CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

JUNE 2017 **Volume 35, Issue 2** **Page 1 of 8**

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Forward: In this issue there are summaries of recent cases from the U.S. Supreme Court, 4th Circuit Court of Appeals and the North Carolina Court of Appeals. There are reminders dealing with questions that have been recently received by the police attorney's office. Please feel free to contact any police attorney concerning questions that should be addressed in the next issue. Stay safe, your police attorney staff.

CASE BRIEFS:

SUPREME COURT OF THE UNITED STATES

Use of Force: County of Los Angeles, California, *et al.* v. Mendez *et al.*, ____US____ (May 30, 2017).

Issue: Was the officers' use of deadly force against an individual who appeared to be pointing a rifle at them when they entered a residence unreasonable because the officer's did not have a search warrant to enter a third party residence to serve an arrest warrant?

Holding: No, whether a use of force is objectively reasonable is based on what information the officers had when the use of force occurred and not separate prior constitutional violations.

Facts: Deputies assisted a task force in serving a felony arrest warrant for a violent and dangerous parolee believed to be at a third party's residence. The deputies were assigned to cover the backyard of the property and the back door. The backyard included three metal shacks, a one room wooden shack, and various abandoned automobiles and debris. There was information in the briefing that Mendez and his girlfriend lived in the one room shack. Deputies opened a plywood door of the shack and pulled back a blanket to find Mendez raising a rifle at them. They yelled "gun" and 15 shots were fired severely injuring Mendez and his girlfriend. The task force did not obtain a search warrant to enter the third party's residence.

The 9th Circuit upheld a 4 million dollar verdict against the deputies, not because using deadly force was unreasonable, but because it was provoked by the deputies' failure to obtain a search warrant.

Discussion: The U.S. Supreme Court reversed holding that once force is deemed reasonable applying *Graham v. Connor* standards, it may not be found unreasonable by reference to some separate constitutional violation. The 9th Circuit rule that allowed consideration of whether the officers provoked a foreseeable result by a separate constitutional

violation is not proper when evaluating a use of force claim under the Fourth Amendment. "If there is no excessive force claim under *Graham*, there is no excessive force claim at all."

The purpose of the "provocation rule" was to hold officers liable for the foreseeable consequences of all of their constitutional violations. The Supreme Court disagreed and emphasized that there are remedies for the separate Fourth Amendment violation of failing to obtain a search warrant. The Fourth Amendment claim alleging excessive force is to be judged solely by the *Graham* standards.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Traffic Stop: U.S. v. Hill, 849 F3d 195 (4th Cir. 2017).

Issue: Was a 2012 traffic stop impermissibly extended under the standards announced in *Rodriguez v. U.S.*, 135 S. Ct. 1609 (2015)?

Holding: No, applying the legal standards controlling in 2012, the deputy diligently pursued the purpose of the stop during the thirty-three minute encounter.

Facts: A deputy stopped a vehicle for following too closely and began the process of issuing a warning ticket. During the process there were delays in checking the owner of the vehicle and getting identification information from the passenger. After seventeen minutes, the deputy returned the license and warning ticket to the driver and asked if the driver would continue to speak to him about inconsistencies in the stories of driver and passenger. Eventually the driver and passenger were released with no further charges. While reviewing video recordings of the stop, the deputy saw the passenger place a bag behind the patrol car's driver seat. A bag was located containing hydrochloride. The passenger contended the evidence should be suppressed because the duration of the stop was unreasonable under *Rodriguez*.

Discussion: The Fourth Circuit ruled that the deputy acted in accordance with the law as it existed in 2012 and under the good faith exception the evidence was admissible. Even prior to *Rodriguez*, the U.S. Supreme Court had held when a traffic stop strays outside its permissible scope or duration, the exclusionary rule would prevent the government from using the evidence obtained. Reviewing the audio and video of the stop the Court did not find the actions of the deputy were unreasonable. The record demonstrated the deputy continued to pursue activities related to the initial stop and continued issuing the warning ticket throughout the pre-ticket process. Although the deputy asked off-topic questions during this time, he did so while diligently attempting to: (1) issue a warning ticket; (2) validate lawful possession of the car; (3) identify driver and passenger and run a record check for outstanding warrants; and, (4) dispel suspicion that criminal activity was afoot after Defendants gave conflicting accounts about their travels.

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Illegal Arrest: Smith v. Munday, 848 F.3d 248 (4th Cir. 2017).

Issue: Is there sufficient probable cause to arrest a woman because her name matches the one given by an informant and she had a history of drug convictions without any other information?

Holding: No. The minimal record check by the officer raised merely suspicion and lacked any evidence to identify Defendant as the suspect.

Facts: A confidential informant purchased crack cocaine from a woman. He told officers the woman was a skinny black female whose name was April Smith. The informant did not provide any other information. Over a nine month period officers checked for black females named April Smith who lived nearby and located three with criminal records. The Defendant had prior convictions for selling crack cocaine. Based on that information, officers arrested the Defendant, a black female who weighed two hundred pounds on the date of the offense. The Defendant was held in custody for eighty days until the charges were dismissed. She filed a civil action against the officers.

Discussion: The Fourth Circuit reversed the District Court's dismissal of the lawsuit. The Court reasoned that even ignoring the weight difference, a criminal history, common race, common gender and common name is not enough to establish probable cause.

The officer failed to have the informant identify a photo of Defendant as the suspect, failed to tie the Defendant to residence where the drug sale took place, or review available video to identify the Defendant. There was no attempt to connect the Defendant to the crime and therefore no probable cause to arrest her. The warrant application was so lacking in probable cause that the officer affiant is not entitled to qualified immunity. The officers who served the warrant were dismissed from the case because they merely executed a facially valid warrant.

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NORTH CAROLINA COURT OF APPEALS

Probation Search: State v. Powell, 2017 N.C. App. LEXIS 375 (2017).

Issue: Can probation officers conduct a random search of supervised probationer's residence without any purpose directly related to the probation supervision?

Holding: No, G.S. 15A-1343(b)(13) requires some reasonable facts as to the purpose of a warrantless search of a probationer's residence beyond "in the interest of law enforcement."

Facts: State probation officers provided a U.S. Marshall's task force with the names of individuals who were on supervised probation in the county. The task force then conducted warrantless searches of residences with the State probation officers. The Defendant was on supervised probation and a

search of his residence revealed a firearm. The Defendant was selected at random and there was no evidence provided about the Defendant engaging in criminal activity or any activity which would violate the terms of his probation. The Defendant contended the completely random search violated State law and the Fourth Amendment.

Discussion: The Court of Appeals agreed and reversed the conviction. In 2009, the General Assembly amended G.S. 15A-1343(b)(13). The statute had permitted warrantless searches of supervised probationers' residences by probation officers as long as the search was "reasonably related" to probation supervision. The amendment changed the language to require that warrantless searches by probation officers be "directly related" to the probation supervision. The amendment was meant to place a higher burden on the State in attempting to justify a warrantless search of a probationer's home.

The State failed to present any evidence to justify the purpose of the warrantless search. The testimony was that the Defendant was randomly selected because he was on supervised probation. The statute requires the State present facts to show the probationer may be violating terms of his probation. In prior cases upholding probation searches there was evidence presented from informants or law enforcement that the probationer was engaged in criminal conduct. Random searches are not permitted under the statute or the Fourth Amendment.

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Curtilage Search: State v. Huddy, 2017 N.C. App. LEXIS 281 (2017).

Issue: Does an open car door at 11:00 a.m. in a backyard justify a search of the curtilage of a home?

Holding: No, neither the knock and talk doctrine nor the community caretaker doctrine permitted a warrantless search the home's curtilage.

Facts: At eleven o'clock in the morning a deputy was patrolling an area at risk for break-ins. He saw a parked vehicle with an open door at the end of a 150-yard driveway leading to the rear of a house. The deputy drove to the back of the driveway behind the vehicle and ran the license plate to find the registered owner's address did not match the location. He went to the front door and saw cobwebs around the door. He continued to check front and side windows for signs of a break-in. Then the Deputy opened the gate in an enclosed backyard and knocked on the back door. The Deputy smelled marijuana and obtained a search warrant resulting in the seizure of a large quantity of marijuana. The Defendant contended the warrantless search of his side and back yards was in violation of the Fourth Amendment.

Discussion: The Fourth Amendment protection applies to one's home and the "curtilage" which is the area immediately surrounding and associated with the home. Law enforcement cannot enter the curtilage without consent, a search warrant or exigent circumstances. The State argued the warrantless search was lawful based on the knock and talk doctrine and the community caretaker doctrine. The Court disagreed.

The knock and talk doctrine recognizes that curtilage does not include the part of a home where the public usually is allowed to approach such as a front door. Officers are allowed to knock at the front door to engage in consensual conversations with the homeowner. The knock and talk doctrine does not permit law enforcement to approach *any* exterior door. The deputy walked around the entire residence, ran the tag of a vehicle in the backyard and opened a gate in the backyard to knock on the back door. The deputy's warrantless search of the Defendant's curtilage was not a knock and talk.

The action of the deputy was not justified under the community caretaker doctrine which recognizes law enforcement may be required to help citizens or protect the public in emergencies. An open car door in the back of a driveway during the daytime without any other signs of a break-in was insufficient to invoke the doctrine.

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Assault on a Government Official: State v. Mylett, 2017 N.C. App. LEXIS 274 (2017).

Issue: Does assault on a government official requires proof that the defendant specifically intended to assault the officer?

Holding: No, assault on a government official is a general intent crime requiring that the defendant knew the individual was an officer discharging a duty of the office and the officer was assaulted.

Facts: The Defendant was intoxicated and fighting with individuals. When officers tried to separate the individuals the Defendant became combative and belligerent and attempted to spit on the individuals behind the officer. The spit landed on the officer's face and shirt. The Defendant was told to stop and spat two more times also striking the officer with spit. The Defendant contended he never intended to spit on the officer and the charge of assault on a government official should be dismissed.

Discussion: The elements of assault on a government official [14-33(c)(4)] are: (1) an assault; (2) on an officer; and, (3) when the officer is discharging or attempting to discharge a duty of their office. Defendant did spit on a person the Defendant knew was a law enforcement officer who was discharging a duty of his office. The elements were met in this case.

Note that malicious conduct by a prisoner [14-258.4] makes it a felony for a person in custody to willfully spit on a law enforcement officer. However, inadvertent conduct would not constitute an offense for that felony. The State must show the defendant acted knowingly and willfully in spitting at the officer.

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Admission of Photographs: State v. Little, 2017 N.C. App. LEXIS 279 (2017).

Issue: May photographs from Facebook and Instagram be introduced to illustrate the testimony of a witness?

Holding: Yes, if they are used by a witness to illustrate or explain anything that the witness can describe in words.

Facts: The defendant was charged with armed robbery of a motorcycle. The Defendant had tattoos on his hands and neck. Officers had gone on Facebook and Instagram and found pictures of the Defendant as well as the Defendant and a motorcycle. The photos were used to illustrate testimony of witnesses concerning the Defendant appearance and the type of motorcycle that was stolen. The Defendant contends the State failed to show the photos came from his Facebook or Instagram.

Discussion: The photographs in this case were introduced in evidence to assist the witnesses explain their descriptions of the Defendant and the motorcycle. The only question required to introduce those photos is whether it will help the witness to explain their testimony.

If the prosecution wanted to introduce the pictures to prove the Defendant was the one depicted in Facebook and Instagram with the stolen motorcycle then they would have to tie the Defendant to those specific sites during a relevant time period. The photos were properly introduced in evidence for illustration.

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Constructive Possession: State v. Rice, 798 S.E. 2d 432 (2017).

Issue: Does the offense of possession of stolen property require the defendant have exclusive possession of a vehicle in order to constructively possess the stolen property in the vehicle?

Holding: No, when a defendant does not have exclusive possession of a vehicle the State must show other incriminating evidence to show the defendant constructively possessed the stolen items.

Facts: During the time the Defendant was in possession of a van, it had been identified as leaving the scene of a break-in where a semi-automatic pistol had been stolen. The day after the break-in, officers asked Defendant and his passenger for permission to search the van. They found items in the van still in their original boxes. Defendant contended he had purchased the items but did not have a receipt. The Defendant then said he had to leave. The search of the van revealed a stolen Smith & Wesson handgun under the driver's seat and the stolen semi-automatic pistol under the passenger seat. The Defendant was convicted of possession of both stolen firearms. The Defendant contends he did not have exclusive control of the van and therefore cannot be in constructive possession of the stolen firearms.

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Discussion: Possession of stolen property can be proven by actual possession or constructive possession of the stolen items. A defendant constructively possesses an item when it is not on him, but in a place where the defendant has the intent and capability to maintain control and dominion over the item.

In this case, the van was in possession of both the Defendant and his passenger. Because the Defendant did not have exclusive possession of the van, the State was required to show additional incriminating evidence. Some evidence to show further incrimination may include: (1) defendant's clothing or personal items in proximity to stolen items; (2) defendant's control of the vehicle where stolen items located; (3) defendant's nervousness with officers; (4) facts showing defendant was in fear of officers finding stolen items; or, (5) stolen items in plain view of defendant.

In this case, the Defendant acknowledged items in the back of the van were his and not the passenger's. The Defendant then abruptly left leaving the passenger with the officers. The Defendant was in control of the van and had made arrangements to borrow it. Looking at all those circumstances, the Court found a jury could reasonably conclude the Defendant was in constructive possession of the stolen firearms.

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CASE PENDING BEFORE U.S. SUPREME COURT

16-402, Decision below Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016), *CERT.* GRANTED 6/5/2017

On June 5, 2017, the United States Supreme Court agreed to hear a case on whether or not the government must have a search warrant to obtain historical data from cellphone companies showing the customers movement over time.

QUESTION PRESENTED: In this case, as in thousands of cases each year, the government sought and obtained the historical cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government 'offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.' 18 U.S.C. § 2703(d).

As a result, the district court never made a probable cause finding before ordering Petitioner's service provider to disclose months' worth of Petitioner's cell phone location records. A divided panel of the Sixth Circuit held that there is no reasonable expectation of privacy in these location records, relying in large part on four-decade-old decisions of this Court. The Question Presented is: Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment."

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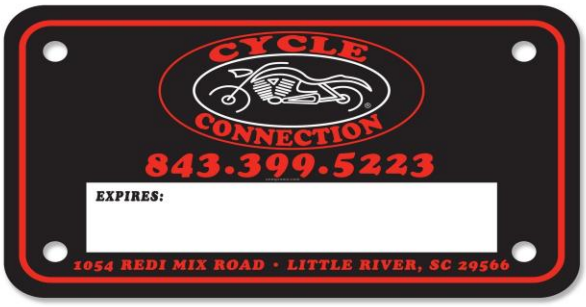
REMINDERS

South Carolina Dealer Temporary License Plates



South Carolina Law [Section 56-3-210(C)] permits dealers of new or used vehicles to issue temporary license plates with an expiration date not to exceed beyond 45 days from the date of sale. The temporary plates must contain: (1) the dealer's name, city, and phone number; or, (2) the dealer's name and computer website address. On the bottom of the plate there must be a rectangular box with a white background (not less than 6" wide and 2" high) and the box must contain the expiration date (numerical month, day, and year) written in permanent black marker. The temporary license plates must be made of heavy stock paper or plastic. North Carolina law requires that all vehicles display current license plates. Officers may stop vehicles displaying a dealer plate that is expired, appears to have been altered or displays no expiration date. The correct charge is G.S. 20-111(2) which is a Class 3 misdemeanor. If the dates appear valid then there is no reasonable suspicion to stop the vehicle simply because the plate is from a South Carolina dealer.

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Requesting Name or Identification from Passengers during Traffic Stops

Officers are permitted to request passenger identification during a lawful traffic stop. An officer may take the minimally intrusive step of requesting passenger identification for a possible check of the passenger's criminal history so long as the request does not prolong the seizure. U.S. v. Soriano-Jarquin, 492 F.3d 495 (4th Cir. 2007).

Officers cannot require a specific form of identification such as a driver's license. North Carolina law requires that only driver's must produce a driver's license when requested by a law enforcement officer.

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