CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Cases reviewed in this Issue include: a United States Supreme Court case explaining the "clearly established law" standard necessary before officers are personally liable for use of excessive force. A case that was decided by the Fourth Circuit determining whether the evidence was sufficient to extend a completed traffic stop. For the first time, the North Carolina Supreme Court decided whether a police officer can sue his employer for failing to follow the Police Department Directives in the promotional process. The North Carolina Court of Appeals upheld combining retail banning and misdemeanor larceny for felony breaking or entering and larceny convictions. Finally a list of paintball charging options is provided.

CASE BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/ Use of Force/Qualified Immunity:
Kisela v. Hughes 138 S. Ct. 1148 (2018)

Issue: At the time of the shooting of an erratic woman with a knife, was the officer on notice that the use of force in shooting her was against clearly established law?

Holding: No, the law was not clearly established at the time of the shooting. A case against an officer for excessive use of force will be dismissed unless a Plaintiff can show a statute or case(s) with similar facts that let the officer know that the use of force was clearly unconstitutional.

Facts: Tucson Arizona police responded to a call that a woman was acting erratic with a knife. When officers arrived a woman was standing next to a car separated from the officers by a gated chain link fence. The suspect emerged from the nearby house carrying a large knife at her side. Officers ordered her twice to drop the knife. The suspect continued to walk towards the other woman disregarding the commands of officers. When she was within six feet of the woman, an officer shot the suspect four times resulting in non-life threatening injuries. Less than a minute had elapsed between the officers' arrival and shots being fired.

The officer was sued for use of excessive force in violation of the Fourth Amendment under 42 U.S.C. § 1983. The District Court dismissed the case against the officer based on qualified immunity and the 9th Circuit Court of Appeals reversed finding the law was clearly established that the use of force was unconstitutional.

The United States Supreme Court emphasized once again that claims will not proceed against officers unless the evidence shows that the officer was plainly incompetent or knowingly violated clearly established law. The cases relied upon by the 9th Circuit Court of Appeals did not show that the law was clearly established.

Discussion: CMPD Officers are responsible for knowing North Carolina statutes regarding the use of force and case law from the U.S. Supreme Court, Fourth Circuit Court of Appeals and the North Carolina Supreme Court that deal with lawful and unlawful uses of force. A Plaintiff must show a statute or case that put officers on notice that the use of force that was used in their particular case was clearly unlawful. A Plaintiff cannot simply state the force was unreasonable, but rather, must point to a similar fact situation where a court found the officers use of force was unlawful**.**

The 9th Circuit Court of Appeals relied on three cases that they stated put the officer on notice, one of which occurred after the current case. The U.S. Supreme Court held it was improper to consider any cases after the fact because officers are not expected to guess what future cases may hold. The other two cases were not factually similar to the events facing the officer in this case. The lack of cases similar to what confronted officers in this case requires the case be dismissed against the officer based on qualified immunity.

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Stored Communications Act 18 U.S.C. § 2701 *et seq.*:
U.S. v. Microsoft, 200 L. Ed. 2d 610 (2018)

Issue: Is Microsoft required to comply with a search warrant pursuant to the Stored Communications Act for e-mail stored in a facility outside of the United States?

Holding: On March 23, 2018**,** Congress amended the Stored Communications Act to make it clear that a provider must comply with the Act for records within the provider's possession, custody or control, regardless of the location of stored information.

Facts: In December 2013, Microsoft was served by federal agents with a search warrant under 18 U.S.C. § 2703 requiring Microsoft to disclose all e-mails associated with an account of one its customers. Microsoft refused because the contents of the e-mails were stored in a Microsoft datacenter in Dublin, Ireland outside of the territorial application of the Stored Communications Act. The District Court in 2016, held Microsoft in civil contempt for failure to comply with the search warrant, a decision which was reversed by the 2nd Circuit Court of Appeals when the search warrant was quashed as unauthorized. In 2018, the U.S. Supreme Court was preparing to hear the issue when Congress amended the law, and federal agents issued a new search warrant under the amendment, making the issue moot.

Discussion: On March 23, 2018, Congress enacted and the President signed into law the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), as part of the Consolidated Appropriations Act, 2018, Pub. L. 115-141. The CLOUD Act amends the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*,

by adding the following provision:

> A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States. CLOUD Act §103(a)(1).

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4TH CIRCUIT COURT OF APPEALS

Traffic Stop/Unlawful Extension of Stop
United States v. Bowman, 884 F.3d 200 (4th Cir. 2018)

Issue: Did the trooper unjustifiably prolong the traffic stop?

Holding: Yes, the traffic stop was complete when the trooper asked the Defendant to "hang tight" in his patrol car while the officer talked to the passenger without consent or reasonable suspicion to prolong the stop.

Facts: A North Carolina trooper with the drug interdiction unit was given by DEA a license plate, number, make and model of a vehicle whose occupants were suspected of transporting methamphetamine. At 3:40 a.m., the trooper observed the vehicle and followed it looking for a traffic violation. The trooper eventually issued a warning ticket to the driver and returned his license and registration as the defendant was sitting in the patrol car. The trooper observed both the driver and passenger were extremely nervous and gave inconsistent stories about where they had been. The trooper asked the defendant to "hang tight right there, ok" in his patrol car while he talked again to the passenger. A K-9 officer was called and fifty grams of methamphetamine was located. The defendant contended the stop was extended without consent or reasonable suspicion and the drugs should be suppressed. The 4th Circuit agreed.

Discussion: The U.S. Supreme Court has held the Fourth Amendment is violated when officers extend the time needed to complete tasks related to a traffic stop unless the officer receives consent or develops reasonable suspicion of a separate crime. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

The 4th Circuit had previously ruled that a twenty(20) minute time period to check national, state and local databases with the names of the driver and passenger was reasonably required to complete the mission of a traffic stop. *United States v. Hill*, 852 F.3d 377 (4th Cir. 2017).

In this case, the Court held the defendant did not consent to stay in the trooper's car. Nor did the factors listed by the trooper establish reasonable suspicion. The Court held "a driver's nervousness is not a particularly good indicator of criminal activity because everyone is nervous when interacting with

the police." In addition, video revealed the driver was calm and cooperative even though the trooper testified the driver's hands were trembling. The defendant had told the trooper the address they were coming from was entered in his vehicle's GPS and he did not know the address. The trooper never checked the GPS. The defendant told the trooper he was unemployed and had purchased the vehicle on Craigslist where he had recently purchased several vehicles. The court contended these factors were "vaguely suspicious." The trooper failed to give a sufficient explanation to show a combination of totally innocent factors combined to form reasonable suspicion.

The government agreed the DEA tip should not be considered in any way in the Court's legal analysis because the subjective intent of the trooper was not relevant to the stop.

Officers are reminded that such information should be included in their report as it is discoverable information to be revealed to the defense. See: https://nccriminallaw.sog.unc.edu/shhhh-whisper-stops-and-u-s-v-bowman/.

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Prior Bad Acts of Officer/Use of Force
United States v. Cowden, 882 F.3d 464 (4th Cir. 2018)

Issue: Can evidence of lieutenant's prior uses of excessive force be admitted against him in a federal criminal prosecution for excessive use of force under 18 U.S.C. § 242?

Holding: Yes, the prior bad acts were introduced to prove the officer did not commit the crime charged in the indictment by either accident or mistake.

Facts: The defendant was charged under 18 U.S.C. § 242 making it a federal crime for government officers to willfully deprive a person of their constitutional rights. The defendant, a former lieutenant with the Hancock County, West Virginia Sheriff's Department, was processing an inmate who had resisted a trooper. The lieutenant said the inmate was "not going to act that way with us, this is our house, play by our rules." The inmate arrived handcuffed escorted by four officers and was said to be loud and drunk, but not threatening. When the inmate tried to pull away the lieutenant threw him against the wall of an elevator, pulled his head away from the wall and slammed his face and head back into the wall. The inmate was then struck in the back of his head and knocked into the corner of the elevator while the lieutenant yelled at him about resisting officers. Other officers stepped in and told the lieutenant to back off.

Two incidents from the previous two years were introduced into evidence. In the first incident, the lieutenant without warning or provocation struck an individual in the nose causing bleeding and was told to back off by other officers. Another incident involved punching an individual in the head and throwing them to the ground while the lieutenant stated "you need to learn to show respect." The 4th Circuit ruled the prior two incidents were proper for the jury to consider.

Discussion*:* Generally prior bad acts would not be admissible to establish an officer's bad character.

The evidence may be admitted however, to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In this case, the prior uses of force were sufficiently similar to the charged offense to be relevant to show lieutenant's use of force in circumstances where other officers were not actually threatened when the lieutenant felt disrespected. The lieutenant testified he did not intend to punish the inmate. The prior acts were relevant to show intent, and lack of accident. The fact the evidence was prejudicial to the lieutenant did not make the incidents inadmissible. The probative value outweighed any possible unfair prejudice.

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NORTH CAROLINA SUPREME COURT

N.C. Constitutional Violation/Failing to Follow Department Promotion Policy
Tully v. City of Wilmington, 810 S.E. 2d 208 (2018)

Issue: Did a Wilmington police officer state a valid claim under the North Carolina Constitution against his employer for failing to follow their own promotional process policy?

Holding: Yes, the officer is entitled to a non-arbitrary, non-capricious promotional process and it is inherently arbitrary for the Department to establish promotional policies and procedures and utterly fail to follow them.

Facts: A Wilmington police officer took a written exam for the sergeant's promotional process and received a failing grade. When the officer reviewed the official exam answers he discovered the answers were based on outdated law. He filed an internal grievance and was informed "the test answers were not a grievable item" and there was nothing that could be done. The Police Department Directive allowed promotional candidates to appeal any portion of the selection process as a grievance. The officer filed suit alleging that failure to allow his grievance denied him the "enjoyment of the fruits of his own labor" contrary to Article 1 Section 1 of the North Carolina Constitution. The Court held the allegation that the City of Wilmington acted in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place was a proper claim.

Discussion: To state a direct North Carolina constitutional claim based on the promotional process a public employee must show there is no other state law remedy and establish three additional elements. First, there is a clear rule or policy regarding the employment promotional process. Second, the employer violated that policy. Third, the employee was injured as a result of that violation.

Here, the officer first alleges there was a clear written directive allowing a grievance related to the promotional selection process. Second, he alleges the City of Wilmington arbitrarily denied his grievance. Third, the officer alleged he was denied a fair opportunity to proceed to the next stage because the examination defects were never addressed. The lawsuit was allowed to continue and the Court did not give an opinion as to the ultimate result of the claim only that it would not be dismissed at that stage.

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Constructive Possession of Property
State v. Chekanow, 809 S.E. 2d 546 (2018)

Issue: What proof is necessary to show defendant constructively possessed marijuana plants growing in a remote part of property owned and occupied by the Defendant?

Holding: In addition to ownership, the State must show other incriminating evidence demonstrating the defendant had control over the property and contraband.

Facts: Troopers in a patrol helicopter observed marijuana plants growing on a three-acre parcel of land owned by the defendant. The troopers observed the defendant on her front porch making an obscene gesture at the helicopter. When troopers arrived at the property the defendant was attempting to leave. The defendant gave consent to search and the troopers located twenty two (22) marijuana plants growing on a fenced-in one half acre portion of defendant's property. Access to the fenced-in area was limited to a gate adjacent to defendant's yard. From the helicopter troopers had observed that a trail had been worn down from the residence to the plants. The plants were two hundred (200) feet from the defendant's residence. Troopers found a shovel with dirt similar to the dirt at the base of the marijuana plants and different from other dirt in defendant's garden. During the search, no marijuana or related paraphernalia was found in the home or outbuildings. Defendant maintained she had no knowledge of the marijuana plants. The defendant was convicted and the conviction was overturned by the Court of Appeals which held the evidence presented created only an "inference" of constructive possession and failed to show defendant was aware of, and exercised control over the marijuana. The North Carolina Supreme Court reversed finding the evidence sufficient to show constructive possession of the marijuana plants.

Discussion: A defendant constructively possesses contraband when they do not have actual possession of the contraband but have "the intent and capability to maintain control and dominion over it." The defendant may have the power to control either alone or jointly with others. When there is joint occupancy of property, ownership alone does not establish constructive possession. There must be some additional connection linking the defendant to the contraband. Looking at all of the evidence presented, the State had shown sufficient evidence of constructive possession beyond simple ownership. Evidence sufficient to show control over marijuana plants included: proximity to residence; path from residence to marijuana; shovel with similar dirt at base of marijuana; defendant's "unfortunate gesture" to Patrol helicopter; and, her attempt to leave property after helicopter flew over her land.

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Self-Defense/Stand Your Ground on Public Street
State v. Lee, 2018 N.C. LEXIS 221 (2018)

Issue: Does a person who is justified in using deadly force have a duty to retreat when on a public street?

Holding: No, under North Carolina law a person does not have a duty to retreat, but may stand their ground on a public street.

Facts: Defendant claimed he observed Walker and Epps arguing in the street near his house that was escalating so the defendant grabbed his gun and walked toward the street. He observed Walker punch Epps in the face. Epps took a gun he was holding behind his back and shot Walker at close range in the stomach and continued to shoot as Walker attempted to flee. Epps then turned and pointed the gun at the defendant who shot and killed Epps. The defendant contended he acted in self-defense. He was charged with first degree murder and the State argued the defendant should have retreated and run away when he saw the fight turn deadly. The defendant claimed he had the right to stand his ground and had no duty to retreat. The Court of Appeals affirmed the defendant's conviction for second degree murder holding the law does not recognize the defendant's right to stand his ground on a public street. The North Carolina Supreme Court reversed holding General Statute §14-51.3 recognizes a person does not have a duty to retreat from the use of deadly force by another as long as they are in a place they have a lawful right to be including a public street.

Discussion: Under General Statute § 14-51.3 there is no duty to retreat in any place the defendant has a lawful right to be:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

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NORTH CAROLINA COURT OF APPEALS

Banning/Felony Breaking or Entering and Larceny
State v. Allen, 2018 N.C. App. LEXIS 221 (2018)

Issue: When a person who has been previously banned from a store returns and steals items what are the appropriate charges?

Holding: Felony breaking or entering and felony larceny are the appropriate charges.

Facts: The defendant had been banned from Belk stores for fifty years. Belk maintains a database of banned individuals that included their photo, date of birth and address. In addition, the database includes a document signed by the banned individual acknowledging they have been notified it is illegal for the individual to return to any Belk store. The defendant was observed by the loss prevention officer stealing a two hundred forty dollars ($240) coat from a Belk store. She checked the database and found the defendant's ban. He was charged with felony breaking or entering and felony larceny. The defendant was convicted of both charges.

Discussion: The Court of Appeals set forth what evidence must be presented to establish a ban. In this case, a loss prevention officer familiar with the Belk procedure testified concerning their process and the databank maintained of banned individuals. The notice signed by the defendant acknowledging his ban was introduced into evidence by the loss prevention officer as a business record.

The elements of breaking or entering are: (1) breaks or (2) enters (3) without consent (4) any building [General Statute § 14-54(b)]. The breaking or entering becomes a felony with a fifth element; (5) when the individual has the intent to commit a felony or larceny [General Statute § 14-54 (a)]. When a person commits a larceny pursuant to a breaking or entering, the larceny automatically becomes a felony larceny regardless of value [General Statute § 14-72(b)]. In this case, the State's evidence showed the defendant was banned and aware of the ban, so he entered the Belk store without Belk's consent in order to steal the jacket. Therefore, felony breaking or entering and felony larceny were the correct charges and the conviction stands.

It is important to remember that to establish a valid ban there must be evidence that the person acknowledged the ban and a standardized banning process that a representative of the store could explain at trial. These felony charges would apply only when an individual steals an item from a store where they were previously banned. Without the larceny the correct charge(s) would be misdemeanor breaking or entering or trespass.

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Paintball Charging Options

In response to recent paintball incidents, Mecklenburg County Magistrates have found no probable cause for assault and/or damage to property charges between willing paintball participants ruling there is no criminal intent because they are playing a game.

Assault and damage to property charges should be appropriate however when a person is injured or property damaged and the victim was not involved with the game. Below are other charges which may be considered even for paintball participants:

SHOOTING **M** **MA**
unlawfully and willfully did shoot a paintball missile from a paintball gun in violation of Sec. 15-13, City Code of Charlotte, NC. This offense having occurred with the corporate limits of the City of Charlotte.

PLAYING GAMES IN STREETS **M** **MA**
unlawfully and willfully did play the game of paintball on (public street) in violation of Sec. 19-10, City Code of Charlotte, NC. This offense having occurred with the corporate limits of the City of Charlotte.

DISORDERLY CONDUCT BY FIGHTING **M** **MA**
intentionally cause a public disturbance at (identify the place so as to indicate its public nature) by engaging in fighting with others by the use of paintball guns. **G.S. 14-288.4(a)(1)**.

FAILURE TO DISPERSE WHEN COMMANDED **M MA**

failed to comply with a lawful command to disperse given in a manner reasonably calculated to be heard by those assembled by a law enforcement officer or public official responsible for keeping the peace when the officer reasonable believed that a riot or disorderly conduct by three or more persons was occurring. **G.S. 14-288.5**.

NOTE: Officers must: record the announcement (also record from back of group to show it could be heard); and, announce an exit route and give a reasonable time for persons to leave.

WEAPONS, EXPLOSIVES, FIRES IN COUNTY PARKS **M MA OR C**

unlawfully and willfully did (carry) (possess) or (discharge) a paintball gun within (name of Mecklenburg County Park) without an authorized permit in violation of Sec. 29, Mecklenburg County Park and Recreation Facilities Ordinance.

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