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Police Law Bulletin

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In this issue:

NORTH CAROLINA SUPREME COURT

Plain View Doctrine and Exigent Circumstances Justified Officers' Warrantless Seizure of Marijuana

State v. Grice, ___ N.C. ___, ___ S.E.2d ___ (Jan. 23, 2015).

This case overturns a decision of the North Carolina Court of Appeals discussed in the March-April 2014 Police Law Bulletin.

On May 5, 2011, the Johnston County Sheriff's Office received an anonymous tip that Jerry Grice, Jr. was growing marijuana at a particular residence on Old School Road. The Sheriff's Office dispatched two detectives to conduct a knock and talk investigation at the address. The property was located in a rural area, and the house was situated along with several outbuildings approximately 1/10th of a mile down a dirt path. After driving up the driveway, the detectives parked behind a white vehicle on the right side of the house.

The front door of the house was inaccessible, covered with plastic and obscured by furniture. The officers noticed that the driveway led to a side door which appeared to be used as the main entrance. Detective Guseman knocked on the side door but no one answered. Detective Allen, who had remained at the car, noticed from the driveway several buckets at a distance of approximately 15 yards. Detective Allen recognized the plants growing in the buckets as marijuana. The officers walked to the plants, seized them, and returned to the Sheriff's Office to obtain a search warrant. A search warrant for the residence was executed the following morning. The defendant was arrested and admitted that the plants seized the previous day were his.

Defendant was indicted for manufacturing a controlled substance. Defendant filed a motion to suppress, claiming discovery of the plants was the product of an illegal search and seizure. The motion was denied. The jury unanimously found defendant guilty. Defendant appealed. The North Carolina Court of Appeals reversed, holding that the seizure of the plants was a Fourth Amendment violation. The North Carolina Supreme Court reversed the Court of Appeals.

When law enforcement observes contraband in plain view, no reasonable expectation of privacy exists, and thus, the Fourth Amendment's prohibition against unreasonable warrantless searches is not violated. Instead, the Fourth Amendment analysis must consider whether a subsequent warrantless seizure of the items left in plain view was reasonable. In the case at hand, defendant had no privacy interest in the marijuana plants left in plain view in his driveway, where any member of the public coming to his door might have seen them. Thus, the court was left to examine whether the seizure of the plants violated defendant's possessory interest in them.

While the general rule is that warrantless seizures are unconstitutional, a warrantless seizure of an item may be justified as reasonable under the plain view doctrine if three elements are met: First, the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; second, the evidence's incriminating character was immediately apparent; and third, the officer had a lawful right of access to the object itself.

Regarding the first element, officers in this case were present in defendant's driveway to perform a knock and knock investigation. There is an implicit license, which defendant did not contest, that typically permits a visitor to approach the home by the front path. Second, from this location, the officers saw and, based upon their training and experience, instantly recognized the plants as marijuana.

The sole point of contention was the third element, whether the officers had a lawful right of access from the driveway 15 yards across defendant's property to the plants' location. Defendant claims that while officers had a lawful right to be present at the door of defendant's home, they did not have a lawful right to enter the curtilage fifteen yards away. The court held that the seizure in this case was lawful. The court reasoned first that where the *initial* intrusion that brings police within plain view of evidence is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage.

Furthermore, the court found the seizure justified by exigent circumstances. In this case, the plants were small and easily transportable, there was a vehicle in the driveway, and two dogs had been left unleashed roaming the unfenced yard. Therefore, the court found it objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property.

A Police Dog's Instinctive Action, Unguided and Undirected by the Police, That Brings Evidence Not Otherwise In Plain View Into Plain View Is Not a Search Within the Meaning of the Fourth Amendment

State v. Miller, No. 368PA13 (19 December 2014).

In May 2009, the Spencer Police Department received a burglar alarm report indicating a possible break-in at defendant Michael Miller's residence. Officer Hill was the first to arrive at the scene. Officer Hill surveyed the exterior of the home and noticed a broken window on the back side of the house having an opening large enough for a person to gain entry into the residence. The doors of the residence were locked. Concerned that an intruder was in the house, Officer Hill called for backup and the assistance of a canine officer to perform a protective sweep. Shortly thereafter, additional backup arrived, including Officer Fox and his police dog, "Jack." As the officers began discussing how to proceed, defendant's mother arrived at the scene with a key to the house. She gave the officers the key, as well as permission to search the premises for intruders. (Note that it is unclear what expectation of privacy, if any, defendant's mother would have in defendant's home so that she could provide valid consent for police to

enter and search the residence. The issue did not require analysis by the court since exigent circumstances, created by the activated alarm and broken window, authorized a warrantless entry).

Officer Fox began the search by deploying Jack inside the house. Jack began methodically working his way through the house searching for intruders. Jack went from room to room until he reached a side bedroom. After remaining there for some time, Officer Fox, fearing for Jack's safety, entered the house and went to the bedroom to investigate. Jack was sitting on the bedroom floor staring at a dresser drawer, thereby alerting Officer Fox to the presence of narcotics. Officer Fox opened the drawer and discovered a brick of marijuana. He then called for Officer Hill, who also observed the drugs. (Note that because the officers' warrantless entry into the home was based upon exigent circumstances, officers were limited to searching those areas of the home where an intruder or victim could reasonably be located. Although the canine's alert to the dresser drawer provided probable cause to search the dresser, opening the drawer required a warrant or valid consent). Leaving the brick of marijuana undisturbed, Officers Fox and Hill, and Jack continued their protective sweep of the house. As Jack neared the back of the house, he stopped in front of a closet at the end of the hallway and began barking at the closet door. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers Fox and Hill drew their firearms and opened the closet door, revealing two large black trash bags on the floor. Jack immediately stuck his nose inside one of the trash bags and nuzzled the bag open; Officer Fox indicated that the marijuana was then visible to him. No intruder was found in the closet. The officers did not immediately seize the marijuana. Instead, they finished their protective sweep of the house, still finding no intruders, and locked and secured the residence.

Defendant arrived at the scene shortly thereafter. Based on the information gathered by Officers Hill and Fox, Sergeant Ennis, applied for a search warrant to recover the drugs observed in defendant's residence. When the search warrant arrived, the officers reentered defendant's home and seized the drugs.

Defendant was subsequently indicted on charges of possession with the intent to sell or deliver marijuana, and maintaining a dwelling house for keeping, storing, using or selling marijuana. Defendant moved to suppress all evidence seized from his house, arguing that the search and seizure violated his rights under the Fourth Amendment. The trial court entered an order granting defendant's motion in part and denying the motion in part. With respect to the brick of marijuana seized from defendant's dresser drawer, the trial court found that the officers deviated from the search for intruders when they opened the drawer. Consequently, the trial court found that defendant's constitutional rights were violated by that action and ordered that this evidence be suppressed; however, with respect to the marijuana seized from the trash bags in the hall closet, the trial court denied defendant's motion. Defendant pled guilty to all charges and then appealed the order and subsequent judgments to the Court of Appeals. The Court of Appeals reversed the judgments and sent the case back to the trial court for further proceedings. The Court of Appeals concluded that Jack was an instrumentality of the police, and his actions, regardless of whether they are instinctive or not, were no different than those undertaken by an officer. If he opened the bags and exposed the otherwise hidden marijuana, it would not be admissible under the plain view doctrine. The State appealed to the North Carolina Supreme Court.

The question before the North Carolina Supreme Court was whether the Court of Appeals erred by holding that the canine was an instrumentality of the police and that his actions, whether instinctive or not, were no different than those undertaken by an officer. This question presented two inquiries: (1) whether Jack was an instrumentality of the police, and (2) whether Jack's actions were are analytically different under the Fourth Amendment from similar actions performed by the police.

With respect to the first inquiry, the Court determined that a police dog assisting officers in the search of a home for intruders is clearly acting as an instrumentality of the police.

With respect to the second inquiry, the Court had to decide whether a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is a search within the meaning of the Fourth Amendment. The Court held that such action is not a search.

In its analysis, the Court noted that that in case law establishing search doctrine, there is a prerequisite that the State or government actor have as his or her purpose a desire to find something or obtain information. A trespass on "houses or effects," or an invasion of privacy, is not by itself a search unless it is done to obtain information; and the obtaining of information is not by itself a search unless it is achieved by a trespass or invasion of privacy. If a police dog is acting without assistance, facilitation, or other intentional action by its handler (i.e. acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information.

In short, the Court held that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of the instinctive nature of his actions, was reversed and the case was sent back to the Court of Appeals to return to the trial court to determine whether Jack's nuzzling of the bags was in fact instinctive, undirected, and unguided by the officers.

NORTH CAROLINA COURT OF APPEALS

Search of Defendant's Garage Pursuant to Search Warrant Was Improper Due to Fact That Warrant Was Based, In Part, Upon Information Gathered During Unlawful Entry Into Defendant's Curtilage

State v. Gentile, No. COA 14-438 (18 November 2014).

On September 9, 2011, Detective Langdon received an anonymous complaint that there was a marijuana grow operation in a detached garage adjacent to the residence located at 3236 Jackson-King Road in Willow Spring. After verifying ownership of the residence, Detective Langdon conducted surveillance on the residence on September 13, 15, and 17. He did not observe any vehicles on the property on these dates or any persons outside the residence. However, the landscaping to the residence was maintained and it appeared as though the residence was occupied because on the 13th, there were no exterior lights on, but on the 15th and 17th, each of the lights affixed beside the front door to the residence were illuminated.

On September 21, Detectives Langdon and Creech, went to the residence to conduct a knock and talk. They parked near the entrance where the electronic gate was located on the driveway. Detective Langdon pushed the button to the electronic gate in an attempt to make contact with someone at the residence,

however, after pushing the button numerous times, nothing happened and he eventually heard what sounded like a dial tone through the intercom speaker. He announced "Sheriff's Office" several times, but no response was noted. The dial tone led the detective to believe that the intercom to the electronic gate was not functioning properly. After pushing the button several times and not receiving any response, Detective Langdon observed vehicle tracks next to the left hand side of the electronic gate. It appeared as though numerous vehicles had been traveling around the gate based on the track impressions observed in the grass on the left hand side of the gate. The electronic gate was positioned only on the paved portion of the driveway and did not surround the entire property. There was an open field to the left of the gate looking toward the residence. There were no "No Trespassing" or any other signs positioned on the gate. The detectives then walked around the gate on the grass along the vehicle tracks on the left hand side of the gate. They then walked the rest of the way up the paved portion of the driveway leading to the front door, which was approximately 500 feet in distance.

Detective Langdon testified that the residence was fairly large in size and had a detached two-car garage located directly at the end of the driveway next to the residence. The garage was connected to the residence by a paved walkway. Detective Langdon approached the front door to the residence and knocked multiple times. While waiting at the door, they heard dogs barking. After efforts to reach someone at the front door were unsuccessful, the detectives walked through what both described as a "privacy fence" around a paved pathway to the backyard, thinking that since they had heard dogs barking, that the owner could be in the backyard.

Detective Langdon knocked on the backdoor, but was unable to make contact with anyone. While standing at the back door, Detective Langdon testified that he heard an air conditioner unit running near the rear of the detached garage. The weather was cool and brisk and the temperature was approximately 72 degrees. Detective Langdon testified that since an air conditioner unit was not running to the main residence, but was running to the detached garage, he believed that the garage could be occupied. Detective Langdon then walked to the door of the garage and knocked in an attempt to locate the owner or any other persons on the property. Detective Langdon observed while knocking at the door that there were two surveillance cameras on the garage, neither of which faced the main residence. Unable to make contact with anyone at the door to the garage, Detective Langdon testified that as he was turning to leave the property, Detective Creech told him that he detected the odor of marijuana emitting from the front of the garage. Detective Langdon then stepped to Detective Creech's location at the front of the detached garage and detected the "overwhelming pungent odor of marijuana" emitting from the front of the garage.

The detectives left the residence and applied for a search warrant. During the execution of the warrant, the detectives located 143 marijuana plants (228 lbs.), approximately 3 oz. of psilocybin, digital scales, gallon Ziploc bags, and other miscellaneous drug paraphernalia.

The trial court concluded that the evidence seized pursuant to the search warrant had been unconstitutionally obtained because when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be. Thus, the trial court granted defendant's motion to suppress the seized evidence. The State appealed.

A search conducted without prior approval by judge or magistrate is per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. One such exception is the plain smell doctrine, under which a seizure is lawful when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent that the items smelled constitute evidence of a crime.

Fourth Amendment protections extend to the curtilage of an individual's home. In this state, the curtilage will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by other outbuildings. However, no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper.

Here, however, the detectives far exceeded the scope of their right to generally inquire about the information received from the anonymous tip at the time they smelled the marijuana. When the detectives initially reached the house, they knocked on the front door for a couple of minutes, but received no response. They only proceeded to the back of the house because they heard barking dogs, and believed that an occupant might not have heard the knocks. The sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard and the area on the driveway within ten feet of the garage. Law enforcement officers, without a search warrant or exigent circumstances, may merely approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.

As a result, when the detectives smelled the odor of marijuana, their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location. Accordingly, the subsequent search of the residence based, in part, on the odor of marijuana was unlawful. Thus, the trial court did not err by granting defendant's motion to suppress.

Evidence Was Properly Seized Pursuant to Plain View Doctrine

State v. Lupek, No. COA11-63 (2 August 2011).

Deputy Carroll with the Chatham County Sheriff's Department received information that dogs had gotten loose in a mobile home park and become aggressive with a resident who had then shot one of the dogs. As the deputy entered the mobile home park, he was met by the defendant who alleged that his dog had just been shot by his neighbor and that he was going to Animal Control to pick up the dog. The defendant then left the mobile home park. The deputy proceeded to the defendant's residence and pulled into the driveway. Almost immediately, a woman exited the residence. She was very nervous, her hands were shaking, and she smelled strongly of burnt marijuana. The woman told the deputy that her name was Elizabeth Sweatt, and that she did not live at the residence, but was staying there temporarily. The deputy told Sweatt that he had received information that dogs had gotten loose, become aggressive with a neighbor, and that the neighbor had consequently shot one of the dogs. Sweatt then showed the deputy a hole in the side of defendant's home where the dogs had escaped. The deputy completed his investigation concerning the dog shooting, but noticed that Sweatt, who still smelled like burnt marijuana, remained extremely nervous. He asked her why she was so nervous. Sweatt told the deputy that she had a "nervous condition" for which she took Xanax. Believing Sweatt was nervous as a result of his presence and her use of marijuana, rather than a "nervous condition," he asked Sweatt to produce her prescription. Sweatt told the deputy that her pills were in the vehicle that her husband was driving at the time. The deputy then asked Sweatt for identification. In response, Sweatt turned and went back around to the front door. The deputy followed her. Sweatt opened the front door. The deputy remained on the porch and did not enter the residence. However, because of Sweatt's height, when she opened the door the deputy could see, over her head, an 18" glass bong directly across from the door. He also smelled the odor of fresh

marijuana and saw the back of a man's head in a recliner. When Sweatt attempted to shut the door, the deputy entered the residence. The deputy directed Sweatt and the man to stay where they were. He then patted them down and searched their immediate area for weapons. Without venturing any further into the residence, the deputy saw a salad bowl containing fresh marijuana. Sweatt consented to a search of her bedroom. Next to the bedroom was a closed door which the deputy opened to make sure no one else was in the trailer. Inside, he found a marijuana growing operation. The two occupants were arrested. No items were seized until a search warrant was obtained. Defendant was later arrested when he returned to the residence.

Defendant made a motion to suppress the evidence seized from his residence. The trial court denied the motion. Defendant pled guilty to manufacturing marijuana and maintaining a dwelling place for storage of controlled substances. He then appealed.

Defendant argued that the deputy's observation of the bong inside the home constituted an unconstitutional search and, therefore, the bong and all subsequently discovered evidence should have been suppressed. The State argued that the plain view doctrine applied.
The plain view doctrine applies if 1. the officer was in a place he had a right to be when the evidence was discovered; 2. the evidence was discovered inadvertently; 3. it was immediately apparent to the police that the items observed were evidence or contraband. Defendant argued that the first prong was lacking because the deputy did not have a right to be on the porch when he saw the bong and smelled the fresh marijuana. Defendant contended that the porch is part of the curtilage and that the officer did not have the necessary probable cause to enter the curtilage.

Because an individual ordinarily possess the highest expectation of privacy within his home and the curtilage surrounding it, those areas typically are given the most stringent Fourth Amendment protection. Thus, as with the home, probable cause is the appropriate standard for searches of the curtilage. However, in North Carolina, no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as the front door of a house. Therefore, the Court of Appeals held that the trial court did not err in finding that the deputy had a right to be on the defendant's doorstep. Accordingly, it was not an error for the trial court to apply the plain view doctrine. Defendant's motion to suppress was properly denied.