CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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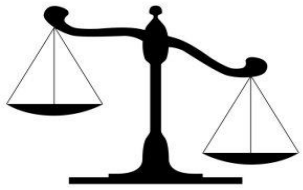

Cases reviewed in this Issue include: United States Supreme Court cases explaining the requirements for obtaining historic cell-site location information, First Amendment claims against a local government for retaliatory arrest, curtilage and the motor vehicle exception and, the reasonable expectation of privacy in rental cars; and, a North Carolina Supreme Court case discussing reasonable suspicion. Finally, notice of a new online resource for officers and reminders about found property and court orders.

CASE BRIEFS:

UNITED STATES SUPREME COURT

Fourth Amendment/Historical Cell-Site Location Information:
Carpenter vs. U.S., 2018 U.S. LEXIS 3844 (2018)

Issue: Do officers need a search warrant to obtain historical cell-site location information (CSLI) from a service provider?

Holding: Yes, officers must use a search warrant supported by probable cause to obtain historical CSLI from a service provider.

Facts: In 2011, police officers arrested four men involved in a series of commercial robberies that occurred over four months. One suspect provided the cell phone numbers of some of the others, and Federal agents reviewed his call records to identify additional numbers called during the robberies. Based on this information, prosecutors applied for two court orders to obtain historical CSLI for the defendant. The applications and orders were based on the standard from the Stored Communications Act (18 U.S.C. § 2703(d)) that the records sought were "relevant and material to an ongoing criminal investigation." As a result of the orders the government "obtained 12,898 location points cataloging [the defendant's] movements – an average of 101 data points per day," and charged the defendant with six counts each of robbery and carrying a firearm during a federal crime of violence.

Prior to trial, the defendant moved to suppress the cell-site data provided by the service providers, and the motion was denied. At trial, maps based on the historical CSLI were introduced that placed the defendant's phone near four of the robberies. The defendant was convicted on all but one firearm charge and sentenced to over 100 years. On appeal, the Sixth Circuit affirmed the trial court's denial of the defendant's motion to suppress, and "held that [the defendant] lacked a reasonable expectation of privacy in the location information collected by the FBI because he had

shared that information with his wireless carriers."

Discussion: In this case, the Supreme Court reversed the lower court's decision and held that even though historic CSLI records are held by a third party, "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Since obtaining the defendant's historic CSLI was a search under the Fourth Amendment, the government should have used a search warrant supported by probable cause.

Officers are hereby advised that they must use a search warrant to obtain historical cell-site location information. A motion, affidavit and order may still be used to obtain subscriber account information (ex. name, address, payment information, local and long distance records, and call and text message detail information). Note: The Court stated that its decision does not address real-time CSLI or situations where officers must obtain CSLI information based on exigent circumstances.

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First Amendment/Retaliatory Arrest:
Lozman v. Riviera Beach, 2018 U.S. LEXIS 3691 (2018)

Issue: Does the existence of probable cause bar a First Amendment claim against a municipality under 42 U.S.C. § 1983 for retaliatory arrest for a citizen's protected speech?

Holding: No, even though probable cause to arrest exists, a city may be liable if there is evidence the city acted based on a retaliatory official policy.

Facts: Lozman was an outspoken critic of the City of Riviera Beach's use of eminent domain to obtain waterfront property. He also sued the city alleging council violated Florida's public meeting laws. In June 2006, council held a closed-door session where his public meetings lawsuit was discussed. According to the transcript a councilmember suggested that "the City use its resources to 'intimidate' Lozman." Later, "a different councilmember asked whether there was 'a consensus of what [the other councilmember] is saying,'" to which the other members of the council responded affirmatively.

Five months later, Lozman signed up to be a speaker during the public comment session of a council meeting. After making comments about the arrest of a former county official, he was interrupted by the councilmember who previously made the "intimidate" comment, and told to stop discussing issues unrelated to city government – the city had a procedural rule that prohibited speakers from discussing issues unrelated to the city during public comments. When he refused to stop, the councilmember requested a police officer's assistance. The officer asked Lozman to leave the podium, and when he refused, the councilmember instructed the officer to "carry him out." Lozman was handcuffed and arrested before he could complete his comments. The prosecuting attorney eventually dismissed the case and Lozman filed suit against the city for violating his First Amendment right to petition the government for redress of grievances. Lozman argued that even though there was probable cause for his arrest, the order to arrest him was given in retaliation for him suing the city and his previous history of public criticism.

Discussion: In order to impose liability on a local government in a § 1983 lawsuit, a plaintiff must be able to show that his/her injury was caused by "the implementation of official municipal policy." In this case, the Court concluded that the transcript of the June 2006 meeting and the video of the plaintiff's arrest could show that by ordering his arrest, the city acted pursuant to a retaliatory policy based on his prior lawsuit and criticisms of council. While the existence of probable cause would bar a Fourth Amendment claim for unlawful arrest, probable cause will not bar a First Amendment claim against a city for retaliatory arrest when the plaintiff can "prove the existence and enforcement of an official policy motivated by retaliation."

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Fourth Amendment/Motor Vehicle Exception
Collins v. Virginia, 138 S. Ct. 1663 (2018)

Issue: Does the motor vehicle exception to the Fourth Amendment permit police to enter the curtilage of a home in order to search a vehicle parked there?

Holding: No, the motor vehicle exception does not allow officers to intrude into the curtilage to search a vehicle.

Facts: Officers were investigating two separate traffic incidents in Virginia where the driver of an orange and black extended frame motorcycle was able to elude officers. Officers determined that the

motorcycle was likely stolen and in the possession of the defendant. One of the officers located what appeared from the street to be the motorcycle covered by a tarp. The motorcycle was "parked at the same angle and in the same location on the driveway" as depicted in photographs on the defendant's Facebook page. The officer exited his car and took a photograph of the motorcycle from the sidewalk. He then walked up to the top of the driveway where the motorcycle was parked. The officer removed the tarp and determined that the motorcycle was the same one involved in traffic incidents. He ran a search of the license plate and VIN to confirm it was stolen, and took a photograph of the uncovered motorcycle before putting the tarp back on. The defendant was charged with receiving stolen property and moved to suppress the evidence obtained from the warrantless search of the motorcycle.

Discussion: The curtilage of a home ("area immediately surrounding and associated with the home") is entitled to the same amount of protection under the Fourth Amendment as the home itself. An officer who physically intrudes into the curtilage to look for evidence has conducted a search under the Fourth Amendment, and absent a search warrant, consent or exigent circumstances, such a search is unreasonable. In this case, the Court reversed the Virginia Supreme Court's decision and determined that the motor vehicle exception cannot be used to justify a warrantless search of a motor vehicle located within the curtilage. The Court concluded that the motorcycle was within the curtilage of the defendant's home because the top portion of the driveway where the motorcycle was parked was behind the front corner of the house, and enclosed by a brick wall on two sides and the side of the house. Also, there was a side door that provided access to the enclosed section of the driveway from the house, and a visitor would have to turn before entering the enclosed area to reach the front door.

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Fourth Amendment/Rental Cars
Byrd v. U.S., 138 S. Ct. 1518 (2018)

Issue: Does a driver of a rental car who is not listed as an authorized driver on the rental agreement have a reasonable expectation of privacy in the car?

Holding: Yes, a person in lawful possession and control of a rental vehicle has a reasonable expectation of privacy in the vehicle even though they are not listed on the agreement.

Facts: The defendant was driving a rental car and was not listed on the rental agreement. After committing a traffic violation, he was pulled over by police. Upon determining that the defendant was not listed on the rental agreement, officers advised the defendant that they did not need his consent to search the vehicle. Officers proceeded to search the vehicle and located body armor and forty nine bricks of heroin in the trunk along with the defendant's personal belongings. The defendant moved to suppress the heroin as the fruit of an unlawful search, but the motion was denied. On appeal, the Third Circuit agreed with the trial court and concluded that the defendant did not have a reasonable expectation of privacy in the rental car because he was not listed as an authorized driver on the agreement.

Discussion: The Supreme Court disagreed and held that "as a general rule, someone in otherwise

lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." An unauthorized driver does not lose his/her expectation of privacy in the car because he/she violates a term or condition in the rental agreement. In the absence of probable cause, as long as the driver's possession of the car is lawful (i.e. he/she is not a thief), officers must obtain consent to search the car.

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NORTH CAROLINA SUPREME COURT

Reasonable Suspicion
State v. Nicholson, 810 S.E. 2d 208 (2018)

Issue: Did the officer have reasonable suspicion to detain the defendant for brief questioning?

Holding: Yes, the circumstances considered together could lead a reasonable officer to conclude that the officer had come upon a robbery in progress.

Facts: An officer on patrol around 4:00 a.m. noticed a car parked in a turning lane next to a gas station. The vehicle's headlights were on but no turn signal was on. The officer pulled alongside the vehicle and saw two men inside, the driver and the defendant in the rear seat directly behind the driver. The windows were down despite a light rain and temperature in the 40s. The defendant began pulling down a ski mask over his face, but pushed it back up when he saw the officer. The officer asked them if everything was okay. The driver stated that the man in the back was his brother and that they had an argument. The driver stated the argument was over and everything was okay. The defendant stated that everything was fine. Sensing something was wrong, the officer asked again if they were okay, and both nodded yes. The driver then moved his hand near his neck, "scratching or doing something with his hand." After the car remained in the turn lane for another thirty seconds, the officer got out of his patrol car and walked over. The defendant stepped out of the vehicle, and the driver began to edge the car forward. The officer asked the driver, "Where are you going? Are you going to leave your brother just out here?" The driver responded, "No. I'm just late for work. I've got to get to work." The officer again asked whether everything was okay, and although the driver said he was okay, he was shaking his head no. The officer told the defendant, "Well, your brother here in the driver's seat is shaking his head. He's telling me everything's not fine. Is everything fine or not? Is everything good?" The driver quickly told the officer that everything was fine but that he had to get to work. After the driver stated he was going to be late, the officer told him to go to work. Once the car drove away, the defendant asked the officer if he could go into the store. The officer instructed the defendant to, "[H]ang tight for me just a second," and asked him if he had any weapons on him. The defendant stated that he had a knife he carried for self-defense, but a frisk by a second officer did not reveal a weapon. After further questioning during the investigative detention, officers determined the defendant's name from his ID card and told him he was "free to go."

Later that day, the driver reported to police that the defendant was not his brother and had been robbing him at knife point when the officer arrived. The defendant had flagged the driver down and asked for a ride to the gas station. When he got into the car, he held a knife to the driver's throat and

demanded money. Officers found a knife in the back seat of the car that looked identical to other knives that were found in the defendant's kitchen during a subsequent search. The other knives were found in a knife block and one was missing. The defendant moved to suppress the incriminating evidence seized as a result of an unlawful detention. The trial court denied the motion and the defendant was convicted at trial. However, the Court of Appeals reversed and determined the officer lacked reasonable suspicion when he detained the defendant and discovered his name.

Discussion: The North Carolina Supreme Court reversed the Court of Appeals and concluded that "the undisputed facts establish reasonable suspicion necessary to justify defendant's seizure." The Court determined that the defendant was seized when the officer instructed him to hold up for a second, and that an objective analysis of all of the facts known to the officer at the time of the seizure constituted reasonable suspicion to justify the investigative detention: it was early in the morning; the car was stopped in the road without a directional; the windows were down and it was cold and wet outside; the defendant was putting on a ski mask and then removed it upon the officer's arrival; the driver stated they were brothers, but were seated in a vehicle like "a taxi or rideshare driver and customer"; the driver made a hand motion by his neck when asked if he was okay; the driver was shaking his head while stating everything was okay; when the officer asked the defendant why the driver was shaking his head, the driver quickly stated everything was okay; and, the driver was going to leave "his brother" on the side of the road in the middle of a cold, wet night after an argument.

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Law Enforcement Officer Statutes Guide

An online N.C. statutes guide resource is now available. The link can be found on the Field Operations applications links page. The guide contains charging language for commonly charged offenses, lists of waivable offenses, and selected sections of Juvenile and Domestic Violence law, among other topics.

Found Property

Officers are reminded that N.C. Gen. Stat. § 15-11, *et seq.* and S.L. 2002-92 govern the handling and disposition of found property (see Directive 700-003, Found Property). Notice of unclaimed property will be published for found property that remains unclaimed for a period of sixty days. If the property remains unclaimed for an additional 30 days after that, a notice of sale will be published. The property may then be sold at electronic auction ten days after publication of the notice of sale. Individuals who turn in found property may be advised they can bid at auction, but they should **NOT** be advised they are otherwise entitled to the property they found.

Court Orders

Before charges are pending officers should use the revised motion, affidavit and order template instead of an application and order to obtain subscriber account information from service providers. Once charges are pending, officers should consult with the District Attorney's Office.

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