CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Cases reviewed in this Issue include: A Fourth Circuit Court of Appeals case discussing probable cause to arrest multiple occupants in a vehicle for drugs located in the vehicle. There is also Fourth Circuit Court of Appeals case involving search warrants and the veracity of information contained within the affidavit. Lastly, there are reminders about a law enforcement officer's ability to enter a home to render emergency aid, disclosing information about juveniles, and a reminder about how to contact Police Attorneys.

CASE BRIEFS:

4th CIRCUIT COURT OF APPEALS

4th Amendment- Probable Cause/ Multiple Occupants of a vehicle
United States v. Myers, 986 F.3d 453 (January 26, 2021).

Issue: Is there probable cause to arrest both occupants of a vehicle when neither claim ownership of drugs found in the vehicle in a place that is readily accessible to both occupants?

Holding: Yes, an officer can reasonably infer that all occupants are in a common enterprise or conspiracy to possess the drugs found in a readily accessible place in the vehicle when no one claims ownership; and therefore, arrest them based on probable cause that they are committing a crime.

Facts:
On February 1, 2018, Sergeant Winingear with the Norfolk, Virginia Police Department drug interdiction unit, was conducting surveillance of a parking lot bus station. A bus company operated an inexpensive bus service between Norfolk and Chinatown, New York City from the location. Previously, the bus service had been used to further drug distribution between New York City and Norfolk. The interdiction unit had made drug seizures from this bus station in the past.

While conducting surveillance, Sergeant Winingear observed a bus arrive at the station and 20 to 30 passengers, including the defendant exited the bus. Sergeant Winingear's attention was drawn to the defendant because he was not carrying any luggage or bags as might be expected from someone travelling that distance. Instead, the defendant was only carrying a "dark unidentifiable object' in his hand. The defendant placed a call on his

cellphone. Minutes later a silver Infiniti arrived, and Defendant got into the passenger seat. Based on his observations of the defendant, Sergeant Winingear notified his unit to start conducting surveillance on the vehicle. He further instructed that there was a "possible person of interest in the vehicle" and to follow "to see if probable cause could be obtained to stop the vehicle to question the occupants." Officers following the Infiniti noted that the tint on the windows was likely excessive and in violation of Virginia law. They followed the vehicle as it passed two convenience stores and turned into a third. The driver of the vehicle briefly stopped and then retraced the route back to the bus station and then in an illogical route entered the highway.

Given the suspicious route of the car officers believed the occupants may have been aware they were being followed. After clocking the speed of the Infiniti officers made a traffic stop for speeding and the window tint violation. On approach of the vehicle officers noted an odor of marijuana and conducted a search of the vehicle and the 2 occupants- the driver and passenger-defendant.

During the search officers located a graham cracker box on the floorboard behind the front passenger seat. The box contained a brick like substance in a vacuum-sealed bag. The substance field tested positive for fentanyl. Lab testing later confirmed the item was over 300 grams of fentanyl. Officers also located three cellphones in various areas of the car and a loaded gun in the trunk. The driver admitted ownership of the three cellphones and gun.

During a search of the defendant officers located a cell phone and approximately $1800 cash. Neither occupant of the car claimed ownership of the drugs. Both the driver and defendant were arrested for possession of the fentanyl.

Defendant was subsequently federally indicted for conspiracy to distribute and possess with intent to distribute fentanyl. He filed a motion to suppress evidence on the grounds that officers lacked probable cause that he had committed the drug crime. The District Court denied the motion. He subsequently appealed that ruling to the 4th Circuit Court of Appeals.

Discussion:

Defendant argued that officers did not have sufficient knowledge to reasonably believe that he, separate and apart from the driver, possessed the fentanyl. Therefore, he claimed officers did not have probable cause to arrest him for possessing the narcotic. He further argued that because the driver admitted ownership of the gun and it is commonly understood that "drugs and guns all too often go hand in hand," that officers only had probable cause to arrest the driver.

"To be reasonable, an arrest of an individual must be supported by probable cause to believe that the individual has committed or is committing a crime." *United States v. Watson, 423 U.S 411, 423-424 (1976).* There is not a legal formula or test but analysis turns on the "commonsense and streetwise assessment of the factual circumstances." *United States v. Humphries, 372 F. 3d 653, 657 (4th Cir. 2004).* Therefore, in determining whether an arrest was justified by probable cause courts take into

account all the relevant facts known to the arresting officer, the officers practical experience, and inferences that can be drawn from both. Id. The facts known to Sergeant Winingear, a 21-year vet, and the stopping officer, a 16-year vet were as follows:

1. Drugs had been seized from the bus stop before and the bus stop was a known entry point for drugs into Norfolk.
2. The defendant exited the bus with no luggage and a dark object in his hand. He was picked up at the bus stop after placing a phone call. Given Sergeant Winingear's experience this behavior was suspicious.
3. The Infiniti took a long and unnecessary route to the highway suggesting to officers that the occupants likely knew they were being followed.
4. After the vehicle was stopped for speeding and window tint violation officers noted the odor of marijuana coming from the car.
5. A gun and three phones were found in the car and claimed by the driver. The defendant was found in possession of one phone and $1800. Neither the driver or defendant admitted to ownership of the drugs lying behind the front passenger seat.

Based on these facts, officers could reasonably believe that the crime of possession of fentanyl was being committed and that the two occupants were involved in a common enterprise or conspiracy. The driver and defendant obviously knew each other or had some sort of arrangement since the driver picked the defendant up from the bus stop and there was no evidence of ride-sharing. Both were present in a vehicle that had an odor of marijuana and neither provided information regarding who owned the fentanyl which was readily accessible to both.

The court concluded that this case was factually similar to the United States Supreme Court case, *Maryland v. Pringle,* 540 U.S. 366. In *Pringle,* during a search of a vehicle with three occupants officers located money and baggies of cocaine between the backseat armrest. All occupants of the car denied ownership of the money and drugs so they were all arrested. The court held that there was probable cause to infer a criminal enterprise and justify the arrest of all three passengers because, "a car passenger will often be engaged in a common enterprise with the driver and have the same interest in concealing the fruits or evidence of their wrongdoing." Id. at 373.

In this case, while the specific role of each occupant may have been unknown to the officer the totality of conduct in this case by the defendant and the driver particularized the suspicion to both and justified their arrests for the fentanyl.

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4th Amendment/ Search Warrants/ Omission of Facts/ Franks Hearing
United States v. Pulley ___F.3d____; 2021 U.S. App. LEXIS 3723 (February 10, 2021).

Issue: Did the probable cause statement in a search warrant for a robbery suspect's home, car, and mobile device contain false information or omit information that made the warrant affidavit misleading when it did not contain certain facts about the co-defendant?

Holding: No, there was no evidence that the detective that applied for the warrant made misrepresentations in or omitted information from the affidavit, "with reckless disregard of whether it would make the affidavit misleading."

Facts:
Four similar armed robberies were committed at pharmacies in Norfolk, Virginia between April 2016 to October 2017. The modus operandi was the same in each case. The armed robber entered the pharmacy with a trash bag and directed the clerk to fill the bag with certain prescription narcotics. The first 3 robberies involved only one man entering the pharmacy, but the affiant-detective (Detective Howard) believed there was a second person involved, likely a getaway driver. During the fourth robbery, two individuals entered the pharmacy.

After the third robbery but before the fourth, a confidential informant identified Darryl Blunt as being involved in the second and third robberies. The informant also told officers that when he received narcotics from Blunt at least one other person was present. He did not know the person's name but believed he was Blunt's cousin and went by the nickname "Cuz." He also stated that "Cuz" had been charged with murder twice. Further investigation by officers revealed that Blunt and Pulley (Defendant) were not cousins but were very close. Defendant had also been charged with murder prior to the robberies.

Detective Howard obtained Blunt's cellphone records and GPS data. The data confirmed he was in the area of the pharmacies during the second and third robberies. Data also confirmed that he received a short incoming call during the third robbery. This was significant because the pharmacist told officers that during the robbery he overheard the suspect answer his phone and say, "we're good in here." Detective Howard discovered that the call was placed from the defendant's phone.

After the fourth robbery a search warrant and arrest warrant were executed related to Blunt. Several items seized pursuant to the warrant confirmed Blunt was involved. Those items included prescription narcotics in bottles that had markings consistent with the description of the bottles taken from the fourth robbery, a loaded magazine, and clothing matching what was worn during the last robbery.

During an initial interrogation, Blunt denied involvement in the robberies and stated that he only sold

drugs. Detective Howard did not believe his statement. While in a holding cell, Blunt hid a purple gun behind the toilet. The gun was discovered several days later and was the same caliber as the loaded magazine seized from his residence. Officers confronted Blunt about the discovery of the gun and he denied knowledge of it, even though there was video footage of him with the gun in the holding cell.

A different detective listened to Blunt's jail calls and heard him tell a friend that he had thrown out some clothes but needed them retrieved because they would be important. The statement was included in Detective Howard's investigative file, but she was unaware of this information when she drafted the search warrant at issue. During a second interrogation Blunt, implicated the defendant in all four robberies. He further stated that he could show detectives where the defendant had hidden clothes worn during the final robbery.

Prior to drafting search warrants related to the defendant, another officer told Detective Howard that the defendant was in jail at the time of the first 2 robberies. Detective Howard did not believe this information was accurate and still believed Defendant was involved in all four robberies.

Detective Howard obtained several search warrants related to the defendant. The affidavit stated that the co-defendant (Blunt), "has provided information found to be credible by detectives." Additionally, the affidavit failed to mention that Blunt had disposed of the clothes, not the defendant as Blunt said. Further, the affidavit did not mention that another officer believed the defendant was in jail at the time of the first 2 robberies or that Blunt denied knowledge of the purple gun even though video footage confirmed he had it in the holding cell.

The defendant was indicted for possession with intent to distribute controlled substances. He filed a motion to suppress evidence obtained from the search warrants based on what he believed to be the misleading statement that Blunt was credible, and the detective's failure to include information about the clothing, gun, and the belief the defendant was incarcerated during two robberies. After a Franks hearing the District Court denied his motion. Defendant subsequently appealed to the Fourth Circuit Court of Appeals.

Discussion:
Generally, a defendant cannot challenge the veracity of a facially valid search warrant with a motion to suppress. *United States v. Allen,* 631, F3d. 164, 171. However, in *Franks v. Delaware,* 438 US 154, the Supreme Court made an exception to allow an evidentiary hearing, known as a *Franks* hearing, on the veracity of statements made in search warrant affidavit, if certain conditions are met. At the *Franks* hearing, a defendant must prove that, "the affiant either intentionally or recklessly made a materially false statement or that the affiant intentionally or recklessly omitted material facts from the affidavit." Therefore, a defendant must show that an affiant acted intentionally or recklessly, and that the information was material.

In this case, the defendant alleged that Detective Howard acted recklessly in making misrepresentations in and omitting information from the affidavit, which in turn made the affidavit misleading. "Reckless disregard requires a showing that the affiant personally recognized the risk of making the affidavit misleading." *Miller v. Prince George's Cnty., Md.*, 475, F.3d. 621, 627 (4th Cir. 2007). Objective knowledge does not matter if the officer-affiant did not subjectively know the information was misleading. In the context of omissions, the burden is high because officers cannot be expected to include every piece of information gathered during an investigation in an affidavit. *U.S. v. Lull,* 824, F.3d. 109

The court then analyzed each statement and omission in the affidavit to determine whether the affiant recklessly made a materially false statement, or recklessly omitted material facts to determine whether the District Court committed clear error in denying the defendant's motion.

<u>Fact #1: Blunt, "has provided information found to be credible by detectives"</u>
The court reasoned that providing credible information is not synonymous with stating that Blunt is a credible and truthful person. This is unlike a search warrant based on information provided by a confidential informant, where credibility and reliability of the informant must be proven. Here, Blunt was named in the warrant and the information he provided was corroborated by detectives. The Court determined that the defendant may not like the wording used by the affiant but that in itself did not make the statement false. There was no clear error in the District Court's decision that the statement was not false or misleading.

<u>Fact #2 (omission): In the warrant Detective Howard stated Blunt confirmed that the defendant threw out the clothes. She omitted information that showed that at least one other investigator heard Blunt admit to discarding the clothing himself during a jail call.</u>
The defendant argued that even though Detective Howard testified that she did not learn about the jail recording until after she applied for the search warrant, the information should be imputed to her based on the collective knowledge doctrine. The Court determined that the collective knowledge doctrine does not apply in the context of a *Franks* hearing because the inquiry is whether the omission is intentional or reckless. Therefore, an officer who does not know information cannot intentionally or recklessly omit that information. Additionally, the court determined that no showing had been made that Detective Howard was being untruthful in her statement that she did not know about the jail call at the time she applied for the warrant. In fact, at the hearing she stated that who discarded the clothing did not matter to her. In her investigation the primary concern was that the clothing was retrieved to compare to the clothing worn by the robbers and that it be tested for DNA. There was no clear error in the District Court's decision that there was not a reckless disregard in omitting the fact.

<u>Fact #3 (omission): Another officer believed defendant was in custody during the first 2 robberies and relayed that information to Detective Howard.</u>

Here, the Court determined that although the Detective Howard knew about the officer's belief about the defendant's custody status at the time of the first 2 robberies, she testified that she had serious doubts about whether the information was accurate. She believed that the modus operandi of the four robberies, the information from the confidential informant, and the phone data all pointed to the fact that the defendant was involved in all four robberies. Detective Howard also stated that it was her practice to only include information in a search warrant that could be corroborated. In this case the defendant being in custody was not corroborated by any independent evidence. There was no clear error in the District Court's decision that there was not a reckless disregard in omitting the fact

In fact, after the search warrant was issued it was later determined that the defendant was not in custody at the time of the first 2 robberies. If the information from the other detective had been included it would have made the search warrant more misleading and less accurate.

Fact #4 (omission): Blunt initially denied involvement in the robberies and also denied possession of the purple gun used in the fourth robbery, even though it was found in his holding cell.
The defendant argued that these statements spoke directly to Blunt's lack of credibility and should have been included in the affidavit. Detective Howard testified that it is common for suspects to either deny involvement or minimize their role in crimes therefore, she did not give much weight to Blunt's statement that he was not involved in the robberies. Detective Howard also testified that Blunt's statement denying possession of the gun was irrelevant to the search warrant application for this defendant. The District Court found that, Detective Howard based her credibility determination on the fact that she had corroborated other information obtained from Blunt. There was no clear error in the District Court's decision that there was not a reckless disregard in omitting the fact.

Because the Court concluded that Detective Howard did not act recklessly in making statements or omitting information in the affidavit there was no need to conduct the second part of the inquiry to determine whether the information was material.

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REMINDERS

Entering a Home to Render Emergency Assistance

The Supreme Court of the United States recognizes an emergency aid exception to the 4th Amendment warrant requirement. Officers may make a warrantless entry based on exigency:

1. To render emergency assistance to an injured occupant **or**
2. Protect an occupant from imminent injury. *Brigham City v. Stuart,* 547 U.S. 398 (2006).

There must be an objectively reasonable basis for believing that a person in the house needs emergency aid. Id.

North Carolina law also recognizes an officer's authority to make warrantless entry into a building or residence to render emergency assistance. See NCGS §15A-285 and CMPD Directive500-004-B (IV)(D)(4) "Conducting searches of structures"- Warrantless Emergency/ Exigent Entry

Juvenile Information Disclosure

No information concerning juveniles should be disclosed or released to the public.

Please remember that until jurisdiction of the case has been transferred to Superior Court, juveniles' information is confidential and must not be shared with the public. This is true even when the "juvenile" is 18 years of age or older at the time the juvenile is charged. **It is the age of the juvenile at the time of the offense that determines whether or not the case will begin in juvenile or adult court.** For example: a case involving a 19-year-old suspect who committed an armed robbery when he was 15-years-old would be treated as a juvenile until that case is transferred to Superior Court. Once transferred, the Juvenile Code's confidentiality provisions no longer apply and public information concerning the individual such as their name, sex, age, address, employment, and alleged violation of law can be released.

Contacting Police Attorneys

During normal business hours:
In addition to emailing or calling individual attorneys, officers who have questions or court orders for review can email our listserv: CMPDPoliceAttorney@cmpd.org. Officers can also contact the main number for the Police Attorney's Office: 704-336-2406.

Monday-Friday after 5:00pm and weekends:
The on-call attorney should be contacted for all after-hours urgent warrants and questions.

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