

CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

Fall 2020

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Forward: This issue will review two cases that address the Fourth Amendment and cover non-testimonial identification procedures as it relates to juvenile suspects.

FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment- Probable Cause/ Necessary Particularity
[United States v. Cobb, 970 F.3d 319\(2020\)](#)

Issue: Did officers violate the Fourth Amendment when they searched a computer for evidence of a murder and found child pornography?

Holding: No, the officers did not violate the Fourth Amendment when they conducted the searches based on probable cause and obtained two search warrants.

Facts: On September 7, 2014, James Timothy Cobb ("Cobb") lived with his parents James and Freda Cobb, and his cousin, Paul Dean Wilson, in Marion County, West Virginia. That afternoon Cobb and Wilson got into a physical altercation. During the fight, Cobb placed Wilson in a chokehold and put his knee in Wilson's chest. At the time of the altercation, Cobb's parents were home and called 911 for assistance. By the time law enforcement arrived on-scene, Cobb was still on top of an unresponsive Wilson, who was pronounced dead by emergency medical personnel. Cobb was arrested and charged with second-degree murder.

Unbeknownst to Cobb's parents when they called 911, they inadvertently left the phone line open. Upon reviewing the recording, the parents were heard begging Cobb to "stop," and telling him that Wilson was "helpless," and "he was going to end up killing the man."

Detectives interviewed Cobb's parents, who gave different accounts of the events leading to Wilson's death. The father told officers the altercation began because of Wilson's gun and that Wilson threatened him when his son, James Cobb, stepped in to protect him. In her interview, the mother stated Wilson punched her in the mouth because she yelled at him for being mean to his cat, and that is when James Cobb stepped in to protect her. Additionally, while reviewing jail calls from September 8, it was discovered that Freda Cobb, Defendant's mother, told her son she placed cotton in her lip and took a picture on a neighbor's advice to support her version of events.

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On September 9, Cobb was recorded in another jail call telling his father to remove a laptop from his room and put it in the father's room to keep it safe. Cobb also disclosed to his father that Wilson used the laptop, and "he put some shit on it." He then requested that his father, "wipe down or clean the computer."

After reviewing all this information with the state prosecutor, the lead detective obtained a search warrant to search Cobb's residence for "any and all firearms belonging to Paul Dean Wilson Jr., and any and all laptop computers, including tablets or desktop computers belonging to or operated by James Timothy Cobb, any all cell phones belonging to or operated by James Timothy Cobb, and any and all evidence of a crime." The investigating officers executed the search warrant and seized three firearms and a Gateway laptop believed to be the computer Cobb referred to in the phone call with his father.

On September 23, the officers obtained a second search warrant for the Gateway laptop's internal contents for evidence of the murder. The probable cause to support the warrant was based on the altercation that led to Wilson's death, Cobb's instructions to his parents, and other jail phone calls made by Cobb. The search warrant was granted and specified that it may be for evidence of the homicide and "any and all other evidence of any other crimes."

When the executing officer began to open the computer files, he quickly discovered pornographic photos of underage females in various undress stages and engaged in sexual acts. The officer immediately stopped the search and consulted with the state prosecutor, who concurred that the pornographic images were of prepubescent females. Subsequently, the computer was surrendered to the state lab for further analysis.

Several months later, while awaiting trial, Cobb's cellmate came forward and informed investigators that Cobb admitted to killing Wilson because Wilson had discovered the child pornography on Cobb's computer, and had threatened to turn him into the authorities.

Cobb later pleaded guilty to second-degree murder and received a sentence of 20 years. On May 1, 2018, a federal grand jury indicted Cobb for possession of child pornography. Cobb moved to suppress, stating both warrants lacked probable cause, and the second warrant lacked the requisite particularity. The District Court held both warrants were supported by probable cause. Cobb entered a conditional guilty plea and appealed.

Discussion: The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Probable cause exists when, given all the circumstances outlined in the affidavit..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. The particularity

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requirement is focused as well on the officer executing a warrant. It ensures that the search will be carefully tailored to its justifications rather than becoming a wide-ranging exploratory search.

When deciding the necessary particularity, the Court stated it does not take a hyper-technical approach but instead relies on the reasonableness to make the determination. Ultimately, the Court held, both search warrants were supported by probable cause. The Court then reviewed the second warrant and stated there are two ways to satisfy the particularity requirement of the Fourth Amendment.

Either by identifying the items to be seized by reference to a suspected criminal offense or by describing them in a manner that allows an executing officer to know precisely what he has been authorized to search for and seize. Since the second search warrant stated evidence of the murder, it met the first prong of the particularity requirement. Once the Court established, the officers had a valid search warrant support by probable cause and met the Fourth Amendment's particularity requirement; the child pornography discovery was permissible under the plain view doctrine. Both courts found the use of the term "any and all crimes" not to be a sufficient bases to support a search warrant on its own.

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FOURTH AMENDMENT/PROBABLE CAUSE/ BYSTANDER TIPS

[United States v. Mitchell, 963 F.3d 385\(2020\)](#)

Issue: Did officers violate the Fourth Amendment when they relied on a known 911 caller and bystander's tip to establish reasonable suspicion to stop and frisk the defendant?

Holding: No, the officer had reasonable suspicion of criminal activity when he stopped the defendant since he fit the police dispatch description, and it was near in time and geographic location to the disturbance outside a bar. The arresting officer was justified in relying on the bystander's tip as a part of his basis for reasonable suspicion.

Facts: On April 7, 2013, after witnessing a large fight, Jim Smith ("Smith") called and reported the incident. Smith was known to officers to be a regular at the bar and may have been employed at the bar in the past. He also left his name and telephone number when he reported the incident.

Since this area was a hot spot, officers were familiar with the bar from past altercations and are regularly dispatched to the bars in the area around 3:00 a.m., closing time. The initial call for service was entered on the CAD at 3:11:29 a.m. At 3:12:06 a.m., the CAD was updated to state about 30 people involved in the fight, and Smith advised he heard someone say, "he has a gun." A few seconds later, at 3:13:00, the CAD was updated to say one suspect was knocked out and laying on the ground.

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At 3:16:51, the first officer arrived at the bar—while others were en route. The first officer advised over the radio that a bystander at the scene had informed him a black male wearing red pants and a black shirt was the person with the gun. The bystander also advised the person was walking eastbound on Fourth Avenue away from the bar. As soon as the radio cleared, the second officer en route to the bar spotted James A. Mitchell ("Mitchell"), who matched the description precisely and was walking eastbound on Fourth Avenue, within one block of the bar, and no other pedestrians were around.

The officer ordered Mitchell to stop and place his hands on his head. At this point, a third officer also stopped his car to assist with Mitchell. Subsequently, they conducted a pat-down on Mitchell and discovered a firearm. After securing Mitchell, the officer called in the serial number to dispatch at 3:20:27. Mitchell was indicted for possession of a firearm by a felon based on a recent prior felony conviction. After his motion to suppress was denied, he pled and appealed.

Discussion: The Fourth Amendment protects against unreasonable searches and seizures. However, under the well-established doctrine, a police officer may conduct a brief investigatory stop—known as a *Terry* stop—predicated on reasonable, articulable suspicion that criminal activity may be afoot. In evaluating the validity of a *Terry* stop, the Court reviews the totality of the circumstances.

The Court only focused on the stop in this matter because Mitchell did not challenge the frisk. It is important to note, *Terry* requires reasonable suspicion to stop someone and then to frisk them. The bases of the arguments before the Court was whether or not the two tips established reliability to be the basis of reasonable suspicion. In distinguishing between anonymous tips and bystanders' tips, the Court gave a factor of reliability to the bystander's tips for reasons stated below.

In the instant case, Smith, who was known to the police, called to report the assist and identified himself. Officers were familiar with Smith as a regular at the bar who, at one point, may have been an employee. Therefore, the standard applied to anonymous tips does not apply to Smith's call.

As to the bystander who provided Mitchell's description, the Court determined that their presence at the scene strongly supported the tip's reliability. Since the officer had a face-to-face interaction with the bystander, they had the opportunity to observe the informant's credibility and demeanor, which also lends itself to the tip's reliability. By providing the tip in a public place, the bystander opens themselves to risk or reprisal, and if they provide a false statement, they may be prosecuted. Because of the stated rationale, this tip was also found to be reliable.

Once established, both tips provided reliable information that can be the basis for reasonable suspicion. The circumstances sufficiently created reasonable suspicion of a crime committed by the defendant—the stop of Mitchell was upheld.

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Juvenile Suspects & Non-Testimonial Identification Procedures

A non-testimonial identification order (NTO) is required for ALL non-testimonial identification procedures performed on juvenile suspects (ages 6-17 years old), unless: 1) the juvenile is charged as an adult; 2) the juvenile has been transferred to Superior Court to be tried as an adult; or, 3) one of the two exceptions below applies. G.S. [7B-2103](#). Please note that the juvenile, the juvenile's parents, and/or the juvenile's attorney CANNOT give consent for the procedure. Unlike with adults, NTOs can be served on a juvenile while in custody. Once non-testimonial evidence is obtained, it may be used for any investigative or comparative purpose (i.e. it is not limited to the case the evidence was obtained for). Examples of non-testimonial evidence include: fingerprints, photographs, blood, saliva, gun-shot residue, hair, urine, footprints, measurements, handwriting samples, voice, palm prints, lineups or any other reasonable physical examination.

Exception for Photographing & Fingerprinting:

Officers MUST fingerprint and photograph a juvenile without a NTO when:

- a. Juvenile is at least 10 years old at the time the offense is committed;
- b. Juvenile committed a non-divertible offense*;
- c. Complaint has been prepared for filing as a petition by Juvenile Court Counselor; and,
- d. Juvenile is in custody of LEO or DJJ.

*Non-Divertible Offenses are:

- a. Murder;
- b. First-degree or second degree rape or sexual offense;
- c. Arson;
- d. Felony violations of Article 5, Chapter 90 of the General Statutes;
- e. First degree burglary;
- f. Crime against nature; or,
- g. Any felony which involves the willful infliction of serious bodily injury upon another or which was committed by use of a deadly weapon.

Exception for Show-Ups:

Officers MUST photograph juveniles at show-ups without a NTO when:

- a. Juvenile is at least ten (10) years of age or older at the time of the show-up; and,
- b. Juvenile committed a non-divertible offense OR common-law robbery.

A NTO is NOT required to obtain non-testimonial evidence from a juvenile victim or witness. Parents can provide consent to a non-testimonial identification procedure for juvenile victims/witnesses under 15 years old. 16 and 17 year old juveniles can consent without their parents to photographing and fingerprinting, however, officers should always seek parental consent first. For all other types of non-testimonial evidence, a search warrant is preferred if parental consent cannot be obtained. If Officers have a juvenile that is both a victim/witness and a suspect (or there is any possibility that the juvenile victim/witness may be a suspect), then the juvenile should be treated as a suspect and the juvenile NTO requirements followed.

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