CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue we review four cases from the United States Court of Appeals for the Fourth Circuit. The first two cases deal with issues related to reasonable searches and seizures under the 4th Amendment. A third case covers the issue of qualified immunity for officers in a civil law suit. The fourth case discusses interrogations, coercion, and *Miranda* waivers.

We will then examine two cases from the North Carolina Supreme Court dealing with issues that frequently arise in driving while impaired trials and investigations.

CASE BRIEFS:

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Fourth Amendment / Scope of the Stop: United States v. Hill, 852 F.3d 377 (4th Cir. 2017).

Issue: Did the officer exceed the reasonable time required to complete a traffic stop when he stopped writing citations in order to search a third law enforcement database while waiting for a K-9 unit to respond?

Holding: No, the officer did not act unreasonably because he was diligent in performing tasks incident to the initial purpose of the stop.

Facts: At approximately 6:01 p.m., officers initiated a traffic stop on a vehicle that had been speeding and crossing the center-line. After the officer activated his blue lights and siren, the car pulled into the driveway of a residence and the driver immediately stepped out of the car. The driver complied with officers' commands to get back into the vehicle and the officers approached and saw two occupants. Officer Taylor recognized the passenger, Hill, as the victim of a prior stabbing incident.

Officer Taylor returned to the patrol car, while Officer McClendon remained at the passenger-side of the vehicle. Officer Taylor put both occupants' names into the DMV and NCIC databases. NCIC returned an alert that both men were associated with drug trafficking and were "likely armed." At approximately 6:04 p.m., Officer Taylor began to write two citations for the driver and also requested a K-9 unit to respond. Officer Taylor paused writing the citations to enter the occupants' names into a third database with a lengthy search process and spent three to five minutes reviewing those search results. During this time, Officer McClendon remained at the passenger-side of the vehicle making small

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talk and asking whether the men had any drugs or firearms in the car. Hill finally responded that he had a firearm on his person and Officer McClendon shouted "gun." This alerted Officer Taylor, who returned to the vehicle to assist in recovering the firearm. The K-9 unit arrived just before Officer McClendon shouted "gun" but while the canine was still in the vehicle. Approximately 20 minutes had passed from the initiation of the traffic stop to the moment that Officer McClendon shouted "gun."

Discussion: For an officer to extend a traffic stop beyond the time reasonably required to complete tasks related to the purpose of the stop, the officer must either have reasonable suspicion of criminal activity or obtain consent from the individuals seized. Generally, a traffic stop should last no longer than necessary to complete the purpose of the stop, and courts will look at whether officers diligently pursued the investigation. Officers' actions during the stop must be "reasonably related" to the basis for the stop. Traffic stops pose a danger to officers and those officers may take certain steps to ensure that stop is completed safely, including searching databases to look for outstanding warrants or alerts regarding an individual's prior contacts with law enforcement. Officers may also ask occupants about unrelated topics, request a K-9 unit, or use other investigative techniques unrelated to the underlying traffic stop so long as these unrelated activities do not prolong the stop absent reasonable suspicion or consent.

Here, the officers acted with reasonable diligence in performing the tasks associated with the traffic stop. Officer Taylor briefly stopped writing the citations only to search a third computer database. Officer McClendon's conversations with the car's occupants took place while Officer Taylor was writing citations and reviewing database search results. The officers' actions were reasonable under the totality of the circumstances and did not extend the length of the encounter beyond the time necessary to complete the tasks associated with the stop.

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Fourth Amendment / Search and Seizure / Inventory Searches / Inevitable Discovery: United State v. Bullette, 854 F.3d 261 (4th Cir. 2017).

Issue: Were officers justified in conducting a warrantless search of a vehicle that they planned to impound?

Holding: Yes, it was reasonable for officers to conduct a warrantless search of a vehicle located on private property because the evidence would have inevitably been found during an inventory search after impoundment.

Facts: Drug Enforcement Agency ("DEA") agents were investigating a PCP conspiracy when local law enforcement officers responded to a house fire. The investigation of the fire revealed chemical

containers used in PCP manufacturing. Three months later, local law enforcement contacted the agents in regard to a call for service from neighbors about suspicious activity on that same property. The agents arrived on scene at approximately 3:00 a.m. Sheriff's deputies and DEA agents observed the Defendant's Pontiac. On the property in plain view, they observed evidence consistent with the manufacturing of PCP. The Pontiac had no visible license plate or registration tag. Inside the Pontiac, law enforcement officers saw a backpack, amber-colored liquid in bottles (believed to be PCP, subsequently found to be Pine-Sol), cellphones, and various documents in plain view. The DEA agents determined that they were going to impound the vehicle. They conducted an inventory search of the Pontiac on scene. As a result of that search they found a cell phone. Pursuant to a subsequent search warrant that cell phone showed texts related to drug activity.

Discussion: The exclusionary rule prevents the government from presenting evidence obtained as the result of an unlawful search; however, there are exceptions that would allow the evidence to be presented. Under the rule of inevitable discovery, evidence obtained without a warrant will not be suppressed if law enforcement would have eventually discovered the evidence by lawful means. These lawful means include subsequent inventory searches or some other search falling within the exception to the warrant requirement.

In this case, it was reasonable for the DEA agents to impound the vehicle. Despite the search taking place prior to impoundment, the Court held that the search was lawful because the same evidence would have been discovered through an inventory search after they impounded the vehicle.

Guidance: Please refer to CMPD Directive 500-004-C regarding our inventory search policy.

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Qualified Immunity / Arrest Warrants: **Safar v. Tingle, 859 F.3d 241 (4th Cir. 2017)**.

Issue: Was the officer entitled to qualified immunity when he failed to withdraw an unserved arrest warrant after learning that no crime had occurred?

Holding: Yes, the officer was dismissed from a lawsuit pursuant to qualified immunity because no duty existed requiring him to withdraw the arrest warrant.

Facts: In September 2012, Plaintiffs purchased flooring from Costco which was placed on sale a few weeks later. Sales personnel instructed the Plaintiffs to buy new flooring and then immediately return it using the old receipt in order to get a price adjustment. Plaintiffs followed these instructions and received a refund. A few hours later, Costco representatives called the police department and mistakenly reported a fraudulent return. An officer filed an affidavit with the magistrate who then issued arrest warrants for the two customers. The next day, Costco representatives contacted the

officer and notified her of the mistake. The officer did not withdraw her affidavit or the arrest warrants.

Eight months later, Plaintiff Eshow was pulled over for a traffic violation and was arrested on the outstanding warrant. The judge dismissed the charges against Eshow after hearing from the Costco representative and the prosecutor. Neither the officer nor prosecutor took any action to withdraw the arrest warrant for Plaintiff Safar. In late 2013, Plaintiff Safar was in the process of obtaining her American citizenship and was arrested out of state on the outstanding warrant. Three days later, she was extradited back to Virginia and a different prosecutor dismissed the charges against her.

Discussion: The Court uses a two-part test to determine whether the law suit should stand: (1) whether the officers violated a Constitutional right; or (2) whether that right was clearly established at the time of the alleged misconduct. In the two-part inquiry which can be answered in any order, if the Court answers "no" to either question, qualified immunity applies and the case is dismissed. For a right to be clearly established there must be an existing statute or case law that is specific to the facts of the case at hand.

In this case, the Court addressed the second part of the inquiry regarding whether there was a clearly established law at the time of the alleged violation. At the time of the officer's conduct there was no clearly established law placing an affirmative duty on officers to withdraw unserved arrest warrants after learning that no crime had actually occurred. The Court then went further to state that it was not, at this time, deciding whether that duty exists and therefore did not clearly establish an officer's duty under these circumstances.

Guidance: Although the Court did not decide to recognize an affirmative duty for officers to withdraw existing arrest warrants, the best practice is to inform the Assistant District Attorney of the newly obtained information so that they may make a decision about how to proceed.

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Interrogations / *Miranda* / Coercion: United Stated v. Giddins, 858 F.3d 870 (4th Cir. 2017).

Issue: Did officers violate a suspect's 5th Amendment rights during an interrogation where officers locked and blocked the doors and misled the suspect as to whether he was the subject of the investigation?

Holding: Yes, officers violated the 5th Amendment by coercing the suspect into waiving his *Miranda* rights.

Facts: Three bank robberies were committed in and around Baltimore over a three-day period. The Defendant was the suspect in the first robbery, and the Defendant's car was used in the other two robberies. Two female suspects were arrested, and one admitted that her boyfriend, Giddins, was

involved in the first robbery and had been present when the other two robberies were planned. Detectives obtained arrest warrants against Giddens and told him that he needed to come to police headquarters to get his car.

Upon arrival, detectives took the Defendant to a locked interview room. Because the car was used in a crime, they told him that he needed to sign a *Miranda* waiver and answer their questions. Detectives also told the Defendant that he was not in any trouble. After waiving his *Miranda* rights, the Defendant gave incriminating statements.

Discussion: The Court found that the Defendant's waiver was involuntary and coerced. The officers should have served the arrest warrants, advised the Defendant of his *Miranda* rights and then obtained a knowing and voluntary waiver.

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NORTH CAROLINA SUPREME COURT

Drive While Impaired / HGN / Rule 702 / Expert Testimony: State v. Godwin, 800 S.E.2d 47 (2017).

Issue: Must an officer be qualified as an expert before he may testify to the results of the Horizontal Gaze Nystagmus ("HGN") test?

Holding: No, an officer who has successfully completed training in the HGN test may testify to the results of that test without being qualified as an expert witness.

Facts: In January of 2011, CMPD Officer Kennerly initiated a traffic stop for speeding. Officer Kennerly detected a strong odor of alcohol and observed that the Defendant's eyes were red and glassy. Defendant admitted to drinking alcohol and Officer Kennerly had the Defendant perform the standardized field sobriety tests. The Defendant showed four out of six clues on the HGN test, and also exhibited multiple clues on the one-leg stand and walk-and-turn tests. Defendant was arrested for driving while impaired ("DWI") and had a breath alcohol concentration of 0.08.

Discussion: Officers may testify as to the HGN and other standardized field sobriety tests if they are certified by the National Highway Traffic Safety Administration ("NHTSA") and have the proper departmental training and experience.

Guidance: Officers should be sure to properly recite their training and experience on the record and to bring any relevant training certificates to court. Also, please make sure to show the court that you administered the tests in a manner consistent with your training.

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Fourth Amendment / Driving While Impaired / Warrantless Blood Draw: State v. Romano, 800 S.E.2d 644 (2017).

Issue: Did the officer violate the Fourth Amendment's protection against unreasonable searches when she took possession of a blood sample that was taken while the Defendant was unconscious?

Holding: Yes, the officer's actions violated the Constitution because she did not take the blood sample pursuant to a search warrant, consent, or exigent circumstances.

Facts: An officer responded to a call from dispatch regarding an impaired driver. Defendant was arrested for DWI and transported to the hospital because of his high level of intoxication. Defendant became combative while at the hospital and the medical staff decided to sedate him. A sergeant told a nurse that she would need a blood draw for law enforcement purposes, but Defendant had not been informed of his implied consent rights prior to his sedation. The nurse drew blood for medical purposes and drew extra blood for law enforcement purposes. The sergeant attempted to wake Defendant in order to get his consent; however she was unable to wake him and accepted the blood sample that the nurse had previously taken.

Discussion: In 2013 the Supreme Court of the United States held in *Missouri v. McNeely*, 569 U.S. 141 (2013), that, absent consent, officers must have exigent circumstances in order to conduct a warrantless blood draw from a person. In *Birchfield v. North Dakota*, 195 L. Ed. 2d 560 (2016), the Supreme Court found that drivers do not impliedly consent to blood draws on the basis that they have committed a crime.

At the time the blood draw was taken in this case, the sergeant relied on North Carolina General Statute § 20-16.2(b) which permitted law enforcement to direct the taking of a blood sample of an unconscious person who had committed an implied consent offense. The Court held that this statute was inconsistent with *McNeely* and *Birchfield* because it created a per se exigency exception to the warrant requirement and is unconstitutional under the Fourth Amendment.

REMINDERS

AUTHORITY TO ACT AS AGENT FORMS

Officers are reminded that the Authority to Act as Agent (ATAA) forms give officers the authority to enforce State trespass laws ONLY when ABSOLUTELY NO ONE is permitted to be on the property. Additionally, these forms do not give officers the authority to ban specific individuals from private property.

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