

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 1 of 7



### Contents

#### United States Supreme Court:

Fourth Amendment / Vehicle Exception to Warrant Requirement

#### United States Court of Appeals:

1. Fourth Amendment / Deadly Force / Qualified Immunity / Warning / Failure to Warn

2. Fourth Amendment / Deadly Force / Moving Vehicle

#### North Carolina Supreme Court:

1. Fourth Amendment / Duration of Traffic Stop / "Mission of the Stop"
2. Fourth Amendment / Requirements for Seizure of Person

#### Discussion: Criminal Summons vs. Arrest Warrant

**Forward:** In this Issue we review a case pending before the United States Supreme Court. Hopefully this case will clarify whether the automobile exception to the warrant requirement will extend to vehicles parked on private property close to a residence. In addition, we review two Fourth Circuit and two North Carolina Supreme Court cases addressing issues ranging from use of force to the proper duration of a traffic stop. Finally, we discuss the amendment to N. C. Gen. Stat. §15A-304(b) and its strong presumption in favor of issuing a criminal summons over an arrest warrant.

### CASE BRIEFS:

#### UNITED STATES SUPREME COURT

**Fourth Amendment/ Automobile Exception to Warrant Requirement:** *United States v. Collins*, Supreme Court Docket No. 16-1027. Oral Argument January 9, 2018.

**Issue:** Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

**Holding:** TBD.

**Facts:** Officer McCall observed the operator of a custom "stretched out" orange and black motorcycle commit a traffic violation. The operator failed to stop and sped away at a high rate of speed. A few weeks later Officer Rhodes observed an orange and black motorcycle speeding. Officer McCall attempted to stop the motorcycle but once again it sped away. Officer Rhodes' captured the license plate of the motorcycle on his car video camera. Officer Rhodes and Officer McCall compared their observations and after noting the distinct similarities of the operator and motorcycle, concluded the same operator and motorcycle eluded each officer. They eventually traced the license tag to Eric Jones who advised the officers that he sold the motorcycle to Ryan Collins. He also advised the officers that Collins knew that the motorcycle was stolen.

Later, Police received a call at the local DMV involving Collins. Officer Rhodes heard the call which identified Collins as one of the parties involved. Officer Rhodes responded to the DMV and met with Collins. Collins agreed to talk to Officer Rhodes and denied knowing anything about the motorcycle. Officer Rhodes pulled up Collins' Facebook page and observed pictures of what appeared to be the same make and model

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 2 of 7



of the stolen motorcycle. The motorcycle was parked in a residential driveway and only a few feet away from a residence. Officer Rhodes showed the photographs to Collins who denied any knowledge of the motorcycle or the location of the house depicted in the photographs. Later, an informant advised Officer Rhodes the location of the house depicted in the photograph that was posted on Collin's Facebook page. Officer Rhodes located the house and observed a motorcycle covered with a tarp. A portion of the wheel was exposed along with some distinctive chrome accents similar to the motorcycle that he tried to stop. Also, the motorcycle was the same unique length as the one he attempted to stop. Without obtaining a search warrant, Officer Rhodes entered the property, removed the tarp and recorded the VIN which checked back to be stolen. Officer Rhodes seized the motorcycle and arrested Collins for possession of stolen property.

Collins filed a motion to suppress asserting that Officer Rhodes conducted an illegal warrantless search which deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures. According to Collins, all evidence obtained by Officer Rhodes, including the VIN, should be suppressed. The State countered that the warrantless entry and search onto the property fell within the long recognized "automobile exception" to the general rule that all warrantless searches and seizures are per se unreasonable. The trial court denied Collin's Motion without specifically finding that it fell into one of the long recognized exceptions to the warrant requirement. Collins appealed to the Court of Appeals which upheld the search under the doctrine of exigent circumstances rather than under the automobile exception because other exigencies "existed aside from the inherent mobility of the motorcycle." Collins appealed this ruling to the United States Supreme Court which is set to hear oral argument on January 9, 2018.

**Discussion:** The key issue before the Supreme Court is whether it will distinguish the automobile exception based on whether the vehicle is located on a private driveway close to a residence versus a public highway or road.

[Return to Top](#)

### UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

**Fourth Amendment / Qualified Immunity / Deadly Force / Armed Subject / Failure to Warn:**  
[Hensley v Price, 2017 U.S. App. LEXIS 23258 \(4th Cir. Nov. 17, 2017\)](#)

**Issue:** Were Deputies justified in using deadly force against Hensley?

**Holding:** Based on the facts plead by the Plaintiff, a reasonable jury could find that the force was unreasonable under the Fourth Amendment.

**Facts:** Deputies responded to a domestic disturbance call at the Hensley residence. Hensley, along with his two daughters walked out of the residence and onto the front porch. The Deputies observed that Hensley was holding a handgun. A short struggle occurred between Hensley and his daughters during which Hensley struck his older daughter. Hensley then stepped off the front porch and walked toward the Deputies. He stopped, turned and looked back at his daughters while holding the handgun

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 3 of 7



with the barrel pointed at the ground. He then turned away from his daughters and back to the Deputies. He started to walk toward them holding the gun at his side with the muzzle pointed towards the ground. Neither the Deputies nor Hensley said anything. Hensley neither raised the gun toward the Deputies nor made any overt threats. The Deputies never ordered Hensley to stop advancing, to drop the gun or issued any warning. The Deputies shot and killed Hensley.

**Discussion:** This case is a civil action filed against the Deputies seeking damages in part for deprivation of Hensley's Fourth Amendment right to be free of an unreasonable seizure. (Excessive force) Prior to trial the Deputies filed a motion for summary judgment asserting that they were entitled to qualified immunity. Qualified Immunity is a defense available to police officers and other governmental officials when they are sued in a civil action for an alleged violation of a constitutional or federal right. Essentially it is a limited privilege providing immunity from suit rather than simply a defense to liability. Given the backdrop that Defendant's Motion for Summary Judgment must be viewed in a light favorable to the Plaintiff, the Deputies version of facts was given little or no weight. The trial judge denied the Deputies' motion for summary judgment and found that the facts plead by the Plaintiff – if true- could lead a jury to conclude that the Deputies used excessive force.

The Deputies appealed to the Fourth Circuit Court of Appeals which upheld the trial court's denial of qualified immunity. According to the Court, the "facts" outlined above if proven true would be sufficient for a reasonable jury to render a verdict of excessive force against the Deputies.

The Court noted that if the allegations plead by the Plaintiff are true, Hensley did not pose a threat of serious physical harm to either the Deputies or Hensley's family members. "The lawful possession of a firearm by a suspect at his home, without more, is an insufficient reason to justify the use of deadly force. Indeed, it is unreasonable to believe that a suspect poses a threat of serious physical harm, either to himself or to others merely because the suspect possesses a firearm." According to the Plaintiff, Hensley never raised or pointed the firearm at anyone and made no threatening statements and took no threatening actions to the Deputies. Moreover, the Deputies never warned or issued any commands to Hensley – in fact they said nothing to him. "Before an officer may use deadly force, he should give a warning if it is feasible."

[Return to Top](#)

### **Fourth Amendment / Qualified Immunity / Deadly Force / Moving Vehicle**

***Brown v. Elliot* 876 F. 3d 637 (Nov. 2017)**

**Issue:** Is there any controlling authority that clearly establishes that an officer must abstain from using deadly force when the suspect puts a vehicle in motion while the officer is leaning into it?

**Holding:** No. Deputy Elliot did not violate clearly established law when he discharged his firearm at Lawhorn while leaning into the window of a moving truck.

**Facts:** Deputies received a tip that Lawhorn would be transporting a large quantity of cocaine in a truck on a rural road in South Carolina. The informant also advised the Deputies that Lawhorn usually carried a gun when he transported narcotics. Deputies located the truck and conducted a traffic stop

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 4 of 7



after observing traffic violations. Lawhorn was in the front of the truck and seated as a passenger. As Deputy Elliot approached the passenger door, Lawhorn moved toward the driver's seat, pressed down on the accelerator and attempted to shift the truck into drive. The Deputies shouted "freeze" and "don't move." Deputy Elliot leaned inside the passenger side window in an attempt to grab Lawhorn. However, Lawhorn was able to put the truck in gear and, as the truck moved forward, Deputy Elliot fired one shot striking Lawhorn in the back killing him. Deputy Elliot testified that he feared not only for his safety but for the other deputies and the general public.

**Discussion:** This is another civil case reviewing whether a police officer is entitled to qualified immunity. Qualified immunity attaches if the officer did not deprive a person of a constitutional right or the officer's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The undisputed circumstances in this case are: Lawhorn's actions placed Deputy Elliot in danger; Deputy Elliot yelled "stop, stop"; Deputy Elliot's torso was inside the moving truck when he discharged his weapon killing Lawhorn; and the entire incident occurred within seconds. Here, the court focused on the second prong of qualified immunity and found that it was not clearly established that it was unlawful for Deputy Elliot to use deadly force under the circumstances confronting him. Since the Court determined the law was not clearly established there was no need to review whether Deputy Elliot deprived Lawhorn of his right to be free from an unreasonable seizure (excessive force) under the Fourth Amendment.

[Return to Top](#)

**Guidance:** This case does not endorse the tactic of reaching into a vehicle.

### NORTH CAROLINA SUPREME COURT

#### Fourth Amendment / Duration of Traffic Stop / Reasonable Suspicion.

[State v. Bullock, 2017 N.C. LEXIS 896 \(N.C. Nov. 3, 2017\)](#)

**Issue:** Did the officer unreasonably extend the duration of a traffic stop?

**Holding:** No, the officer did not unreasonably extend the duration of the traffic stop by asking the driver to step out of his vehicle and submit to a brief frisk before putting the driver in his squad car while he conducted a records check.

**Facts:** Officer McDonough stopped the defendant for traffic violations on I-85 in Durham. The violations, along with the preceding conversation that Officer McDonough engaged in with the defendant, were recorded on Officer's McDonough's DMVR. After asking for and receiving the subject's driver's license, Officer McDonough observed two cell phones in the car. Officer McDonough asked the defendant about his destination. The defendant's response was inconsistent and contradictory. After being advised that the car was a rental vehicle, Officer McDonough noted that the defendant's hand was shaking and that he was not listed as an authorized driver of the vehicle.

Officer McDonough told the defendant to exit his vehicle and asked for and received permission to conduct a "pat down" search before placing the subject in the front seat of his patrol car. While

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 5 of 7



conducting a records check, Officer McDonough had a conversation with the defendant and asked whether he would find illegal drugs in the car. The defendant denied the presence of drugs. Officer McDonough follows the defendant's denial with a request to search the car and the defendant replies that the officer can search the car but not his hoodie or bag. A second officer arrives and removes the bag and hoodie from the truck whereupon the defendant exclaims that the bag is not his and repeats he does not want it searched. Officer McDonough's drug dog hits on the bag which when opened contains a large amount of heroin.

The defendant was arrested and filed a motion to suppress the search alleging that Officer McDonough unlawfully extended the duration of the stop and therefore the search was impermissible. During the suppression hearing, the officer testified he was an experienced drug interdiction officer and that I-85 is a major thoroughfare for drug trafficking. In addition, he testified that he routinely conducted a record check of persons who commit traffic violations by inquiring into three separate data bases. The trial court denied the motion to suppress and upon appeal, the Court of Appeals overturned the trial court and in a split decision ruled that the officer improperly extended the duration of the traffic stop. The State appealed to the North Carolina Supreme Court.

**Discussion:** This case reviews the appropriate duration of a traffic stop as opposed to the reason for the initial stop. This case does not change the general rule that an officer cannot unreasonably extend the duration of a traffic stop: Once the mission of the stop has been completed the officer cannot extend the duration of the stop unless the person stopped consents or the officer develops additional reasonable suspicion that another crime has been committed.

What is unique about this case is the Court's discussion of what constitutes the "mission" of a vehicle stop and how the mission forecasts the appropriate or reasonable duration of the stop. The mission of the stop is not just issuing a citation. Instead, the mission of the stop includes conducting the stop in a manner that enhances the officer's safety. Since officer safety "stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete the mission." Here, ordering the defendant out of his car is justified by officer safety as it allowed Officer McDonough to observe the defendant's movements and demeanor. Likewise, conducting a brief pat down frisk for weapons before placing the defendant in his patrol car heightened Officer McDonough's safety as does conducting a records check. Officer McDonough's decision to engage in a conversation while waiting for the return of his record check(s), although not necessarily related to officer safety or the reason for the stop, did not extend the duration of the stop because the conversation occurred while he was waiting for a return on his records check.

The Court cautioned police that although officer safety is part of the mission of the stop, officer safety does not permit a wholesale extension of the stop for an indeterminate period of time. Asking the defendant to get out his car and conducting a pat down frisk before placing him in the patrol car were permissible actions because the time it took to conduct these activities did "not measurably extend the duration of the stop." Likewise, moving the defendant from his vehicle to the patrol car only negligibly (if at all) increased the duration since the officer was permitted to conduct a background check regardless of the location of the defendant.



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 6 of 7



Officer McDonough's detention of the defendant until his drug dog sniffed the hoodie and package did not unlawfully extend the stop. The detention was lawful not because it was related to officer safety, but because Officer McDonough had developed reasonable suspicion that the hoodie and package may contain drugs by the time the records check was completed. The source of the reasonable suspicion was the inconsistent and conflicting statements made by the defendant about his destination. The inconsistencies coupled with the defendant's apparent nervousness and possession of two cell phones (Officer McDonough testified that based on his training and experience drug dealers often carried multiple cell phones) provided Officer McDonough with reasonable suspicion to detain the defendant while the drug dog sniffed the hoodie and bag.

[Return to Top](#)

### **Fourth Amendment / Seizure of Person**

*State v. Wilson*, 2017 N.C. LEXIS 1014 (Dec. 22, 2017)

**Issue:** Did Officer Johnston illegally seize the defendant?

**Holding:** No, a reasonable person would not have felt compelled to stop to talk to Officer Johnson.

**Facts:** Officer Johnson received an anonymous tip that Wilson had an outstanding arrest warrant and was at a particular residence. As Officer Johnson was parking his patrol car across the street from the residence, a pickup truck backed out of the driveway and onto the street. Officer Johnson did not recognize the driver. Officer Johnson stepped into the street and waved his hands back and forth above his shoulders for the purpose of questioning the driver if knew where he could find Wilson. He was in uniform and did not have his weapon drawn. His emergency equipment was not activated. Neither Officer Johnson nor his vehicle was blocking the driver's path. The driver stopped and Officer Johnson upon approaching the driver smelled an alcoholic beverage emanating from the cab of the truck. The driver admitted he had been drinking, but could not remember how many drinks he consumed. Officer Johnson placed the driver under arrest for driving while impaired. The defendant filed a motion to suppress any evidence related to what he contended was an illegal stop. The trial court denied the motion to suppress and the defendant appealed to the North Carolina Court of Appeals. In a split decision, North Carolina Court of Appeals upheld the trial court's denial of the defendant's motion to suppress. The defendant appealed the split decision of the North Carolina Court of Appeals to the North Carolina Supreme Court which upheld the trial judge's decision that Officer Johnson did not illegally seize the defendant.

**Discussion:** Officer Johnson had neither reasonable suspicion nor probable cause to stop the defendant as he pulled into the street. As such, the focus of this case is whether Officer Johnson's actions rose to the level of a seizure under the Fourth Amendment. The test to determine if a person is seized under the Fourth Amendment is whether, taking into account all of the circumstances surrounding the encounter, the officer's conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Here, the defendant argued that the seizure was unlawful because Officer Johnson approached him and was waving his arms in the air. The court disagreed and noted that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions." Rather, a seizure occurs "only when the officer, by means of physical force or show of authority, has in some way restrained

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

December 2017

Volume 35, Issue 5

Page 7 of 7



the liberty of a citizen." In this case, Officer Johnson did not have his weapon drawn, he did not issue any commands to stop, he did not block the defendant's travel with either his person or his patrol vehicle and he did not have his emergency equipment activated.

Finally, the defendant argued that Officer's Johnson's use of his hands was the equivalent of a police order to control traffic and therefore he felt compelled by Officer Johnson to stop otherwise he would be in violation of the law. The Court disagreed and reasoned that "Officer Johnson's hand motion was not related to the control of traffic nor were there any circumstances which would indicate to a reasonable person that Officer Johnson was acting as a traffic control officer." In addition, there was no roadblock, no blue lights activated, no evidence of any cones, construction, a visible accident, or any other indication that Officer's Johnson's motions were related to the control of traffic. Therefore, Officer Johnson's action of waving his hands above his head would not indicate to a reasonable person they were being compelled to stop.

[Return to Top](#)

### DISCUSSION

#### Summons vs. Arrest Warrant

By now all of us are aware that the North Carolina General Assembly amended G. S. §15A-304(b) which significantly curtailed when an arrest warrant may be issued. Senate Bill 384 was initially filed on March 23, 2017, and was entitled "The Pharmacy Patient Fair Practices Act" which contained no amendments to the process of obtaining arrest warrants. However, a substitute Bill was introduced entitled "Criminal Law Changes" which included the now controversial language favoring the issuance of a criminal summons over an arrest warrant. Both the Entitlement Section of the Bill and the Section heading refer to the Amendment as relating to "Citizen's Warrants." However, the language favoring a criminal summons was inserted into 15A-304(b) that provides the procedure for issuing **all** arrest warrants. There was absolutely no reference to "Citizen's Warrants" in the language that was adopted. Similarly, no separate section was created entitled "Citizen's Warrants" thereby limiting the amendment to only citizens obtaining warrants.

#### FAQs about the new law.

- Are you kidding me? *No.*
- Doesn't this only apply to Citizens who want to obtain an arrest warrant? *See above*
- What are we doing about it? *We are looking at the feasibility of seeking an amendment.*
- What can I do? *If you find a summons being issued when you think there are grounds for an arrest warrant or the issuance of a summons jeopardizes public safety please document and forward to the Police Attorneys' Office.*
- Does this affect my ability to make a warrantless arrest upon probable cause that a felony has occurred? *No. Officers may make a warrantless arrest for a felony upon probable cause.*
- Does this affect my ability to conduct a custodial interrogation? *Not if the officer makes a warrantless arrest based on probable cause that the person committed a felony or one of misdemeanor exceptions.*