CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: This issue will review relevant cases from November 15, 2019 to January 7, 2020, and highlight some new laws effective December 1, 2019.

CASE BRIEFS:

FOURTH CIRCUIT

Warrantless Search of Cell Phone/Abandonment:
U.S. v. Small, 944 F.3d 490 (4th Cir. 2019).

Issue: Did a warrantless search of cell phone render subsequent search warrant using information for historical phone location data and texts inadmissible?

Holding: No, the phone was abandoned and officers could access non-password protected information.

Facts: A license plate reader hit identified a vehicle stolen during an armed robbery carjacking three days earlier in Baltimore Maryland. Officer located the vehicle and a high-speed chase ensued resulting in Defendant crashing through a fence at Fort Meade and down an embankment. The Defendant ran from the scene before officers arrived. Defendant was located emerging from a sewer the following morning. While officers were pursuing Defendant on foot they came across a hat, bloody t-shirt and cell phone.

Officers recorded the phone's serial number and observed the cell phone had received messages and called the number listed to learn the identity of the suspect. Subsequently a search warrant was obtained to collect call history, contacts, deleted data and historical cell site location data on the day of the robbery. The Defendant contended all cell phone evidence should be suppressed due to the initial warrantless search of his cell phone.

Discussion: The Court held the initial warrantless search of cell phone was lawful because it was objectively reasonable for officers to believe Defendant had abandoned the phone. The Court held given limited accessibility of public to the location where the phone was found it was reasonable to believe that the phone belonged to Defendant. It was reasonable to believe that with other evidence discarded near the scene that Defendant voluntarily abandoned his phone.

The Court emphasized that abandonment of cell phones should not be

casually inferred. People lose or misplace their cell phones all the time. There must be some evidence to show a voluntary aspect of abandonment. In this case, it was reasonable to conclude discarding the hat, clothes and phone was voluntarily done by Defendant to evade detection. Because Defendant had no reasonable expectation of privacy in what he abandoned, the warrantless search and subsequent search warrant was lawful.

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Execution of Search Warrant/Use of Force/Clearly Established Violation of 4th Amendment: Betton v. Belue, 942 F.3d 184 (4th Cir. 2019).

Issue: Did officers violate clearly established law in their execution of a search warrant and subsequent use of deadly force?

Holding: Yes, the execution of a search warrant without knocking or announcing by officers in plain clothes was a clear violation of the Fourth Amendment and the officers may be sued in their individual capacity for the resulting paralysis of the homeowner.

Facts: In 2015, a team of plain-clothed law enforcement officers armed with "assault style rifles" used a battering ram to enter Betton's home to execute a search warrant authorizing the search for marijuana and other illegal substances. The officers did not identify themselves as police before using the battering ram. From the back of his home Betton heard a commotion and pulled a gun from his waistband and held it down by his hip as he approached the front of his home. Without any commands or warnings, three officers fired a total of 29 shots at Betton, striking him nine times. Betton suffered permanent paralysis and sued the officers under 42 U.S.C. §1983 alleging unlawful entry and the use of excessive force in violation of the Fourth Amendment.

The officers requested the Court dismiss them from the lawsuit in their individual capacity because they were entitled to qualified immunity from liability. The Court refused to dismiss the case because the officers action was clearly established by case law to be an illegal entry and use of excessive force. Officers failed to identify themselves at any time before entering and firing their weapons. There were no announcements or commands given by officers after entering Betton's residence and observing him holding a gun at his side. Officers' decision not to identify themselves limits their ability to use deadly force based on court decisions.

Discussion: North Carolina officers must be aware of Fourth Amendment cases decided by the U.S. Supreme Court, Fourth Circuit and North Carolina Supreme Court. Those decisions establish "clearly established law" that a reasonable officer must abide to avoid personal liability. The Fourth Circuit clearly established in 2013 that officers do not possess an "unfettered authority to shoot" based on the mere possession of a firearm by a suspect when the suspect is not aware of police presence.

In *Cooper v. Sheehan,* 735 F.3d 153 (4th Cir. 2013), Cooper held a firearm by his side to investigate noises outside his home caused by unannounced police officers. Cooper called out for the person outside to identify themselves and officers did not respond. Cooper walked outside onto his dark porch

holding a shotgun with the muzzle pointed downward. Without warning officers fired their weapons. The Fourth Circuit ruled officers may not use deadly force based on the mere possession of a firearm by a suspect when officers have failed to identify their presence to suspect. Instead, officers must make a reasonable assessment that they or another is *actually threatened* with the weapon in order to justify the use of deadly force. If officers had identified themselves to Cooper, then it would have been reasonable to conclude that Cooper posed a deadly threat. No citizen can fairly expect to draw a gun on police without risking tragic consequences. When officers fail to notify a suspect of their presence it is reasonable for the suspect to assume some unknown person intends to harm them. In 2013, the Court in *Cooper* held officers use of deadly force violated the Fourth Amendment.

When officers, in 2015, failed to identify themselves or give commands to Betton before employing deadly force; they repeated the same acts the Court had ruled a violation of the Fourth Amendment in *Cooper*. If Bretton had disobeyed commands given by officers to drop his weapon or to come out with his hands raised, officers could reasonably fear for their safety seeing a gun at Betton's side. Officers failure to employ any of these protective measures as required by the prior Fourth Circuit decision, rendered their use of force unreasonable. The officers will proceed to trial and may be held individually liable for their use of deadly force.

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NORTH CAROLINA SUPREME COURT

Accessory after the Fact/Obstruction of Justice:
State v. Ditenhafer, 373 N.C. 116 (2019).

Issues: 1. Is failure to report a crime sufficient action to be convicted of an accessory after the fact?
2. Was the evidence sufficient for a felony obstruction of justice conviction based on alleged interference to access of a child victim?

Holdings: 1. No, the distinction is between action and omission. An individual can be liable as an accessory after the fact for their action in either concealing a crime or giving false testimony, not for omissions like failure to report a crime.
2. Yes, there was evidence of action by Defendant that impeded and obstructed in the investigation.

Facts: The Defendant's boyfriend sexually abused her daughter over a period of years. The Defendant was convicted of felony accessory after the fact for failing to report sexual abuse she witnessed. The Court reversed the conviction because the evidence did not show Defendant actively assisted her boyfriend by concealing the crime or giving false information. Prior case law held one could not be an accessory after the fact by merely failing to give information to authorities. Failing to provide information concerning child abuse is a misdemeanor (N.C.G.S.§7B-301) and would be the appropriate charge.

The Court upheld the obstruction of justice conviction based on evidence presented of Defendant's interference and obstruction. The Defendant talked over the child victim during several interviews

which precluded the child from answering questions. Defendant told investigators her child was lying and sent repeated texts to the child to recant her story. She induced the child to refuse to speak to investigators as the child stated "I can't talk to you. I need to call my mom." When investigators attempted to interview the victim, Defendant fled in her vehicle. When finally apprehended she told victim" Don't say anything… don't get out of the car…refuse to go."

Discussion: The North Carolina Supreme Court asked the Court of Appeals to review whether the action of Defendant amounted to misdemeanor or felony obstruction of justice. At common law, it is an offense to do any act which prevents, obstructs, impedes or hinders legal justice. If such action is done with "deceit and intent to defraud" it is elevated to a felony offense.

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Impermissibly Suggestive Identification Procedures/Eyewitness Identification Reform Act: State v. Malone, 373 N.C. 134 (2019).

Issue: Was the District's Attorney's investigator's trial preparation with eyewitnesses to a murder unduly suggestive and a violation of eyewitness identification procedures mandated by state law?

Holding: Although the pretrial preparation of witnesses was a violation of the Eyewitness Identification Reform Act (EIRA) it was not unduly suggestive given the independent in-court identification of Defendant by the witnesses.

Facts: Two witnesses were present on the front porch with the victim when two men approached and an argument ensued. The Defendant reached in his waistband, produced a gun and shot the victim. The eye witnesses did not know the Defendant or the second man. They were asked to review a line-up in compliance with EIRA and identified the Defendant as the possible shooter. Two weeks later the witnesses saw Defendant's Facebook photo and positively identified him as the shooter. They also looked at the jail website and positively identified the Defendant.

Three and a half years later, they were called to the District Attorney's office to prepare for their testimony in Defendant's trial. An investigator gave them copies of their original statements to police, showed them pictures of Defendant and allowed them to view the Defendant's video recorded police interview. As the witnesses were speaking with the investigator they saw Defendant in prison clothes, handcuffed being brought to the court house by officers. Both witnesses identified the Defendant as the shooter at trial.

Discussion: The procedure for eyewitness identification of suspects by a photo lineup is set forth in N.C.G.S.§§ 15A-284.50 to 284.53 requiring an independent administrator, five filler photos, sequential individual photos shown and specific instructions to be given to the eyewitness. These procedures were not followed in the witnesses' trial preparation meeting. The Defendant contended their identification should be suppressed because of the violation. Even with a violation, the Court must determine whether the identification procedures were so impermissibly suggestive that it violated Defendant's due process rights.

The court must determine if the in-court identification of Defendant was reliable and from an independent origin and not the improper action of the investigator. First, the court must consider the witnesses' opportunity to observe the crime. In this case, the witnesses were only feet from the suspects at the time of the murder. The second factor is the degree of attention to the suspect the witnesses would have at the time of the crime. Both witnesses were paying attention to the suspect at the time of the confrontation. Third, the accuracy of prior description of the suspect. Both witnesses gave general descriptions and on their own identified the Defendant through Facebook and the jail inmate photos. Finally, the court looks to the degree of certainty concerning the identification. Both witnesses testified they were certain the Defendant was the shooter and the identification was independent of what they viewed when preparing for trial. The in-court identification of the Defendant was allowed.

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Mere Presence Insufficient:
State v. Campbell, 835 S.E.2d 844 (2019).

Issue: Is showing that Defendant had the opportunity to commit a crime sufficient?

Holding: No, evidence must link Defendant to the crime more than mere presence.

Facts: Defendant's wallet was found at a church on a Sunday where audio equipment had been stolen. The last time the equipment was seen was the previous Wednesday. The church was discovered unlocked on Wednesday and was locked the next morning. Defendant admitted he slept in the church Wednesday evening but denied the larceny. The items were never located and the larceny could have occurred anytime between Wednesday and Sunday. Defendant contends the case should have been dismissed because evidence was insufficient to identify him as perpetrator.

Discussion: The Court examined whether there was substantial evidence to show Defendant was the perpetrator. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." However, if the evidence is sufficient only to raise suspicion or conjecture as to the identity of Defendant as the perpetrator, the motion to dismiss should be allowed. In this case, the evidence simply established that Defendant had the opportunity to steal the equipment while he was in the church. Under well-established caselaw, a conviction cannot be sustained if the most the State can show is that defendant had been in an area where he could have committed the crime charged. The case was dismissed.

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NORTH CAROLINA COURT OF APPEALS

Search Warrant for Blood Draw/Use of Force/*Brady* and Violation of BWC Policy:
State v. Hoque, 2020 N.C. App LEXIS 15 (2020).

Issues: 1. Is handcuffing and asking two nurses to hold a person down to draw blood pursuant to a search warrant excessive force? 2. When officers fail to follow policy on body worn camera recording

is that a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)?

Holding: 1. No, Defendant had no right to resist execution of a search warrant and the force used was a reasonable response to Defendant's resistance. 2. No, *Brady* concerns evidence collected by the State that is favorable to Defendant and this evidence never existed.

Facts: Defendant was found asleep in the middle of the road at 6:00 a.m. with his vehicle's engine running. An officer determined he was impaired. Defendant explained to the officer that he was home. The officer forgot to activate his body worn camera at the initial contact with Defendant. The body worn camera was also not activated when Defendant was advised of his implied rights. Defendant refused chemical analysis of his breath test and a search warrant was obtained. Defendant was transported to the hospital and told nurse she did not have his permission to take his blood. Defendant became combative was placed in handcuffs and two nurses assisted holding him down while blood was drawn. This encounter was also not captured by the officer's body camera. An analysis of the blood showed an alcohol concentration of 0.07 and the presence of marijuana, amphetamine and methamphetamine. Defendant contended the results should be suppressed because the force used to obtain the blood draw was unreasonable. He also contended the case should be dismissed because the officer did not comply with the Department policy concerning when a body worn camera must be activated denying him possible exculpatory evidence.

Discussion: It is well established that blood can be forcibly drawn from an individual suspected of impaired driving. *Schmerber v. California*, 384 U.S. 757 (1966). However, the *Schmerber* Court emphasized that a blood draw remains subject to the Fourth Amendment standard of reasonableness. In this case, Defendant was given multiple opportunities to comply with the warrant; he was the one who decided that physical force would be necessary. A defendant cannot resist a lawful warrant and be rewarded with the exclusion of the evidence. The use of force was reasonable.

Defendant cannot show that a video which does not exist would have been favorable to him. In *Brady,* the Supreme Court ruled that the Constitution requires the prosecution to provide a defendant with all favorable evidence. Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. Failure to provide such evidence when material to a case can result in dismissal. In this case, the Court will not extend *Brady's* holding to include evidence not collected by an officer. The State is required to produce only those matters in its possession. There was no *Brady* violation in this case.

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NEW LAWS

Several new laws were enacted and effective December 1, 2019. John Rubin from UNC School of Government summarized those law here. Highlights of some of the new laws are contained below. Raise the Age changes to Juvenile Law were covered in assigned on-line training. Please note that two useful resources can be found on the Police Attorney's page on the CMPD Portal:

- Raise the Age Brochure
- Raise the Age Case Jurisdiction Flow Chart

S.L. 2019-40 (S 151): Breaking and entering a pharmacy. Effective for offenses committed on or after December 1, 2019, the act enacts G.S. 14-54.2(b) to create a new crime, a Class E felony, for a person to:

1. break or enter
2. a pharmacy permitted under G.S. 90-85.21
3. with the intent to commit a larceny
4. of a controlled substance as defined in G.S. 90-87.5.

Unless the conduct is covered by another provision of law providing for greater punishment, new G.S. 14-54.2(c) makes it a Class F felony for a person:

1. who receives or possesses
2. any controlled substance
3. stolen in violation of new G.S. 14-54.2(b)
4. knowing or having reasonable grounds to believe the controlled substance was stolen.

New G.S. 14-54.2 provides that any interest in property obtained in violation of G.S. 14-54.2 is subject to forfeiture under G.S. 90-112.

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S.L. 2019-83 (H 474): Death by distribution of certain controlled substances. Effective for offenses committed on or after December 1, 2019, new G.S. 14-18.4 creates two new offenses. A person is guilty of death by distribution of certain controlled substances if the person:

1. unlawfully and without malice
2. sells
3. at least one certain controlled substance, defined in new G.S. 14-18.4(d) as any opium, opiate, or opioid; any synthetic of those substances; cocaine or derivative described in G.S. 90-90(1)(d); methamphetamine; depressant described in G.S. 90-92(a)(1); or mixture of one or more of these substances, and
4. ingestion of the substance causes the user's death, and
5. the sale was the proximate cause of the death.

The principal difference between this new crime and murder by distribution of controlled substances under current G.S. 14-17(b)(2) is that the new crime does not include malice as an element.

A person is guilty of aggravated death by distribution of certain controlled substances if, in addition to the above, the person has a previous conviction under new G.S. 14-18.4 or for other specified controlled substances offenses within the previous seven years. Any period of incarceration is excluded from the seven-year period.

Unless the conduct is covered under another provision providing for greater punishment, death by distribution of certain controlled substances is a Class C felony and aggravated death by distribution is a Class B2 felony. The new statute does not prohibit lawful distribution as defined in subsection (g) of the statute. It remains a Class B2 felony under current G.S. 14-17(b)(2). For further discussion, see Shea Denning, *General Assembly Creates New Crime of Death by Distribution*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jul. 18, 2019).

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S.L. 2019-109 (S 191): Temporary intergovernmental law enforcement agreements. The title of the act expresses its purpose: "To authorize a city with a population of more than five hundred thousand people which holds a national convention [that is, the 2020 Republican National Convention in Charlotte] to contract with out-of-state law enforcement agencies to provide law enforcement and security for the national conviction." New G.S. 160A-288.3 implements this purpose, which applies to intergovernmental law enforcement agreements entered into on or after January 1, 2020, and expires October 1, 2020.

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S.L. 2019-115 (H 257): Using face mask while operating motorcycle. Effective for offenses committed on or after December 1, 2019, new G.S. 14-12.11(b) creates an exception to G.S. 14-12.7 and 14-12.8, which prohibit wearing a mask on public ways and public property unless an exception applies (such as the wearing of traditional holiday costumes in season). The new subsection allows a person to wear a mask to protect the person's head or face while operating a motorcycle. The person must remove the mask during a traffic stop, including a checkpoint or roadblock under G.S. 20-16.3A, or when approached by a law enforcement officer.

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S.L. 2019-116 (H 224): Increased punishment for assault with firearm on law enforcement officer. Effective for offenses committed on or after December 1, 2019, amended G.S. 14- 34.5(a) makes it a Class D instead of Class E felony to assault with a firearm a law enforcement, probation, or parole officer while the officer is in the performance of his or her duties.

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S.L. 2019-117 (S 594): False liens. Effective for offenses committed on or after December 1, 2019, revised G.S. 14-118.6 makes the filing of a false lien against the real or personal property of an owner or beneficial interest holder a Class I felony. Previously, the statute applied to more limited conduct—namely, the filing of a false lien against a public officer, a public employee, or an immediate family member of a public officer or employee on account of the performance of the officer's or employee's official duties.

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S.L. 2019-157 (S 29): Move over law and flashing amber lights. Effective for offenses committed on or after December 1, 2019, amended G.S. 20-157(i) makes it a Class F instead of a Class I felony for a person to violate the move over law when the person causes serious injury or death to certain personnel, including law enforcement officers and other emergency response personnel. Amended G.S. 20-130.2 prohibits any vehicle from operating a flashing or strobe amber light while in motion on a street or highway unless a specific exception applies, such as when a vehicle exceeds a width of 102 inches. A violation is an infraction under G.S. 20-176.

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S.L. 2019-245 (S 199): Laws on sexual assaults and other matters. Effective for offenses committed on or after December 1, 2019 (unless otherwise noted below), the act enacts new crimes, modifies existing crimes, and makes other changes.

Ten-year statute of limitations for some misdemeanors. Revised G.S. 15-1 provides that the following misdemeanors may be charged within ten years of the commission of the crime:

- G.S. 7B-301(b) (failure to report abuse, neglect, dependency, or death due to maltreatment)
- G.S. 14-27.33 (sexual battery)
- G.S. 14-202.2 (indecent liberties between children)
- G.S. 14-318.2 (misdemeanor child abuse)
- New G.S. 14-318.6 (failure to report crimes against juveniles)

Revocation of consent to sex. The act revises the definition of "against the will of the other person," a required element of proof for forcible rape, forcible sexual offense, and sexual battery (except when the other person is mentally incapacitated, mentally disabled, or physically helpless and effectively incapable of consenting). New G.S. 14-27.20(1a) defines the element as either:

- without consent of the other person, or
- after consent is revoked by the other person, in a manner that would cause a reasonable person to believe consent is revoked.

The second clause explicitly recognizes the right to withdraw consent, responding to the North Carolina Supreme Court's 1979 decision in *State v. Way*, 297 N.C. 293 (1979), in which the Court appeared to take the position that if a woman consents to sexual intercourse and in the middle of the act changes her mind, the defendant is not guilty of rape for continuing to engage in intercourse with her. For further discussion, see John Rubin, *"No" Will Mean "No" in North Carolina*, N.C. Crim. L., UNC SCH. OF GOV'T BLOG (Nov. 6, 2019).

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