CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

February 2018 **Volume 36, Issue 1** **Page 1 of 6**

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Forward: In this Issue we review the concept of probable cause by way of a 2018 U.S. Supreme Court opinion. We also discuss a N.C. Court of Appeals decision about the "private-search doctrine." The second half of this Issue includes a refresher on the law of discovery in North Carolina Superior Court, a note about a new motor vehicle law taking effect March 1st, and reminders about the city ordinance governing towing in private lots and misdemeanor larceny versus concealment of merchandise.

CASE BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Probable Cause:
***District of Columbia v. Wesby,* Supreme Court Docket No. 15-1485. Decided January 22, 2018.**

Issue: Whether the officers had probable cause to arrest the partygoers and whether the officers were entitled to qualified immunity.

Holding: Based on the totality of the circumstances, the officers had probable cause to arrest the partygoers. Also, the officers were entitled to qualified immunity.

Facts: Officers received a complaint about loud music and illegal activities at a vacant house. The caller told police that the house had been vacant for months. Upon arrival, several neighbors confirmed that the house should be unoccupied. Officers heard loud music playing inside. When they knocked on the door, they saw a man look out a window and run upstairs. Another partygoer opened the door and officers immediately observed a house "in disarray" that looked like "a vacant property." Officers smelled marijuana and saw beer bottles and cups of liquor on the floor. The only furniture located downstairs was a few padded metal chairs. The Supreme Court dubbed the living room "a makeshift strip club" with "several women wearing only bras and thongs, with cash tucked into their garter belts." Upon seeing officers, many partygoers scattered to other parts of the house. According to Justice Thomas, the officers found "more debauchery" upstairs, including a mattress on the floor (the only mattress in the house), some lit candles, condom wrappers, and naked partygoers. Others were hiding in the closet and bathroom. Officers interviewed all 21 partygoers and were given various answers about what type of party it was and who invited them. Some claimed it was a bachelor party, but no such bachelor could be found. Two people said that "Peaches" or "Tasty" was renting the house and had given them

permission to be there. Yet, Peaches and/or Tasty were nowhere to be found. Eventually, a woman claiming to be Peaches communicated with officers via telephone. She refused to come to the house to speak with police, but insisted that she was renting the house, had just left to go to the store, and that she had given everyone permission to be there. To explain the condition of the house, Peaches claimed the homeowner was fixing up the house for her, but refused to give that person's name and hung up. On a subsequent call, she admitted that she did not have permission to use the house.

Officers contacted the homeowner and he confirmed that he did not give anyone permission to be in the house. Officers arrested all 21 partygoers for unlawful entry. A group of the partygoers sued D.C. and five of the arresting officers. Their claims were all based on the premise that the officers did not have probable cause to arrest them.

Discussion: The crime in this case was "Unlawful Entry" in the District of Columbia. Essentially, the three elements that needed to be satisfied were: (1) entry by the partygoers, (2) against the will of the owner, and (3) that the partygoers knew or should have known that their entry was against the will of the owner. The first two elements were easily met. But because the partygoers claimed they were invited, the third element was the subject of contention. The lower court found in favor of the partygoers. However, the Supreme Court ultimately decided that, considering the totality of the circumstances, the officers made an entirely reasonable inference that the partygoers knew they were not invited.

While some partygoers contend that Peaches gave them permission to be there and they could not have known that Peaches was not in a position to give them such permission, the Court points out that the totality of the circumstances could lead police to a different conclusion. Proper things for the officers to consider here were: the "near-barren" condition of the house; the activities officers observed in the house; the inconsistent and implausible responses of partygoers to questions about who invited them and for what purpose; the running and hiding of many partygoers upon seeing police; and the lies told on the telephone by a nervous, agitated and evasive Peaches. According to the Court, the officers were not required to negate every possible explanation provided by the partygoers in light of the other compelling evidence that would, when viewed together instead of independently, amount to probable cause.

Some excerpts from this Opinion that serve as a refresher on the concept of probable cause:
► To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, quoting *Ornelas v. U.S.*
► Because probable cause "deals with probabilities and depends on the totality of the circumstances," it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*
► Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common sense conclusions about human behavior.'" *Gates*, quoting *U.S. v. Cortez.*

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Private-Search Doctrine/Digital Evidence:
***State v. Terrell,* NC Court of Appeals Docket No. COA17-268**
Decided February 6, 2018.

We will be watching this recent case decided by the NC Court of Appeals. It was a 2-1 decision that may be reviewed by the NC Supreme Court.

Issue: Did the scope of the detective's warrantless search of a USB flash drive exceed that which is permissible under the private-search doctrine?

Holding: Yes, the detective exceeded the permissible scope of a search conducted under the private-search doctrine; a USB flash drive should not be viewed as a "single container."

Facts: In *Terrell*, defendant's girlfriend was looking at contents on a USB flash drive that she found in Terrell's briefcase. She came across a photo of her 9-year-old granddaughter depicted without a shirt. She gave the flash drive to police and told them about the photo.

A detective examined the flash drive without a warrant. While looking for the single image he was told about, he saw two other suspected images of child pornography on the flash drive. Defendant's girlfriend never saw those images and only told police about the single image of her granddaughter. Based on what the detective saw, he obtained a search warrant to have the flash drive forensically examined; the result was that several more images of other victims were detected that had been previously "deleted." At trial, the defendant moved to suppress the contents of the flash drive, arguing that the search warrant was based on evidence illegally obtained during the detective's warrantless search. The trial judge denied that motion and allowed the evidence obtained by the search warrant to be used at trial. The defendant was convicted and appealed.

Discussion: The search warrant and the "private-search doctrine" were at issue on appeal. The doctrine, established by the U.S. Supreme Court in *U.S. v Jacobson*, 466 U.S. 109 (1984), holds that the Fourth Amendment is not implicated by law enforcement's inspection of private effects when that inspection follows a private party's search and does not exceed its scope.

In *Terrell*, the defendant argued that when the detective looked at more than the single photo, without a warrant, he exceeded his authority under the Fourth Amendment. The State responded by citing a 2007 NC case in which a search of a VHS tape -- where police viewed the entire tape -- was upheld even though the private party had only viewed part of the footage. In that case, the Court analogized the videotape to a single container that was first opened by a private party and then handed over to law enforcement for a valid search of the entire container. Thus, the State argued that the *Terrell* Court should view the flash drive as a single container.

The NC Court of Appeals sided with the defendant. The Court did not analogize a flash drive to a

VHS tape, instead saying that the flash drive should not be viewed as a "single container" for Fourth Amendment purposes. Therefore, the Court found that the detective's warrantless search exceeded its lawful scope.

The Court remanded the case to the trial judge to determine whether the trial judge would have determined that the search warrant was supported by probable cause without the tainted evidence obtained during the unlawful search.

For now, a flash drive (or other similar digital evidence) should not be viewed as a single container for purposes of the private-search doctrine and the Fourth Amendment. It is quite possible that the NC Supreme Court will weigh in on this case. We'll keep you updated.

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DISCUSSION:
Discovery in Superior Court Criminal Cases

All CMPD employees should be aware of the Department's obligations under state law regarding discovery in superior court criminal matters. These laws are not new.

The State must make available to a defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant. Pursuant to N.C.G.S. 15A-903:

> […]
> *(a)…(1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.*
> *a. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.*
> *b. The term "prosecutor's office" refers to the office of the prosecuting attorney.*
> *b1. The term "investigatory agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation of the crimes committed or the prosecution of the defendant.*
> *c. Oral statements shall be in written or recorded form, except that*

oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness.

d. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

[…]

(c) On a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a). Investigatory agencies that obtain information and materials listed in subdivision (1) of subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for disclosure to the defendant.

[…]

When should I give required materials to the DA?

A "timely basis" should be read to mean that everything in existence at the time of papering should be given to the prosecutor during papering. Remember, CMPD Directive 900-013 requires officers to paper the case with the DA within 14 calendar days of date of arrest. As the case progresses beyond the papering date, anything later created or otherwise coming into the possession of the police department should be given to the prosecutor immediately.

What happens if I do not comply with the law?

Any person who willfully omits or misrepresents evidence or information required to be disclosed as noted in the discovery statute above is guilty of a Class H felony. Even if the omission or misrepresentation is not willful, the Court may - and likely will - still sanction the State. This could mean sanctions on the individuals involved, refusal to allow the prosecutor to introduce certain evidence to the jury, the jury being informed of the discovery violation and person(s) responsible for the violation, outright dismissal of the case, or any other relief the judge deems appropriate.

Isn't there an analysis to be done under *Brady v. Maryland*, 373 U.S. 83 (1963), before a determination can be made as to whether something is discoverable?

Not for cases within the original jurisdiction of North Carolina Superior Court. The General Assembly elected to provide **more** discovery rights to the defendant than might be provided under *Brady*.

Anyone who has a question about the discovery laws should consult with a Police Attorney.

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NEW LAW:
MV Backup Lamps

Effective March 1, 2018, N.C.G.S. 20-129 will have a new section: *(h) Backup Lamps. -- Every motor vehicle originally equipped with white backup lamps shall have those lamps in operating condition.* This offense is an infraction and is waivable as an improper vehicle equipment offense (as such, it requires an additional $50 improper equipment fee). The offense code will be 4487.

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REMINDER:
TOWING & BOOTING FOR BUSINESSES / PRIVATE LOTS

The relevant City Ordinance can be found here: Article XI. – Towing and Booting Businesses. Pursuant to Sec. 6-563, signs are required to be posted before any towing/booting can occur. Below you will find examples of signage that meets the **minimum required** size, wording and font size requirements of the ordinance. See Sec. 6-563 for more information.

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REMINDER:
MISDEMEANOR LARCENY VS. CONCEALMENT

Please remember that if an officer has probable cause to believe a suspect committed concealment of merchandise outside of the officer's presence, the officer may: 1) make a warrantless arrest; 2) issue a criminal citation; or, 3) refer the complainant to the Magistrate's Office. When an officer has probable cause to believe a suspect committed misdemeanor larceny outside of the officer's presence, the officer may: 1) issue a criminal citation; or, 2) refer the complainant to the Magistrate's Office. An officer cannot make a warrantless arrest for misdemeanor larceny that occurs outside of the officer's presence unless the situation falls within one of the exceptions in G.S. 15A-401(b)(2) – i.e. the suspect will not be apprehended unless arrested immediately, or the suspect may cause physical injury to himself or others, or damage to property unless arrested immediately.

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