

CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

Winter 2009

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Forward: In this issue we'll examine five North Carolina cases dealing with traffic stops, license checkpoints and destruction of exculpatory evidence. A prior article is updated with new CMPD and DA's procedures for preserving biological evidence. Also we have articles reviewing the requirements to obtain cell phone provider records, new procedures for renewing a North Carolina driver's license and miscellaneous reminders that will help officers on the job.

BRIEFS:

NORTH CAROLINA SUPREME COURT

Traffic Stops / Totality of Circumstances / Reasonable Suspicion:
State v. Maready, 669 S.E. 2d 564, 2008 N.C. LEXIS 985 (2008)

FACTS: On February 12, 2005, Durham County deputies saw an intoxicated man staggering along the road. They started to drive toward the man when he walked across the street in front of a slow driving minivan with its flashers on and got into a Honda Civic behind the van. The deputies turned around intending to drive behind the Civic when the driver of the minivan signaled them to stop. She said she had seen the driver of the Civic running stop lights and stop signs. The deputies observed the female was obviously distressed by what she had just seen. They did not ask her for her name or make any attempt to identify her; instead, the deputies followed the Civic. The Civic stopped at a stop light and the deputies approached finding Mr. Maready to be the driver.

Maready had a strong odor of alcohol on his breath and admitted that he had been drinking. Deputies asked him to step out of the vehicle and perform some sobriety tests. Mr. Maready said he wasn't going back to the penitentiary, pulled away from the officers and sped off reaching speeds of seventy miles an hour in a forty-five miles an hour zone. The deputies pursued the Civic and lost sight of it as it rounded a curve. As the deputies rounded the curve, they saw the Civic and a red pick-up truck flipping over continuously. The driver of the truck was thrown from her vehicle and pronounced dead at the scene. Mr. Maready's blood alcohol level six hours after the collision was .16. Mr. Maready had six prior DWI convictions, the last one occurring six months before this crime. Mr. Maready was convicted of Second Degree Murder along with other charges.

ISSUE: Did the deputies have reasonable suspicion to initially stop Mr. Maready's vehicle?

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HOLDING: Yes, reasonable suspicion must be based on specific facts and rational inferences from those facts as viewed through the eyes of a reasonable officer guided by their training and experience. The courts will consider the totality of the circumstances facing the officers when determining whether reasonable suspicion exists to justify a stop. In this case, the defendant contended the information provided by the anonymous minivan driver combined with what the deputies observed, was insufficient to rise to the level of reasonable suspicion to justify the stop of the Civic.

The Court applied the facts of this case to the reasonable suspicion standard and found the information provided by the minivan driver and the circumstances surrounding her statements made them sufficiently reliable and when combined with the deputies' observations provided a reasonable suspicion to stop the vehicle.

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Exculpatory Evidence / Destruction Of Evidence / Dismissal Of Charges: *State v. Williams*, 669 S.E. 2d 290, 2008 N.C. LEXIS 978 (2008)

FACTS: Mr. Williams was arrested on November 17, 2003 and sent to the Stanley County Detention Center. During February and March 2004, while still in custody, Williams sued an Assistant District Attorney for Stanley County, along with the sheriff and others, alleging civil rights violations. After filing the lawsuit Williams was moved to the Union County jail and within twenty-four hours he was charged with assault on a government official for fighting a guard. Mr. Williams denied the charge and claimed he was maced and beaten by several guards sustaining severe injuries including a broken arm. Williams was transferred the next day back to Stanley County where pictures were taken of him showing the injuries he had received.

Shortly afterwards, Mr. Williams' attorney told him there were pictures of him on a poster in the DA's office. The first poster had his original picture taken at Stanley county jail under which it stated: "Before he sued the DA's office." There was a second picture showing Mr. Williams' injuries on his return to Stanley County jail, under which was written: "After he sued the DA's office." Mr. Williams' attorney subpoenaed the DA's office for the posters and received no response. At a pretrial hearing, an Assistant DA acknowledged the posters existed but stated they had been destroyed as well as the original jail photos. Mr. Williams contended the destruction of the pictures was a flagrant violation of his constitutional rights which irreparably prejudiced the preparation of his defense and filed a Motion to Dismiss the charges against him pursuant to G.S. 15A-954(a). The trial court granted his motion which was upheld by the Court of Appeals. The State contends the dismissal was in error.

ISSUE: Was the destruction of photos of the defendant in the DA' office ridiculing the defendant for his lawsuit and indicating that injuries he received were appropriate, a flagrant violation of the Defendant's constitutional rights irreparably prejudicing his defense of the underlying assault charges warranting dismissal of the charges?

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HOLDING: Yes, It is very difficult for defendants to prove pretrial that the destruction of evidence leads to irreversible prejudice in preparing their defense. In this case the picture of Mr. Williams' injuries were important to his defense that he was assaulted by the guards and that he did not assault them. The Court was appalled by the unprofessional conduct of the DA's office which was only compounded by their willful destruction of the photos. The Court concluded that was no remedy but to dismiss the charges.

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NORTH CAROLINA COURT OF APPEALS

Traffic Stops / Criminal Activity / Reasonable Suspicion: *State v. Murray*, 666 S.E.2d 205, 2008 N.C. App. LEXIS 1656 (2008)

FACTS: A Concord police officer was performing a property check near the Motorsports Industrial Park as part of a problem oriented policing project following a rash of break-ins. At 3:40 in the morning he observed a car on the main road near the Park and thought it was "kind of weird." He turned around on the vehicle and ran the tag number which revealed the car was a rental vehicle. The officer observed no traffic violations or any erratic movement of the car which was on a public road. The officer stated he decided to stop the car "to find out what they were doing at the location." As a result the stop Mr. Murray was arrested for possession of cocaine.

ISSUE: Did the officer have reasonable suspicion that the vehicle's occupants were engaged in criminal activity to justify a stop of the vehicle?

HOLDING: No, the officer had no reason to believe the vehicle or its occupants were engaged in unlawful activity. Although an officer can stop a vehicle based on a minimal level of objective justification, the officer in this case lacked any specific articulate facts to reach that minimal level. The officer's stop of the vehicle was based only on his suspicion or hunch. Officers cannot stop vehicles to see if the occupants might be engaged in criminal activity. Officers can stop vehicles when they have specific facts and reasonable inferences under the totality of the circumstances to objectively believe the occupants are engaged in criminal activity.

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License Checkpoint / Purpose Of Checkpoint / Constitutional Requirements: *State v. Gabriel*, 665 S.E. 2d 581, 2008 N.C. App. LEXIS 1627 (2008)

FACTS: Troopers set up a driver's license checkpoint at the intersection of Highway 85 and Glenwood Drive in Charlotte. Several armed robberies had occurred near that location the previous week and one suspect used that intersection to escape in a stolen vehicle. The checkpoint began around 9:00 p.m. with drivers being asked to produce their license and registration. The defendant was stopped in his vehicle at the checkpoint around 11:00 p.m. and charged with DWI. Defendant contended the primary purpose of the checkpoint was unconstitutional. The trial court found that one purpose of the checkpoint was a license check and therefore the checkpoint was constitutional.

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ISSUE: Did the trial court make sufficient findings of fact and conclusions of law concerning the primary purpose of the checkpoint?

HOLDING: No, the trial court must make additional findings of fact and conclusions of law to determine the primary purpose of the checkpoint. In this case, the trooper cited both the recent robberies and checking licenses and registrations as the purpose of the checkpoint. When there are conflicting reasons given for the checkpoint, the trial court must determine the primary purpose. A checkpoint with an unlawful primary purpose will not become constitutional when coupled with a lawful secondary purpose. If the primary purpose was to perform a driver's license check then the purpose would be constitutional. If the primary purpose of the checkpoint was for general checking of criminal activity in an area of recent crimes it would be unconstitutional. Once the trial court makes the initial determination concerning the purpose of the checkpoint, if the court concludes the checkpoint was constitutional; the court must then determine whether the operation of the checkpoint was reasonable

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Traffic Stops / Warrantless Searches / Firearms Possession: *State v. Smith*, 666 S.E. 2d 191, 2008 N.C. App. LEXIS 1661 (2008)

FACTS: An Asheville officer stopped a pickup truck for improper registration and smelled marijuana as he approached the driver's window. A search was conducted and in the bed of the trunk within a lift-up cover, wrapped in a jacket, was a handgun. The driver was a convicted felon and charged with possession of a weapon by a felon and being a habitual felon. He contended the evidence was insufficient to show possession of the firearm.

ISSUE: Was there sufficient evidence to convict the driver for possession of a firearm when it was located in a container in the back of a truck?

HOLDING: Yes, the driver can be convicted by showing actual or constructive possession of the firearm. When the driver has the intent and capability to maintain control and dominion over the property, he has constructive possession of the property. As with other questions of proving intent, proof of constructive possession usually involves proof of circumstantial evidence.

Constructive possession depends on the totality of the circumstances and is ordinarily a question for the jury. In this case, the State's evidence tended to show:

- (1) defendant was the owner and driver of the vehicle;
- (2) defendant had exclusive control of the vehicle;
- (3) the cargo area of the truck contained other objects owned by the defendant;
- (4) defendant stated everything in the cargo area belonged to him; and
- (5) the handgun found in the cargo area was wrapped in a man's jacket.

This evidence was sufficient for the jury to determine the defendant possessed the handgun.

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Traffic Stops / Fourth Amendment / Consent Search: *State v. Isenhour*, NO. COA08-478, 2008 N.C App. LEXIS 2230 (2008)

FACTS: On May 10, 2006, CMPD Officers Ferguson and Gaskins were patrolling Statesville Avenue near a Bojangles parking lot known to be a high drug and prostitution area. They observed two men sitting in a car in the back corner of the lot. When the officers went back ten minutes later, the men were still sitting in the car. The officers pulled their marked unit approximately eight feet from the defendant's vehicle and one officer approached the driver, Mr. Isenhour, while the other officer went to the passenger. The officers became suspicious when the driver and passenger gave different explanations concerning why they were waiting in the car.

The driver was asked to step out of his car and he consented to a pat down for weapons. Officer Ferguson then asked for consent to search the car and the driver consented. An unlabeled pill bottle containing eight methadone pills, several syringes and a spoon inside a Crown Royal bag was found. Officer Ferguson testified that Mr. Isenhour was very cooperative and did not seem nervous during the entire interaction. Mr. Isenhour contends the initial encounter was an illegal seizure because he did not feel free to leave and therefore, the consent was involuntary because it was the result of an illegal seizure.

ISSUE: Is a person seized under the Fourth Amendment when a marked police car stops eight feet from a vehicle and uniformed officers approach the driver and passenger?

HOLDING: No, Officers do not violate the Fourth Amendment by merely approaching individuals on the street or other public places and asking questions of them if they are willing to listen. Although it is possible to "seize" a person without ever laying hands on the person by a "show of authority"; the question is whether in view of all the circumstances, a reasonable person would believe they are not free to leave. The test does not take into account a defendant's subjective impressions of the encounter. In this case, the court found the defendant was free not to answer the officer's questions and drive away from the scene at any time. There was no suggestion in the testimony that Officer Ferguson's car physically blocked the defendant's car or that the officer's behavior or demeanor amounted to a show of force necessary for a seizure to occur.

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PRESERVATION OF BIOLOGICAL EVIDENCE - NCGS § 15A-268

In the *Spring 2008* PLB we discussed the new law requiring the preservation of physical evidence that may contain biological evidence. We have been working with the District Attorneys' office to develop procedures that will comply with the law and not lead to storage issue for Property Control. We are also working with the law's sponsors in Raleigh to amend the law to limit its application to specific felonies. Here is a summary of the CMPD and DA's procedures to date:

1. All items that might contain biological evidence relating to homicide and sex offenses are being retained until a court order allows for disposition.

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2. Found guns not related to any crime or related to misdemeanor offenses are not affected by the law.
3. Cases that have been dismissed, a verdict of not guilty or not accepted by the DA; items may be disposed of, if there are no additional suspects.
4. Pending felony cases where items have been kept that may have biological material will be retained until a court order is entered as to their disposition.
5. The DA's office in guilty pleas pursuant to a plea bargain will have the defendant sign a waiver allowing for the disposition of evidence in their case and a judge will issue an order permitting CMPD to dispose of evidence seized in the case.
6. In felony cases where the defendant was found guilty or pled guilty and would not sign the waiver; items containing identifiable biological material will be retained as provided by G.S. 15A-268.

It will be necessary for Property, Crime Scene and the Crime Lab to make changes in their CMPD Directives and SOP in light of 15A-268. We will continue to keep you informed of any procedural changes or amendments to this law.

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MOTIONS AND ORDERS RELATED TO CELL PHONES

During the course of an investigation it may be necessary to seek cell phone information including subscriber information, numbers dialed or received from a cell phone or location information using the cell phone as a tracking device. This article will review the federal and state statutory requirements for each category. These statutory requirements are necessary when law enforcement cannot obtain the consent of the subscriber for the information.

Subscriber Information

The Stored Wire and Electronic Communications Act, 18 USC §§ 2701-2711 (1986), permits law enforcement to receive stored cell phone subscriber information from a service provider with a court order. Subscriber information includes, the name and address, local and long distance records, session time and duration information. Law enforcement can also receive information concerning the length of the service contract and methods of payment. The Motion and Order should be submitted to a Superior Court Judge. The court will issue an order when specific and articulate facts show there is "reasonable grounds to believe that the records are relevant and material to an ongoing criminal investigation". The order will specify that the subscriber will not be informed of the motion or order and the service provider will not reveal the information.

The Police Attorneys' Office has the templates for the Motion and Order and each Motion must be signed by a Police Attorney.

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Pen Register And Trap And Trace Information

Federal law 18 USC §§ 3121-3127 and State law 15A §§ 260-264 set forth the procedures necessary to obtain current numbers that are being dialed and/or received by a cell phone subscriber. Law enforcement must submit an application to a Superior Court Judge swearing under oath that they have reasonable suspicion to believe a felony or Class A1 or class 1 misdemeanor has been committed. They must show there are reasonable grounds to suspect an identified individual and that the information requested will be of "material aid in determining whether the suspect committed the offense."

The order will direct the service provider to furnish the technical assistance necessary to install and use a pen register and/or trap and trace device for a specified cell phone and number for up to sixty (60) days. The order will also specify that the information contained in the Motion and Order not be revealed by the service provider. The Police Attorneys' Office has the templates for the application and order. The application form must be signed by a Police Attorney prior to submitting to the Superior Court Judge.

The federal law recognizes a limited emergency situation when an order is not immediately required. When there is "immediate danger of death or serious bodily injury", a service provider may install a pen register and/or trap and trace device without a court order. Under 18 USC § 3125, the officer must submit an order to the service provider approving the installation within forty-eight (48) hours after the emergency installation.

Tracking Information

The Communications Assistance for Law Enforcement Act, 47 USC § 1001 *et seq.* (1994), requires telecommunication carriers provide law enforcement with call-identifying information pursuant to a Court Order. Call-identifying information is defined as dialing or signaling information that identifies the origin, direction destination or termination of each communication generated or received by a subscriber of a telecommunication carrier. This information also can provide the location of the suspect through either the cell towers used (triangulation of towers provides general location) or the cell phone's GPS device (more exact location obtained).

Tracking requests require a showing of probable cause before an order will be issued because the person tracked may enter into areas that have Fourth Amendment protection. Under 47 USC §1007 and 18 USC § 3117, law enforcement must swear under oath to specific facts showing there is probable cause to believe the individual tracked is a suspect and that obtaining his location will produce his arrest or material evidence in the case. The order should authorize tracking for no more than forty-five (45) days. The application and order should be under seal with specific language prohibiting release of information concerning it.

Templates are available at the Police Attorneys' Office and the signature of the Police Attorney is required on the application.

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If you have any questions about these motion and order requirements or need assistance in their preparation, please contact the Police Attorneys' Office.

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NEW DRIVER'S LICENSE RENEWAL PROCEDURE

Effective July 1, 2008, G.S. 20-7(f)(5), provides that motorists renewing their driver's licenses will no longer be given a new license on the spot by their local DMV office. Instead they'll be provided with a Temporary Driving Certificate which will be valid for 20 days. The DMV will send the renewed license to the motorist's mailing address. According to the DMV, the program is first being implement in Lillington and Erwin, N.C., and will go state-wide in March 2009.

The Temporary Driving Certificate, shown below, is valid for driving purposes only. It is not valid as a form of identification.

North Carolina Division of Motor Vehicles



NORTH CAROLINA 20-DAY TEMPORARY DRIVING CERTIFICATE

(As required by North Carolina General Statutes 20-7(f)(5))

This Temporary Driving Certificate is valid for 20 days from the date of the original issue date shown below. This certificate is valid for driving purposes only and shall not be valid for identification purposes.



The North Carolina
Department of Transportation

DRIVER LICENSE

12345678
Duplicate Printed: 06-10-2008

Sample TDC Record
112 Sample Drive
Raleigh NC 27697

class: C endors: None restr: 1
original issued: 06-06-2008 expires: 06-26-2008
sex: F ht: 5-03 eyes: BRO hair: BRO race:

birthdate:
06-06-1960

Sample Sig

Non-Transferable



Class C: Any single vehicle with a GVWR less than 26,001 pounds and designed to transport fewer than 16 passengers including the driver and is not transporting hazardous materials requiring CDL endorsements and is exempt from CDL requirements. May tow a vehicle with a GVWR less than 10,001 lbs.

Restrictions: 1. Corrective Lenses

Endorsements: NONE



Non-Transferable

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REMINDERS

Assisting Probation Officers

Probation Officers have authority under G.S.15A-1345 to arrest a probationer for violating the terms of probation. Also, as a special condition of probation, the probationer may be subject to warrantless searches of his person, vehicle and premises by the probation officer under G.S. 15A-1343(b1)(7). Law enforcement may assist the probation officer so long as the arrest and search is authorized and directed by the probation officer. If officers are asked to assist and are unsure about the sufficiency of the arrest order written by the probation officer, they may suggest that the probation officer seek an order for arrest from a judicial official. Likewise, there is nothing which prohibits officers from seeking a search warrant if the probation officer has probable cause to believe evidence of a crime will be located.

Stolen Vehicle / Non- Division Towing Lot

When a stolen vehicle has been transported to a non-division wrecker tow lot, the CMPD does not have authority to remove the vehicle from the lot to place it in a Division wrecker lot. The owner must retrieve the vehicle.

Police Attorney Website

New information has been placed on the Police Attorneys' website. The new waiver lists and corresponding fees effective December 1, 2008, are located at the website.

http://cmpdweb/dept/Police_Atorney/Lists/Announcements/DispForm.aspx?ID=53&Source=http%3A%2F%2Fcmpdweb%2Fdept%2FPolice%5FAttorney%2Fdefault%2Easpx

Also for those of you who can not get enough in-service, the 2008 BLET Student outline and lesson plan have been added. Finally, charts reviewing the 5th and 6th Amendment procedures in light of the U.S. Supreme Court decision in *Rothgery v. Gillespie County*, __U.S.__, 128 S.Ct. 2578 (2008), holding that the Sixth Amendment right to counsel attaches when the Magistrate finds probable cause, are provided for your review.

The long-awaited, eagerly anticipated Citation Language book has been added to the Police Attorneys' website and can be found here:

http://cmpdweb/dept/Police_Atorney/Lists/Announcements/Attachments/56/Citation%20Language%20Booklet%20-%202009.pdf

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