

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

January-February 2007

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**Forward:** We start this issue with two search and seizure cases. The first case deals with searching a cell phone incident to arrest, while the second involves whether an entry into a residence is legally justified based on exigent circumstances. A Supreme Court case that answers the question of when the statute of limitations begins to run on a 42 U.S.C. § 1983 claim for false arrest is discussed next, followed by a preview of an upcoming Supreme Court case on vehicle pursuits. We then examine the procedure whereby CMPD officers can issue uniform citations for City Code violations (housing, health, and zoning) for Neighborhood Development Code Enforcement inspectors. Questions will be answered about the City Ordinance making it unlawful to leave an unattended motor vehicle with the engine running. We also have reminders from the Magistrate's Office and brief articles about the statutes involving felons in possession of firearms and laser devices, as well as reasonable suspicion for a DWLR traffic stop.

### **BRIEFS:**

#### **FIFTH CIRCUIT COURT OF APPEALS**

**Fourth Amendment/Search and Seizure/Search Incident to Arrest/Cell Phones:** *U.S. v. Finley*, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 1806 (5<sup>th</sup> Cir. 2007).

**Facts:** An informant working for officers from Midland, TX and DEA agents arranged to make an undercover purchase of methamphetamine. The defendant Finley was the driver of the van in which the transaction took place. After the purchase, officers conducted a traffic stop on the van and arrested Finley and the passenger, who had sold the methamphetamine to the informant.

Officers searched Finley and seized a cell phone that was located in his pocket. They then transported Finley and the passenger to the passenger's residence, where a search warrant was being executed. While at the residence, officers and agents questioned Finley about his involvement with drugs. They searched the cell phone's call records and text messages and confronted Finley with several incriminating text messages related to drug distribution and use.

Finley was charged in federal court and convicted of possession with intent to distribute methamphetamine. On appeal, he claimed that the information obtained during the search of his cell phone should have been suppressed at trial.

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**Issue:** Was the search of Finley's cell phone a lawful search incident to arrest?

**Rule:** Yes. The search of the cell phone was a lawful search incident to Finley's arrest.

**Discussion:** A full search of a person incident to a lawful custodial arrest is a reasonable search under the Fourth Amendment. Officers may not only search for weapons; they may also search for evidence of the arrestee's crime which may be found on his person. The scope of a search incident to arrest also includes containers that are found on the arrestee's person.

Finley unsuccessfully argued that his cell phone was a closed container and, therefore, the officers had no authority to examine the phone's contents without a warrant. The court held that no warrant was required for the search since it was conducted pursuant to a valid arrest.

In addition, in a footnote, the court held that the fact that the search took place after Finley had been transported to the residence did not change its conclusion that the search was lawful. As long as the administrative processes incident to the arrest and custody have not been completed, a search of items seized from the defendant's person is still incident to the arrest. Even though the police had moved Finley, the search was still substantially contemporaneous with his arrest and, therefore, permissible.

The same principles associated with the search of a cell phone incident to arrest also apply to pagers. In *State v. Harris*, 145 N.C. App. 570, 551 S.E.2d 499 (2001), the North Carolina Court of Appeals upheld the search of a defendant's pager after he had been arrested for a drug offense inside a hotel room.

The following are some guidelines that CMPD officers should follow in conducting a search of a cell phone or pager incident to arrest. Officers should always first ask the arrestee for consent to search the phone or pager which, if given, will establish an additional legal justification for the search.

1. There should be some connection between the criminal activity involved and the need to conduct the search (for example: drug arrest vs. DWI arrest).
2. The individual in possession of the cell phone or pager should first be asked for consent to conduct the search.
3. If the individual is under arrest and does not give consent, the cell phone or pager may be searched incident to the arrest. The search must be conducted at the time of or shortly after the arrest (prior to the completion of the booking process).
4. If the search is not conducted at the time of the arrest, any later search must be conducted with consent or with a search warrant, based on probable cause to believe that the cell phone or pager contains evidence of or related to a criminal offense.

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### NORTH CAROLINA SUPREME COURT

**Fourth Amendment/Search and Seizure/Warrantless Entry/Exigent Circumstances:** *State of N.C. v. McKinney*, 361 N.C. 53, 637 S.E.2d 868 (2006).

**Facts:** On May 17, 2003, "Amy" informed a sergeant of the Greensboro Police Department that her roommate, "Aja" confided in her that Aja's friend (the defendant McKinney) had killed his roommate. She also provided an address where she believed the defendant lived. Officers responded to the scene and found the residence locked, with the curtains or blinds drawn. The defendant was reportedly driving the victim's vehicle, which was not parked in the driveway of the residence.

The victim's sister arrived and informed the police that her brother lived there. Shortly thereafter, the victim's brother arrived. Neither of them had heard from the victim in several days. The police contacted the victim's employer and learned that the victim had not been at work the previous day, which was very unusual.

Information was relayed to the police at the scene that the defendant had told Aja that the victim "pulled a knife on me. I didn't know what else to do," and also stated that the victim "wouldn't be coming back."

Meanwhile, the victim's brother, on his own, entered the residence by removing an air conditioning unit and climbing through a window. He invited the police into the house. They later testified that they entered the house to look for a victim who might be in need of assistance or for any sign that an assault may have occurred there.

While inside the house, officers observed what appeared to be blood spatter in the front bedroom. After making this discovery, they left the house, secured it, and obtained a search warrant. They later found the victim's body in a large trash can located in the laundry room of the residence.

The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. On appeal, he challenged the initial warrantless entry by the police into the residence, as well as the search warrant that was based, in part, on the observation of the blood spatter made pursuant to that entry. The North Carolina Court of Appeals held that the entry was not supported by exigent circumstances and reversed the defendant's conviction. The North Carolina Supreme Court then decided to review the case.

**Issue:** Was the initial warrantless entry by the officers into the residence justified on the basis of exigent circumstances?

**Rule:** No. There were no exigent circumstances to justify the initial warrantless entry by the officers.

**Discussion:** The Supreme Court agreed with the Court of Appeals' conclusion that exigent circumstances were not present to justify the initial warrantless entry by the police.

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The Court of Appeals stated that the general rule is that, prior to searching a residence, law enforcement officers are required to obtain a search warrant based upon probable cause. However, when officers are responding to an emergency and there is a compelling need to take action and no time to obtain a warrant, exigent circumstances exist which allow officers to enter a residence without a warrant. For example, when officers believe that individuals on the premises are in need of immediate aid or there is a need to protect or preserve life or avoid serious injury, a warrantless entry is reasonable under the Fourth Amendment. Although the facts and circumstances may vary, the essence of exigent circumstances is that there is insufficient time to obtain a warrant.

In this case, the court was not convinced that the circumstances created an exigency requiring that the officers immediately enter the residence. The officer at the scene admitted that the information she received had been related to her "maybe second or third hand" and that it indicated only that "something" had occurred at the residence several days before. In addition, she testified that she "needed more to go on" and "didn't know for sure" that an assault had occurred in the residence or whether it was necessary for her to enter.

Although officers were notified of a possible homicide, other information indicated that it had occurred more than two days prior to their arrival at the residence. The residence appeared to be secured and after the victim's brother entered the residence, he informed the officers that no one was inside.

In short, the court concluded that there was no indication that, had the officers left the scene in order to obtain a search warrant, the defendant's arrest would have been thwarted or the victim would have survived. Therefore, the State failed to establish any exigent circumstances authorizing the officers' warrantless entry into the residence.

Although the Supreme Court affirmed the Court of Appeals' ruling on the issue of exigent circumstances, it ordered that the case be sent back to the trial court for further consideration of two issues: 1) whether the defendant lacked standing to challenge the warrantless entry because he had abandoned the residence, and 2) whether the search warrant affidavit was sufficient to establish probable cause without including the information gathered as a result of the warrantless entry.

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### UNITED STATES SUPREME COURT

**Liability for Constitutional Violations/42 U.S.C. § 1983/Statute of Limitations:** *Wallace v. Kato*, 2007 U.S. LEXIS 2650 (February 21, 2007).

**Facts:** In January 1994, Chicago police arrested Andre Wallace, who was fifteen years of age, for murder. He was tried and convicted of first-degree murder and sentenced to 26 years in prison. In April 2002, after several appeals and a ruling that the arrest was illegal, the prosecutors dropped the charges against Wallace. In April 2003, Wallace filed suit under 42 U.S.C. § 1983 (the federal law that authorizes lawsuits for constitutional violations) against the city of Chicago and several of its police officers, seeking damages for his unlawful arrest in violation of the Fourth Amendment.

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The federal district court granted summary judgment for the city and the officers on the grounds that the suit was barred by the statute of limitations. The court held that the statute of limitations began to run on Wallace's claim (his cause of action "accrued") at the time he was arrested and not when his conviction was set aside. The 7<sup>th</sup> Circuit Court of Appeals upheld the district court's ruling and Wallace appealed to the United States Supreme Court.

**Issue:** When does the statute of limitations begin to run on a 42 U.S.C. § 1983 claim for false arrest in violation of the Fourth Amendment?

**Rule:** The statute of limitations begins to run on a 42 U.S.C. § 1983 claim for false arrest in violation of the Fourth Amendment at the time the claimant becomes detained pursuant to legal process.

**Discussion:** The Supreme Court noted that, although 42 U.S.C. § 1983 is a federal law, the relevant statute of limitations is that which applies in the State in which the cause of action arises. In this case, the Illinois statute of limitations for false imprisonment (unlawful arrest) is two years.

The Court then held that the statute of limitations on a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process. In this case, that occurred when Wallace appeared before the magistrate and was bound over for trial in 1994. Therefore, the lawsuit he filed in 2003 was initiated well-beyond the two year statute of limitations.

**NOTE:** Under North Carolina law, the statute of limitations for claims against police officers for assault and battery and false arrest or false imprisonment is three (3) years.

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### UNITED STATES SUPREME COURT HEARS IMPORTANT POLICE PURSUIT CASE

*Scott v. Harris, (05-1631)*

On February 26, 2007, the United States Supreme Court heard oral arguments in the case of *Scott v. Harris*. This case concerns a police pursuit which may have far reaching impact on how police conduct pursuits. In this case, an officer used his vehicle to strike the suspect vehicle for the purpose of terminating the pursuit. Harris brought suit claiming that one of the officers used excessive deadly force when the officer intentionally struck Harris's vehicle for the purpose of stopping the pursuit. The pursuit started after Officer Reynolds observed Harris driving 73 mph in a 55 mph zone. Officer Reynolds attempted to stop Harris by using his emergency equipment, but Harris failed to stop and a pursuit ensued at speeds averaging between 80 and 90 mph. Officer Reynolds never advised the dispatcher the reason for the pursuit. Officer Scott heard the pursuit and assuming that it was related to another call involving a drug deal, joined into the pursuit. The pursuit continued and Harris pulled into a parking lot where Officer Scott blocked Harris's path. There was a minor collision, but Harris managed to speed away. Officer Scott then asked for permission to use the "PIT" maneuver (using a

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police vehicle to strike the suspect vehicle in a particular place causing the suspect vehicle to spin). Even though Officer Scott was not trained to use the maneuver, his supervisor gave him permission to “take him out”. Officer Scott was unable to position himself to use the PIT maneuver so he deliberately ran into the back of Harris vehicle. This action caused Harris to lose control of his vehicle and roll down an embankment seriously injuring him.

### Issues before the Court:

What is the standard to measure whether the force used by Officer Scott was excessive? Is it the standard set forth in *Tennessee v. Garner* which permits deadly force only if (1) “the officer has probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others”; or the “suspect threatened the officer with a weapon, or there is probable cause to believe the suspect committed a crime involving the infliction or threatened infliction of serious physical harm”; (2) the use of force is “necessary to prevent escape”; and (3) “where feasible some warning has been given.”

Or will the Court follow the standard similar to *Graham v. Connor*, which requires that all force be objectively reasonable which is measured by looking at facts and circumstances of each particular case including the “severity of the crime at issue, whether the suspect is an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight.”

Further information about this important case can be found on the Police Attorney’s Portal under the folder entitled “Pending Supreme Court Cases”.

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### ISSUING CODE CITATIONS FOR CODE ENFORCEMENT INSPECTORS

CMPD officers are authorized to issue uniform citations for City Code violations (housing, health, and zoning) for Neighborhood Development Code Enforcement inspectors for cases to be scheduled for Environmental Court. Environmental Court is a criminal district court that focuses on various code violation cases. A session of court is scheduled for one Tuesday morning each month. Normally, these types of citations will be issued by community coordinators who regularly work with the code enforcement inspectors. However, other officers may also issue citations upon request. The following guidelines apply to the process:

1. The inspector provides the officer with the probable cause necessary to support the charge.
2. The inspector is able to visually identify the defendant.
3. The inspector accompanies the officer at the time the citation is issued.
4. The inspector provides the officer with the charging language for the citation.

An officer who issues a uniform citation should set the case for a first appearance in Courtroom 1130, as he/she normally does with other citations. In addition, the officer should place the notation "ENV" on each side of the defendant's name on the citation. This will alert personnel in Courtroom 1130 to set the case for trial in Environmental Court. In addition, the officer must list the inspector as a witness on the back of the citation and place a "Y" or "1" in the "Wt." block on the front of the citation.

#### Court Appearance

Normally, it will **not** be necessary for the officer to appear as a witness in Environmental Court, as he/she did not witness the violation but merely issued the citation. However, the officer will likely be subpoenaed for court. If the officer is not needed as a witness, he/she should notify Court Liaison in order to be excused. When contacting Court Liaison, the officer should specifically mention that the case involves a code violation and is scheduled for Environmental Court.

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### CITY ORDINANCE SEC. 14-221 – LEAVING UNATTENDED VEHICLE

City Code Sec. 14-221 makes it unlawful for an operator or person in charge of a vehicle to leave it unattended on any street, alley, other public property, new or used car lot, or any private parking lot to which the general public is invited without first stopping the engine, locking the ignition, and removing the ignition key from the vehicle. Three questions are frequently raised in connection with this ordinance:

#### **Does the ordinance apply to an unattended vehicle in a private driveway?**

**No.** The ordinance does **not** apply to a vehicle that is parked in a private driveway to a residence. However, the ordinance does apply to apartment/condominium parking lots that are open to the general public.

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### Does the ordinance apply if a remote starter is used and the engine is running?

**Yes.** The ordinance not only requires that the ignition key be removed; it also requires that the engine be stopped. Therefore, if there is no key in the vehicle, but the engine is running, the ordinance has been violated.

### Can the ordinance be enforced by issuing a uniform citation (“big ticket”)?

**No.** A violation of the ordinance can **only** be enforced by issuing a parking ticket (\$50.00 fine – #12 on the parking ticket).

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## REMINDERS FROM THE MAGISTRATE’S OFFICE

### Arrest Affidavits – Vehicle Information

When completing the arrest affidavit in cases involving vehicles (larceny of auto, B&E vehicle, etc.), make sure that you include the appropriate vehicle information – year, make, model, VIN #, tag #, owner. When this information is not included, it makes it more difficult for the District Attorney’s Office to prepare indictments for the grand jury.

### Dismissal of Traffic Citations

The Magistrate’s Office does **not** dismiss traffic citations. In the past, individuals have appeared at the Magistrate’s Office with their driver’s licenses, vehicle registrations, etc., and asked to have their tickets dismissed. Officers should **not** refer people to the Magistrate’s Office for this purpose. Instead, they should be directed to speak with an ADA in Courtroom 1130 on their court date. Or, prior to their court date, they can go to the Criminal Clerk’s Office, Room 2132, where an ADA is available to review citations beginning at 9:30 a.m. The on-call ADA reports to the Clerk’s Office every thirty minutes during the day until 4:00 p.m. and reviews citations for reductions and dismissals.

### Juvenile Petitions – Citizens

The Magistrate’s Office will **not** issue a juvenile petition for a citizen in any type of case, including undisciplined (runaway) or delinquency (criminal offense). Instead, a citizen inquiring about a juvenile petition should be directed to the court counselors at the Department of Juvenile Justice and Delinquency Prevention, located at 720 East Fourth Street, Suite 400, telephone number (704) 330-4338.

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### OFFICER REMINDER: FELON IN POSSESSION OF A FIREARM

North Carolina eliminated the exception that permitted a convicted felon to possess a firearm in his/her home or business. G.S. 14-415.1 was amended a few years ago making it a Class G felony for a convicted felon to possess a firearm including in his/her home or business. This brings North Carolina into conformity with federal law. For purposes of this statute, a firearm includes:

- Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver; or
- Any firearm muffler or silencer
- The statute also now includes long guns, shotguns and rifles

Juveniles who have been adjudicated delinquent for felony offenses, however, cannot be charged with this offense based on the "felony" in juvenile court. In juvenile court, the juvenile is considered delinquent of an offense "that would be a felony if committed by an adult" so this does not act as a felony conviction for purposes of the felon in possession of a firearm statute.

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### OFFICER REMINDER: LASER DEVICES

G.S. 14-34.8 makes it an infraction to intentionally point a laser device at a law enforcement officer or at the head or face of another person, **while the device is admitting a beam** (exceptions for laser tag, etc.).

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### OFFICER REMINDER: REASONABLE SUSPICION FOR DWLR

Reasonable suspicion for a traffic stop **may** exist when an officer runs a vehicle tag and learns that the owner/driver is driving with a revoked license. However, the officer **should not** conduct a traffic stop unless the owner's description matches the appearance of the driver as to race, sex, and approximate age.

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