

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 1 of 6



### *Contents*

#### [4<sup>th</sup> Circuit Court of Appeals:](#)

[Fourth Amendment/ Abandonment/ Search Incident to Arrest](#)

#### [North Carolina Supreme Court:](#)

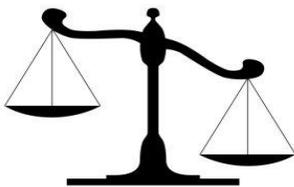
[Fourth Amendment/ Search Warrants and Drug Sales](#)

[Fourth Amendment/ Reasonable Suspicion and Traffic Stops](#)

#### [Reminders:](#)

[Crime Stopper Tips](#)

[Domestic Criminal Trespass](#)



Cases reviewed in this Issue include: A Fourth Circuit Court of Appeals case involving the issue of abandoned property. There are also North Carolina Supreme Court cases discussing search warrants and reasonable suspicion in traffic stops. Lastly, there are reminders about Crime Stopper Tips and a refresher on the elements of Domestic Criminal Trespass.

### **CASE BRIEFS:**

#### **4<sup>th</sup> CIRCUIT COURT OF APPEALS**

#### **[4<sup>th</sup> Amendment- Abandonment/ Search Incident to Arrest](#) [United States v. Ferebee, 957 F.3d 406 \(2020\)](#)**

**Issue:** Did the defendant have a reasonable expectation of privacy in a bookbag that was searched by an officer who did not hear or otherwise know the defendant disavowed ownership of the bag and its contents to other officers on scene?

**Holding:** No, the defendant did not have a reasonable expectation of privacy in a bag that he disavowed ownership of regardless of who heard the defendant state that the bag did not belong to him.

**Facts:** On March 23, 2017 Defendant Ferebee was visiting his friend Shana Dunbar in Charlotte, North Carolina. At the time of his visit he was unaware that Dunbar was on probation. Law enforcement officers including a probation officer arrived at Dunbar's residence to conduct a warrantless probation search. When officers entered Defendant was seated on the sofa with a marijuana blunt in hand.

Probation Officer Bensavage ordered him to stand up so that the couch could be searched for weapons. When the defendant stood up, he grabbed a bookbag that had been on the ground beside his leg. CMPD Officer Sinnott conducted a frisk of the defendant who held the bookbag in his outstretched hand. P.O. Bensavage asked Defendant if he had any weapons in the bookbag. The defendant then stated that the bag was not his. Officer Sinnott arrested the defendant for possession of marijuana and the bookbag was handed to CMPD Detective Grosse who was also present inside the house. Detective Grosse did not hear the defendant disavow ownership of the bag nor was he told by Officers Sinnott or Bensavage. After the defendant was handcuffed and taken outside Detective Grosse searched the bookbag. Located in the bookbag was the defendant's identification, a firearm and

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 2 of 6



drug paraphernalia. Officers on scene then determined that the defendant was a convicted felon.

He was subsequently transported to the police station. While at the station he admitted that the bookbag and the gun belonged to him and he was charged with Possession of a Firearm by a Convicted Felon. At trial the defendant filed a motion to suppress the evidence obtained from the bookbag arguing that the warrantless search of the bookbag violated his reasonable expectation of privacy in the bookbag. The United States Federal District Court denied the motion.

**Discussion:** The first inquiry in determining whether a 4<sup>th</sup> Amendment right can be asserted is whether a person has a reasonable expectation of privacy in the item or area to be searched. “A person who abandons property loses any reasonable expectation of privacy in the property,” and cannot seek to suppress any evidence seized as a result of a search. Disavowals and abandonment are treated the same for purposes of determining whether there is a reasonable expectation of privacy.

Since abandonment occurs based on a defendant’s intent to disclaim ownership it does not matter whether anyone else sees or hears the abandonment. Here, the court found that the Defendant made “a clear and unequivocal statement” disavowing ownership of the bookbag even though he was holding it in his hand at the time he made the statement. The court further reasoned that there was not enough information to determine whether the defendant was holding the bookbag out to comply with the pat-down or to give to officers. Therefore, he could not challenge the legality of the subsequent search.

The court further reasoned that even if they had determined that the defendant had not abandoned the property this was still a valid warrantless search incident to arrest. A search incident to arrest is proper if, “the defendant is unsecured and within reaching distance of the property being searched, such that the police could reasonably believe that the defendant could access the property at the time of the search.” Here, based on Officer Sinnott’s body cam footage the court determined that while defendant was handcuffed and standing outside with Officer Sinnott he was in very close proximity to the open front door and the bookbag and other officers were directly inside the front door. Officer Sinnott and Defendant were standing close to each other at all times but Sinnott did not have physical control over the defendant.

“There is no impediment to *the defendant’s* movement beyond the handcuffs, and it is clear from the video that *the defendant* is only a few feet outside the house and thus could reach the other officers and the backpack within seconds.”The court also made note of the fact that while handcuffed outside the defendant was able to throw away his marijuana cigarette without drawing any attention to himself. The court noted that this tampering with evidence was proof that handcuffs are not alone determinative of whether a person could access dangerous weapons or destructible evidence in the area to be searched. Based on the aforementioned facts, the Court concluded that the officers could reasonably believe that defendant could access the bookbag and the subsequent search was also proper as a search incident to arrest.

[Return to Top](#)

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 3 of 6



### NORTH CAROLINA SUPREME COURT

#### 4<sup>th</sup> Amendment/ Search Warrants and Drug Sales

[State v. Bailey 841 S.E.2d 277 \(2020\).](#)

**Issue:** Did a search warrant contain sufficient probable cause to support the search of a residence based on an illegal drug sale observed by an officer at a separate location?

**Holding:** Yes, based on the totality of the circumstances there was probable cause to believe evidence of drug sales would be located inside the residence.

**Facts:** On April 25, 2017 Detective Rose of the Carteret County Sheriff's Office was conducting surveillance in the secluded parking lot of an apartment complex in Newport, North Carolina. Rose observed a Blue Jeep Compass pull into the parking lot. The occupants, James White and Brittany Tommasone were known to Rose due to their prior drug-related histories. Rose also knew that White and Tomassone did not live at the apartment complex but, actually lived across town at 146 East Chatham Street.

Rose then observed a female exit a nearby white Mercury Milan and enter the blue Jeep. After approximately 30 seconds the female exited the Jeep, returned to her car, and both vehicles left the parking lot. Based on his training and experience, Detective Rose believed a drug transaction had just taken place. Rose and two other officers on scene followed the Mercury and conducted a traffic stop after observing the driver commit several traffic violations. During the traffic stop the female admitted that she had just purchased heroin from White, consumed it in the car, and threw the baggie out the window.

At the same time another officer on scene followed White and Tomassone's Jeep. He observed them drive directly to 146 East Chatham Street, their known residence. Both White and Tomassone exited the vehicle and went into the house.

Based on the aforementioned facts Detective Rose applied for a search warrant for the 146 East Chatham Street residence. In the search warrant application the items to be seized included "controlled substances, drug paraphernalia, weapons, cell phones, computers and any United States Currency." The search warrant was granted.

Officers served the warrant that night and found White and Tomassone present inside. Defendant Bailey and his girlfriend were also present. Defendant was located in a bedroom that contained approximately 41 grams of cocaine, drug paraphernalia, and \$924 cash.

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 4 of 6



Defendant was indicted for trafficking in cocaine. He filed a motion to suppress evidence seized arguing that the warrant was not supported by probable cause. The trial court denied the motion and the defendant subsequently pled guilty. He then appealed the denial of his motion to the North Carolina Court of Appeals. The Court of Appeals affirmed the ruling of the trial court.

**Discussion:** Search warrants for a residence must set out the facts showing some nexus or connection between the residence and illegal activity. The court found that the magistrate did have a substantial basis for finding that there was probable cause to search the residence. There were 5 key facts the court focused on:

1. Detective Rose observed the encounter in the secluded parking lot between White, Tommasone, and the female in the Mercury, which based on his training and experience likely involved the illegal sale of drugs.
2. Detective Rose knew Tomassone and White had a history of selling drugs.
3. The female in the Mercury admitted purchasing drugs from White in the parking lot.
4. Another officer observed White and Tommasone travel from the drug deal directly to the Chatham Street residence, exit the car, and go inside.
5. Detective Rose knew White and Tomassone lived at the residence.

The court found that there was no need to show that drugs were being sold at the residence in order to support a finding of probable cause. Officers needed to only show a nexus between the Chatham Street residence and drug activity. Here, “the information set out in Detective Rose’s affidavit allowed the magistrate to infer that evidence related to this criminal activity—such as drugs, drug paraphernalia, proceeds from drug sales, or associated items—would likely be found at the residence.”

[Return to Top](#)

### **4<sup>th</sup> Amendment/ Reasonable Suspicion and Traffic Stops** **State v. Ellis 841 S.E.2d 247 (2020).**

**Issue:** Was a traffic stop supported by reasonable suspicion that the crime of disorderly conduct was being committed based on a passenger “flipping the bird” from the car window?

**Holding:** No. Absent additional facts, “flipping the bird” from the car window does not constitute the crime of disorderly conduct.

**Facts:** On January 9, 2017, Trooper Stevens of the North Carolina Highway Patrol was assisting a stranded motorist on a roadway. While on the roadway with the stranded motorist, Trooper Stevens observed a small white SUV travelling in their direction. He further noticed that the defendant-

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 5 of 6



passenger had his hand outside the window and was waving it back and forth. As the car got closer Trooper Stevens observed that the hand motion changed from the wave to a pumping motion with his middle finger.

Trooper Stevens believed the defendant-passenger of the SUV was committing the crime of Disorderly Conduct. He got into his patrol car and pursued the SUV with his blue lights activated. He pursued the vehicle for approximately ½ mile before the car stopped. No other traffic violations were observed. Once the car stopped Trooper Stevens approached and asked for the identification of both the driver and the defendant. After initially failing to comply, the driver gave her identification to the Trooper. The Defendant refused and Trooper Stevens escorted him from the car to his patrol vehicle. Defendant then provided his name and date of birth. Trooper Stevens issued him a citation for Resist, Delay, Obstruct for initially refusing to provide his identification.

At trial the defendant moved to suppress the stop for a lack of reasonable suspicion. The trial court denied the motion and the defendant pled guilty. The Court of Appeals affirmed the ruling of the trial court finding that the stop was justified by reasonable suspicion.

**Discussion:** Trooper Stevens believed the defendant committed the crime of disorderly conduct. North Carolina General Statute 14-288.4(A)(2) states that “Disorderly conduct is a public disturbance intentionally caused by any person who . . . makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.”

Based on the testimony at trial Trooper Stevens did not know whether the middle finger gesture was directed at him or another driver on the roadway. The fact that it could have been directed at another driver was insufficient to show his action was likely to provoke a violent retaliation from another driver. Furthermore, the action of raising his middle finger, or “flipping the bird,” was insufficient on its own to show a “breach of the peace.” Since there were no other traffic violations observed the stop was not supported by reasonable suspicion.

[Return to Top](#)

## REMINDERS

### Crime Stopper Tips

Crime Stopper Tips must be included with the investigative file presented to the District Attorney’s Officer during papering. The tip itself is discoverable. The District Attorney’s Office will make the necessary redactions of information that could identify the tipster pursuant to [NCGS 15A-904\(a3\)](#). That statute states that, “The State is not required to disclose the identity of any individual providing assurance of anonymity unless ordered by the court.”

# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

Spring 2020

Volume 37, Issue 5

Page 6 of 6



### Domestic Criminal Trespass

The elements of Domestic Criminal Trespass ([NCGS 14-134.3](#)) are:

A person:

1. After having been forbidden to enter *or* after being ordered to leave
2. By a lawful occupant
3. Enters *or* refuses to leave
4. The premises occupied by the person's present or former spouse *or* a person with whom the charged person has previously lived as if married
5. At a time when they are living apart.

Element 4: The term "occupied" as used in this statute does not require proving physical presence of an occupant at the time of the trespass. The North Carolina Court of Appeals has distinguished the term "occupied" as used in crimes such as Discharging a Firearm into Occupied Property from the use of the term in the Domestic Criminal Trespass statute. Actual physical presence is required to prevent the harm that could be inflicted from a person shooting into a house where people are present inside. "With regard to the crime of domestic criminal trespass, conversely, the infliction of mental distress upon a victim resulting from a defendant's unauthorized entry into her home is a harm that can occur regardless of whether the victim is physically present at the time of the trespass." [State v. Vetter 810 S.E.2d 759 \(2018\)](#).

Element 5: Evidence that the parties are living apart can include, but is not limited to, orders of separation; divorce decrees; or verbal or written agreements that the parties live apart.

[Return to Top](#)

