CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this edition we review two United States Supreme Court cases. In *Illinois v. Caballes,* the Court addressed the constitutionality of a drug dog sniff of the exterior of a vehicle during a traffic stop. In *Muehler v. Mena*, the Court addressed the constitutionality of the use of handcuffs to detain occupants of a residence during the execution of a search warrant. We also review a North Carolina Court of Appeals case which upheld the constitutionality of the North Carolina crime against nature statute. As general information, we include a reminder to officers about the proper procedure to follow if they receive a subpoena *duces tecum* or request for the production of documents; when officers may take juveniles and adults into custody without custody orders for involuntary commitment; tenant or guest determinations in landlord tenant matters; the procedure for seizing revoked driver's licenses, and we highlight recent changes to citation forms

BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment / Search Warrant / Use of Force: *Muehler v. Mena*, 2005 WL 645221(March 22, 2005)

FACTS: Officers obtained a search warrant for a residence in Simi Valley, California, based on information gathered in relation to a gang-related, drive-by shooting. The information indicated that a gang member from the West Side Locos lived at this address and was armed and dangerous. The warrant authorized a broad search for the house and premises for deadly weapons and evidence of gang membership. Due to the high risk nature of the warrant service and the potential for armed gang members, the SWAT team was used to secure the residence. Immigration and Naturalization Service ("INS") officials also accompanied the officers during the execution of the search.

Upon entry into the residence, Mena, an occupant of the residence, was placed in handcuffs with three other occupants. They were taken to a converted garage and guarded periodically by one to two officers, while sixteen others conducted the search. All four occupants remained handcuffed for two to three hours but were allowed to move about the

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garage while the search proceeded. During the detention, officers asked the four detainees for certain information, including their immigration status. INS confirmed Mena's status as a permanent resident. Mena was released at the scene at the conclusion of the search.

The search of the residence yielded a .22 caliber handgun, ammunition, and several baseball bats with gang paraphernalia, additional gang paraphernalia and a bag of marijuana.

Mena filed a civil rights lawsuit alleging violations of the Fourth Amendment. She claimed that she was detained with unreasonable force by the use of handcuffs and for an unreasonable length of time. A jury found that the officers violated Mena's Fourth Amendment right to be free from unreasonable searches and seizures and awarded her actual damages as well as punitive damages against each officer.

The Ninth Circuit affirmed and held that the use of handcuffs to detain Mena during the search was unreasonable and violated the Fourth Amendment. The Ninth Circuit further held that the questioning of Mena regarding her immigration status, while she was detained, constituted an independent Fourth Amendment violation. The United States Supreme Court granted a writ of certiorari.

ISSUE 1: Was the detention of Mena in handcuffs during the execution of the search warrant reasonable?

RULE 1: Yes. The officers' use of force in the form of handcuffs was reasonable during the detention and not a violation of the Fourth Amendment.

DISCUSSION: The Court noted several law enforcement interests which justify detaining occupants of premises during the execution of a search warrant. These include the prevention of flight if incriminating evidence were located, minimizing the risk of harm to officers and facilitating the orderly completion of the search. The Court found, based on the existence of the search warrant that Mena, as an occupant of the premises, was subject to detention. The Court further reiterated that an officer's authority to detain carries it with the authority to use reasonable force to effect that detention. The handcuffing of Mena, as a use of force, was reasonable at the outset and during the period of time that it took to complete the search of the premises. The Court also noted that the need to detain several occupants during the search made the use of the handcuffs all the more reasonable. The Court ruled that the length of Mena's detention was not unreasonable when balanced against the officers continuing safety interests. Consequently, there was no Fourth Amendment violation.

ISSUE 2: Did the officers violate Mena's Fourth Amendment rights by questioning her about her immigration status during her detention?

RULE 2: No. Mena was not seized for purposes of the Fourth Amendment so no further justification for questioning her was required.

DISCUSSION: The Court continues to hold that "mere police questioning does not constitute a seizure." Officers were not required to have independent reasonable suspicion to question Mena. In

this case, Mena's detention was not prolonged by the questioning and therefore was not a seizure under the Fourth Amendment and was lawful.

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Fourth Amendment / Traffic Stop / Dog Sniff: *Illinois v. Caballes*, ____ U.S. ____, 125 S.Ct. 834 (Jan. 24, 2005)

FACTS: The Defendant was stopped on an Illinois highway for speeding by a state trooper. A second state trooper arrived at the stop with a narcotics detection dog. There was no information about the defendant other than the speeding violation. While the first trooper wrote the defendant a citation, the second trooper walked the drug dog around the vehicle. The dog alerted to the trunk and a search was conducted in which marijuana was located. The defendant was arrested. The entire incident lasted approximately ten minutes. The defendant filed a motion to suppress the search of the trunk claiming that the police prolonged the stop in order to conduct the dog sniff in violation of the Fourth Amendment. The motion was denied and he was convicted. The Illinois Supreme Court reversed the conviction finding that the traffic stop was converted into an unlawful drug investigation. The United States Supreme Court granted a writ of certiorari and vacated, or set aside, the judgment of the Illinois Supreme Court.

ISSUE: Whether the Fourth Amendment requires articulable, reasonable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop?

RULE: No. So long as the initial lawful traffic stop was not prolonged beyond the time required to complete the stop, a dog sniff of the exterior of a vehicle does not constitute a new search requiring independent reasonable suspicion.

DISCUSSION: The Court focused its decision on whether or not the defendant's privacy interests were implicated by the dog sniff search. Any constitutionally protected privacy interest must be based on a privacy interest that society considers reasonable. The search by a drug dog reveals only the possession of contraband and there is no legitimate expectation of privacy in contraband. The Court relied on the trial court's finding that the dog sniff was sufficiently reliable to establish probable cause to conduct a full blown search of the trunk. The Court distinguished this case from its decision in the thermal imaging case of *Kyllo v. United States*. In that case, the thermal imaging device used to search the home was not limited to revealing contraband but revealed activities in which there is a legitimate expectation of privacy and thus was a violation of the Fourth Amendment.

In this case, the dog sniff was performed while the defendant was lawfully seized for a traffic violation. The stop was not prolonged in order to conduct the dog sniff. Consequently, a dog sniff conducted during a lawful traffic stop that reveals only contraband does not implicate a constitutionally protected privacy interest and is not a violation of the Fourth Amendment.

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NORTH CAROLINA COURT OF APPEALS

Crime against Nature / Constitutionality: *State v. Pope*, ___ N.C. ___, 608 S.E. 2d 114, (Feb. 15, 2005)

FACTS: The defendant was charged with four counts of solicitation of crime against nature after indicating to undercover officers that she would perform oral sex in exchange for money. The defense alleged that the North Carolina crime against nature statute was unconstitutional in light of the United States Supreme Court's decision in *Lawrence v. Texas*, which dealt with consensual sexual conduct that occurs in private. The district court agreed and dismissed the criminal charges. The State appealed to Superior Court, which reversed the lower court's dismissal and certified the interlocutory order for immediate appellate review.

ISSUE: Whether or not the United States Supreme Court decision in *Lawrence v. Texas* renders the North Carolina crime against nature statute unconstitutional?

RULE: No. The *Lawrence* decision is limited to consensual private conduct and does not protect prostitution or public conduct.

DISCUSSION: The Court of Appeals distinguished the ruling in *Lawrence* in which the United States Supreme Court reversed its earlier holding in which it sustained a Georgia law that made it a criminal offense to engage in sodomy, whether the participants were the same sex or not. In its ruling, the *Lawrence* Court noted that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct. That Court distinguished conduct that involves minors, public conduct or prostitution. Consequently, the North Carolina Court of Appeals ruled that the state may criminalize the solicitation of a sexual act under crime against nature under those circumstances.

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SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS

Officers frequently receive subpoenas from criminal defense attorneys as well as civil attorneys requesting that the officer produce certain documents, either prior to the court date or for the court appearance. Generally speaking, officers should refrain from providing any CMPD documents directly to a criminal defense attorney.

FELONY CASES:

- Officers should be reminded that in felony criminal matters, any documents related to the case MUST be provided to the District Attorney and should not be given directly to a defense

attorney. The Open Discovery law as well as the CMPD policy provides the proper mechanism for attorneys to receive this information and record what was provided.

MISDEMEANOR CASES:

- In misdemeanor cases, North Carolina law does not provide for discovery. Officers may receive subpoenas requesting that certain items be provided directly to the defense attorney. Officers receiving such requests should contact the District Attorneys office for direction or contact the Police Attorneys office for assistance. (On occasion, the attorney simply wants to be certain the officer brings his or her notes with them to court.) If the subpoena is for a civil matter and requests documents that either are not in the immediate possession of the officer or may not be public record, please contact the Police Attorney's office for assistance.

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INVOLUNTARY COMMITMENT TRANSPORTING ADULTS AND JUVENILES TO MENTAL HEALTH WITHOUT A CUSTODY ORDER

Usually, the involuntary commitment process involves a custody order issued by a magistrate, which authorizes law enforcement to transport the patient to a mental health facility. However, there are two statutes that allow for transporting an individual without a custody order, if certain criteria are met.

G.S. §122C-262 provides that anyone, including a law enforcement officer, may transport without a custody order **if** the patient:

- meets the criteria for involuntary commitment (mentally ill + dangerous to self or others), **and**
- requires immediate hospitalization to prevent harm to self or others.

In this situation, the officer should transport the patient to CMC Randolph on Billingsley Road.

Another statute, G.S. §122C-282, provides that a law enforcement officer may transport a **substance abuser** without a custody order **if** the individual:

- meets the criteria for substance abuse commitment (substance abuser + dangerous to self or others), **and**
- is violent and requires restraint, **and**
- delay would endanger life or property.

In this situation, the officer must transport the individual to the **Magistrate's Office** and petition for an order to take the individual to CMC Randolph.

Please note that both of the above statutes may be used to transport adults **and** juveniles. (For more information on taking temporary custody of juveniles, please see below.)

Also, G.S. §122C-251(e) provides that a law enforcement officer may use **reasonable force** to restrain an individual if it appears necessary to protect the officer, the individual, or others and that no officer may be held criminally or civilly liable for assault, false imprisonment, or other torts or crimes on account of reasonable measures taken by the officer.

The relevant terms may be defined as follows:

"Mentally ill" =

- judgment and self-control impaired by mental condition to a degree that treatment or supervision is advisable.

"Dangerous to self" =

- unable to care for self + probability of physical debilitation, **or**
- attempt or threat of suicide + probability of suicide, **or**
- actual or attempted self-mutilation + probability of mutilation.

"Dangerous to others" =

- threatened, attempted, inflicted, or created a substantial risk of serious bodily harm + probability of conduct repeating, **or**
- engaged in extreme destruction of property + probability of conduct repeating.

"Substance abuser" =

- use or abuse of alcohol or drugs resulting in impaired personal, social, or occupational functioning.

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TEMPORARY CUSTODY OF JUVENILES WITHOUT A COURT ORDER

In addition to the involuntary commitment situation, there are two additional occasions in which a juvenile may be taken into temporary custody by a law enforcement officer without a court order as follows:

1. Pursuant to G.S. §7B-500, if the officer has reasonable grounds to believe that the juvenile is abused, neglected or dependent **and** that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order.
2. Pursuant to G.S. §7B-1900, if grounds exist for the arrest of an adult in the identical circumstances; if there are reasonable grounds to believe that the juvenile is an undisciplined juvenile; if there are reasonable grounds to believe the juvenile is an absconder from a residential facility operated by the Department of Juvenile Justice or from a detention facility.

The respective statutes elaborate upon the various duties required of the officer after taking custody of the juvenile including notifying the parent, guardian or custodian. Please refer to those statutes or contact the Police Attorney's Office for assistance.

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NOTE: "TENANT OR GUEST – EVICTION OR TRESPASS?" ARTICLE IN NOVEMBER-DECEMBER 2004 ISSUE HAS BEEN CHANGED

The November-December issue of the Police Law Bulletin (beginning on page 2) contained an article entitled, "Tenant or Guest – Eviction or Trespass?" As a result of additional legal research, one of the scenarios in the article (#7 on page 5) has been amended and the advice given to officers has changed. The new version of the scenario is as follows:

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. As strange as it may seem, in this situation, the landlord will normally be required to follow eviction procedures to have the remaining individual removed from the premises. Depending on the particular facts of the situation, the landlord may have to pursue eviction against the original tenant or the leftover occupant. Therefore, officers should inform the landlord that the best course of action is to obtain legal advice on how to handle the situation. Officers should not make an arrest or advise the landlord to go to the Magistrate's Office to obtain a trespassing warrant.

The full article, containing this revision, can be accessed on the Police Attorney's public folder (Public Folders/All Public Folders/CMPD/Police Attorney/General Information).

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SEIZING REVOKED DRIVER'S LICENSES – DMV FORM

When an officer makes a traffic stop and discovers that the driver of the vehicle has a revoked license or there is a DMV pick-up order on the license, the officer should seize the license and complete DMV form DL-53A, "Acknowledgement and/or Receipt for Surrender of North Carolina License." The form applies **only** to North Carolina driver's licenses and limited driving privileges. The form should also be completed when the driver of the vehicle is revoked, but has lost his license or does not have it with him at the time of the stop.

The form should be dated and signed by the driver and the officer. The officer should give the pink copy of the form to the driver and retain the white and yellow copies.

The forms are available in each patrol division and can be obtained from the division traffic enforcement officer. It is recommended that each division office establish a central repository for seized licenses and that the traffic enforcement officer deliver the licenses, along with the yellow copies of the DL-53A forms, to DMV on a regular basis. An officer who seizes a revoked driver's license and completes the form should **not** turn the license into Property Control.

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CITATION FORMS UPDATE

A number of officers have forwarded questions about the new citation forms in use since March 14. The Department contacted the Administrative Office of the Courts (AOC) for these answers in order to assist officers.

- Officers have asked when they should use the new check blocks for injuries and passengers under 16:
  - The new check block for "Injury Or Serious Injury" should be checked if there was any injury to a person from an accident or other offense related to the citation. The new check block for "Passenger(s) Under 16" should be checked whenever a person under 16 is a passenger in the vehicle (not just when the citation is related to an accident.)
  - These two blocks involve "aggravating factors." They are especially important in citations involving impaired driving (G.S.- 138.1-7) where an injury or the presence of a juvenile can affect sentencing in the case.

- On the color (black/red) of the charge text on #4 and #13 on the new citation: according to the AOC, the color is related to whether the charge is entered in AOC's system as a misdemeanor or infraction:
  - The new charge under #13 shows in black print due to a printer's mistake. It will be changed in the next printing of more books. However, according to AOC, the print color has no effect on the legal validity of the citation, so the new citation form and the charge should be used despite the printing error.
  - AOC has not changed #4 from the old citation form and it will remain as it is currently printed

- The "Note" about age and weight that used to be attached to #3 was dropped because of space limitations on the new form and the longer text on age and weight restrictions in the current G.S. 20-137.1a:
  - "A child less than eight years of age and less than 80 pounds in weight shall be properly secured in a weight-appropriate child passenger restraint system. In vehicles equipped with an active passenger-side front air bag, if the vehicle has a rear seat, a child less than five years of age and less than 40 pounds in weight shall be properly secured in a rear seat, unless the child restraint system is designed for use with air bags. If no seating position equipped with a lap and shoulder belt to properly secure the weight-appropriate child passenger restraint system is available, a child less than eight years of age and between 40 and 80 pounds may be restrained by a properly fitted lap belt only."

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