CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue we review two United States Supreme Court cases. The first involves the ability of law enforcement to conduct a search based on consent when a physically present co-occupant objects to the search. The second case involves the constitutionality of anticipatory search warrants. We also review a North Carolina Court of Appeals case addressing when routine booking questions may constitute custodial interrogation requiring Miranda warnings. We also highlight the United States Supreme Court's pending decisions dealing with the emergency aid and exigency exceptions to the 4th Amendment and two cases that address the admissibility of testimonial statements, including 911 calls, after *Crawford.* Lastly, we discuss the CMPD's authority to assist with searches and inspections on Charlotte Housing Authority Property, the regulation of BB guns in the city and county, prohibitions on possessing weapons on City property, vehicle checkpoints and undisciplined juveniles.

BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Search/Consent/: *Georgia v. Randolph*, ___ U.S. ___,126 S.Ct. 1515 (March 22, 2006)

Facts: Janet Randolph complained to police that during a domestic dispute, her estranged husband, Scott Randolph, took their child. She also informed police that he was a cocaine user. After the police arrived at the residence, Scott returned and informed officers that his wife was in fact the drug user and he had removed the child as he feared for the child's safety. Janet renewed her complaints to the officers concerning her husband's drug use and told them that there were items of "drug evidence" in the home.

A sergeant asked Scott Randolph for permission to search the house but he unequivocally refused permission to search. The sergeant then asked Janet Randolph for consent to search and she agreed. The search revealed cocaine residue in an upstairs bedroom. Janet withdrew her consent and a search warrant was obtained. A subsequent search located additional drugs and Scott Randolph was indicted for possession of cocaine.

At trial, Scott Randolph moved to suppress the evidence on the basis of his wife's consent to search over his objection. The trial court found that his wife had common authority over the premises to consent to the search

and denied the motion. The Georgia Court of Appeals reversed and the United States Supreme Court granted certiorari and affirmed the lower court's decision.

Issue: Whether one occupant may give law enforcement officers consent to search shared premises when there is a co-occupant present who refuses to consent to the search?

Rule: The Fourth Amendment prohibits the search of a dwelling based on a consenting occupant when a co-occupant is physically present and refuses to consent to the search. Officers, however, are not required to seek out other occupants to determine if they consent if officers have received consent from one occupant. Officers may not remove a potentially objecting co-occupant from the entrance to the residence to avoid an objection to consent.

Discussion: The question in this case was whether a search with the consent of one co-occupant is good against another co-occupant standing at the door and expressly refusing consent. In this case, Scott Randolph's refusal to consent to the search was clear. The court specifically noted that it was drawing a fine line in making a distinction at the threshold or entrance to a residence in concluding that a physically present occupant who ***objects*** to a search will prevail over a physically present and consenting occupant. Officers, however, may not remove a potentially objecting occupant from the entrance of a residence to avoid a possible refusal to consent. Additionally, if officers obtain consent from an occupant, there is no requirement that officers search for other occupants to seek consent, such as from a back bedroom.

The court noted that this ruling does not change the ability of law enforcement to conduct a search with the consent of an occupant over the objection of an ***absent*** non-consenting occupant.

The court further stated that the ruling has no bearing on the capacity of law enforcement to assist domestic violence victims. This ruling does not change the ability of law enforcement to enter a dwelling to protect a resident from domestic violence if there is reason to believe such a threat exists. Officers may continue to enter a residence with a domestic violence victim to allow a victim to gather belongings or determine whether violence has occurred or is about to occur, even if the spouse or co-occupant objects. If officers are lawfully inside a residence, they may then seize evidence in plain view.

The case also does not change the ability of an occupant to provide information to law enforcement about another occupant which may develop probable cause for a search warrant. Likewise, the exigent circumstances exceptions to the Fourth Amendment warrant requirement such as hot pursuit, protecting officer's safety, imminent destruction to the residence or likelihood that a suspect will imminently flee, are not impacted by this ruling.

NOTE: While the court drew the distinction at the entrance to a residence, the Police Attorney's Office recommends that if officers enter a residence based on one occupant's consent to search, but confront a co-occupant **after entry** who objects to the search, officers should terminate the search. If, however, officers observe evidence of a crime or develop probable cause, either before or simultaneous to the co-occupant's objection, officers should secure the scene and obtain a search warrant.

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Fourth Amendment/Anticipatory Search Warrants/Conditions Precedent: *United States v. Grubbs,* ___ U.S. ___, 126 S.Ct. 1494 (March 21, 2006)

Facts: Jeffrey Grubbs purchased a videotape containing child pornography from a web site operated by an undercover postal inspector. The postal inspectors obtained an anticipatory search warrant for Grubbs' home with an affidavit that stated the warrant would be executed only after a controlled delivery of the videotape to the home. The warrant included an affidavit and two attachments.

A search was conducted after the package was delivered to the home. The videotape was seized and Grubbs admitted to ordering the tape. Grubbs was provided with a copy of the warrant and attachments, which did not include the affidavit.

Grubbs moved to suppress the evidence alleging that the warrant was invalid as it failed to list the triggering condition. Grubbs motion was denied and he pled guilty but reserved the right to appeal. The Ninth Circuit reversed stating that because Grubbs was not presented with the affidavit containing the triggering conditions, the warrant was defective and the search illegal. The United States Supreme Court reversed.

Issue 1: Do anticipatory search warrants violate the Fourth Amendment?

Rule 1: No. Anticipatory search warrants that are based on an affidavit that shows probable cause that at some future time, certain evidence will be located in a specified place, do not violate the Fourth Amendment.

Issue 2: Does the failure of the warrant itself to specify the triggering condition, when the affidavit specifies the condition, invalidate the anticipatory search warrant?

Rule 2: No. The Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself.

Discussion: The Fourth Amendment requires that a warrant particularly describe the place to be searched and the person or things to be seized. The particularity requirement does not include the conditions precedent to execution of the warrant. Therefore, the triggering condition is not required to be set forth in the warrant itself.

When an anticipatory search warrant is issued, the fact that contraband is not presently at the location is not critical as long as there is probable cause to believe it will be there when the warrant is executed. In this case, the triggering event was the delivery of the videotape which established probable cause for the search and occurred before execution of the warrant.

NOTE: In North Carolina, the search warrant form specifically incorporates the affidavit by reference.

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Interrogation/Routine Booking Questions: *State v. Boyd*, ____ N.C. App. _____, 625 S.E. 2d. 550 (April 18, 2006)

Facts: After several months of surveillance of drug activity at 809 Wilson Street in Elizabeth City and a controlled purchase of cocaine from defendant Boyd at that location, officers obtained and executed a search warrant for the residence. Large amounts of cocaine were seized and Boyd was arrested and charged with numerous controlled substance violations.

As part of the booking process, and before being given his Miranda rights, the arresting officer asked Boyd a number of questions. These included his name, age, date of birth and home address. In response to the inquiry about the address, Boyd answered that he lived at 809 Wilson Street. Boyd was subsequently convicted of various offenses including maintaining a dwelling for the purpose of keeping or selling cocaine. He appealed alleging that the booking question and his response were improperly admitted into evidence against him to prove an element of the maintaining charge, in violation of Miranda. The Court of Appeals agreed and reversed Boyd's conviction on the maintaining charge.

Issue: Was the officer's question to defendant about his address, and the defendant's response, a product of custodial interrogation in violation of Miranda?

Rule: Yes. The question was not a routine informational "booking" question but was reasonably likely to elicit an incriminating response and was, therefore, obtained in violation of Miranda.

Discussion: The exception to Miranda for routine booking questions is limited to *routine informational* questions that are not reasonably likely to elicit an incriminating response from the accused. In this case, the question concerning Boyd's address was reasonably likely to elicit an incriminating response as proof that Boyd owned, leased, maintained or was otherwise responsible for the premises. Evidence that a defendant was in control of the premises is a required element for proof of the offense of maintaining a dwelling. The only evidence produced at trial on this issue was a utility bill in his girlfriend's name and a receipt from a retail store. Because Boyd had not waived his Miranda rights when he was questioned, the appellate court found that the admission was the product of custodial interrogation in violation of Miranda and was inadmissible. The remaining evidence on the maintaining a dwelling charge was insufficient and the court reversed Boyd's conviction for that offense.

NOTE: When the answer to a routine booking question establishes an element of the offense charged, it is "reasonably likely to elicit an incriminating response," and officers should either refrain from asking the question or precede it with Miranda warnings.

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COMING THIS SUMMER FROM THE U.S. SUPREME COURT….ANSWERS TO THE FOLLOWING QUESTIONS…..

Whether officers who entered a private home because they believed a fight was occurring inside violated the Fourth Amendment or are the officers protected under either the emergency aid exception or the exigency exception? *Brigham City v. Stuart* (05-502).

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Whether 911 calls, which were previously admissible as evidence in court even when the witness was absent are testimonial statements and, therefore, no longer admissible under the new *Crawford* standard? *Davis v. Washington* (05-5224).

Whether an oral accusation made by a victim or witness to an investigating officer at the scene of a crime is a testimonial statement within the meaning of *Crawford*? *Hammon v. Indiana* (05-5705).

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CHARLOTTE HOUSING AUTHORITY PROPERTY – SEARCHES AND INSPECTIONS

Questions have been raised recently concerning the authority of CMPD officers to accompany or assist Charlotte Housing Authority ("CHA") personnel with searches and inspections of CHA housing units. The term "search" refers to a criminal investigation of and search for evidence or contraband in a CHA unit, while an "inspection" refers to a routine inspection of a unit conducted by CHA personnel for administrative purposes.

CMPD officers are **not** considered agents of the CHA for the purpose of conducting searches or inspections. However, CMPD officers have been authorized by CHA, in writing, to ban individuals from CHA property, charge banned individuals with trespassing, and issue lease violations to residents.

The authority of a CMPD officer to conduct a search of a CHA unit is governed by the 4th Amendment and is not related to the authority of CHA personnel to inspect a unit according to the terms of the lease agreement. Voluntary consent to search must be obtained from an occupant who has the capacity/authority to consent and the usual rules regarding the scope and withdrawal of consent apply. In the process of determining who is able to give consent, you may encounter individuals who are not on the lease and not authorized to be on the property, but who may attempt to object to a search. Such individuals lack a reasonable expectation of privacy in the premises and, therefore, their consent to search is not needed, nor is their objection to a search effective.

Even if consent is requested by CHA personnel, there should be some expression of consent by the occupant(s) to the CMPD officer's presence and participation. Assuming that occurs, the officer can participate fully in the search and is not limited to a "standby and keep the peace" role.

Based on the United States Supreme Court case of *Georgia v. Randolph*, ___ U.S. ___, 126 S.Ct. 1515 (2006), (discussed on page 1), if a situation is encountered in which two occupants are physically present and one gives consent to search while the other objects, the search should not go forward. This assumes that the two occupants are both adults. You may encounter an adult occupant who is not listed as the head of household, but is otherwise an authorized occupant under the lease. Such an individual has the ability to object to a search. In the *Randolph* case, the Court stated that the police, in asking for consent from one individual, do not have to inquire about other occupants who may object, but are not physically present.

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The general rules regarding the right of one occupant to consent to a search when other occupants are absent apply equally to CHA property. An occupant may consent to a search of the common areas and any areas in which he/she has an exclusive expectation of privacy. Before making an entry into or conducting a search of the bedroom of an absentee occupant, the consenting party must demonstrate, in response to questions, that he/she has joint access to and control over the room and the specific areas or items in the room that will be searched.

The CHA lease agreements specify that announced inspections may be conducted by CHA personnel between the hours of 8:00 a.m. and 5:00 p.m., with forty-eight (48) hour written notice. Without valid consent from an occupant, a CMPD officer has no authority to accompany CHA personnel inside of a unit on an inspection. This also applies when an inspection is conducted when no one is present at the unit.

An officer may enter a unit on an inspection in a situation involving a specific threat of danger to CHA personnel from the occupant(s); however, this is a very limited exception and an officer should seek guidance in advance from a supervisor or contact the Police Attorney's Office. In any event, an officer may always stand by outside of a unit during an inspection. Of course, an occupant may consent to the officer entering the unit. If that occurs, the officer's role is limited to standing by, unless consent is requested and obtained from the occupant to conduct a general search.

When an officer is lawfully inside a CHA unit during a search **or** inspection, the officer may seize any item or object that is in plain view and that he/she has probable cause to believe is evidence of a crime or contraband.

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REGULATION OF BB GUNS

City ordinance 15-13(b) makes it unlawful for any person, in the city, to shoot missiles of any description from instruments of any kind. The language of the ordinance is broad enough to include BB guns. Note that the ordinance prohibits shooting a missile from the instrument and not mere possession of the instrument itself. Therefore, it is not unlawful for an individual (of **any** age) to possess a BB gun, only to discharge it within the city limits. A violation of the ordinance is a Class 3 misdemeanor and involves a mandatory court appearance (or a juvenile petition).

NOTE: Shooting a paintball gun is not normally treated as a violation of the ordinance if it is being used for its intended recreational purpose; however, it is a violation if the person is shooting at strangers, shooting at close range, or shooting at vehicles, buildings, etc.

There is no corresponding prohibition against discharging BB guns in the Mecklenburg County firearms ordinance. The county ordinance only regulates the discharge of "firearms," which are defined as weapons or instruments from which projectiles are discharged by means of the explosion of gunpowder. BB guns are **not** included within this definition. Therefore, it is **not** unlawful for an individual (of **any** age) to possess or discharge a BB gun in the county.

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G.S. § 14-316 makes it unlawful for any parent, guardian or person in loco parentis (has the status and obligation of a parent, but not legal custody) to knowingly permit his/her child under the age of 12 years (not yet reached 12th birthday) to have the possession, custody or use of any gun, pistol or other dangerous firearm. In Mecklenburg County (along with 16 other counties in North Carolina), BB guns, air rifles and air pistols are considered to be "dangerous firearms." To constitute a violation of the statute, it is not necessary that the firearm be loaded. However, the statute does **not** apply when the child is under the supervision of the parent, guardian or person in loco parentis. The statute also makes it unlawful for any other person to knowingly furnish a child under 12 any such weapon. A violation of the statute is a Class 2 misdemeanor and also involves a mandatory court appearance.

Note that this statute **does not** make it unlawful for a child under the age of 12 to possess a BB gun. Therefore, it is possible for such a child to lawfully possess a BB gun, while the individual who permitted the possession of or furnished the gun would be in violation of the statute.

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POSSESSION OF WEAPONS ON CITY PROPERTY

City ordinance 15-14 makes it unlawful for a person to carry, possess or have within his/her immediate access any dangerous weapon while on any real property owned (except property owned by the city and leased to some other person or organization), leased, or otherwise temporarily controlled by the city, whether the property is located within or outside the city limits. However, the possession or carrying of such weapons is **not** prohibited on the public streets and sidewalks. A violation of the ordinance is a Class 3 misdemeanor with a mandatory court appearance.

The ordinance defines "dangerous weapon" as any object or device designed or intended to be used to inflict serious injury upon persons or property, including, but not limited to, the following:

- firearms;
- knives of any kind having a blade in excess of 3½ inches in length (except when used solely for preparation of food, instruction or maintenance);
- razors and razor blades (except when used solely for personal shaving);
- metallic knuckles;
- clubs, blackjacks and nightsticks;
- dynamite cartridges, bombs, grenades, mines and other powerful explosives;
- slingshots;
- shurikins;
- stun guns; and
- loaded canes.

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NOTE: In spite of the language of the ordinance, State law (G.S. § 14-409.40) provides that firearms may be stored lawfully in motor vehicles that are parked on the grounds of public buildings (i.e., parking lots, parking decks). Therefore, it is not a violation of the ordinance to store a firearm in such a manner (but it may constitute the offense of carrying a concealed weapon, depending on the circumstances). The exception for firearms does not include the other weapons described in the ordinance, and those weapons may not be stored in vehicles parked on city property.

In addition (based on the same statute), because the City of Charlotte has a policy (Violence in the Workplace – HR 8) that prohibits possession by employees of dangerous weapons on city property, the above exception for storing firearms in motor vehicles does not apply to a city employee when his/her vehicle is parked on city property in connection with his/her employment. Therefore, it is a violation of the ordinance for a city employee to store a firearm in his/her vehicle while it is parked on city property for a reason related to his/her employment or to store any other type of dangerous weapon in his/her vehicle at any time it is parked on city property.

There are over 140 city-owned properties located in Mecklenburg County and many city employees may not be aware of this ordinance. Other than the firearm/motor vehicle exception discussed above, there is no exemption which allows individuals to carry or possess weapons on city property. The following persons are exempted from the ordinance:

- law enforcement officers;
- officers and soldiers of the armed forces, militia and national guard;
- any person who carries a dangerous weapon onto the premises of Charlotte/Douglas International Airport for the sole purpose of shipping the weapon by air;
- persons authorized by state or federal law to carry firearms in the performance of their jobs; and
- any other person authorized, in writing, by the city manager to carry or possess dangerous weapons while on specified public property.

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CONDUCTING VEHICLE CHECKPOINTS

Stopping a vehicle is considered a "seizure" of an individual, which must be reasonable in order to be constitutional under the Fourth Amendment. The Fourth Amendment requires that officers have reasonable suspicion or probable cause to believe an individual is engaged in criminal activity before stopping a vehicle. Vehicle checkpoints are seizures of individuals without reasonable suspicion or probable cause. The Fourth Amendment does **not** permit officers to conduct vehicle checkpoints to detect general criminal activity.

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The United States Supreme Court has approved checkpoints in limited situations, including license/registration and impaired driving checkpoints. In considering the reasonableness of a checkpoint, a court will typically consider factors such as:

1. the neutral criterion implicit in a systematic procedure;
2. warning signs or flares;
3. the safety of the location;
4. the productivity of the checkpoint;
5. standardized procedures for the operation of the checkpoint; and
6. whether the checkpoint was a pretext to uncover evidence of general criminal activity.

When addressing the issue of pretext, the trial court is required to consider all of the evidence surrounding the checkpoint to determine if it was truly a license check, which is constitutional, or a checkpoint to detect general criminal activity, which is unconstitutional. Recent cases have held that simply labeling a checkpoint as a "license or registration check" does not make it constitutional. The factors which the court may review in making that determination include:

1. Location

   The correlation between the location and past traffic offenses, accidents and the need for a license checkpoint **versus** a location known as a high crime area.

2. Time

   The correlation between the time of day and the amount of traffic encountered **versus** the time of day and increased criminal activity.

3. Participants

   Traffic officers participating in the checkpoint **versus** specialized police forces normally used to detect drug or criminal activity.

4. Operation

   A short detention of each motorist to inspect drivers license and registration **versus** increased surveillance, including seeking consent to search or the use of a drug dog, which would indicate a seizure to detect criminal activity.

5. Results

   The checkpoint results in numerous citations for traffic offenses **versus** charges for other criminal offenses.

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Practical Pointers

- Impaired Driving Checkpoint: An impaired driving checkpoint must be conducted in accordance with Directive 600-009 and 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 drivers, 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 who 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 that the plan should be in writing and be approved by a supervisor. The plan should contain a specific explanation why this particular location and time would, in all likelihood, promote roadway safety.
- Drivers 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 roadway 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 that, in all likelihood, was not committed by the vehicle occupant(s).
    - The crime about which the police are seeking information must be grave (serious).
- 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 it may convert the legitimate purpose of the checkpoint to an overall

investigation of criminal activity. However, if officers develop reasonable suspicion of criminal activity, then a dog can be deployed while the driver is being detained, as long as officers do not unreasonably extend the time of the detention beyond the period needed to conduct the investigation.

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UNDISCIPLINED JUVENILES

Juveniles up to age 18 who have not committed a criminal offense may be "undisciplined" and appear in juvenile court. Undisciplined juveniles fall into two categories:

- less than 16, but at least 6 years of age; and
- unlawfully absent from school; or
- regularly disobedient to and beyond the disciplinary control of the parent, guardian or custodian; or
- regularly found in places where it is unlawful for a juvenile to be; or
- run away from home for more than 24 hours.

OR

- 16 or 17 years of age; and
- regularly disobedient to and beyond the disciplinary control of the parent, guardian or custodian; or
- regularly found in places where it is unlawful for a juvenile to be; or
- run away from home for more than 24 hours.

(NOTE: There is no time requirement prior to filing a missing person/juvenile report when the juvenile has run away.)

Officers may be dispatched to a 911 call involving an undisciplined juvenile who is "not listening to" his/her parents or is "out of control", but has not committed any offense. The call may even have resulted from a recommendation by DSS that the parents contact the police. In those situations, however, the parent may go directly to the local Department of Juvenile Justice Delinquency and Prevention office, (704-330-4338), to request a juvenile petition and **no** call for service or police report is needed.

An officer **may** take a juvenile into temporary custody if there are reasonable grounds to believe the juvenile is undisciplined. If an officer takes a juvenile into temporary custody, the officer may release the juvenile with or without first counseling the juvenile; release the juvenile to the parent or guardian; refer the juvenile to community resources; seek a juvenile petition; seek a petition and a secure custody order. (Generally, secure custody orders for undisciplined juveniles are issued only for runaway behavior).

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