



# Police Law Bulletin



City Attorneys' Office

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## NORTH CAROLINA COURT OF APPEALS



**Officer Had Authority to Conduct Protective Sweep of Defendant's Apartment; Seizure of Shotgun from Defendant's Bedroom Could Not Be Justified Under the Plain View Doctrine Because Incriminating Nature of the Weapon Was Not Immediately Apparent**

*State v. Smith*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 15, 2017).

On April 1, 2015, three officers with the Kernersville Police Department entered defendant's residence to serve outstanding arrest warrants for absconding probation and failing to appear at a scheduled court date.

The front door of defendant's apartment led directly into the living room. The living room opened up on the back right corner, opposite the doorway, leading directly into the kitchen. A short hallway ran perpendicular in between the living room and the kitchen. The hallway was visible from the front door and more closely resembled the center of a four-way intersection, connecting every room inside the apartment: the living room and kitchen to the south, a bathroom to the east, an empty bedroom to the north, and defendant's bedroom to the west.

While two of the officers were placing defendant in custody in his apartment living room, one of the officers conducted a protective sweep of the other rooms, only searching areas where individuals might be hiding. During the sweep, the officer saw a shotgun leaned up against a wall in the defendant's bedroom. After completing the sweep, the officer secured the shotgun, "to have it in our control and also check to see if it was stolen." Once he confirmed the shotgun was unloaded, he carried it into the living room, placed it on a couch, used his flashlight to examine the receiver, and then turned over the shotgun to expose its serial number, which he then called into Communications. When Communications reported the shotgun stolen, the officers seized the weapon.

Defendant was charged with possession of a stolen firearm and possession of a firearm by a convicted felon. The trial court denied defendant's motion to suppress. After the ruling, defendant pleaded guilty to

possession of a firearm by a felon and, pursuant to defendant's plea arrangement, the court dismissed the charge of possession of a stolen firearm. Defendant appealed to the North Carolina Court of Appeals.

Defendant first challenged the protective sweep of his apartment. "A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094, 108 L. Ed. 2d 276, 281 (1990), cited in *State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002). To be lawful, the sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281. In *Buie*, the U.S. Supreme Court articulated two scenarios in which police may conduct a protective sweep. First, incident to an arrest, officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286. Second, when an officer has "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger." *Id.* The trial court concluded that the protective sweep of the apartment was valid under the first prong of *Buie*. Defendant argued, however, that the officer was not authorized to conduct a protective sweep of the bedroom, where the shotgun was found, because the bedroom was not "immediately adjoining the place of arrest from which an attack could be immediately launched." Our appellate courts have not specifically addressed which areas might qualify as "immediately adjoining the place of arrest," but decisions from the federal courts led the Court of Appeals to conclude that, based on the size and layout of the apartment, all of the rooms - including defendant's bedroom - were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched.

Next, defendant argued that the seizure of the shotgun could not be justified under the plain view doctrine because its incriminating nature was not immediately apparent. The plain view doctrine allows an officer to seize evidence without a warrant if: (1) the officer views the evidence from a place where he has a legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, and (3) the officer has a lawful right of access to the evidence itself. The "immediately apparent" requirement is satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct. If the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, then its incriminating nature is not "immediately apparent" and the plain-view doctrine cannot justify its seizure. In the case at hand, the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe the weapon was contraband or evidence of a crime.

The officers were executing arrest warrants issued for misdemeanor offenses and were not aware that defendant was a convicted felon. In fact, before the seizure, the officer had asked the other officers in the apartment if defendant was a convicted felon, which they could not confirm. Further, the officer did not have probable cause to believe that the shotgun was stolen until he moved the weapon into the living room, placed it on the couch, shined his flashlight on the receiver, and then turned it over to expose the serial number, which Communications was then able to confirm as stolen. Because the incriminating nature of the shotgun was not immediately apparent, its seizure could not be justified under the plain view doctrine and the trial court erred in denying defendant's motion to suppress.



## FOURTH CIRCUIT COURT OF APPEALS

### **Officer Had Authority to Conduct Frisk of Lawfully Stopped Person Whom the Officer Reasonably Believed To Be Armed With a Concealed Firearm, Regardless of Whether the Person May Have Been Legally Entitled To Carry the Firearm**

*United States v. Robinson*, \_\_\_ F.3d \_\_\_, 2017 WL 280727 (4th Cir. Jan. 23, 2017) (en banc).

At 3:55 p.m. on March 24, 2014, the Ranson, West Virginia police department forwarded an anonymous call to Officer Tharp. The caller advised that he was in the parking lot of a 7-Eleven on North Mildred Street and that he had just seen a black male in a bluish greenish Toyota Camry, with a white female driver, load a firearm and then conceal it in his pocket. The caller indicated that the Camry had headed south on North Mildred Street. Immediately adjacent to the 7-Eleven is an apartment complex regarded by local officers as the highest-crime area in Ranson.

Approximately 2-3 minutes after the anonymous call had been received and roughly three-quarters of a mile from the 7-Eleven, officers spotted a vehicle traveling on North Mildred Street matching the caller's description. Noticing that the occupants were not wearing seatbelts, a violation of West Virginia law, officers stopped the vehicle.

Officer Hudson approached the driver's side of the car with his weapon drawn and asked the female driver for her license and registration. She complied. After being asked to step out of the car, Captain Roberts opened the passenger-side door. As Robinson was exiting the car, Roberts asked Robinson if he had any weapons. In response, Roberts testified, Robinson gave a "weird look." Roberts ordered Robinson to put his hands on top of the car and began to frisk him for weapons, discovering a firearm in Robinson's pants pocket. After frisking him, however, Roberts recognized Robinson from prior criminal proceedings and confirmed that Robinson was a convicted felon.

A grand jury indicted Robinson on one count of being a felon in possession of a firearm and ammunition. Robinson moved to suppress the evidence on the ground that the frisk was unlawful. The district court denied the motion. After being sentenced to 37 months imprisonment, Robinson appealed to the fourth circuit. The three-judge panel reversed his conviction (814 F.3d 201 (4th Cir. 2016) holding that the frisk violated the Fourth Amendment because, while the defendant was armed, there was insufficient evidence that he was also dangerous. The court reasoned that the mere fact that an individual possesses a firearm does not automatically mean that he or she poses a threat to the officer or others. The government petitioned for a rehearing en banc (which means they requested a rehearing before a panel of all the fourth circuit's judges). The petition was granted and the court, sitting en banc, vacated the three-judge panel's judgment and opinion.

Before the en banc court, the defendant acknowledged that: (1) the officers had the right to stop the vehicle for the seat belt violation; (2) the officers had the right to order him to exit the vehicle; (3) the anonymous call was sufficiently reliable to justify the officers' reliance on it; and (4) the district court

was correct in concluding that the officers had reasonable suspicion to believe he was armed with a concealed firearm. The defendant argued, however, that officers must articulate that an individual is armed *and* dangerous in order to justify a frisk. While the officers may have had good reason to suspect that he was carrying a loaded concealed weapon, they lacked objective facts indicating that he was also dangerous. The defendant noted that West Virginia permits a person to lawfully carry a concealed firearm if they have a license to do so. And because the officers did not know whether he possessed such a license, the anonymous call was a report of innocent behavior that was insufficient to indicate that he posed a danger to others. In addition, the defendant argued that his behavior during the stop did not create a belief he was dangerous.

The en banc court rejected the defendant's arguments and held that the officer's frisk of the defendant was justified under the Fourth Amendment. The court analyzed various United States Supreme Court rulings on frisk and stated that they impose two requirements to conduct a frisk: (1) an officer must have conducted a lawful stop, which includes a traditional *Terry v. Ohio*, 392 U.S. 1 (1968) stop as well as a traffic stop; and (2) that during the lawful seizure, the officer reasonably suspects that the person is armed and therefore dangerous. The court continued that in both *Terry* and *Pennsylvania v. Mims*, 434 U.S. 106 (1977), the Court deliberately linked "armed" and "dangerous," recognizing that the frisks in those cases were lawful because the stops were valid and the officer reasonably believed that the person stopped "*was armed and thus*" dangerous. The use of "*and thus*" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed. In this case, both requirements—a lawful stop and a reasonable suspicion that the defendant was armed—were satisfied, thus justifying the officer's frisk under the Fourth Amendment as a matter of law.