

CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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NEW LAW

Forward: In this issue, we look at two cases from the Fourth Circuit, addressing an extension of a traffic stop and the applicability of the automobile exception to a suspect vehicle. Further, we discuss cases from the North Carolina Supreme Court regarding a vehicle search and the North Carolina Court of Appeals addressing the validity of a search warrant. We will also look at an upcoming law change concerning skimming devices.

CASE BRIEFS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Fourth Amendment - Searches / Seizure / Traffic Stop : [United States v. Buzzard, 2021 U.S. App. LEXIS 17518, F. 3d \(June 11, 2021\).](#)

Issues: Did the officer improperly extend traffic stop by asking the defendant about the existence of any contraband in the vehicle?

Holding: No, the officer's question was related to officer safety and the mission of the traffic stop. It did not extend the stop as it was asked while the officer was waiting on backup officers and the officer did not have information needed to perform his usual checks on the driver and the vehicle.

Facts: At approximately 1:30 am, a West Virginia police officer initiated a traffic stop for a defective brake light. Defendant, Buzzard was driving along with passenger, Martin. Upon approach, the officer recognized Martin from prior interactions. During the stop, the officer asked if there was anything illegal in the vehicle. Buzzard and Martin admitted that there was drug paraphernalia in the vehicle. Buzzard then produced a marijuana bowl and Martin brought out a needle and syringe.

Additional officers came to the scene and Buzzard and Martin were removed from the vehicle. During a search of the car, officers discovered two pistols wrapped in socks. One was located under the driver's seat and the other was located under the passenger seat. Both were arrested and charged with possession of a firearm by a felon.

Defendants filed motions to suppress alleging the officer violated the Fourth Amendment by prolonging the stop when the officer asked if there was anything illegal in the vehicle. They claimed the question was not related to the mission of the stop. Their motions were denied and they appealed.

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Discussion: The Court examined the case of *Rodriguez v. United States*, 575 U.S. 348 (2015). The Court distinguished the dog sniff in *Rodriguez* from the facts in this case. The Court pointed out that in *Rodriguez*, the dog's sniff was performed after the completion of the traffic stop. However, in the present case, the officer was in the middle of the traffic stop when he asked if there were any illegal items inside the car. The officer was still waiting on the information he needed to perform routine database checks and was also waiting on a backup officer to arrive on scene. The Court said the officer's question "didn't extend the stop by even a second."

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Fourth Amendment - Searches / Automobile Exception : [United States v. Caldwell, 2021 U.S. App. LEXIS 23202, F. 4th \(August 3, 2021\)](#)

Issues: (A) Is a warrantless search of a vehicle permissible on an empty, abandoned vehicle attributed to a robbery investigation? (B) Does the automobile exception apply to a vehicle that has been impounded and immobilized?

Holding: (A) Yes, the automobile exception applies to impounded and immobilized vehicles. (B) Yes, so long as probable cause exists when the search is being conducted.

Facts: On December 9, 2016, two men entered a Wells Fargo Bank in Charlotte, North Carolina armed with revolvers. They took close to \$6,000 cash from the tellers and fled in a vehicle. The cash was embedded with two GPS tracking devices which officers used to track its location to an area a couple of miles away from the robbery scene. Once the officers arrived, they heard rustling in the woods and saw three individuals running away. For safety, the officers called in a K-9 and Helicopter Unit to assist. During the search, Defendant Caldwell managed to keep himself hidden alongside a fence with vines and weeds. An officer walked past him and only recognized his presence due to the K-9 alert. The K-9 Unit apprehended him and located a bag containing almost all the stolen cash along with one of the GPS trackers.

Soon after the arrest, officers found the Chevy Impala nearby. Located in the back seat in plain view was a dark jacket, license plate, and revolver. Along the fence, a dark sweatshirt and glove were found. Officers also located a ski mask beside the vehicle. In the front yard of the address where the suspects fled, officers located two loose bills of currency, a cash wrapper and the second GPS tracker.

The vehicle was sealed at the scene and subsequently towed to the headquarters. A search warrant was obtained and the vehicle was searched. The search revealed a dark jacket, mask, toboggan, gloves, and a revolver. The trunk was unable to be searched as the vehicle's battery was dead. After this first search, the vehicle was transported to an impound lot. On December 22, 2016, the car battery was jump-started and the trunk was accessed. Another revolver was located inside along with gloves and a skullcap. Caldwell was indicted on multiple felony charges and filed a motion to suppress the evidence located in the vehicle alleging the searches of the car violated the Fourth amendment.

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Discussion: The Court cited *Maryland v. Dyson*, to describe how the automobile exception to the search warrant requirement allows a warrantless search if probable cause exists. The Court examined the December 9th search and the December 22nd search independently for Fourth amendment issues. In examining the December 9th search, the Court concluded probable cause did exist because the Impala was found at the site the GPS trackers led officers to find. The clothing and gun located in the car matched the description of the tools of the robbers as well. The Court concluded, therefore, officers could search the entire vehicle, including the trunk, without a warrant. Court further said even though officers took the precaution of obtaining a search warrant before the December 9th search, a warrantless search of the vehicle was still permitted.

Addressing the validity of the December 22nd search, the Court said the automobile exception still applies even after a vehicle has been impounded and immobilized so long as probable cause is still present. The Court said the passage of time did not interrupt the applicability of the automobile exception here. Probable cause was still present on December 22 since the trunk was unable to be searched back on the 9th. Concluding both searches fell within the automobile exception, the Court concluded the lower court was correct in denying Defendant's motion to suppress.

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NORTH CAROLINA SUPREME COURT

Fourth Amendment – Reasonable Suspicion/Terry Search of Vehicle : [State v. Johnson, 2021 N.C. LEXIS 707 \(August 13, 2021\).](#)

Issues: (A) Did officers who conducted a search for weapons within suspect's immediate control in the vehicle possess reasonable suspicion to initiate the frisk under *Terry v. Ohio*? (B) Did the officer's search of the vehicle after discovering defendant's criminal history constitute an unconstitutional extension of the traffic stop?

Holding: (A) Yes, the officer who performed the traffic stop possessed facts sufficient to demonstrate reasonable suspicion that the suspect was armed and dangerous. (B) No, the entire chain of events that occurred demonstrated there was not an unconstitutional extension.

Facts: A seven year veteran of the Charlotte-Mecklenburg Police Department conducted a traffic stop in a location he deemed a "very high crime area." On patrol with his partner, they observed a Dodge Charger with a license plate that came back to an Acura MDX. Determining the tag was fictitious, the officer conducted a traffic stop. Upon approach, the officer observed the suspect raise his hands in the air. He asked for his license and registration and if any weapons were in the car, to which the suspect denied any. The officer testified the defendant was extremely nervous, and in the officer's training and experience, the defendant's raising of his hands potentially indicated the presence of a gun. The officer further indicated the defendant "bladed" his body as if he was trying to hide something. The officer said that the suspect's shoulders completely came off the seat when doing this. Upon running the suspect's information in a database, it was determined the suspect had numerous criminal charges for violent offenses between 2003 and 2009.

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The officer returned to the car and had the suspect exit. The defendant consented to be frisked for weapons but a pat down revealed no weapons or contraband. The officer asked suspect the defendant for permission to search the car and defendant denied. The officer responded they were going to do a limited frisk of the vehicle, based on suspect's "criminal history...and some other things." The defendant protested this and a search of the front driver's side of vehicle was performed. Officer opened the unlocked center console of the car and discovered apparent cocaine which he proceeded to remove from the car. After he completed searching behind the driver's seat, he arrested the suspect. The defendant moved to suppress the evidence.

Discussion: Referencing *Terry v. Ohio*, the Court said once a traffic stop is performed, a limited search of the passenger compartment of a vehicle can be done if the officer has reasonable suspicion the suspect is armed and dangerous. The Court concluded there was competent evidence from the officer that the suspect encountered was nervous and in a high-crime area late at night. Furthermore, the "blading" of the defendant's body accompanied with his criminal history "solidified the existence of reasonable suspicion for the officer to conduct a *Terry* search."

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The court noted the criminal record of the suspect alone is not sufficient to establish reasonable suspicion. Furthermore, his presence in a high-crime area, by itself, also would not justify a search under *Terry*. The Court concluded, however, the totality of the circumstances (high-crime area, nervousness, "blading," criminal record) about the encounter made it reasonable for the officer to conclude the suspect was potentially armed and dangerous. As such, the Court found the officer acted properly in removing the suspect from the vehicle and searching the passenger compartment area within the immediate control of suspect.

The Defendant's last contention was that the stop was wrongful because a citation was not issued for the fictitious tag. Defendant stated the subsequent frisk of vehicle and himself were "not in furtherance of the officer's safety while fulfilling the purpose of the traffic stop itself, but were instead independent investigative actions targeting other unarticulated suspicions of criminal activity."

Rejecting defendant's argument, the Court said this claim disregarded the totality of the circumstances upon which the officer formed his reasonable suspicion. The Court said the officer's records check of the defendant and vehicle "is readily recognized as a proper function of the police during traffic stops." See *Rodriguez*. The actions taken by the officer were not unrelated to the traffic stop and they did not prolong the stop beyond the purpose of the officer's mission. Furthermore, even though the officer did not intend to arrest the defendant just for a fictitious tag, he did not say he already made a decision to not charge for the tag when he was performing the records check. The Court reasoned just because the officer decided not to cite for the tag issue does not mean he wrongfully extended the stop.

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment - Searches / Seizure / Search Warrant: [State v. Logan, 2021 N.C. App. LEXIS 327 \(July 6, 2021\).](#)

Issues: Should evidence be suppressed where a search warrant's supporting affidavit failed to include information as to when alleged events took place?

Holding: Yes, the evidence should be suppressed as the search warrant did not provide proper facts to show when the alleged events occurred nor did it offer information about the timing of such events.

Facts: Officers received a noise complaint call for service. Two officers arrived on scene. The scene was a building with a parking lot in the front. The officers parked across the street and as they walked over, they heard the noise and a strong odor of marijuana. The Defendant came out to the officers as they entered the parking lot and admitted the building was his and that he was throwing the party. Though Defendant said he would address the noise complaint, officers advised him they would need to investigate the marijuana odor. A request was made for a sergeant to come down and assist with a search warrant application. Defendant then proceeded to run to the building's door and tell everyone in attendance to lock the door and not let anyone inside. The door was then locked from the inside.

While the search warrant was being obtained, the Defendant waited outside with officers. Officers then heard a "metallic bang" from inside the building and "flashing lights" spotted through a crack in the curtains. Officers made entry as individuals exited from the door and the building was secured for officer safety. Officers searched the building and discovered two firearms in a locked closet. Defendant told the officers he was unaware of the pistol but that he was the owner of the shotgun. Two additional firearms were located in the same room as the others. After the firearms were located, the officers contacted dispatch and confirmed the Defendant was a convicted felon.

Defendant was charged with possession of a firearm by a felon. He was indicted as a result. The trial court denied his motion to suppress evidence from the search on the basis the warrant lacked probable cause. He was later convicted by a jury.

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Discussion: The Court stated that the proper test in evaluating the sufficiency of a search warrant is the "totality of the circumstances" standard. Furthermore, probable cause must be shown through facts "so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time." The affidavit of the search warrant application contained a statement that the

search warrant pertains to an investigation being conducted by the Shelby Police Department concerning 801 S. Lafayette St. Shelby, NC. Officers were dispatched to 801 S. Lafayette St. in reference to a loud music complaint. Upon Officers Brandon Smith and Officer Brent Walker [sic] arrival they spoke with a William Logan about the loud music. While speaking with Mr. Logan the Officers could smell marijuana coming from inside the business. Based on the totality of the circumstances[,] Sergeant McKinney believes a reasonable person would suspect that illegal narcotics and drug paraphernalia are being kept at this residence. And a search of this residence is warranted."

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The Court concluded the officer's supporting affidavit did not provide any time-table as to the events relied upon to establish probable cause. The time the investigation began, date of dispatch to the address, date when officers spoke with defendant, and the date of the odor of marijuana were not contained within the officer's affidavit. The Court emphasized the importance of a Magistrate reviewing the "four corners" of the search warrant and not relying on outside facts in making its determination whether or not to grant the application. The Court reversed the order denying Defendant's motion to suppress.

NEW LAW POSSESSION OF CREDIT CARD SKIMMING DEVICES

Session Law 2021-68 was recently enacted to amend N.C.G.S 14-113.9 pertaining to Financial Transaction Card Theft. Effective **DECEMBER 1, 2021**, a person is also guilty of this offense if that person "knowingly possesses, sells, or delivers a skimming device." For the purposes of this statute, a skimming device is defined as

"A self-contained device that (i) is designed to read and store in the device's internal memory information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a financial transaction card or from another device that directly reads the information from a financial transaction card and (ii) is incapable of processing the financial transaction card information for the purpose of obtaining, purchasing, or receiving goods, services, money, or anything else of value from a merchant."

The new provision outlines some exceptions including, that this prohibition doesn't apply to employees/agents of a law enforcement agency, courts, agencies of government or investigators employed by a merchant.

Be aware a "scanning device" (a scanner, reader, or any other device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a financial transaction card) has a separate definition under the statute and it's mere possession alone **IS NOT** illegal under the statute.

This statute applies to offenses committed on or after **December 1, 2021**.

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