCENARIO 4**

Officers observe several youths congregating in a mall parking lot after business hours. One of the youths enters a vehicle and proceeds to drive recklessly through the parking lot, doing "doughnuts" and spinning the rear wheels. The officers initiate a traffic stop.

The driver is a seventeen year old who is well known to the officers. During a traffic stop one month earlier, he used his cell phone to call several of his friends to the scene. Once there, the friends caused a disruption and delayed the completion of the stop. On this occasion, the individual has his cell phone in hand when he is asked to exit the vehicle.

In this situation, officers are justified in immediately seizing the cell phone. The history of the individual indicates that he is likely to use the phone to obstruct the officers in performing their duties.



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In conclusion and as a general rule, an officer is not automatically justified in immediately seizing a cell phone or restricting its use during a traffic stop. Only in cases where the use of the phone actually hinders the officer in the performance of his/her duties (Scenario 1) or where an individual is summoning another or has a history of summoning another for the purpose of obstructing or delaying officers (Scenario 4) is a seizure of the phone justified. Otherwise, an officer may only inquire as to who is being called and whether the reason for the call is to hinder the officer's investigation. In a situation where it is reasonable for an officer to seize a cell phone, only reasonably necessary force may be used to effect the seizure.

In circumstances where the person refuses to put the phone away or resists its seizure, officers may charge the person with resisting, delaying or obstructing. Remember, it is crucial that the officer be able to articulate that the use of the phone interfered with his/her discharging a duty.

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### ADMINISTRATIVE INSPECTIONS

The purpose of this article is to explain the administrative inspection process, including administrative inspection warrants, and to provide guidance to CMPD officers as to their role in such inspections.

G.S. 15-27.2 authorizes an official or employee of state, county or local government to obtain an administrative inspection warrant in order to carry out a legally authorized inspection. A warrant may be issued when the property to be searched or inspected is part of a program of inspection which includes that property or when there is probable cause to believe there is a condition, object, activity or circumstance which justifies a search or inspection of the property. The warrant may be issued by a magistrate, judge or clerk of court. The inspector seeking the warrant must complete an affidavit which establishes the grounds for supporting the warrant.

An administrative inspection warrant is valid for only 24 hours after it is issued. It must be personally served on the owner or possessor of the property between the hours of 8:00 a.m. and 8:00 p.m. and must be returned within 48 hours (however, a warrant for a fire scene may be executed at any hour and is valid for 48 hours). If the property owner or possessor is not present and the inspector has made reasonable efforts to locate that person, a copy of the warrant may be affixed to the property and the inspection may proceed.

**NOTE:** Evidence of a crime not related to the purpose of the inspection which is obtained during an inspection conducted with a warrant is **not** admissible in any civil, criminal or administrative proceeding and **cannot** serve as a basis for obtaining a search warrant. For example, if an officer observed cocaine in plain view during an inspection, the officer could seize the cocaine, but could not charge the occupant(s) with possession of the cocaine or use the discovery of the cocaine to obtain a search warrant for the residence. However, this limitation does not apply to an inspection that is conducted based on consent or exigent circumstances. Exigent circumstances exist if the inspector reasonably believes that if he/she took the time to obtain a warrant, the condition or object which is the subject of the inspection would likely disappear.



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CMPD officers are authorized, upon request, to accompany inspectors in the execution of administrative inspection warrants or during consensual or emergency inspections. The role of the officer is to stand by and keep the peace and **not** to assist in forcing entry into the property or in conducting the actual inspection.

Individuals who willfully interfere with inspectors or officers during an administrative inspection that is made pursuant to a warrant or based on exigent circumstances may be charged with resisting, delaying, or obstructing a public officer under G.S. 14-223. Although the statute does not define "public officers," it is our interpretation that inspectors are included as well as police officers. Note that verbal abuse by itself does not constitute the offense of resisting, delaying or obstructing unless it is so severe that it prevents inspectors or officers from communicating or otherwise conducting the inspection. In addition, the misdemeanor assault statute (G.S. 14-33(c)(4)) used to charge the offense of Assault on an Officer includes employees of any political subdivision of the State, which clearly includes inspectors.

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### **KNOCK AND TALK PROCEDURE**

When conducting a knock and talk at a residence, officers should **not** position themselves at the rear of the residence on the curtilage of the property (back yard, back door) in order to observe individuals who may leave the residence when officers knock on the front door. Entry onto the property through a common entranceway, such as the driveway and walkway leading to the front door is legally justified; however, going to the back of the residence can only be justified on the basis of consent, a search warrant, or exigent circumstances, none of which are normally present in a knock and talk situation.

NOTE: Officers may position themselves in the common area of an apartment complex so that they can observe the rear door of the apartment (but see the next paragraph).

Also, the fact that an individual leaves a residence during a knock and talk (even by running away) does not mean that an officer is justified in involuntarily detaining or using force on that person. The mere fact that a person leaves the residence upon or after the arrival of the police does not provide reasonable suspicion for a detention. Unless there are additional circumstances present that would provide reasonable suspicion or probable cause, any contact initiated with the person must be voluntary/consensual.

This is to be distinguished from a situation where an officer observes an individual in a public area (such as standing on a street corner) which is known for significant drug activity, and the individual runs away after becoming aware of the officer's presence. In that case, the individual's presence in a high drug area along with their flight provides the officer with reasonable suspicion to conduct a detention. However, the area's status as a high drug area must be supported by objective factors, such as prior drug arrests, drug seizures, intelligence information, surveillance, etc.



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Finally, whenever a knock and talk is conducted and a request is made to conduct a search, the incident must be documented by completing a stop data ("profiling") form.

If officers have questions about knock and talks, please contact a Vice detective or supervisor or the Police Attorney's Office.

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### WAIVER OF RIGHTS FORMS

The waiver of rights forms used for in-custody suspect interviews are available in electronic format on the CMPD Portal. The route to obtain the forms is as follows: [CMPD Portal/Employee Resources/CMPD Forms/Investigative Services Group/Waiver of Rights](#). Hard copies of the forms are also available in the basement of the Headquarters Building next to the Property Control window and in the Report Room. The forms that are available include:

1. Adult Waiver of Rights
2. Adult Waiver of Rights – Spanish
3. Juvenile Waiver of Rights
4. Juvenile Waiver of Rights – Spanish
5. Sixth Amendment Waiver of Rights
6. Sixth Amendment Waiver of Rights – Spanish

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### MAGISTRATE'S OFFICE REMINDERS

#### Arrest Warrants for Traffic Offenses

Whenever an officer applies for an arrest warrant for a traffic offense (such as DWLR), the officer should include a driver's history in the paperwork that is submitted to the magistrate. The magistrate will use that information in determining the amount of bond that is set. The officer must bring the driver's history to the jail, as Arrest Processing is no longer able to run drivers' histories for officers.

#### Arrest Worksheets

An officer should always check the final copy of the arrest worksheet before it is submitted to the magistrate to make sure that the offense(s) listed is/are the offense(s) that the officer intends to charge the defendant with. On occasion, the wrong charge code may be listed on the initial paperwork. This will result in the wrong offense being charged and the magistrate finding no probable cause. If no charge code exists for the offense being charged, an officer should use the **UCR code number 26400** and **charge code 999**.



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### 50C Civil No-Contact Orders

Magistrates do **not** issue 50C civil no-contact orders (not even on nights or weekends). An individual who is seeking such an order should be directed to Room 215 of the Civil Courts Building, 800 East Fourth Street, (704) 347-7814.

The Family Court Judges have asked that we remind officers of the limitations of protective orders under G.S. 50C, and that ex parte orders are rarely granted. Please remember that these orders are **not** enforceable by arrest.

Things to remember about G.S. 50C:

- Provides for civil no-contact protective orders when the victim of unlawful conduct does not have a personal relationship under domestic violence law.
- Unlawful conduct includes nonconsensual sexual conduct and stalking. (Stalking is the criminal stalking violation, as set out in G.S. 14-277.3)
- The victim's address may be withheld and an alternative address provided.
- The sheriff is responsible for service of the order. When the sheriff is unable to serve an individual, the complainant may serve the order by publication
- A violation of an order is punishable by contempt of court, **not** by arrest.
- Temporary orders are valid for 10 days unless extended. Permanent orders are valid for one year.

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### JUVENILES AND FIREARMS

The Police Attorney's Office has received the following question concerning juveniles:

**QUESTION:** Can a juvenile adjudication for a felony serve as a basis for the subsequent charge of possession of a firearm by a felon after the juvenile turns 16 years of age?

**ANSWER: NO.** A juvenile adjudication that a juvenile is "delinquent" is **not** considered a criminal conviction nor does it cause the juvenile to forfeit any citizenship rights pursuant to G.S. 7B-2412.

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