

CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

Winter 2021

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Forward: This issue contains reviews of two relevant cases from November 13, 2020 to December 18, 2020, and reminders about recent changes to the process for requesting accident reports, hotel trespass vs. tenancy, and the City Ordinance on lodging establishments.

CASE BRIEFS:

FOURTH CIRCUIT

4th Amendment/Entry into Private Premises to Arrest:
[U.S. v. Brinkley](#), 980 F.3d 377 (Nov. 13, 2020).

Issue: Was the officers' entry into the apartment pursuant to an arrest warrant reasonable?

Holding: No, when entering a residence pursuant to an arrest warrant officers must have probable cause (1) that the defendant resides at the location, and (2) that the defendant is presently inside.

Facts: In February 2017, a CMPD/ATF task force was attempting to serve an outstanding arrest warrant on the defendant for possession of a firearm by a convicted felon. The ATF Agent in charge of the case obtained two potential addresses for the defendant. One location was linked to an apartment on Stoney Trace Drive and the other location was associated with a water bill in the defendant's name. A CMPD TFO assigned to the case also identified several other addresses associated with the defendant through CJLEADS. Two of the database entries were made in January 2017 and were associated with the apartment. Other entries from December and November 2016 were associated with different addresses, including one linked to an address on Planters View Drive which also matched other older entries in the system for the defendant. The TFO also located the defendant's Facebook page and determined from the posts that the defendant was dating Brittany Chisholm. A CJLEADS search for Chisholm showed that she was also associated with the Stoney Trace Drive apartment.

The TFO, ATF Agent and three officers then went to the apartment in the morning to conduct a knock and talk and to monitor the apartment to determine if the defendant was there. After the TFO knocked on the door,

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officers heard movement coming from inside for a minute until they heard a woman's voice asking who was there. The TFO responded that it was the police and after another minute Chisolm opened the door. The TFO told Chisolm that they were looking for the defendant and asked her for consent to enter to make sure the defendant was not there. Chisolm appeared nervous to officers and they observed her body tense and her breathing quicken. Officers also noticed a second woman folding laundry in the living room and observed both women looking towards the rear of the apartment where they heard sounds of movement coming from. The TFO again requested consent to enter, but Chisolm stated she did not want police to enter. The ATF Agent then informed Chisolm that he believed she was hiding the defendant in the apartment and the five officers made entry. The defendant was located inside of a bedroom and arrested.

Officers made a protective sweep of the apartment and located digital scales, a plastic baggie with cocaine base, and a bullet. Chisolm then initially gave consent to search the apartment but revoked it, so officers obtained a search warrant, and located and seized three firearms and magazines. The defendant was subsequently indicted on additional weapons and drug charges associated with the evidence obtained from the search of the apartment. The defendant moved to suppress the evidence, alleging that the officers' entry was unreasonable since they lacked probable cause that he resided in the apartment and was present at the time they made entry. The trial court denied the motion and the defendant entered conditional guilty pleas to two charges related to the search of the apartment and appealed.

Discussion: The Court determined that in order to satisfy the heightened protection afforded the home under the 4th Amendment, officers must have probable cause that the defendant resides at the location and that the defendant is present at the time when entering private a residence pursuant to an arrest warrant. The Court concluded that the officers' reliance on the database entries and Facebook posts associated with the apartment was insufficient to establish probable cause that the defendant resided at the apartment considering the numerous other addresses associated with the defendant, including the one with a utility bill in the defendant's name, and the officers' failure to investigate any of the other addresses. Additionally, the officers' interactions with Chisolm prior to their entry did not provide any additional evidence that the defendant resided at the apartment as opposed to merely staying there temporarily.

The Court similarly concluded that officers lacked probable cause that the defendant was present at the time they made entry into the apartment. The Court reasoned that due to the uncertainty as to whether the apartment was the defendant's residence, the other factors (morning hour, delay in responding and opening the door, nervous behavior, sounds of movement from the rear of the apartment and occupants' looking toward the source of the sounds) did not establish probable cause that it was the defendant who was presently inside the apartment as opposed to some other occupant. The Court stated that "[w]hen police have limited reason to believe a suspect resides in a home, generic signs of life inside and understandably nervous reactions from residents, without more, do not amount to probable cause that the suspect is present within."

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NORTH CAROLINA SUPREME COURT

Sufficiency of Evidence/Second-Degree Sexual Exploitation of a Minor/First-Degree Forcible Sexual Offense:

[In re J.D.](#), ___ N.C. ___, ___ S.E.2d ___ (Dec. 18, 2020).

Issue: Was there sufficient of evidence to support delinquent adjudications of second-degree sexual exploitation of a minor and first-degree forcible sexual offense?

Holdings: No, there was insufficient evidence to support delinquent adjudications of these offenses.

Facts: In November 2016, the victim (age 13) was staying overnight at the house of the juvenile defendant (age 15). Along with the victim and the juvenile, two of the juvenile's younger cousins (ages 12 & 13) and his parents were also at the house. The juvenile engaged in illegal sexual contact with the victim during the sleepover, twenty-one seconds of which the juvenile's older cousin captured in a video recording. In the recording, both the victim and the juvenile have their pants pulled down and the victim is leaning over a piece of furniture with the juvenile performing thrusting motions from behind him. The juvenile is heard telling his cousin that he "better not be recording this" and "not to record this." At one point the juvenile can be seen grabbing the victim's shirt and lifting his thumb from his hand as he grabs the shirt.

The victim's parents alerted law enforcement when they became aware of the incident after the juvenile's cousin sent the video to other people. The juvenile was interviewed by officers and stated that the sexual contact between himself and the victim was consensual. The juvenile admitted that his penis touched the victim's buttocks but denied penetrating the victim's anus. The juvenile's cousins told officers that it appeared as though the juvenile and the victim were having sex. Juvenile petitions alleging second-degree sexual exploitation of a minor and first-degree forcible sexual offense were filed against the juvenile. At the adjudicatory hearing the victim testified that that he felt the juvenile's private parts on his buttocks but also denied that any anal penetration had occurred. The juvenile's motion to dismiss was denied and the juvenile was adjudicated delinquent for the two offenses.

Discussion: In this case, the Court concluded that there was insufficient evidence presented at trial to support an adjudication of delinquent on the charge of second-degree sexual exploitation of a minor. The petition alleged that the juvenile committed the offense by "record[ing] material containing a visual representation of a minor...engaged in sexual activity, ...the defendant knowing the material's content." Since the evidence indicated that it was the juvenile's cousin who made the video recording, the State proceeded against the juvenile under an acting in concert theory. Acting in concert occurs when "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose...or as a natural or probable consequence thereof." (internal citation omitted)

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The Court stated that the video itself did not provide enough evidence of a common purpose or plan. The length of the video was very short, and since it depicted the incident after it had begun, it did not contain any evidence of what occurred between the juvenile and his cousin prior to the illegal conduct. The statements of the juvenile captured in the recording showed that the juvenile did not want his cousin to make the recording. The Court also determined that even if the juvenile had made a “thumbs-up” sign when he grabbed the victim’s shirt, this would be insufficient to support an acting in concert theory “as acting in concert requires more than mere approval.”

The Court also concluded that there was insufficient evidence to support an adjudication of delinquent on the charge of **first-degree forcible sexual offense**. The petition alleged the juvenile committed the offense “by unlawfully, willfully, and feloniously engag[ing] in anal intercourse with [the victim] by force and against his will.” Since the victim in this case unequivocally denied that any penetration occurred, the State was required to present additional corroborative evidence of penetration. The Court found that the video recording did not depict evidence of actual penetration or other sexual act as defined in the statute. Additionally, the Court determined that the statements of the juvenile’s cousins that they believed the juvenile and the victim were having anal sex insufficient corroborative evidence to support the adjudication.

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REMINDERS

Hotel Trespassing Tenants v. Guests

- Please remember that COVID-19 eviction restrictions do not affect officers’ ability to enforce criminal trespassing laws at hotels. Although the Governor previously issued an Executive Order placing a moratorium on evictions (which has since been lifted), that particular provision did and does not change law enforcement officer’s response to trespassers.
- Tenants v. Guests, generally
 - Tenants must be evicted while guests may be asked to leave at any time
 - In order to be a tenant or to “establish residency” the individual must “contribute to the household”
 - This can be done by paying rent, bills, buying groceries, or a portion thereof, or performing a lawful service (e.g., home healthcare; lawn/house maintenance, childcare, etc.)
 - There is no “toothbrush rule” and there is no set time period before tenancy attaches
 - A guest is someone who does not contribute to the household, known as a “freeloader,” who may be removed at any time
 - If the person does not leave, they can be charged with trespassing
- Hotel Tenants v. Guests
 - Hotels are different because, generally, the person is paying to stay there; however, hotel fees and payments, alone, do not make someone a tenant

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- Factors for hotel tenancy:
 - Is this their primary residence?
 - What amenities does the hotel offer: in-suite kitchen; multiple bedrooms; on premises self-laundry room; full or limited housekeeping services?
 - How long has the subject been there?
 - Does the subject receive mail at the hotel?
 - How does the subject pay: daily, weekly, monthly?
 - Is this a long term stay establishment?
- If the subject is a hotel guest, then they may be asked to leave at any time
 - If a hotel manager wants to keep payments that have already been made by the guest but seek to remove the guest for continued nonpayment of the room, noise, property damage, etc., the manager should seek a criminal trespass warrant at the Magistrate's Office
 - If the hotel manager returns the room rates that have been paid by the guest, CMPD officers can make a warrantless arrest (listing the hotel staff member as the prosecuting witness) for trespassing even if the guest refuses to accept the refund. The guest should be given an opportunity to retrieve their belongings in this situation.
- If the facts indicate that the subject is a hotel tenant, officers should advise hotel staff and the subject that this is a civil matter for eviction
- Please see the following link for a reference form with tenant/guest examples:
 - "Tenant or Guest — Eviction or Trespass?"
<https://cmpdweb/pao/Lists/Announcements/Attachments/84/Tenant%20or%20Guest---Eviction%20or%20Trespass.pdf>

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Requesting Motor Vehicle Accident Reports

Requests for DMV-349 reportable accident reports should be directed to the NC DMV at this time: <https://www.ncdot.gov/dmv/offices-services/records-reports/Pages/crash-reports.aspx>. This applies to all CMPD sworn and civilian personnel including NEPS and Patrol Division Offices.

The Police Attorney's Office has updated the CMPD Driver Information Exchange form to comply with the requirements of G.S. 20-166 and the Federal Driver's Privacy Protection Act. Please note that officers will now need to inform citizens on scene whether they are classifying the accident as reportable to the DMV or non-reportable. Please indicate which type of accident this is by circling the appropriate type on the bottom of the form.

Non-reportable accident reports are not sent to the DMV. Therefore, citizens will need to go to a division office in order to obtain a copy of their non-reportable accident report. For each request for a non-reportable accident report, the requestor must complete a CMPD Request for Non-Reportable Motor Vehicle Crash Form. At least one box must be checked by the requestor and a valid photo ID must be presented in order to obtain a copy of the non-reportable accident report. Please retain the completed form at the division office. The report should not be released to the requestor without this form.

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Hotel and Motel Requirements Ordinance

Sec. 15-302 of the Charlotte City Code was amended in 2019 to eliminate the provision of the Ordinance that required hotel and motel operators to provide guest registration or reservation information upon the request of a law enforcement officer due to the U.S. Supreme Court's decision in [City of Los Angeles v. Patel](#). Officers wishing to inspect or obtain the records should do so by consent or pursuant to a search warrant. The Ordinance states:

Sec. 15-302. - Prohibited acts.

- (a) It shall be unlawful for any lodging establishment, person, owner, operator, general manager, night clerk or person responsible for the day to day operations of a lodging establishment to:
- (1) Fail to number or designate in a plain and conspicuous manner each lodging unit. Such number or designation shall be placed on the outside of each lodging unit and no two lodging units shall bear the same number or designation, unless clearly designated as to a building, wing, or other identifier.
 - (2) Allow a guest to register or check in at the lodging establishment who does not provide a valid credit card or government issued identification except when a reservation is established by a confirmation number, or provided by an amenity program, kiosk, or on-line system.
 - (3) Charge a registered guest an hourly rate for a lodging unit except if:
 - i. The hourly extension was granted by the lodging establishment to accommodate a late check out; or
 - ii. The hourly extension is a partial day rate granted for flight layovers or other travel delays; or
 - iii. The hourly rate is established by a written company policy.
 - (4) Block 911 calls from a guest room.
 - (5) Knowingly allow a person to remain or return to the premises of the lodging establishment, or provide or continue to provide lodging to a registered guest or other person only where the registered guest or other person is participating in observable criminal activity in or on the property. This section does not apply to a lodging establishment if it is currently taking legal action to remove the registered guest or other person or has provided the registered guest or other person written notice to leave within a reasonable time period or the registered guest or other person has been notified to leave and has refused to leave.

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