CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

December 2007 **Volume 26, Issue 3** **Page 1 of 9**

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Forward: In this edition we review two cases pending before the U.S. Supreme Court. The first is a case concerning consular notification. The second case will determine if the Second Amendment protects an individual's right to bear arms. Closer to home, we take a look at five recent North Carolina cases dealing with topics that range from stop and frisk, to consent to search and DWI checkpoints. We conclude this issue with a section of FAQ's called "Asked and Answered."

BRIEFS:

UNITED STATES SUPREME COURT UPDATE: CASES PENDING BEFORE THE SUPREME COURT

Mexican National / Consular Notification / Federal Treaty Obligations: M*edellín v. Texas* (06-984)

The Court has agreed to review whether a state court must follow a holding issued by the International Court of Justice. In this case Medellin, a Mexican National, was convicted for the rape and murder of two teenage girls in Houston, Texas. Local officers failed to contact the Mexican Consulate as required by the Vienna Convention of Consular Notification; a treaty between the United States and several countries including Mexico. After he was sentenced to death and his appeal was upheld by the Texas Court of Criminal Appeals, Medellin contacted the Mexican Consulate which filed an appeal to the International Court of Justice (ICJ), alleging that the United States violated international law. ICJ ruled that the officers did violate the treaty and held that state courts should review the convictions to determine if the failure caused "actual harm." At issue in this case is whether ICJ rulings are binding upon state and local authorities.

Second Amendment / Individual Right / Local Regulation: *District of Columbia v. Heller* (07-290)

The Supreme Court has agreed to review the controversial issue of whether the Second Amendment protects not only the collective right of a state militia to bear arms, but also an individual's right to possess a handgun in their own home. The controversy in this case arose when the District of Columbia passed one of the most restrictive firearm regulations in the country which prohibited anyone from possessing a handgun in their home. The regulation also requires that all rifles and shotguns be unloaded and disassembled or equipped with a trigger lock. The specific

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constitutional issue to be reviewed by the Court is whether the regulation violates the Second Amendment rights of individuals who are not a member of the state militia, but wish to possess handguns in their own home. The ruling in this case will have far reaching effects on the ability of state and local authorities to regulate firearms.

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NORTH CAROLINA SUPREME COURT

Fourth Amendment / General Consent / Search of Genital Area: *State of North Carolina v. Timothy Stone,* 2007 LEXIS 1228 (December 7, 2007*)*

Stone was the passenger in a car lawfully stopped by a CMPD officer for speeding. As the officer approached the vehicle, he noticed a passenger was moving in an irregular fashion by shifting his weight from side to side. Upon making contact with the passenger, he recognized him as the person who had been identified through an anonymous tip as a drug dealer. The passenger was unable to provide any identification and was asked to step back to the officer's patrol car. The officer asked Stone if he had any drugs or weapons on his person and Stone stated no. Stone's denial was immediately followed by the officer's generic request to search Stone to which he consented. At the time of the search, Stone was wearing a jacket and drawstring sweat pants. During this search the officer found $552.00 in Stone's lower left sweat pants pocket. The officer asked Stone once again if he had any drugs or weapons on him and Stone insisted that he did not and told the officer he could continue to search him. The officer proceeded to search the back portion of Stone's sweat pants and then moved his search to the front waistband where he pulled the front of Stone's sweat pants away from his body and shined his flashlight onto Stone's groin area. Stone objected, but not before officers saw a small white cap of what appeared to be a pill bottle tucked between his inner thigh and testicles. Officers retrieved the bottle which contained illegal drugs. After Stone was arrested and indicted for possession with intent to sell or deliver cocaine, he filed a motion to suppress, arguing that the police officer's act of pulling his pants away from his body and shining the flashlight into the groin area of his pants exceeded the scope of his consent. The motion to suppress was denied by the trial court and it was appealed to the Court of Appeals which found the trial court erred. The State appealed the issue to the North Carolina Supreme Court which held that the search violated the Fourth Amendment and ordered that Stone receive a new trial.

Issue: Does the scope of a general consent search necessarily include consent for the officer to manipulate clothing in order to directly observe the genital area of the subject?

Rule: No. A general consent to search does not automatically allow a law enforcement officer to manipulate clothing to directly observe the genital area of the subject.

Discussion: The calculus for determining the scope of consent is different from whether officers can detain someone. The test for measuring whether an officer exceeded the scope of the consent is "objective reasonableness" – that is what would a "typical reasonable person" have understood by

the exchange between the officer and suspect. The Court concluded that "a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals."

It is important to note that this case does not diminish the limited ability of officers to search a person's private area under exceptional circumstances. For example, an officer who has probable cause to believe that narcotics are being hidden under someone's private area may conduct a limited search of that area if the officer can establish exigent circumstances (drugs may be dropped before reaching booking) and the search is conducted in a manner that does not expose the suspect to public view (e.g. a search conducted behind a car door with other officers blocking the public's view). In *State v. Smith,* 342 N.C. 407, 464 S.E. 2d 45 (1995), the Court upheld a search of a suspect's groin area because (1) officers developed probable cause (which in part included a reliable informant's tip that the cocaine was located in the suspects crotch area); (2) officers were confronted with exigent circumstances because the suspect could easily drop the cocaine; and (3) the search was conducted in a manner that protected the suspect's privacy. **Remember:** Officers should never conduct a cavity search without first obtaining a search warrant.

Here, the Court noted that if the officers had taken different actions, then the result may have been different. One factor which clearly would weigh in favor of the legality of the consent is clarification of the scope of the consent. (Can I search here?) Clarification of the consent coupled with shielding the subject from public view would remove both the issue concerning the consent and whether the search was too intrusive. (Obviously it increases the likelihood that the subject will refuse or withdraw the consent.) In discussing whether the officer had probable cause, the Court noted that the officer admitted on the stand that he did not expect to find anything.

Nothing in this recent case affects an officer's ability to detain someone on reasonable suspicion that the person has or is about to commit a crime. Likewise an officer can continue to pat down outer clothing for a weapon so long as they can articulate specific reasons that the subject is armed and dangerous. Justification for a pat down must be made on specific facts confronting the officer and not simply for "officer safety."

Right to Confrontation / Unavailable Witness / Testimonial Statements: *State v. Lewis,* 361 N.C. 541, 648 S.E. 2d. 824 (2007)

Facts: Officer Cashwell received a call of a robbery occurring in an apartment. Upon arrival he saw Carlson, an elderly female, slumped over in a chair. Before speaking with Carlson, Officer Cashwell interviewed two other residents of the apartment building. One of the residents stated that she went to check on Carlson after she failed to reach her on the phone and found her door open and her apartment "tore up." Officer Cashwell then returned to interview Carlson and at this time he noticed that her face and arms were bruised and she was complaining of pain to her head. The officer summoned medical assistance and then began to ask her a series of questions which he put into a written statement. The statement related in detail how the suspect slipped in behind her as she opened the door and demanded money. When Carlson refused to give the suspect any money, the

suspect grabbed and pulled her hair and hit her with a flashlight. Carlson then saw the suspect take some change off a table and then leave. She also provided a brief description of her assailant and that she had seen him before, visiting one of Carlson's neighbors. Another detective obtained the suspect's picture and placed it into a sequential six person line-up. Carlson picked the suspect out of the lineup. Carlson was not able to testify at trial so her statements to police were admitted into evidence. The defendant was convicted based on those statements and received a minimum sentence of 144 months. The defendant appealed on the grounds that admission of Carlson's statements to police violated his rights under the Confrontation Clause of the Sixth Amendment because he was not allowed to cross examine the statements made by Carlson.

Issue: Does the Confrontation Clause of the Sixth Amendment forbid admission of an unavailable witness's statement during the defendant's trial?

Rule: Statements made to officers during an on-going emergency may be admitted at trial even if the person who made the statement is not present in the courtroom.

Discussion: Police reports contain various types of "statements" which may be admitted into evidence under limited circumstances – even when the person making the statements is not present in court. Recently, the United States Supreme Court in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), ruled that if those statements are "testimonial", then the statements cannot be admitted into court by means of an affidavit or by the officer testifying to what the witness/victim told them. The key to admission is to determine the difference between non-testimonial and testimonial statements.

Statements are non-testimonial and therefore admissible (subject to the rules of evidence) when the primary purpose of the questioning is necessary to address an ongoing emergency. On the other hand, statements elicited for the primary purpose of collecting information for prosecution will be considered testimonial.

The Court in *Lewis* provided further guidelines to officers to assist in determining whether the answers evoked were testimonial or non-testimonial. (1) Did the victim/witness provide information about an event that was actually happening at the time of the statement? (2) Was the victim facing an on-going emergency? (3) Was the information provided necessary to resolve the emergency? (4) Was the questioning done in an informal manner?

In this case, the Court found the statements made by Carlson were elicited after the emergency had subsided and were not about events that were currently on-going. For this reason, the Court found that her statements were testimonial and, as such, the introduction of the statements at trial violated the defendant's Sixth Amendment right to confrontation.

Officers and dispatchers should carefully note the circumstances under which statements are provided to them and take particular notice when the statement is made during an on-going emergency. This will assist the prosecutor in determining if the statement can be independently admitted at trial in the event the witness or victim can not be present.

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NORTH CAROLINA COURT OF APPEALS

DWI Checkpoint / Evasion / Refusal: *White v. Tippett*, ___ N.C. App. ___, 652 S.E. 2d 728 (November 20, 2007)

Facts: Matthews Police Department set up a DWI checkpoint near East Jones Street and Interstate 485 in Mecklenburg County. At approximately 12:30 a.m. Ms. White drove up to the checkpoint where a Matthews officer and a trooper were the only officers at the checkpoint. The Matthews officer was talking to a motorist in the opposite lane of travel and signaled to Ms. White to stop her vehicle. She initially stopped but as the trooper approached her vehicle she drove off down the road. The trooper followed Ms. White who drove a tenth of a mile and pulled into her driveway on East Jones Street. The trooper asked Ms. White to step out of her vehicle and he noticed the odor of alcohol and that her eyes were red and glassy. He administered an Alco-sensor test twice, with a reading of .10 both times. Ms. White was placed under arrest. Ms. White was advised of her implied consent rights under G.S. § 20-16.2, including that she could contact a friend or attorney as long as thirty minutes were not exceeded. Ms. White did not make any request and an intoxilyzer test was administered. Ms. White twice did not follow the chemical analyst's instructions resulting in a failure to obtain any test result. She was marked as a willful refusal. Judge Ervin sustained her 12 month revocation for refusal and she appealed raising the following three issues:

Issue: Was the DWI checkpoint unconstitutional?

Discussion: The court said the constitutionality of the checkpoint was not at issue because Ms. White was not "seized" at the checkpoint. She was not "seized" under the Fourth Amendment until after she pulled into her driveway.

Issue: Did the officer have reasonable suspicion to stop Ms. White?

Discussion: The action of Ms White in failing to stop at the checkpoint gave the trooper a reasonable suspicion that she was engaged in criminal activity which justified the stop. The appearance of Ms. White, together with the odor of alcohol and the results of the Alco-sensor tests gave the trooper probable cause to believe she was driving while impaired.

Issue: Is the Chemical Analyst required to wait 30 minutes after advising a suspect of their implied consent rights before administering the chemical analysis?

Discussion: When a suspect fails to request to contact a witness or attorney and simply remains silent, there is no reason to delay the chemical analysis. If the suspect requests a witness or attorney, the Chemical Analyst must wait 30 minutes before administering the test. Once the 30 minutes has expired, the test will be administered regardless of whether the witness or attorney has arrived.

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Fourth Amendment / Stop and Frisk / Reasonable Suspicion: *State of North Carolina v. Russell Antoine Cooper*, ___ N.C. App. ___, 649 S.E. 2d 664 (September 18, 2007)

Facts: A Raleigh police officer received a report that an armed robbery just occurred and that the suspect was a "black male." Since the officer was close to the location of the robbery, he began to search the area for the suspect and focused on a path that he knew lead from the store to a nearby neighborhood. Approximately five minutes after the officer received the report, he observed a black male walking near the path. The officer stopped and motioned for the male to approach. The male walked over and the officer told him to put his hands on top of the police car where the officer conducted a pat down search and found a concealed handgun. The male was arrested for carrying a concealed firearm and transported to the convenience store for a "show up" where the clerk advised the officer that the male was not the person who committed the robbery. The black male was then transported to the police station where he later confessed to lending his handgun to another person who committed the robbery. The suspect who loaned the firearm was charged with aiding and abetting an armed robbery and prior to trial filed a motion to suppress the firearm because the initial detention was unlawful. The trial court denied the defendant's motion to suppress because the officer stopped the defendant "based on articulable, reasonable suspicion" and that the frisk was lawful because it occurred to ensure "officer safety." The defendant appealed to the North Carolina Court of Appeals which overturned the trial court holding that the officer did not have a lawful reason to detain the defendant.

Issue: Did the officer have a reasonable and articulable suspicion sufficient to justify an investigatory stop and frisk under *Terry v. Ohio*?

Rule: No, mere reliance on dispatch information that describes a general portion of the population with no further description as to age, physical characteristics, or clothing is insufficient to establish an articulable suspicion sufficient to detain.

Discussion: The landmark decision in *Terry v Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), established that "a police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." In addition "the stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch." *United States v Sokolow,* 490 U.S. 1,7, 1904 L. Ed. 2d 1,10, 109 S. Ct. 1581,1585 (1989).

It has been almost forty years since *Terry* was handed down by the Supreme Court, yet the North Carolina Court of Appeals continues to struggle with providing law enforcement with clear guidance as to what constitutes articulable suspicion. A recent line of cases (*State v. Fleming,* 106 N.C. App. 165, 415 S.E. 2d 782 (1992); *State v. Rhyne*, 124 N.C. App. 84, 478 S.E. 2d 789 (1996); *In Re J.L.B.M,* 176 N.C. App. 613, 627 S.E. 2d 239 (2006)), and now this case all emphasize the need for

officers to rely more on the existence of specific information such as the age, height, weight, and other physical characteristics such as clothing and less on the reasonable inferences guided by the officers training and experience. In this particular case, the court was reluctant to rely on the inference drawn by the officer (reasonable suspicion was inferred because of the subject's proximity in place and time coupled with him being the same race as the suspect), because "we would, in effect, be holding that police, in a time frame immediately following a robbery committed by a black male, could stop any black male found within a quarter of a mile of the robbery."

The keystone to any *Terry* stop is the officer's reliance on specific objective information and the ability to articulate that information. Although officers may draw inferences based on their training and experience, the court's primary focus in examining whether reasonable suspicion exists will be on specific physical information about the suspect. For example, stopping someone simply because they are in a "high crime area" without some other specific information connecting the suspect to criminal activity will not suffice. Likewise, justifying a pat down based on the phrase "officer safety" will not be sufficient. The officer must be able to point to specific reasons and articulate why the subject may be armed. Of course nothing prevents an officer from asking for permission to pat someone down so long as the contact is purely voluntary.

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Common Law Robbery / Larceny From Person: *State of North Carolina v. Lamont Darrell Carter*, ___ N.C. App. ___, 650 S.E. 2d 650, (October 2, 2007)

Facts: Rowlett and Cook worked for Express Teller Services, a company that replenishes ATM's. In this case, they were in the process of replenishing an ATM located just inside a grocery store. Rowlett had just set the money down in a cart next to where he was standing when suddenly he felt someone spray something on the back of his head. He reached up, touched his head and noticed that his hand was covered with an orange substance. A few moments later Rowlett immediately felt a stinging sensation. At the same time he turned towards the money and noticed that it was gone and saw someone running away with the sack containing the money. Carter was arrested a short time later and was charged with common law robbery. Because he was a habitual felon, Carter was sentenced to a minimum of 90 months. Carter appealed his conviction for common law robbery. The Court of Appeals vacated the verdict and remanded the case back to the trial court for re-sentencing based on a charge of larceny from the person.

Issue: Did the prosecution present substantial evidence of each and every element of the crime of common law robbery?

Rule: No. Common law robbery is the "felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. It is not necessary to prove both violence and putting in fear - - proof of either is sufficient."

Discussion: The court noted that the force used may be actual or constructive. Actual force occurs when physical violence is inflicted no matter how slight "so long as it is sufficient to compel the victim to part with his property or property in his possession." Similarly, constructive force (e.g. a demonstration of force) no matter how slight is sufficient so long as the victim is put in fear "sufficient to suspend the free exercise of his will or prevent resistance to the taking." In this case the spray was a diversion used to enable Carter to take the property from his "presence and control." Therefore, larceny from the person is the correct charge. The case was remanded before resentencing.

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"ASKED AND ANSWERED"

Dear A&A:

We are getting clobbered with vehicle break-ins. When is it appropriate to charge someone with Breaking and Entering a Vehicle?

Signed
Ticked Off"

Dear Ticked:

The number of vehicle break-ins is up not to mention a disturbing change in the tactics from the clumsy smash and grab to the efficient lock punch and swipe – a method that unfortunately has become more popular with local thieves. This tactic has resulted in numerous guns being stolen out of vehicles. Officers should always consider whether it is appropriate to file the charge of Breaking or Entering a Vehicle whenever an arrest is made (G.S. 14-56). Unlike the crime of Tampering with a Vehicle, Breaking or Entering Into a Vehicle is a Class I felony. A person may be charged with the offense of Breaking or Entering a Vehicle if the officer has probable cause to believe (1) the suspect broke or entered a vehicle; (2) without the owner's consent; (3) the vehicle contained goods, ware, freight, or other thing of value; (4) and the suspect had the intent to commit any felony or larceny therein.

Note: This crime is a felony if the value of the property taken is over $1,000.00 or some other circumstance making it a felony larceny such as the item taken **was a firearm**. A firearm under this statute includes "any instrument used in the propulsion of a shot, shell, or bullet by the action of gunpowder or any other explosive substance within it. A 'firearm' which at the time of theft is not capable of being fired, shall be included within the definition if it can be made to work. This definition shall not include air rifles or air pistols." (G.S. 14-72).

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Dear A&A:

Hey – I just completed the state mandated legal training and I am confused about the case of Georgia v. Randolph and whether officers can enter a residence to check the well being of a spouse in a domestic violence call where one spouse refuses to allow the officers to enter. Can we still enter when one spouse refuses consent or do we need to get a warrant?

Signed
Clear as Mud

Dear Mud:

You do not need to get a warrant to enter a residence to check the well being of a spouse/partner involved in a domestic disturbance where one of the physically present occupants consents and the other refuses. Remember that in the case of *Georgia v. Randolph,* the court specifically addressed the limited situation where officers were outside a residence and asked consent to search **for evidence of a crime**. In that case, one of the physically present occupants refused to give consent. In this limited situation, the Court held that officers could not enter even if the other occupant granted consent.

The Court emphasized that a request to search for evidence is entirely different than a request to enter a residence to investigate a complaint of a domestic disturbance or some other potentially dangerous situation where an occupant may be in danger.

"[T]his case has no bearing on the capacity of the police to protect domestic victims … No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would [be wrong] by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes." *Georgia v. Randolph*, 547 U.S. 103, 117-118, 126 S. Ct. 1515 (2006).

Consequently, officers may still enter a residence where one occupant consents and the other refuses in order to provide protection to one of the occupants in a domestic or other type of disturbance. If both occupants refused permission, then officers could not enter without a warrant unless they had exigent circumstances.

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