



# Police Law Bulletin



City Attorneys' Office

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**In this issue:**

Officers Exceeded Scope of Search Warrant When They Searched Vehicle in Driveway Which Was Not Owned or Controlled by Resident of the Home – Pgs. 1-2  
Search Warrant Affidavit Failed to Establish Probable Cause – Pgs. 2-4  
Order Directing Officers to Search Defendant's Person, Vehicle and Home Pursuant to a Civil DVPO Violated Defendant's Constitutional Rights - Pg. 5



## NORTH CAROLINA COURT OF APPEALS



### **Officers Exceeded the Scope of a Search Warrant Issued to Search a Home When They Searched a Vehicle Parked in the Driveway Which Was Not Owned or Controlled by the Home's Resident**

*State v. Lowe*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (July 21, 2015).

On September 24, 2013, Detective Barber of the Raleigh Police Department filed an affidavit in support of a search warrant. The affidavit indicated that the investigator had received information that "Mike T" was selling, using and storing controlled substances at his home located at 529 Ashebrook Drive. The investigator established Terrance Michael Turner as "Mike T." The affidavit recanted a lengthy criminal history for Turner involving violations of the controlled substances laws. In addition, it indicated that the officer had examined trash from the home and found within it a small amount of marijuana residue as well as correspondence addressed to Turner. The affidavit described the residence to be searched but did not specify any vehicles. A Wake County magistrate issued the warrant to search 529 Ashebrook Drive.

When executing the warrant, officers found Turner and two overnight guests – defendant Lowe and defendant's girlfriend Margaret Doctors – in the home. Parked in the driveway was a Volkswagen rental car leased to Ms. Doctors and operated by both Lowe and Doctors. Turner had no articulable connection to the vehicle other than it being parked in his driveway. Officers searched the vehicle and found a book bag containing controlled substances and documents with Lowe's name. Consequently, Lowe was charged with violations on the controlled substances laws.

Prior to trial, Lowe moved to suppress all evidence against him on two grounds: 1) the warrant authorizing the search of Turner's residence was not supported by probable cause; and 2) even if the search warrant was valid, the search of the Volkswagen exceeded the scope of the warrant. The trial court denied the motions. Defendant pled guilty to all charges and then filed an appeal.

The Court of Appeals first concluded that the tip given to the detective, corroborated by the presence of marijuana residue found in Turner's trash, was sufficient to establish probable cause to search the residence for narcotics. Thus, the search warrant was valid. However, the Court went on to find that the search of defendant's vehicle exceeded the scope of the warrant. There is a long-standing precedent in North Carolina and other jurisdictions that, as a general rule, if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car. However, the cases which formed this precedent involved vehicles which were owned or operated by the individual associated with the premises identified in the warrant. In the case at hand, the target of the search was Turner. Officers knew that the vehicle did not belong to Turner; the vehicle had not previously been seen at Turner's; the vehicle was rented to Ms. Doctors and was operated by her and Lowe, and there was nothing indicating any dominion or control over the vehicle by Turner. To find that the vehicle falls within the scope of the warrant simply because the vehicle is within the curtilage of the residence to be searched would, by logical extension, allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search.

Thus, a warrant authorizing the search of a home does not automatically cover the search of *any* vehicle found within the curtilage. Officers will have to establish that the vehicle is owned or controlled by a resident of the premises in order for the vehicle to fall within the scope of the warrant. Otherwise, officers will have to articulate probable cause that the vehicle contains evidence of a crime (which is not established by the mere presence of the vehicle at the residence) and then, prior to executing a search of the vehicle, obtain valid consent or a subsequent warrant which describes the vehicle as the place to be searched.



### **Search Warrant Affidavit Failed To Establish Probable Cause**

***State v. Benters, No. 5A14 (19 December 2014).***

In this appeal, the North Carolina Supreme Court considered the sufficiency of an affidavit submitted in support of an application for a search warrant. The Court held that under the totality of the circumstances, the affidavit failed to provide a substantial basis for the magistrate to conclude that probable cause existed. The information available to law enforcement officers from an anonymous tip and from the officers' corroboration was qualitatively and quantitatively deficient, and the affidavit's allegations were largely conclusory.

The affidavit began with the officer identifying himself and providing relevant professional background information.

The affidavit then stated that on September 29, 2011, the affiant (Lt. Ferguson of the Vance County Sheriff's Office) received information from Detective Hastings of the Franklin County Sheriff's Office

Narcotics Division who stated that within the past week, Hastings had met with a confidential and reliable source that told him an indoor marijuana growing operation was located at 527 Currin Road in Henderson. The informant said that the growing operation was in the main house and other buildings on the property. The informant also knew that the owner of the property was a white male by the name of Glenn Benters who was not currently living at the residence, but was using it to house an indoor marijuana growing operation. Detective Hastings obtained a subpoena for current subscriber information, kilowatt usage, account notes, and billing information for the past twenty-four months in association with the 527 Currin Road property from Progress Energy. The affidavit stated that the utility records indicated that Glenn Benters is the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage.

The affidavit went on to state that on September 29, 2011, Detective Hastings and the affiant, along with additional narcotics detectives and special agents from the SBI, traveled to 527 Currin Road and observed from outside of the curtilage multiple items in plain view that were indicative of an indoor marijuana growing operation. The items mentioned were: potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Detectives did not observe any gardens or potted plants located around the residence. Detectives observed a red Dodge full size pickup truck parked by a building located on the curtilage of the residence and heard music coming from the area of the residence. Detectives attempted to conduct a knock and talk. When no one came to the door, the affiant walked to a building behind the residence that music was coming from in an attempt to find someone. Upon reaching the rear door of the building, the affiant instantly noticed the strong odor of marijuana emanating from the building. The affiant walked over to a set of double doors on the other side of the building and observed two locked double doors that had been covered from the inside with thick mil black plastic commonly used in marijuana grows to hide light emanated by halogen light. Thick mil plastic was also present on windows inside the residence as well.

Based upon these facts, the affiant requested and received a search warrant for the property. Officers executed the warrant and seized 55 marijuana plants, various indoor growing supplies, numerous firearms and ammunition, and \$1540 cash. A grand jury indicted defendant for various controlled substance violations.

Defendant moved to suppress the items seized under the search warrant, arguing that the search and seizure violated the Fourth Amendment. The trial court granted defendant's motion. The State appealed to the Court of Appeals who concluded that the affidavit was not supported by probable cause and affirmed the trial court's order allowing defendant's motion to suppress. The State appealed to the North Carolina Supreme Court.

The issue before the Court was whether the facts and circumstances set forth in the affidavit established probable cause. While great deference should be paid to a magistrate's determination of probable cause, this deference is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by merely ratifying the bare conclusions of affiants.

First, the State did not contest the illegality of the officers' entry into the defendant's backyard to conduct a "knock and talk." Because entry into this area was illegal, the marijuana smell and plastic coverings could not be properly considered as part of the probable cause supporting issuance of the search warrant. Consequently, the Court would only take into consideration the first 3 paragraphs of the affidavit.

Because the affidavit was based in part upon information received by Detective Hastings from a source unknown to Lieutenant Ferguson, the Court had to determine the reliability of the information by assessing whether it came from an informant who was merely anonymous or one who could be classified

as confidential and reliable. Statements given by an informant with a history of providing reliable information to law enforcement carry greater weight for purposes of establishing reliability. Although the affidavit described the informant as a “confidential and reliable source,” it did not contain any facts that would establish a “track record.” The affiant apparently relied solely upon Detective Hasting’s assertion that the source was confidential and reliable. The affiant failed to establish the basis for this characterization. Moreover, the affidavit did not explain the basis of the source’s knowledge. Thus, the Court considered the source to be an anonymous informant.

In such a situation, officers carry a greater burden to corroborate the information in order to establish sufficient reliability. The State argued that several factors sufficiently corroborated the anonymous tip. These factors included: (1) utility records in which the kilowatt usage hours were indicative of a marijuana grow operation based on the extreme high and low kilowatt usage; and (2) the officers’ observations of multiple items in plain view that were indicative of an indoor marijuana growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers, in the absence of any gardens or potted plants located around the residence.

With respect to the utility records, the court decided that the weight given to power records increases when meaningful comparisons are made between a suspect’s current electricity consumption and prior consumption, or between a suspect’s consumption and that of nearby, similar properties. By contrast, little to no value should be accorded to wholly conclusory, noncomparative allegations regarding energy usage records. In the case at hand, Lt. Ferguson summarily concluded that “the kilowatt usage hours are indicative of a marijuana grow operation based on the extreme high and low kilowatt usage.” However, the absence of any comparative analysis severely limits the potentially significant value of the utility records. Therefore, the Court concluded, Lt. Ferguson’s unsupported allegations did little to establish probable cause. The Court acknowledged that investigating officers or a reviewing magistrate may have some degree of suspicion regarding defendant’s “extreme high and low kilowatt usage” given that defendant was not living at the residence. These unspecified extremes also may be explained, however, by wholly innocent behavior such as defendant’s intermittently visiting his property. Thus, these circumstances may have justified additional investigation, but they did not establish probable cause.

The Court turned next to the officers’ observations of multiple gardening items on defendant’s property in the absence of exterior gardens or potted plants. The Court found again that Lt. Ferguson made wholly conclusory allegations that the items were indicative of a marijuana grow operation.

Therefore, the Court found the affidavit recanted nothing but an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations. Taking the relevant factors together in view of the totality of the circumstances, the Court concluded that the officers’ verification of mundane information, statements regarding defendant’s utility records, and the officers’ observations of defendant’s gardening supplies were not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause. Furthermore, the material allegations set forth in the affidavit were uniformly conclusory and failed to provide a substantial basis from which the magistrate could determine that probable cause existed. Accordingly, although great deference should be paid a magistrate’s determination of probable cause, the Court held the affidavit at issue was insufficient to establish probable cause.

## **District Court Order Directing Officers to Search Defendant's Person, Vehicle and Residence Pursuant to Ex Parte DVPO Violated Defendant's Constitutional Rights**

*State v. Elder, No. 41A14 (11 June 2015).*

On September 23, 2010, at the request of defendant's then-wife, the district court entered an ex parte DVPO against defendant. After concluding that the defendant had committed acts of domestic violence in the past and that he continued to present a danger of future violence, the court ordered defendant to surrender his firearms, ammunition and gun permits. Relying upon N.C.G.S. 50B-3(a)(13), which authorizes the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child," the court further ordered in the DVPO that any law enforcement officer serving the order shall search the defendant's person, vehicle and residence and seize any and all weapons found.

Officers served the DVPO three days after it was issued. Officers knocked on defendant's door for 15 minutes before he came outside. Defendant then closed and locked the front door of the house. An officer took defendant's keys from his pocket and entered the house to execute the search for weapons ordered in the DVPO. Once inside the home, officers smelled marijuana and followed the odor to the basement where they discovered a marijuana growing operation. Defendant was charged with manufacturing a controlled substance, maintaining a place to keep controlled substances, and possession of drug paraphernalia.

Defendant filed a motion to suppress the evidence. He contended that the district court did not have the statutory authority to order a search under the DVPO and that the search violated his constitutional rights. The trial court denied defendant's motion and the defendant pled guilty reserving his right to appeal. The NC Court of Appeals reversed the trial court's ruling. The State appealed to the NC Supreme Court.

The NC Supreme Court determined that the language of the "catch-all" provision in N.C.G.S. §50B-(a)(13) limits the court to ordering a party to act or refrain from acting, it does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle or residence. Furthermore, under the State's broad interpretation of the statute, district courts would have unfettered discretion to order a broad range of remedies in a DVPO so long as the judge believes they are necessary for the protection of any party. This interpretation contravenes the Fourth Amendment. The Fourth Amendment demands that, subject to a few well-delineated exceptions, officers may not enter a home without a valid warrant based upon probable cause. Therefore, the Court concluded, by requiring officers to conduct a search of defendant's home under the sole authority of a civil DVPO without a warrant or probable cause, violated defendant's constitutional rights.