CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: This edition will review five cases. Two North Carolina Supreme Court cases concern traffic stops and three cases from the North Carolina Court of Appeals discuss 1) flight from a voluntary contact, 2) probable cause for a search warrant and 3) privacy rights of hotel guests. The issue of cell phone use during a traffic stop is also addressed. Finally, information about North Carolina's new electronic inspection program, effective October 1st, is provided.

BRIEFS:

NORTH CAROLINA SUPREME COURT

Traffic Stops / Reasonable Suspicion: *State v. Styles*, 2008 N.C. LEXIS 685 (August 27, 2008)

FACTS: At approximately 1:00 a.m. on February 28, 2004, Officer Jones, of the Bryson City, N.C. Police Department, was on duty and traveling behind the defendant's vehicle. The defendant changed lanes without signaling. The officer stopped the vehicle for failure to signal in violation of N.C.G.S. § 20-154(a) and when he approached, he detected an odor of marijuana. The defendant refused to consent to a search of his vehicle. Officer Jones deployed a drug-sniffing canine to the scene to search.

The dog alerted to narcotics inside the vehicle and Officer Jones performed a search of the vehicle. The defendant was placed under arrest after the officer discovered marijuana and a pipe in the vehicle. During the pat-down search, the officer found methamphetamine. The defendant was charged with possession of Schedule II controlled substances, drug paraphernalia and marijuana.

ISSUE: What is the standard required to make a traffic stop based on a traffic violation: reasonable suspicion or probable cause?

RULE: Reasonable suspicion is the standard for all traffic stops.

DISCUSSION: The defendant challenged the stop arguing that changing lanes without signaling is not sufficient to create probable cause. The N.C. Supreme Court first analyzed which standard is required for a traffic stop: probable cause or reasonable suspicion. The N.C. Supreme Court held the necessary standard for traffic stops is reasonable suspicion. Reasonable suspicion is a lower standard than probable cause and is satisfied by "some minimal level of objective justification." The stop must be based on specific and articulable facts, which may include "rational inferences."

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Next, the Court had to determine if changing lanes immediately in front of another vehicle rises to reasonable suspicion. N.C.G.S. § 20-154(a) states:

> "The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic."

The N.C. Supreme Court held, "it is clear that changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle." Therefore, observing the defendant's traffic violation satisfied the required reasonable suspicion to stop the vehicle.

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Fourth Amendment / Traffic Stops / Search and Seizure / Warrantless Searches: *State v. Barnard*, 362 N.C. 244, 658 S.E.2d 643 (2008)

FACTS: At approximately 12:15 a.m. on December 2, 2004, Officer Maltby was on patrol in downtown Asheville. The area was a high crime area and there were a number of bars located in the vicinity. The officer pulled up behind defendant's vehicle, which was stopped at a red traffic light. When the light turned green, the defendant remained at the light for about 30 seconds before making a legal left turn. The officer then initiated a traffic stop.

The officer observed an open container of alcohol and drug paraphernalia. Upon investigation the officer discovered the defendant was driving while his license was suspended. The defendant was charged with two counts of possession of cocaine and two counts of having achieved habitual felon status.

The defendant challenged the constitutionality of the stop and moved to suppress evidence seized as a result. The officer testified that based on his training and experience, he rationally inferred that the defendant's 30 second delay at a green traffic light may be a sign of impairment. The officer stated, "People's reaction is slowed down. A red light turning green and hesitating for 30 seconds definitely would be an indicator of impairment."

ISSUE: Does a 30 second delay after a traffic light turns green give rise to a reasonable, articulable suspicion to stop the vehicle based on the defendant driving while impaired?

RULE: A 30 second delay after a traffic light turns green under these circumstances amounted to a reasonable, articulable suspicion to stop the vehicle based on the defendant driving while impaired.

Although the court did not specifically discuss the factors taken into account, it is likely the time of day and location of the violation were important considerations under the "totality of the circumstances" test.

DISCUSSION: The Fourth Amendment protects individuals against unreasonable searches and seizures. Traffic stops are considered a "seizure" even though the purpose is limited and the detention brief. Courts have held that reasonable, articulable suspicion that criminal activity is afoot is the standard for traffic stops. Reasonable suspicion is a less demanding standard than probable cause, requiring only "some minimal level of objective justification." When determining whether reasonable suspicion exists, a court must take into account the totality of the circumstances.

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment / Resisting Arrest / Reasonable Suspicion: *State v. Sinclair,* ___ N.C. App. ___, 663 S.E.2d 866 (August 5, 2008)

FACTS: Detective Davis was the lead detective in the Washington, N.C. Police Department's Drug Enforcement Division. On August 6, 2004, the detective and other officers (including an ALE agent) went to a bowling alley because they received information about drug activity. Detective Davis had made prior arrests in the area for drugs. The defendant was sitting outside the bowling alley with six to ten other people when the officers arrived at approximately 3:41 p.m. Detective Davis knew the defendant and had searched him for drugs twice before, including one time at the bowling alley, but found no drugs. When the officers approached and asked to speak to the defendant, he asked if Detective Davis wanted to search him again. The detective said he did want to search the defendant.

As the detective approached, the defendant quickly put both of his hands in his pockets and then removed them, making fists. As the detective got closer, the defendant said he had to go and took off running. The officers chased the defendant and after running about 150 feet, the defendant laid down and was taken into custody. The defendant was convicted of resisting, delaying or obstructing an officer, possession of cocaine and habitual felon.

ISSUE 1: Is flight from a voluntary contact with a law enforcement officer resisting, delaying or obstructing an officer?

RULE 1: No, a person is free to disregard the police and go about his/her business. Therefore, flight from a voluntary contact with an officer is not evidence of resisting, delaying or obstructing.

ISSUE 2: What facts are not enough for reasonable suspicion to justify an investigatory detention?

RULE 2: Officers receiving information about drug activity, the area being a known drug area and an officer having made prior arrests in the area, are not enough to amount to a reasonable, articulable

suspicion of criminal activity. Therefore, an investigatory detention based on these facts would be unlawful.

DISCUSSION: The defendant challenged all three of the convictions, but this discussion is limited to the resist, delay or obstruct charge. Resisting, delaying or obstructing an officer requires the following elements:

1) that the victim was a public officer;
2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
3) that the victim was discharging or attempting to discharge a duty of his/her office;
4) that the defendant resisted, delayed or obstructed the victim/officer in discharging or attempting to discharge a duty of his/her office; and
5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse

The court first had to determine whether the encounter was a voluntary contact or an investigatory detention. A voluntary contact occurs when police approach an individual and the individual is free to disregard the police because no seizure has occurred since there is no basis for suspecting the particular individual. When a reasonable person would believe he/she is not at liberty to ignore the police, a seizure has occurred and it is not a voluntary contact.

An investigatory detention requires reasonable suspicion, specific and articulable facts which may include "rational inferences," that the defendant is involved in criminal activity. The court concluded, considering all of the circumstances, a reasonable person in the defendant's situation would have felt free to ignore Detective Davis' request. Therefore, the contact was voluntary and the defendant was under no obligation to talk to the officer or submit to a search. The defendant's flight from a voluntary encounter with Detective Davis was not evidence of resisting, delaying or obstructing an officer. As a result, there was insufficient evidence to support a conviction for resist, delay or obstruct.

However, the court went on to explain that even if the detective was attempting to effectuate an investigatory detention, reasonable suspicion to justify the stop was lacking. The court noted the articulable facts as:

1) officers received information about drug activity;
2) the scene was a known drug area; and
3) the detective had made prior drug arrests in the area

The court held, "these facts did not give Davis a reasonable, articulable suspicion that defendant was involved in criminal activity."

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Search and Seizure / Search Warrant / Confidential Informants: *N.C. v. Taylor,* ___ N.C. App. ___, 664 S.E.2d 421 (August 5, 2008)

FACTS: Special Agent Perry of the Sampson County Sheriff's Office drafted a search warrant based on six controlled purchases of cocaine by a confidential informant (CI). The application described two dwellings on the property to be searched as:

1) a tan single wide mobile home located at 3095 Brewer Rd, Faison, N.C. 28341; and
2) the single story wood frame house that is located directly behind the mobile home

The application stated the CI had "visited the described location at the direction and surveillance of this applicant and while at the location … made a purchase of the controlled substance." Special Agent Perry stated in his affidavit he had been a law enforcement officer for two years and the CI had been reliable in the past. The application did not:

1) identify the owner or any occupant of either dwelling;
2) specify where on the premises the CI made purchases;
3) specify from whom the CI made purchases;
4) include facts regarding whether the Special Agent observed the transactions and/or the CI enter either dwelling to make the purchases;
5) identify the procedure for controlled purchases of controlled substances;
6) state that procedure that was followed

The magistrate issued a search warrant September 27, 2006, and it was executed on September 28, 2006. The defendant was found asleep in the single story wood frame house. The house contained contraband and the defendant was arrested and charged with possession of cocaine, maintaining a dwelling to keep controlled substances, possession of a firearm by a felon and possession of drug paraphernalia.

ISSUE: Did the affidavit give the magistrate probable cause to issue a search warrant?

RULE: No, the affidavit did not give the magistrate probable cause because:

1) there were no facts alleged that particularly supported the search of the wood frame house or the mobile home;
2) no evidence was presented regarding the ownership or control of the two dwellings;
3) the affiant had limited experience in law enforcement; and
4) there was not a description of adequate surveillance of the controlled purchases

Therefore, the evidence must be suppressed.

DISCUSSION: N.C.G.S. § 15A-244 requires that an application for a search warrant must contain:

1) The name and title of the applicant; and
2) A statement that there is probable cause to believe that items subject to seizure

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under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

In determining whether probable cause exists in a search warrant application, magistrates must apply a totality of the circumstances test. To find probable cause, the magistrate must conclude there is a "fair probability" that the particular evidence/contraband will be found at the specific place.

In *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991), the Supreme Court of N.C. found there was probable cause to issue a search warrant. This case is distinguished from *Taylor* because in *Riggs*:

1) there was only one dwelling to be searched; and
2) the affidavit specifically stated facts of where the drugs deals occurred

NOTE: To establish probable cause, affidavits should show there is a fair probability that contraband or evidence of a crime will be found in a particular place.

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Fourth Amendment / Search & Seizure / Warrantless Searches / Plain View: *State v. McBennett*, ___ N.C. App. ___, 664 S.E.2d 51 (August 5, 2008)

FACTS: The defendant was a hotel guest scheduled to stay from August 12, 2006, through August 19, 2006. He paid in advance for his room with a credit card. During his stay, the defendant refused housekeeping services. On August 16, 2006, the defendant ordered room service and the waitress that delivered the order informed the hotel manager that the defendant's room was "in great disarray." On August 17, 2006, the hotel manager went to the room and tried to use the master key to unlock the door after no one answered. The interior lock caught the door and the manager stated he was "housekeeping" and the defendant told the manager he did not need housekeeping. The manager then called the police.

The manager and two law enforcement officers approached the defendant's door and after several unanswered knocks, the manager attempted to gain entry by using the master key. The interior lock caught again. The manager stated, "I'm going to count to ten. If you don't open up, we're busting the door down." The defendant unlocked the interior lock and one of the officers entered the room followed by the other officer and the hotel manager. In plain view, the officers saw marijuana, syringes and a handgun. The defendant was placed in handcuffs and arrested for possession of the controlled substances and drug paraphernalia.

ISSUE 1: Do hotel guests give implied permission to agents of the hotel to enter the room in the performance of their duties?

RULE 1: Yes, a hotel guest gives implied permission to agents of the hotel to enter a room in the performance of their duties, even to the extent of entering the room without his/her express consent.

ISSUE 2: Do hotel guests give implied permission to others, including law enforcement, to enter the room accompanied by agents of the hotel?

RULE 2: No, entry by the officers was unlawful because it violated the defendant's constitutional right to freedom from unreasonable searches and seizures. The implied permission to hotel agents does not extend to others, even law enforcement.

DISCUSSION: Individuals have a state and federal constitutional right to freedom from unreasonable searches and seizures. Warrantless searches and seizures of private property are per se unreasonable unless an exception, such as exigent circumstances or plain view, to the warrant requirement applies. The court carried out a four-part analysis:

1) did entry into the defendant's hotel room constitute a "search"; and
2) was the discovery of the evidence a result of government action; and
3) if government action caused the discovery of evidence, was the search and seizure reasonable under any exception to the search warrant requirement; and
4) did the defendant waive his Fourth Amendment right at any point

Whether a search occurred depends on whether a reasonable expectation of privacy was infringed. Overnight guests have a reasonable expectation of privacy, but implied permission exists for certain people (maids, janitors, repairmen) in performance of their duties. The fact the defendant declined housekeeping services did not eradicate the implied permission for agents of the hotel.

However, the permission was limited to hotel agents in performance of their duties and did not extend to others, not even law enforcement present at the hotel manager's request. The officers' entry into the room was a search because it violated the defendant's expectation of privacy.

The manager's entry into the hotel room was not a "search" for constitutional purposes. However, the evidence was discovered by the officer who first entered the room and not a result of the manager's private activity as an agent of the hotel. The governmental action resulted in the discovery of the evidence.

The plain view exception to the warrant requirement for government searches requires three elements:

1) the initial intrusion that brings evidence into plain view must be lawful;
2) the discovery of incriminating evidence must be unintentional; and
3) it must be immediately apparent to law enforcement that the items observed are evidence of a crime, are contraband or are otherwise subject to seizure

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In this case, the officer's initial entry was unlawful, so the plain view exception does not apply. The agents of the hotel cannot consent to a search of the defendant's room. Additionally, the fact the defendant unlocked the door would not be considered consent because the hotel manager coerced the defendant by stating the door would be "busted down" if not unlocked. The defendant did not waive his constitutional rights to be free from unreasonable searches and seizures.

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CELL PHONE USE DURING TRAFFIC STOPS

A *Police Law Bulletin* addressed this issue in Oct-Nov 2005. Unfortunately, there is still very little case law in this area. Because of ongoing questions regarding the use of cell phones by a driver or passenger during a traffic stop, this article discusses recommendations for handling these situations.

Is an officer ever legally justified in restricting the use of a cell phone during a traffic stop?

Yes, in limited circumstances, including when:

1) the use of the cell phone delays or obstructs the officer from discharging a duty, or
2) the officer has affirmative and objective evidence that the person is summoning another individual to stop for the specific purpose of interfering with the stop

What should an officer do if a cell phone is in use during a traffic stop?

If cell phone use is interfering with a duty the officer is attempting to discharge, ask the person to set the cell phone down, but let him/her know he/she does not have to hang it up. If the person refuses or ignores the request, let him/her know he/she could be charged with delaying or obstructing an officer if he/she does not comply with the request.

Below is the link to the Oct-Nov 2005 *Police Law Bulletin* that discussed this issue.

http://cmpdweb/dept/Police_Attorney/Police%20Law%20Bulletins/Police%20Law%20Bulletins%20-%202005/E.%20Oct-Nov.pdf

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NORTH CAROLINA ELECTRONIC VEHICLE INSPECTION PROGRAM

North Carolina vehicle inspections are going electronic beginning November 1, 2008. The following information is provided courtesy of the North Carolina Department of Transportation.

1. Why are we changing the way we perform safety and emissions inspections?
We are not changing the way we perform safety and emissions inspections, but only the way we record the results. In the past, vehicle owners would receive a windshield sticker to note the vehicle had passed its inspection and the month its next inspection was due. Beginning November 1, 2008, when you have your vehicle inspected, you will no longer receive a windshield sticker. At that time, your next vehicle inspection date will be due the same month date on your vehicle license tag.

2. What does this new system achieve for vehicle owners, for the environment, for the state?
For the first time, inspections will be synchronized to vehicle owners' ability to renew their registration. Because owners will not be able to renew their vehicle's registration until after it has passed its safety and/or emissions inspection, the state expects inspection compliance to increase to 97 percent. Increased compliance means vehicles will be kept in better running order, their emissions properly controlled, and the emissions fees will be paid as required.

3. Will safety and emissions inspection fees increase?
Safety inspection fees will increase from $9.10 to $13.60. Emissions inspection fees will remain the same, $30.

4. How will the new stickerless program work?
Starting November 1, 2008, North Carolina Vehicle safety and emissions inspections will go electronic. This means that windshield stickers will no longer be issued at your next inspection performed on or after November 1. After that date, the vehicle's inspection will become due the same month as the vehicle's registration renewal as shown on your license tag sticker. Beginning November 1, vehicles will be required to pass a vehicle inspection prior to registration renewal by the North Carolina Division of Motor Vehicles.

5. How is the program electronic?
The program is electronic because a record of the vehicle's inspection will be entered into the DMV's vehicle registration database. DMV license tag agencies and law enforcement personnel use this database to look up information about your vehicle, such as its license tag number and registration information. The database will be updated anytime an inspection occurs.

6. How will my inspection change on or after November 1, 2008?
When you go to get your inspection on or after November 1, you will go through the same process you always have. The mechanic will inspect and test your vehicle, you will pay for the inspection and receive a receipt and inspection report, but you will not receive a windshield sticker showing your car has been inspected. Instead, a record of your vehicle's inspection will be entered electronically into the DMV vehicle registration database. Then, your next inspection will be due the same month your vehicle registration is due. It is important to note that no vehicle will have to be inspected more than once in a 12-month period

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7. How is this new system supposed to help?
Synchronizing your vehicle's inspection and registration dates is expected to increase compliance with the state's inspection program, further benefiting North Carolina air quality and highway safety.

8. How will I know when my next inspection is due if I don't have a sticker in my windshield?
Vehicle owners will receive an annual vehicle registration renewal notice to renew their license plate and/or license tag sticker. The renewal notice will also indicate when your vehicle is due for inspection. The vehicle must be inspected before the registration can be issued.

9. Once the new program begins, there will be two dates listed on the vehicle registration renewal notice. What do they mean?
The first date listed is the expiration date of the license tag/sticker including a 15-day grace period. The second date listed is the inspection due date, listing the last date an inspection can be obtained before the registration is blocked.

10. What happens if I do not get my vehicle inspected by the due date indicated?
Your vehicle registration will be automatically blocked the day after the due date. This means that you must get your vehicle inspected or face a potential $50 penalty.

11. Which should I get first, my vehicle registration or my inspection?
Your vehicle must pass inspection before its registration can be renewed. You may have your vehicle inspected up to 90 days prior to your annual vehicle registration due date, but it must be inspected no later than the last day of the month your vehicle registration expires or your registration will be blocked.

12. How will the police know that my vehicle has passed inspection?
A record of the inspection will appear on the DMV computer database that police now use to check registration information about vehicles.

13. How will I get a license plate for a new vehicle I just purchased?
A new vehicle must be inspected before it is sold at retail in this state. Upon purchase, you will be provided a receipt certifying inspection compliance. The inspection conducted prior to your purchase is valid until the license plate is due for renewal.

14. How will I get a license plate for a used vehicle I just purchased from a dealer?
A used vehicle must be inspected before it is offered for sale at retail in this state. Upon purchase, you will be provided a receipt certifying compliance. The inspection conducted prior to your purchase is valid until the license plate is due for renewal.

15. I purchased a used vehicle from an individual, not a dealer. How do I get my license plate?
A used vehicle acquired from a private sale in this state must be inspected before it is registered unless it has received a passing inspection within the previous 12 months.

16. I have an unregistered vehicle that I now wish to drive. What do I need to do?
An unregistered vehicle must be inspected before the vehicle can be registered.

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17. If the registration cannot be issued until it is inspected, and I can't drive the vehicle to the inspection station, how do I legally get the car in compliance?
DMV may issue a three-day permit to a person that authorizes the person to drive an insured vehicle for the purpose of inspection and registration. You should contact your local License and Theft Bureau office for the permit. (License and Theft office addresses and phone numbers are available at www.ncdot.org/dmv.)

18. My vehicle is due for inspection, but I will be out of the state. What do I do?
A person who is out of state may obtain an emissions inspection in the jurisdiction where the vehicle is located in lieu of an inspection in North Carolina as long as it meets the requirements of 40 C.F.R 51.

19. I'm moving from a non-emissions county to an emissions county. Do I have to have my vehicle inspected again?
No. You will not have to get your vehicle inspected until the current registration expires.

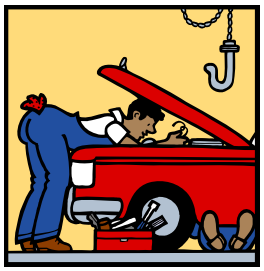
20. I'm moving to North Carolina from another state. Will my vehicle need to be inspected before I obtain my North Carolina license plate?
Generally, your vehicle should be inspected first. However, inspection officials will check to see if your vehicle has received a North Carolina inspection within the past 12 months.

21. Are some older vehicles exempt from an emissions inspection?
Yes. If a vehicle is a model 1995 or older, it is exempt from having an emissions inspection.

22. My vehicle is 35 years old or older. Does this new law affect me?
No. Vehicles that are 35 years old or older are exempt from North Carolina safety and emissions inspections.

23. Does a heavy-duty vehicle require an emissions inspection?
A heavy-duty vehicle, a vehicle with a GVWR greater than 8,500 pounds, requires only a safety inspection.

24. I have permanent plates on my vehicle. When is my inspection due?
Permanent-plated vehicles must be inspected between January and December of every year, but their inspections are not synchronized with registration renewal. The date the inspection is conducted will not affect the vehicle's registration, as long as the inspection occurs on a yearly basis.



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