CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue we review two cases addressing the requirements for search warrants. The United States Court of Appeals for the Fourth Circuit addresses the use of informants in obtaining probable cause to obtain a search warrant. The North Carolina Supreme Court looks at issues that arise from omitting crucial facts from a search warrant affidavit.

We will discuss a case that addresses charging a suspect with felony breaking or entering and felony larceny when the suspect returns to a business after previously being banned.

This issue also includes cases about expanding the scope of a traffic stop, and the doctrine of recent possession.

CASE BRIEFS:

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Fourth Amendment / Scope of Traffic Stop / *Miranda*: United States v. Bernard, 2019 U.S. App. LEXIS 18722 (2019).

Issue: Did an officer unlawfully extend a traffic stop and violate *Miranda* requirements prior to questioning an arrestee?

Holding: No, the officer did not conduct an improper traffic stop; however, he did fail to give proper *Miranda* warnings to the arrestee prior to making statements that were likely to elicit an incriminating response.

Facts: On December 4, 2012, Officer Willis saw a Jeep driving erratically on I-40 and initiated a traffic stop to determine whether the driver was impaired. When the officer approached the Jeep, he observed that the driver, Leonard Bernard, was acting nervously. He asked for Bernard's license and registration, and asked to pat Bernard down to search for weapons. Bernard consented and then sat in the patrol car, uncuffed, with the officer. Officer Willis had technical difficulties with his computer, so he took five to seven minutes to call headquarters by phone to determine whether Bernard had any outstanding warrants.

During this time, Bernard told the officer that he was from California but previously lived in Greensboro. He explained that he was visiting North Carolina for two weeks to work on motorcycles because business was slow. Officer Willis found this story suspicious. The officer asked whether Bernard had any illegal substances, and he said no. Officer Willis was advised that

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Bernard did not have any warrants, so he issued a warning ticket and returned Bernard's documents to him. As Bernard opened the door to the patrol car, Officer Willis asked if Bernard could answer a few more questions and Bernard said yes.

Officer Willis again asked Bernard if he had any controlled substances, and he answered that he did not. The officer asked to search the Jeep, and Bernard said yes and signed a consent-to-search form. A trooper from the Highway Patrol arrived to assist. The officers searched the vehicle and located a loaded handgun, unloaded rifle, marijuana in mason jars wrapped in black plastic bags, and a gun case with a firearm.

Bernard was placed under arrest, and was asked about the items from the Jeep. Bernard admitted to possessing three pounds of marijuana. While transporting the defendant, Officer Willis stated, "there might be some people up there that might want to talk to [you] and [you] might want to think about trying to help [yourself] out." In response, Bernard stated that he had planned to sell the marijuana for $500 a jar and could make more money in North Carolina than in California.

Discussion: The Court stated that reasonable suspicion existed for the traffic stop and that the stop was not excessively long. Officers may only extend the duration of a routine traffic stop if the driver gives consent or if there is reasonable suspicion that an illegal activity is occurring. Here, the officer took no longer than necessary to retrieve information about potential outstanding warrants, and the stop continued only because Bernard provided both verbal and written consent for the vehicle search.

However, the Court stated that Officer Willis' statements during transport were the equivalent of interrogation and triggered the need to *Mirandize* the defendant. The requirement to issue *Miranda* warnings applies not only to explicit questioning, but also to statements by police that they should know are reasonably likely to elicit an incriminating response.

Guidance: Officers should make sure to return a driver's license and registration after completing the initial purpose of the stop and prior to asking for consent. This will ensure that consent is valid and that the stop is not unlawfully extended. Additionally, officers should be sure to *Mirandize* arrested subjects prior to making statements to an arrestee that would likely cause a self-incriminating response.

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Fourth Amendment / Search Warrants / Probable Cause: United States v. Drummond, 925 F. 3d 681 (4th Cir. 2019).

Issue: Did a magistrate have probable cause to issue a drug search warrant based partially on information contained from an informant?

Holding: Yes, based on the totality of the circumstances probable cause existed to justify the issuance of the search warrant.

Facts: In May 2017, Deputy McGrath received a tip from a known informant that Nicholas Finley was selling methamphetamine from room 131 of the Red Roof Inn. The deputy was aware of Finley's reputation and knew him to be a convicted felon who was involved with narcotics and firearms.

On May 11, 2017, Deputy McGrath and her partner drove to the Red Roof Inn to investigate the tip. Room 131 was along the back side of the motel and the only car in the parking lot was parked in front of room 131 and displayed a fictitious paper tag. As Deputy McGrath was checking the vehicle's VIN, Finley came to the door of room 131 with a large pit bull. The deputy recognized Finley and asked for consent to enter. Finley consented and put the dog in the bathroom.

There were seven people inside the motel room, and each person voluntarily produced identification. Finley stated that there were no other people in the room, but gave consent for the deputy to check the bathroom. As Deputy McGrath opened the bathroom door, she located a woman and an orange hypodermic needle cap near the woman's feet. The occupants stated that they did not have any medical conditions that would require a needle.

Deputy McGrath's partner remained at the hotel while she sought a search warrant. Upon execution of the warrant, the deputies located firearms, ammunition, baggies with meth residue, and drug paraphernalia including hypodermic needles.

Discussion: Under the Fourth Amendment, probable cause is required for the issuance of a search warrant. Probable cause "exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in the place to be searched." This determination is based on the totality of the circumstances, not based on viewing facts in isolation.

Here, the warrant was not based solely on the informant's tip. The deputy also knew of Finley's drug-dealing reputation, which led her to investigate at the motel. The motel investigation then led to more facts and circumstances that amounted to probable cause for the search warrant.

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NORTH CAROLINA SUPREME COURT

Doctrine of Recent Possession / Larceny After Breaking or Entering: State v. McDaniel, 2019 N.C. LEXIS 791 (2019).

Issue: Did the defendant have exclusive control of stolen items in her possession as required to apply the doctrine of recent possession?

Holding: Yes, based on the defendant's own admissions she exclusively possessed the property soon after it had been stolen although officers did not discover the property until two weeks later.

Facts: On March 20, 2014, the victim went to his recently deceased father's home on Woody Street to sort through belongings. He locked the door when he left and did not give anyone permission to enter or remove any items. On April 1st the victim returned to the house and noticed that items were missing. Officers received a tip on April 2nd that the items would be found located at a house about a quarter-mile away on Ridge Street and that a white pickup truck had been used to unload the items. The officer went to the house on Ridge Street and observed the missing items on the property.

On April 4th, officers received a report that a white pickup truck had again removed items from Woody Street and drove away and turned on Ridge Street. When the detective arrived on Ridge Street, the defendant was sitting in the driver's seat of a white pickup truck.

At trial, the defendant stated that she had permission to remove the items. The officer testified that the defendant admitted putting the items in the back of her pickup truck and driving them to Ridge Street to help her co-defendant.

Discussion: The doctrine of recent possession states that possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. The strength of that presumption is based on the circumstances of the case and the length of time between the larceny and the discovery of the items in the defendant's possession. The doctrine requires that: (1) the property was stolen; (2) the defendant had possession of the property with the power and intent to control its use; and (3) the defendant had possession soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly. In a breaking or entering case, the jury may presume that the possessor is guilty of both the larceny and the breaking or entering.

Here, the defendant stated that the doctrine should not apply to her because she did not have "exclusive" control of the property under the second prong of the test. However, the Court noted that exclusive possession may include joint possession of co-conspirators or persons acting in concert. The defendant also argued that she did not have "recent" possession of the stolen items under the third prong, because she was not found in possession of the items stolen on March 20th until approximately two weeks later. The Court, however, emphasized that the two-week delay did not outweigh the defendant's own admission that the she possessed the items on March 20th by transporting them in her truck.

Guidance: Officers should make sure to understand the timeline of events when attempting to apply the doctrine of recent possession. Keep in mind that exclusive control of an item can include items jointly possessed by other people (e.g., a defendant may have possession of recently stolen earrings found being worn by his girlfriend).

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Fourth Amendment / Search Warrants/ Probable Cause / Affidavits: State v. Lewis, 2019 N.C. LEXIS 793 (2019).

Issue: Did a search warrant affidavit sufficiently establish probable cause to search the defendant's residence and two vehicles used to commit four recent robberies?

Holding: Because officers failed to include crucial information gathered during the investigation, the affidavit was insufficient for probable cause to search the residence and one of the vehicles.

Facts: On September 21, 2014, a man armed with a handgun wearing dark clothing and a blue face covering robbed a Family Dollar in Hoke County. The man told the store's employees to put money in a bag and to stay in the bathroom until he left the store. A witness saw the man flee in a dark blue Nissan Titan. A similar robbery occurred on Sept 26th at Dollar General in Hoke County with a man using a handgun and wearing dark clothing and a blue face covering. He told employees to put money in a bag and then stay in the bathroom until he left. A robbery took place at a Dollar General in Hoke County on September 28th involving a man with the same clothing and face-covering description, who also told employees to go into the bathroom. On October 19th, a man robbed a Sweepstakes store in nearby Johnston County wearing dark clothing and a blue face covering, who asked the employees to wait in the bathroom until he left. A Johnston County officer identified the Sweepstakes suspect as Robert Dwayne Lewis, and stated that he fled in a dark gray Kia Optima.

On the day of the fourth robbery, Smithfield Police notified the Hoke County Sheriff's Office ("HCSO") about the sweepstakes robbery, and sent a description and tag number for the Kia. They also told the HCSO that that Kia was associated with 7085 Laurinburg Road. That same day a HCSO deputy drove by the Laurinburg Road address and saw a blue Nissan Titan, but did not see a Kia. He came back later in his shift and saw both the Titan and a dark gray Kia. The deputy observed a man matching the suspect's description walk to the mailbox. The man identified himself as Robert Lewis and the deputy placed him under arrest. The deputy spoke with the defendant's stepfather on the doorstep of 7085 Laurinburg Road who stated that the defendant lived at the address and owned the Kia. The stepfather stated that he owned the Titan but that the defendant drove it occasionally. While returning to his patrol car, the deputy observed a BB&T money bag in plain view on the floor of the Kia, and also saw dark clothing in the backseat.

A HCSO's detective drafted a search warrant to search the 7085 Laurinburg Road residence, the Nissan Titan, and the Kia Optima. The search affidavit failed to disclose: that the defendant lived at that address; information linking the defendant to the address; the circumstances surrounding the arrest at the address; the deputy's interaction with the stepfather; that the Kia was observed at the residence; and that the deputy saw incriminating evidence in the Kia. A magistrate issued a search warrant, and officers seized various items of evidence.

Discussion: A court may only rely on information that is actually set out in the affidavit. Although in court an officer may testify to all parts of the investigation, information omitted from an affidavit can be critical in the analysis of a search warrant. The Court determined that although the affidavit had

sufficient probable cause to search the Nissan Titan, the affidavit was insufficient to warrant a search of the residence and the Kia Optima.

Regarding the residence, the Court stated that the affidavit did not connect the defendant to the residence in any way beyond him merely being arrested there. Furthermore, although an unsworn attachment to the affidavit listed the Kia, the tag number, and VIN, the sworn affidavit failed to mention the identifying information about the Kia and failed to explain how this information was obtained.

The Court held that any evidence seized from the Kia Optima and the residence must be suppressed. The Court also stated that the search warrant would have been sufficient for the searches had all the relevant information from the investigation been included in the affidavit; however, the detective's failure to include such crucial information concerning the house and the second vehicle made the affidavit insufficient to warrant those searches.

Guidance: Officers must remember that judges may only consider information contained in the four corners of the search warrant. A search warrant will only be sufficient if the facts within the affidavit establish probable cause, even if an officer may be able to testify to additional facts during a hearing.

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NORTH CAROLINA COURT OF APPEALS

Banning / Trespass / Felony Breaking or Entering and Larceny: State v. Allen, 812 S.E.2d 192 (2018).

Issue: Was a defendant properly banned from a retail store so that he could subsequently be charged with felony breaking or entering and felony larceny?

Holding: Yes, the retail store had proper business records showing that the ban was personally communicated to the defendant; therefore, he was properly charged with felony breaking or entering and felony larceny upon his return to the location.

Facts: In January 2016, a loss prevention officer ("LPO") saw the defendant stealing items at a Belk location in Hickory, NC. Two LPAs placed the defendant in handcuffs and took him to their office to run his name through the store's database. There was an entry under the defendant's name from a Belk located in Charlotte, along with a photograph, address, and date of birth that matched his current driver's license. The database showed that two months earlier the defendant had been banned for a period of 50 years, and there was a "Notice of Prohibited Entry" form with the defendant's signature acknowledging receipt of said ban notice. The defendant was charged and convicted of felony breaking or entering and felony larceny regarding the January Belk encounter.

Discussion: The Court found that the defendant had been properly banned by Belk in November of 2015 at the Charlotte location. Although the Hickory LPO was not present during the November banning, she had knowledge that the "Notice of Prohibited Entry" form was kept in the regular course of

Belk's business activities, and that it was a part of Belk's regular practice to complete such forms and put entries into their database. Furthermore, the defendant signed the Notice form when he was banned acknowledging that the ban was communicated to him. The Court stated that the ban was properly implemented, and that the ban paperwork could be admitted at trial through an appropriate witness like the Hickory-Belk employee.

The defendant argued that, despite the ban, a person cannot unlawfully break or enter a place of business during normal business hours. The Court stated that an entry is unlawful if it is without the owner's consent. If the entry is at a business, entry may still be unlawful whether the business is open or closed at the time of the entry. Here, Belk revoked the defendant's privilege to enter its locations at any time when he was banned two months prior. The ban was personally communicated to the defendant, and no evidence suggested that the ban had been rescinded.

Guidance: Officers should always remember that they are not authorized to ban a subject from a property. An authorized person (e.g., store employee, homeowner, etc.) must ban the subject from the premises. A properly documented ban from a prior incident or different business location may be used against a suspect to arrest them for trespass or felony breaking or entering and larceny; however, make sure to see the documentation prior to charging. Additionally, even when a ban occurs in an officer's presence, the officer should still list the store's employee as a witness to be subpoenaed for court. For more on banning, see the "Reminders" section below.

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REMINDERS

BANNING AT BUSINESSES

1. Any business can tell a person to leave their business and ban a subject from returning.
2. When CMPD officers arrive, there is no trespass charge if the subject says they will leave. This is also true for banning/trespassing at residences.
3. A subject may voluntarily agree to stay and give their information to a store employee or CMPD so that the information can be recorded.
4. To have evidence of an enforceable ban, it is best for the business to have a ban procedure similar to that in the *Allen* case.
    a. The business should have a standard banning procedure that is used in every case.
    b. The business should have a document that identifies the store employee who issued the ban, along with the effective date and length of the ban.
    c. The document should notify the subject in writing that they are banned from that business and that they may be arrested for trespass if they return.
    d. The document should be signed by the banned subject and maintained by the business and/or CMPD as proof of the banning.
    e. If the banned individual refuses to sign, it should be documented on the signature line as "refused to sign."

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5. CMPD would not assist in a trespass or banning if the store employee states that the ban is due to the person's race, color, religion, gender, nationality, or other classification protected by State or Federal law.
6. The business is not required to give a reason for banning; however, officers may not guess or infer that the ban is based on a protected classification.

AUTHORITY TO ACT AS AGENT FORMS

Officers are reminded that the Authority to Act As Agent (ATAAA) forms give officers the authority to enforce State trespass laws ONLY when ABSOLUTELY NO ONE is permitted to be on the property. These forms do not give officers the authority to ban specific individuals from private property. Officers should make sure that all ATAAA application forms include photos of the posted trespass signage.

If an officer is an Apartment Courtesy Officer per Directive 300-007, their authority to trespass individuals under the ATAAA form only applies at times when *no one* is permitted in the common areas of the property. Therefore, signage on the property should state the hours that the common areas are closed to everyone.

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