CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue, we review three recent North Carolina cases. In the *Ivey* case, the North Carolina Supreme Court reviewed a CMPD traffic stop and found that there was **not** probable cause of a turn signal violation, and therefore the stop was not justified. In the *Bowden* case, the North Carolina Court of Appeals upheld the stop of a vehicle based upon the reasonable suspicion that arose when the vehicle turned abruptly (though legally) in an apparent attempt to avoid a driver's license and registration checkpoint. In our final case, *State v. Harris*, the North Carolina Court of Appeals clarified that the presence of an illegal substance in a person's urine, without more evidence, does **not** constitute the crime of illegal possession of that substance.

We also review reminders from the Magistrate's Office regarding the importance of properly completing arrest affidavits in domestic violence cases, answer the question of whether or not tasers are legal to carry concealed, clarify the current status of G.S. 20-138.7(a1), the passenger open-container law, and review Phase 2 cell phone locator technology. Lastly, we have some reminders from the Criminal Clerk's Office of what services are **not** provided to the public.

BRIEFS:

NORTH CAROLINA SUPREME COURT:

Fourth Amendment/Vehicle Stop/Elements of Offense: *State v. Ivey*, ___ N.C. ___, ___ S.E. 2d ___, 2006 LEXIS 844 (2006).

Facts: On September 11, 2002, Charlotte motorist Twanprece Neshawn Ivey made a right turn at a "T" intersection without utilizing a turn signal, but after coming to a complete stop. A CMPD officer on routine patrol observed the turn from some distance directly behind Mr. Ivey's vehicle, stopped the vehicle, and issued a citation for a violation of G.S. 20-154(a), failure to signal while making a turn. The officer asked for and received consent from Mr. Ivey to perform a warrantless search of the vehicle. During the search, the officer discovered a concealed firearm and placed Mr. Ivey under arrest for Carrying a Concealed Weapon. Mr. Ivey was later charged with Possession of a Firearm by a Felon in addition to Carrying a Concealed Weapon.

At trial, the defendant filed a motion to exclude the firearm from evidence on the grounds that the officer lacked probable cause to believe a traffic violation had occurred because there was no indication that there were any other vehicular or pedestrian traffic in the vicinity that would have

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been affected by his right turn. The trial court denied the defendant's motion and the defendant pled guilty to the offenses of Possession of a Firearm by a Felon and Carrying a Concealed Weapon.

Mr. Ivey then appealed the denial of his Motion to Suppress to the North Carolina Court of Appeals, which upheld the trial court's decision in an unpublished opinion. The North Carolina Supreme Court granted certiorari to hear Mr. Ivey's case and overturned his conviction.

Issue: Was the stop of the defendant's vehicle justified?

Rule: No. An officer who conducts a vehicle stop based upon a traffic violation must possess evidence of each element of the traffic violation in order for the stop to be justified.

Discussion: This case impacts North Carolina law enforcement in the following ways:

1. Prosecution of Unsafe Movement – Failure to Signal – G.S. 20-154(a)

The North Carolina Supreme Court has now made it clear that G.S. 20-154(a) requires motorists to give a signal before turning from a direct line ***only*** when there is other vehicular or pedestrian traffic present **that may be affected by such movement**. In this case, the Court observed that nothing in the record indicated that any other pedestrian or vehicle, including the police officer who was traveling "some distance" behind the defendant, would have been affected by the defendant's turn. Officers should in the future carefully note the presence and proximity of any vehicular and/or pedestrian traffic, including the officer's vehicle, that would be affected by a motorist's failure to give a signal. That evidence should then be included in the officers' trial testimony in order to establish both probable cause for the traffic stop, as well as proof beyond a reasonable doubt for conviction.

2. Selective Enforcement – Racial Profiling

While the *Ivey* case is a Fourth Amendment case and its holding did not find nor act upon any evidence of racial profiling, the North Carolina Supreme Court went out of its way to make it clear that such practices will not be tolerated. The Court discussed the meaning of the term "driving while black" and even referred to a publication by researcher Matthew T. Zingraff. (Note: Professor Zingraff is the researcher that has analyzed the CMPD's own stop data.) While it is a bedrock principle of law that selective enforcement of the law based upon a person's race is unconstitutional, officers may not be aware of how some valid police lingo and procedures can be misperceived by the public and even courts. Officers are trained to identify specific suspects or vehicles using visible characteristics of the **specific** suspect that are unusual or allow other innocent bystanders to be quickly differentiated. A person's race and gender, or a vehicle's make and color, are examples of such physical characteristics that are often validly used to describe a specifically known suspect or vehicle.

However, when the first characteristic used to describe a suspect is race, or as in the *Ivey* case, a vehicle is first described as having "tinted windows and expensive, fancy chrome wheels", such

descriptions can be misperceived as showing that an officer's actions were motivated by race or some other arbitrary stereotype. Officers should be aware that the public and courts are very sensitive to the issue of "driving while black", and should be prepared to fully articulate not only the evidence that was observed, but also the motives behind the actions that were taken. Selective enforcement and racial profiling are illegal and will not be tolerated. Solid police work does not need such practices, and will allay any misperceptions when fully articulated.

For a full discussion of the impact of *State v. Ivey*, officers may refer to the Police Attorney's Office Portal site.

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NORTH CAROLINA COURT OF APPEALS:

Vehicle Checkpoint/Fleeing Vehicle/Reasonable Suspicion: *State v. Bowden*, ___ N.C. App. ___, 630 S.E. 2d 208, 2006 N.C. App. LEXIS 1218 (2006).

Facts: A driver's license checkpoint was being conducted in Greensboro, on February 3, 2003. The checkpoint was located such that it was not visible until approaching drivers crested a hill approximately 250 feet from the checkpoint. Officer Goodykoontz was stationed on a side street in order to identify drivers who might try to evade the checkpoint.

At about 11:30 p.m., Officer Goodykoontz spotted one such motorist. The driver of a pickup truck crested the hill leading to the checkpoint while revving the engine, and began to descend rapidly toward the checkpoint. The truck then braked hard and made an abrupt right turn into an apartment complex. Officer Goodykoontz followed with his blue lights off. The officer drove into the apartment complex parking lot approximately 30 seconds after the truck, and spotted the truck pulled into a parking space. As the officer approached, the truck pulled out of the parking space and drove toward the lot exit, but then pulled head first into another parking spot. Officer Goodykoontz pulled his police cruiser behind the truck, activated its blue light, and approached the truck on foot.

Officer Goodykoontz asked the driver and sole occupant, Eddie Bowden, for his driver's license and registration. In response, Bowden stated that someone named "Marcus" had been the actual driver and that he, Bowden, was just parking the vehicle while Marcus visited his girlfriend. Bowden was unable to identify the apartment that Marcus was supposed to be visiting.

During the conversation, Officer Goodykoontz observed that Bowden's speech was slurred, he smelled of alcohol and that his eyes were red and glassy. Bowden complied with Officer Goodykoontz's request to exit the vehicle and the officer observed that Bowden was unsteady on his feet. Bowden admitted that he had had "a few" to drink. When asked to perform a field sobriety test, Bowden told the officer, "[y]ou might as well arrest me. I'm not doing any tests".

Officer Goodykoontz arrested Bowden for DWI and Bowden was later convicted for the offenses of DWI, Habitual DWI and Driving While Licensed Revoked. Bowden appealed his conviction on the

grounds that the stop of his vehicle was not justified and all evidence against him stemming from the stop should have been suppressed.

Issue: Was the stop of Bowden's vehicle justified?

Rule: Yes. Based on the totality of the circumstances, Officer Goodykoontz possessed a reasonable suspicion that criminal activity was afoot and hence was justified in stopping Bowden's vehicle.

Discussion: In order to justify an investigatory traffic stop, an officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." The North Carolina Supreme Court held in the previous checkpoint case of *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000), that it is reasonable and permissible for an officer to stop a vehicle which has turned away from a checkpoint within its perimeters, in order to make reasonable enquiry as to why the vehicle turned away. In this case, the court found that Officer Goodykoontz had reasonable suspicion to stop Bowden's vehicle based on the totality of several factors:

1. The late hour;
2. The sudden braking of the truck as the defendant crested the hill and could then see the checkpoint;
3. The abruptness of the defendant's turn into the nearest apartment complex parking lot;
4. The defendant's actions while in the apartment complex parking lot: pulling his truck into one space, then pulling out of that space, then heading toward the parking lot exit and then re-parking his truck, when he spotted the officer's patrol vehicle approaching him.

As summed up by the Court, "Under the totality of these circumstances, any investigatory stop that Officer Goodykoontz may have performed was proper."

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Controlled Substances/Possession/Elements: *State v. Harris*, ___ N.C. App. __, 632 S.E. 2d 534, 2006 N.C. App. LEXIS 1684 (2006)

Facts: On the morning of August 20, 2005, Renetta Bryant visited a friend's residence in Craven County. While there she encountered the defendant, Darian Harris. Ms. Bryant saw Harris "snort cocaine up his nose" and bought a rock of crack cocaine from him. Ms. Bryant smoked the crack and later fell asleep. After awakening, Ms. Bryant went into the front room of the residence. At that point Harris poured alcohol on Ms. Bryant and set her on fire. Ms. Bryant was transported by EMS to the hospital where she was treated for second and third degree burns.

A few days later, on August 24th, Harris' probation officer took a urine sample from him to determine if Harris had used illegal drugs in violation of his probation. The urine sample tested positive for both marijuana and cocaine. Harris was later charged with the assault upon Ms. Bryant, as well as drug

related charges including possession of cocaine and marijuana, based upon the positive urine test and Ms. Bryant's account of the events of August 20th.

At trial an expert on general pharmacology testified that cocaine can be detected in the body for approximately 27 to 96 hours after being ingested and that marijuana can be detected for up to 40 to 45 days after consumption. Ms. Bryant testified consistent with the facts set forth above. Harris was convicted of possession of marijuana and possession of cocaine. Harris appealed his conviction on the grounds that a positive drug test alone cannot support a conviction for possession of a controlled substance.

Issue: Can a positive urine test, standing alone, support a conviction for possession of a controlled substance?

Rule: No. A positive urine test standing alone, cannot sustain a conviction for possession of a controlled substance.

Discussion: This is an issue of first impression for North Carolina courts. However, numerous other state courts have considered this issue and the majority of them have held that a positive drug test **alone** cannot support a conviction for possession of a controlled substance. There are two legal elements required for a person to be in "possession". The person must have: 1. the power, and 2. the intent, to control the disposition or use of the substance. Neither of those elements exists unless the person is aware of the presence of the substance.

In cases wherein the **only** evidence that a person "possessed" a controlled substance is a positive drug or urine test, there is simply no basis to show that the person knowingly exercised any power and control over the substance. As a Montana case cited by the *Harris* court put it, "without more than proof that a person had a dangerous drug in their system, there is no evidence to establish that such drug was knowingly and voluntarily ingested". *In Re R.L.H.*, 327 Mont. 520, 116 P.3d 791 (2005).

Although the analysis of Harris' urine sample showed positive results for both marijuana and cocaine, the urinalysis alone could not support his conviction for possession of marijuana, and that conviction was overturned. However, there was corroborating evidence of cocaine possession offered by the victim, Ms. Bryant. At trial, Ms. Bryant testified that she had witnessed the defendant snort cocaine. Thus, the positive urinalysis for cocaine, coupled with Ms. Bryant's testimony, was sufficient to support the defendant's conviction for possession of cocaine.

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CASE ALERT: *STATE v. STONE* - CONSENT & SEARCHES UNDER CLOTHING

The North Carolina Court of Appeals issued an opinion on September 5, 2006, in the *Stone* case. In that case, a CMPD officer found crack cocaine when he pulled the front of a suspect's sweatpants open and peered at the suspect's genital area. The search was based upon the suspect's generalized

consent to search. The Court held that a reasonable person would not expect such an intrusive genital inspection in giving consent to search. Hence the search impermissibly exceeded the scope of consent.

It is likely that the North Carolina Supreme Court will review the case and the matter will be fully briefed in the next volume of the *Police Law Bulletin*. In the meantime, officers should obtain **specific consent** before searching under the clothing of a suspect, unless the officer possesses another sufficient legal justification for the search, such as a warrant.

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MAGISTRATE'S OFFICE REMINDERS – ARREST AFFIDAVITS IN DOMESTIC VIOLENCE CASES

In a domestic violence case that is **papered** with the District Attorney's Office, it is important for officers to complete an **arrest affidavit** ("pink sheet") when he/she attempts to obtain a warrant from the magistrate. An affidavit is not normally completed when a case is papered. However, in domestic violence cases, the information contained in the affidavit will be very important for a magistrate or judge to have in determining the amount of the bond or conditions of pretrial release after the defendant is arrested and/or appears in court. Since the papering file will rarely, if ever, be available when pre-trial release conditions are considered, the arrest affidavit should be completed to provide the background information.

When an officer completes an arrest affidavit in **any case** involving domestic violence, the officer, in addition to answering the question of whether or not the complainant and suspect are currently living together, should also indicate whether or not they have **ever lived together**. Again, this information is important to have when a warrant is issued and the defendant is arrested, because G.S. 15A-534.1 contains a number of mandatory conditions of pretrial release that apply in domestic violence cases where the parties are living together **or** have ever lived together.

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TASERS – MAY THEY BE CARRIED CONCEALED?

Questions have been raised recently about whether or not CCW (G.S. 14-269) is an appropriate charge when an individual is carrying a taser concealed. The answer is that a **taser may not be carried concealed** (except on the person's own premises). The statute specifically prohibits the carrying of "stun guns", a term which is broad enough to include tasers.

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MOTOR VEHICLES AND OPEN CONTAINERS OF ALCOHOL – G.S. 20-138.7

Some confusion exists regarding the application and status of the open container law under G.S. 20-138.7. Apparently, this is due to information that is contained in the "Blue Book." Hopefully, this article will clarify what types of charges can be brought under the statute, whether the statute applies

to public vehicular areas (PVA's), whether a violation of the statute is a misdemeanor or an infraction, and whether the law is going to expire on September 30, 2006.

There are **two** types of charges that apply under the statute:

1. **G.S. 20-138.7(a)** – applies **only** to the **driver**
   - operate a motor vehicle on a highway/right-of-way of a highway (**not** PVA);
   - with an open container of an alcoholic beverage in the passenger area; and
   - while the driver is consuming alcohol; **or**
   - while the driver has alcohol remaining in his body
   - **Class 3 misdemeanor** for first offense (Class 2 for subsequent offenses)
   - mandatory court appearance
   - charging language – *Citation Language Booklet*, page 4, # 8

2. **G.S. 20-138.7(a1)** – applies to the **driver and passengers**
   - possess an open container of an alcoholic beverage in the passenger area; or
   - consume an alcoholic beverage in the passenger area;
   - while the motor vehicle is on a highway/right-of-way of a highway (**not** PVA)
   - violation is an **infraction** (also, not a moving violation)
   - waivable – $25.00 fine + court costs
   - charging language – *Citation Language Booklet*, page 4, # 9

The statute provides that the "(a1)" offense involving a driver is a lesser-included offense of an "(a)" violation. Therefore, an officer can use his/her discretion and charge a driver with an infraction instead of a misdemeanor, as long as the decision to do so does not violate the arbitrary profiling policy.

The statute **does not expire on September 30, 2006**. When the law was originally passed, it contained an expiration ("sunset") provision that was extended until September 30, 2006. The part of the statute that applied to passengers was adopted so that North Carolina could qualify for federal highway money. The legislature just repealed the expiration provision, so the statute as it is currently written will continue to apply.

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TRACING CELL PHONE CALLS TO A LOCATION (PHASE 2 WIRELESS)

In February of 2003, wireless cell phone companies acquired technology that assists those companies in identifying the general geographical location of a hang-up call made to 911 from a cell phone. This technology is commonly referred to as "Phase 2". The technology is required to accurately locate 67% of the calls within 100 meters, and 95% of calls within 300 meters. Not all cell phones have this technology, but a growing number do, and thus a new tool is available to help law enforcement locate people in possible need of assistance.

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Dispatchers have been informed to advise officers whenever a Phase 2 Locator or similar technology is utilized in determining the location of a 911 call. Because the device cannot always pinpoint the exact location, officers should not rely solely on the call as the only reason to make a warrantless entry into a residence. Officers can take into consideration the address provided by the Phase 2 Locator so long as they remember that the location could be anywhere within a 300 meter radius, with 95% accuracy.

A decision to make a warrantless entry into a residence or private property should be made based on the "totality of the circumstances", taking into consideration all of the information available to officers at that time. If exigent circumstances exist or officers find it necessary to enter a residence to save lives, prevent injury or protect property, then the officer may enter without a warrant.

For example: 911 receives a cell phone call where the caller is being assaulted. The caller is disconnected before the dispatcher is able to obtain an address. The dispatcher puts the call out and advises officers that they have obtained an address from a Phase 2 Locator. The dispatcher provides that location to the officers assigned to the call. Upon arrival, officers find the front door open and can see that a struggle has taken place inside the residence. The officers are concerned that someone may be injured because of the content of the call and the evidence of a struggle. Under this scenario, officers could lawfully make a warrantless entry into a residence to look for anyone who might be injured. However, in circumstances where officers are not able to confirm the location of the call because there are just too many residences within the radius, then officers, without more information, could not make a warrantless entry unless they obtained consent from someone who has apparent authority over the residence.

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REMINDERS FROM THE CRIMINAL CLERK'S OFFICE

Please note, the Criminal Clerk's Office cannot do any of the following:

1. Reschedule court dates prior to, or on, the court date.
2. Accept proof that any condition has been fixed or requirement has been fulfilled.
3. Reschedule missed court dates over the phone.

The Clerk's Office receives numerous requests for the above services, with callers often stating that he/she was told by an officer that the Clerk's Office can or will do the above. That is not the case, and officers should refrain from disseminating legal advice in any manner.

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