

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

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#### REMINDERS

**Forward:** In this issue we review a case from the United States Supreme Court dealing with qualified immunity.

We will also look at a case from the Fourth Circuit Court of Appeals that addresses officers frisking subjects for weapons in states where citizens may obtain permits to legally conceal firearms.

There are also two cases from the North Carolina Supreme Court. The first case covers search warrants for homes based on evidence found in a car. The second case addresses the scope of search warrants in searching cars in the curtilage of a residence.

Lastly we will discuss two cases from the N.C. Court of Appeals, both coming out of Mecklenburg County. One case addresses search warrant affidavits and confidential informants, while the other addresses *Miranda* and voluntary waivers. We conclude with some important reminders.

### CASE BRIEFS:

#### SUPREME COURT OF THE UNITED STATES

**Qualified Immunity / Use of Force:** [Ray White, et al., Petitioners v. Daniel T. Pauly, as Personal Representative of the Estate of Samuel Pauly, Deceased, et al., 580 U.S. \\_\\_\\_\\_\\_ \(2017\).](#)

**Issue:** Should a lawsuit alleging excessive force be dismissed against an officer based on qualified immunity?

**Holding:** Yes, an officer will be dismissed from a lawsuit unless the plaintiff can show that the use of force violated a clearly established statute or specific case law.

**Facts:** At approximately 11p.m., three officers responded to a highway off-ramp for a call for service regarding a road rage incident. Dispatch gave the officers the address for the registered owner of the suspect vehicle, and two of the officers went to the residence while Officer White stayed behind. The two officers approached the home, and radioed Officer White who left the off-ramp to join them. As Officer White arrived on scene he heard the suspects yelling "we have guns," so he drew his weapon and took cover. As one of the suspects fired two shots from the back door, the decedent-suspect opened the front window and pointed a handgun in Officer White's direction. An officer fired at the decedent and

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missed. Officer White then shot and killed the decedent.

**Discussion:** A lawsuit will be dismissed against an officer unless their actions violate a clearly established law. Whether an officer's actions were a violation must be based on the particular facts of a case, not generalized statements of law. In determining whether an officer violated a clearly established law the court will consider only those facts known to the officer at the time the force was used.

Here, Officer White's level of force did not violate any state or federal law. Under the totality of the circumstances, the officer's actions were reasonable based on the facts known to him at the time he fired his weapon. The Supreme Court has repeatedly advised the lower courts that unless an officer has violated a specific case or statute, the lawsuit will be dismissed. Lawsuits against officers will not continue unless the facts show that the officers were plainly incompetent or knowingly violated the law.

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### UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**Fourth Amendment / Search and Seizure / Concealed Carry Permit:** [United States v. Robinson, 846 F.3d. 694 \(4th Cir. 2017\).](#)

**Issue:** May officers frisk a person during a lawful stop if the officers believe that the subject is armed when state law allows citizens to obtain a concealed carry permit?

**Holding:** Yes, an officer who makes a lawful stop, and who has reasonable suspicion that a subject is armed, may frisk that individual for the safety of officers and others.

**Facts:** An unidentified man called the Ranson, West Virginia police department saying that he had just witnessed a black male in a Toyota Camry load a firearm and conceal it in his pocket in the parking lot of a 7-Eleven. The caller also advised that the Camry was being driven by a white female, and had just left the store's parking lot. An officer saw the Camry and initiated a traffic stop for seatbelt violations. A captain arrived and asked the male passenger, the Defendant, to exit the vehicle and asked whether he had any weapons. The Defendant did not answer but gave the officer a weird look. The captain then frisked the Defendant, finding a loaded gun in his front right pocket. West Virginia law allows citizens to carry a concealed firearm with a valid permit.

**Discussion:** Traffic stops, or other "forced" contacts, are inherently dangerous for police officers. Traffic stops of subjects who are armed, legally or illegally, pose an even greater risk to officers' safety. It has long been held that officers may frisk a validly stopped person whom officers reasonably believe is "armed and dangerous." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The Court found that when an armed person is forcibly stopped the person is also dangerous based simply on the fact that the

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person is armed. This allows officers the right to frisk the person for weapons, regardless of whether the weapon is legally or illegally possessed.

**Guidance:** Officers may frisk subjects who they reasonably believe are armed, even if a subject has a valid permit to carry a concealed firearm. Officers may also remove the weapon from the subject's reach for officers safety and the safety of others.

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### NORTH CAROLINA SUPREME COURT

**Fourth Amendment / Search and Seizure / Probable Cause / Reasonable Inferences:** [State v. Allman, 794 S.E.2d 301 \(2016\)](#).

**Issue:** Did a detective have probable cause to get a search warrant of a residence based on evidence of drug-dealing found within a car?

**Holding:** Yes, probable cause existed under the totality of the circumstances because it was reasonable for the magistrate to infer that the suspects were drug dealers, and that evidence of drug-dealing would be found in their residence.

**Facts:** Deputies conducted a traffic stop on two suspects and found marijuana in a vacuum-sealed bag and over \$1,000 in cash. The suspects both had prior drug-related convictions and lied about where they lived. After determining the suspects' actual address, deputies obtained a search warrant based on the suspects' criminal histories, the quantity of marijuana and cash, and the fact that the marijuana appeared to be packaged for sale. The detective executed the search warrant on the suspects' home, where the Defendant also lived, and found evidence related to the manufacture and sale of illegal drugs.

**Discussion:** Probable cause is based on the totality of the circumstances test. In determining whether probable cause exists to issue a search warrant, a magistrate may make common-sense inferences from the available facts as long as those facts create a fair probability that a police officer executing a warrant will find evidence of a crime in the place to be searched. The detective's affidavit included information that based on his training and experience drug dealers typically kept evidence of drug-dealing at their homes. Although nothing in the detective's affidavit directly linked the Defendant's home with evidence of drug dealing, a suspect's lie about his address, combined with other evidence of drug dealing, gave probable cause to search the home.

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**Fourth Amendment / Search and Seizure / Scope / Vehicle on Premises to be Searched:** [State v. Lowe, 794 S.E.2d 282 \(2016\)](#).

**Issue:** Did officers exceed the scope of a search warrant for a residence when they searched a vehicle located on the premises?

**Holding:** No, the search of the rental car in the driveway did not exceed the scope of the search warrant for the home.

**Facts:** A detective received information that Michael Turner was selling, using, and storing narcotics at his home. Turner had previously been arrested for possession with intent to sell or deliver, trafficking, and other drug-related offenses. The detective conducted a trash pull at Turner's residence and found mail with Turner's name on it and a bag with marijuana residue. Officers arrived on scene with a search warrant and saw a Volkswagen rental car in the driveway, although the detective knew that Turner had an Infinity and a Toyota registered in his name. Officers encountered the Defendant and his girlfriend inside, who were Turner's overnight guests. Officers found contraband in the home, including finding controlled substances in a room that had been occupied by the Defendant. Officers then searched the rental car and discovered a book bag with the Defendant's ID, narcotics, paraphernalia, and \$6,000 in cash.

**Discussion:** The scope of a search warrant depends on the nature of the object of the search. The lawful search of a premises generally includes the entire area in which the object of the search may be found. North Carolina courts have held that a car on a premises, or curtilage, may be searched even if the search warrant does not contain a description of the car, even if it is a rental car. This is because the curtilage of a home is considered part of the home itself for Fourth Amendment purposes. Here, the objects of the search warrant, evidence of drugs or paraphernalia, were types that could easily have been stored in a car, which placed the car within the scope of the search warrant.

**Guidance:** When applying for a search warrant, it is the best practice to include a description of any cars that you know may be on the premises; however, you may still search any vehicles located within the curtilage of the premises even if they are not listed in the search warrant, if the vehicles are connected to the occupants of the residence.

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### NORTH CAROLINA COURT OF APPEALS

**Fourth Amendment / Search and Seizure / Confidential Informants:** [State v. Brody, 2017 N.C. App. LEXIS 41](#).

**Issue:** Did an officer have probable cause to obtain a search warrant based on information received from a confidential informant who the officer had known for two weeks?

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**Holding:** Yes, probable cause existed under the totality of the circumstances and the officer was not required to specify the results of previous tips from the informant.

**Facts:** A CMPD detective applied for a search warrant for Defendant's home. The affidavit for the search warrant contained information the detective received through a confidential informant including that the detective had known the informant for two weeks and that the informant had provided law enforcement with information on other drug traffickers in the Charlotte area. The affidavit also stated that the informant was familiar with drug pricing and packaging, had arranged and purchased cocaine from the Defendant under the detective's supervision, and had also observed the Defendant selling cocaine in his home within the last 48-hours. The detective listed his own training and experiences in general law enforcement and narcotics investigations. The magistrate issued the search warrant, and officers found evidence of illegal drug activity.

**Discussion:** Probable cause is determined through a totality-of-the-circumstances analysis. It has long been established that probable cause may be shown through the use of information received from confidential informants. Unlike cases with anonymous tips, information gained through known informants does not have to be corroborated by independent verification. Here, although the detective did not specify results of previous tips from the informant, the affidavit did state how long the detective had known the informant, that the informant had previously provided information about other traffickers, and that the detective considered the informant to be "reliable." The fact that the affidavit did not include the outcomes of previous tips from the confidential informant is irrelevant to determining whether the informant was reliable.

**Guidance:** Officers should include facts in search warrant affidavits that allow a magistrate to infer a confidential informant's reliability, but this does not have to be done by listing the outcomes of the previous tips received from the informant.

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**Fifth Amendment / *Miranda* / Voluntary Waiver:** [State v. Johnson, 2017 N.C. App. LEXIS 33.](#)

**Issue:** Did officers unlawfully induce a confession when they waited approximately four hours to advise Defendant of his *Miranda* rights?

**Holding:** Yes, the officers' influence caused the Defendant to make an involuntary waiver of his *Miranda* rights and the confession should have been suppressed.

**Facts:** Three suspects fled after committing an armed robbery and homicide at the Thrift Motel in Charlotte in 2007. Defendant was soon after identified as a possible suspect. In a 2007 interview, Defendant waived his *Miranda* rights and gave a buccal swab. In 2009, Defendant's DNA came back as a match to DNA found under the victim's fingernails. In late 2011, detectives asked Defendant to come in for a voluntary interview.

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Defendant began speaking with the detectives in a locked interview room at 9:50 a.m. The detectives showed Defendant the forensic report, and began telling the Defendant that they knew he was lying about not being at the motel on the night of the murder and that this could be a capital case. The detectives also told Defendant that he should help himself and not “go down” for the murder by himself because if the Defendant cooperated the detectives would speak to the District Attorney’s Office about resolving the case in the best way possible. One detective stated that he would be willing to testify on the Defendant’s behalf at trial. During the course of the interview, the Defendant often cried and stated that he was sick to his stomach.

At some point, one detective asked the Defendant if he thought he was going to be able to go home “today.” Defendant responded that he did not feel that he could leave at any time but that he could only leave after detectives told him that he was free to go. The Defendant then stated that he had “faith” that he could walk out of the interview. At approximately 2:03p.m., the detectives told Defendant that he was under arrest but continued to talk and listen to the Defendant. Detectives read the Defendant his *Miranda* rights at approximately 2:14p.m., and the Defendant waived those rights at 2:17p.m. At 2:38p.m., the Defendant then confessed to being present at the murder but stated one of the other two men was the gunman.

**Discussion:** A suspect’s waiver of *Miranda* rights must be given voluntarily and free of any intimidation, coercion, or deception. The courts look at a number of factors in determining whether a statement was voluntarily given under the totality of the circumstances: whether the defendant was in custody, whether *Miranda* rights were given, the length of the interrogation, any physical threats or shows of violence, whether promises were made, and the defendant’s mental condition. Here, the Court stated that although the Defendant “voluntarily” appeared for the interview, it was clear that “the Defendant was not going to leave the police station that day without being placed under arrest for Anita’s murder.”

Cautions by officers for a suspect to the truth, standing alone, do not cause a statement to be inadmissible. The Court considered that the Defendant was questioned for hours after he should have been *Mirandized*, that detectives told the Defendant they knew he was lying, that this could be a capital murder case, that the forensic report was proof of the Defendant’s guilt, and that Defendant’s treatment would depend on his cooperation. It did not matter that the detectives got the Defendant to say that he thought he could leave because the subjective thoughts of officers or interviewees are irrelevant. Here, the Defendant’s inculpatory statements were made under fear or hope, and were not voluntarily given.

**Note:** Although the Court of Appeals held that the Defendant’s statement should have been suppressed, the Court did not overturn the conviction because of other “overwhelming” evidence presented at trial.

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### REMINDERS

#### **NCGS § 15A – 402. TERRITORIAL JURISDICTION OF OFFICERS TO MAKE ARRESTS**

Under North Carolina law, county-city law enforcement officers may arrest persons at any place within North Carolina when the arrest is based on a *felony* committed within the officer's particular city or county. This means that CMPD officers may travel to any jurisdiction in the State to arrest any person charged with a felony arising in Mecklenburg County. If the defendant has established a known residence in another part of the State, the officer may enter that residence to execute the arrest warrant in the same manner that he or she would execute an arrest warrant in Mecklenburg County.

#### **NEW SEARCH WARRANT TEMPLATE**

There is a new AOC form for search warrant templates. Form AOC-CR-119 can be found on the Police Attorney's Portal. If an officer needs a search warrant to be signed by a Superior Court judge, the officer should send the search warrant to the Police Attorney's Office and we will contact the judges' assistant to make an appointment for signing.

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