Emerging Issues in Criminal Law
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Exigent Circumstances

Flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011 (June 23, 2021)
In this case, the Court held, in an opinion by Justice Kagan, that the flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home. Instead, an officer must consider all the circumstances in a case involving the pursuit of a suspected misdemeanant to determine whether there is an exigency that would excuse the warrant requirement. A California highway patrol officer attempted to stop the petitioner Lange's car after observing him driving while playing loud music through his open windows and repeatedly honking his horn. Lange, who was within 100 feet of his home, did not stop. Instead, he drove into his attached garage. The officer followed Lange into the garage, where he questioned Lange and saw that Lange was impaired. Lange was subsequently charged with the misdemeanor of driving under the influence of alcohol and a noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The trial court denied Lange's motion, and the appellate division affirmed. The California Court of Appeal also affirmed, concluding that an officer's hot pursuit of a fleeing misdemeanor suspect is always permissible under the exigent circumstances to the warrant requirement. The United States Supreme Court rejected the categorial rule applied by the California Court of Appeal and vacated the lower court's judgment.

In rejecting a categorial exception for hot pursuit in misdemeanor cases, the Court noted that the exceptions allowing warrantless entry into a home are "'jealously and carefully drawn,' in keeping with the 'centuries-old principle' that the 'home is entitled to special protection.'" Slip op. at 6. Assuming without deciding that *United States v. Santana*, 427 U.S. 38 (1976), created a categorical exception that allows officers to pursue fleeing suspected felons into a home, the Court reasoned that applying such a rule to misdemeanors, which "run the gamut of seriousness" from littering to assault would be overbroad and would result in treating a "dangerous offender" and "scared teenager" the same. Slip op. at 11. Instead, the Court explained that the Fourth Amendment required that the exigencies arising from a misdemeanant's flight be assessed on a case-by-case basis – an approach that "will in many, if not most, cases allow a warrantless home entry." *Id.* The Court explained that "[w]hen the totality of the circumstances shows an emergency — such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home" law enforcement officers may lawfully enter the home without a warrant. *Id.* The Court also cited as support the lack of a categorical rule in common law that would have permitted a warrantless home entry in every misdemeanor pursuit.

Justice Kavanaugh concurred, observing that "there is almost no daylight in practice" between the majority opinion and the concurrence of Chief Justice Roberts, in which the Chief Justice concluded that pursuit of a fleeing misdemeanant constitutes an exigent circumstance. The difference between the two approaches will, Justice Kavanaugh wrote, be academic in most cases as those cases will involve a recognized exigent circumstance such as risk of escape, destruction of evidence, or harm to others in addition to flight.

Justice Thomas concurred on the understanding that the majority's articulation of the general case-by-case rule for evaluating exceptions to the warrant requirement did not foreclose historical categorical exceptions. He also wrote to opine that even if the state courts on remand concluded the officer's entry was unlawful, the federal exclusionary rule did not require suppression. Justice Kavanaugh joined this portion of Justice Thomas's concurrence.

The Chief Justice, joined by Justice Alito, concurred in the judgment. The Chief Justice criticized the majority for departing from the well-established rule that law enforcement officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect – regardless of what offense the suspect was suspecting of doing before he fled. He characterized the rule adopted by the Court as "famously difficult to apply." Roberts, C.J., concurrence, slip op. at 14. The Chief Justice concurred rather than dissenting because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry. The Chief Justice would have vacated the lower court's decision to allow consideration of whether the circumstances in this case fell within an exception to the general rule, such as a case in which a reasonable officer would not believe that the suspect fled into the home to thwart an otherwise proper arrest.

Community Caretaking

***Cady v. Dombrowski*, 413 U.S. 433 (1973) upholding a "caretaking search" of an impounded vehicle for a firearm did not create a standalone doctrine that justifies warrantless searches and seizures in the home**

Caniglia v. Strom, 593 U.S. ___, 141 S. Ct. 1596 (May. 17, 2021)
In this case involving a welfare check that resulted in officers entering petitioner Caniglia's home without a warrant and seizing his firearms, the court held that its decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) upholding as reasonable a "caretaking search" of an impounded vehicle for a firearm did not create a standalone doctrine that justifies warrantless searches and seizures in the home. Following an argument where Caniglia put a gun on a table and told his wife to shoot him, officers accompanied his wife to their shared home to assess his welfare. During that visit, Caniglia agreed to be taken for a mental health evaluation and officers entered his home to confiscate two pistols against his expressly stated wishes. Caniglia later sued, alleging that officers violated his Fourth Amendment rights by the warrantless seizure of him and his pistols. The First Circuit affirmed summary judgment for the officers solely on the basis that the seizures fell within a freestanding "community caretaking exception" to the warrant requirement it extrapolated from *Cady*. Writing for a unanimous court, Justice Thomas noted *Cady's* "unmistakable distinction between vehicles and homes" and the Court's repeated refusal to expand the scope of exceptions to the warrant requirement in the context of searches and seizures in homes. Finding that the First Circuit's recognition of a freestanding community caretaking exception to the warrant requirement went "beyond anything this Court has recognized," the Court vacated the judgment below and remanded for further proceedings.

Chief Justice Roberts, joined by Justice Breyer, concurred by noting that the Court's opinion was not contrary to the exigent circumstances doctrine. Justice Alito concurred by noting his view that the Court correctly had rejected a special Fourth Amendment rule for a broad category of cases involving "community caretaking" but had not settled difficult questions about the parameters of all searches and seizures conducted for "non-law-enforcement purposes." Justice Kavanaugh concurred and elaborated on his observations of the applicability of the exigent circumstances doctrine in cases where officers enter homes without warrants to assist persons in need of aid.

Arrests and Investigatory Stops

The application of physical force with intent to restrain a suspect, even if unsuccessful, is a Fourth Amendment seizure

Torres v. Madrid, ___ U.S. ___, 141 S. Ct. 989 (Mar. 25, 2021)
Law enforcement officers were attempting to serve an arrest warrant early in the morning at an apartment complex in New Mexico. They noticed the plaintiff in the parking lot and realized she was not the subject of the warrant but wished to speak with her. As they approached, the plaintiff entered her car. According to the plaintiff, she did not immediately notice the police approaching (and was admittedly under the influence of methamphetamine). When an officer tried to open her car door to speak with her, she noticed armed men surrounding her car for the first time and drove off, fearing a carjacking. Although not in the path of the vehicle, the officers fired 13 rounds at the car as it drove away. The plaintiff was struck twice in her back but escaped, only to be apprehended the next day. She

sued under 42 U.S.C. § 1983 for excessive force, alleging that the shooting was an unreasonable Fourth Amendment seizure. The district court granted summary judgment to the officers and the Tenth Circuit affirmed. Circuit precedent held that no seizure occurs when an officer's use of force fails to obtain control of the suspect. The Supreme Court granted certiorari and reversed 5-3.

Under the Fourth Amendment, a seizure of a person occurs when law enforcement applies physical force or when a person submits to an officer's show of authority. In *Hodari D. v. California*, 499 U.S. 621 (1991), the Court noted that the application of any physical force to a suspect constituted an arrest (and therefore a seizure) under the common law, even if the use of force was unsuccessful in gaining control of the suspect. "An officer's application of physical force to the body of a person 'for the purpose of arresting him' was itself an arrest—not an attempted arrest—even if the person did not yield." *Torres* Slip op. at 4 (citations omitted). This is distinct from seizure by show of authority, where the seizure is not complete until the suspect submits to the authority. *See Hodari D.* The rule that physical force completes an arrest as a constructive detention is widely acknowledged in the common law.

That the use of force by law enforcement here involved the application of force from a distance (by way of the bullets) did not meaningfully alter the analysis. The Court observed: "The required 'corporal sei[z]ing or touching the defendant's body' can be as readily accomplished by a bullet as by the end of a finger." *Torres* Slip op. at 11 (citation omitted). But not all applications of force or touches will constitute a seizure. For Fourth Amendment purposes, only where an officer applies force with an "intent to restrain" the suspect does the use of force rise to the level of a seizure. An accidental or incidental touching would not qualify, nor would the use of force for a purpose other than with the intent to restrain. Intent to restrain is analyzed under an objective standard. The question is not what the officer intended (or what the suspect perceived), but rather whether the circumstances objectively indicate an intent by officers to restrain the suspect. The level of force used by officers remains relevant in that inquiry. A seizure by application of force lasts no longer than the application of force, and the length of the seizure may be relevant to the question of damages or suppression of evidence. Taking the facts in the light most favorable to the plaintiff, the officers here seized the plaintiff by using force with an intent to restrain her.

The defendant-officers sought a rule that no seizure would occur until there is "intentional acquisition of control" by police of a suspect. They contended that the common law rule from *Hodari D.* was meant to apply only to arrests for civil debt matters, not criminal cases. The majority rejected this argument, finding no distinction at common law between civil or criminal arrests. The common law tort of false imprisonment provides support for the seizure principle at issue—even a moment of wrongful confinement creates liability for false imprisonment, just as a mere touching accomplishes an arrest. The approach proposed by the defendants would eliminate the distinction between arrest by show of authority and arrest by use of force. This would create confusion about when a suspect is considered to be under an officer's control, and how long a suspect would need to be under the officer's control. The dissent faulted the majority's definition of seizure as "schizophrenic" and inconsistent with the law of property seizures and the Fourth Amendment. The majority responded:

> [O]ur cases demonstrate the unremarkable proposition that the nature of a seizure can depend on the nature of the object being seized. It is not surprising that the concept of constructive detention or the mere-touch rule developed in the context of seizures of a person—capable of fleeing and with an interest in doing so—rather than seizures of 'houses, papers, and effects.' *Id*. at 19-20.

The majority also rejected accusations by the dissent that its decision was result-oriented or designed to appear so. The Court noted its holding was narrow. The decision does not determine the reasonableness of the seizure, the question of potential damages, or the issue of qualified immunity for the officers. In the words of the Court:

> [A] seizure is just the first step in the analysis. The Fourth Amendment does not forbid all or even most seizures—only unreasonable ones. All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. *Id*. at 20.

Justice Gorsuch dissented, joined by Justices Alito and Thomas. They disagreed that a mere touching with intent to restrain constitutes a Fourth Amendment seizure where the officer fails to obtain control of the suspect and would have affirmed the Tenth Circuit. Justice Barrett did not participate in the case.

Totality of circumstances showed defendant was seized by officer's show of authority despite not blocking defendant's path or using blue lights; remand to determine if seizure was supported by reasonable suspicion

State v. Steele, ___ N.C. App. ___, 2021-NCCOA-148 (Apr. 20, 2021)
An East Carolina University police officer was responding to a traffic accident call at 2:50 a.m. in Pitt County. He noticed a vehicle on the road and followed it, suspecting it had been involved in the accident. The officer testified that the vehicle did not have its rear lights on. There were no other cars on the road at the time. The vehicle pulled into a parking lot and circled around to exit. The officer entered the parking lot and pulled alongside the defendant's car as it was exiting the lot. The officer gestured with his hand for the other vehicle to stop but did not activate his blue lights or siren and did not obstruct the defendant's path. The defendant's vehicle stopped, and the officer engaged the driver in conversation. He quickly suspected the driver was impaired and ultimately arrested the defendant for impaired driving. The defendant moved to suppress. The trial court denied the motion, finding that the defendant was not seized and that the encounter was voluntary. The defendant pled guilty, reserving his right to appeal the denial of the suppression motion. A majority of the Court of Appeals reversed.

The trial court made a finding of fact that the officer's intention was to conduct a voluntary encounter. While the officer did so testify, this finding did not resolve the conflict between the State's evidence that the encounter was voluntary and consensual and the defendant's evidence that the encounter amounted to a traffic stop. "[W]hen there is a material conflict in the evidence regarding a certain issue, it is improper for the trial court to make findings which 'do not resolve conflicts in the evidence but are merely statements of what a particular witness said.'" *Steele* Slip op. at 8-9. This finding therefore failed to support the trial court's conclusions of law. Additionally, the defendant challenged two other findings of fact relating to the defendant's rear lights. According to the defendant, the officer's testimony about the rear lights was plainly contradicted by the officer's dash cam video. The Court of Appeals, though "inclined to agree" with the defendant, found that these findings were not relevant to the issue at hand:

> The issue of whether Defendant's taillights were illuminated is irrelevant because the trial court's ruling did not turn on whether [the officer] had reasonable suspicion to pull over Defendant for a traffic stop. Instead . . . the dispositive issue is whether this encounter qualified as a traffic stop at all (as opposed to a voluntary encounter which did not implicate the Fourth Amendment). *Id.* at 11-12.

The state argued that the defendant was not stopped and that the encounter was consensual. A seizure occurs when an officer uses physical force with intent to seize a suspect or when a suspect submits to an officer's show of authority. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer's show of authority amounts to a seizure when a reasonable person would not feel free to terminate the encounter and leave. The court noted that this case was unusual, as most seizure cases involve pedestrian stops. The trial court (and the dissent) erred by relying on pedestrian stop cases to find that no seizure occurred. Unlike when an officer approaches a person or parked car on foot, this case involved the officer following the defendant with each party in moving vehicles and the officer gesturing for the defendant to stop. According to the court:

> There is an important legal distinction between an officer who tails and waves down a moving vehicle in his patrol car; and an officer who walks up to a stationary vehicle on foot. In the latter scenario, the officer has taken no actions to impede the movement of the defendant—whereas in the former scenario, the officer's show of authority has obligated the defendant to halt the movement of his vehicle in order to converse with the officer. *Steele* Slip op. at 18.

Given the criminal penalties for failure to follow traffic control commands and resisting a public officer, a reasonable driver would likely feel obligated to stop an officer gesturing for the driver to stop. "[W]hen a person would likely face criminal charges for failing to comply with an officer's 'request,' then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution." *Id.* at 20. Further, the trial court failed to properly weigh the time and location of the encounter. Given the late hour and deserted parking lot, the environment was more "intimidating" than a public, daytime encounter, and a reasonable person would be "more susceptible to police pressure" in these circumstances. *Id*. at 21. Finally, the trial court also failed to properly weigh the effect of the officer's hand gestures. The "authoritative" gestures by the uniformed officer in a marked patrol car (and presumably armed) supported the defendant's argument that he was seized. Had the officer not been in a marked police vehicle, it was unlikely that a reasonable person would have voluntarily stopped under these circumstances. The majority of the court therefore agreed that the defendant was seized and reversed the denial of the suppression motion. The matter was remanded for the trial court to determine whether the seizure was supported by reasonable suspicion.

Judge Hampson dissented and would have affirmed the trial court's order.

The defendant was not seized by the activation of an officer's blue lights

State v. Nunez, 274 N.C. App. 89, ___ S.E.2d ___ (Oct. 20, 2020)
The defendant was charged with impaired driving after being involved in a single car accident in a Biscuitville parking lot. The trial court denied the defendant's motion to suppress the evidence obtained by the arresting officer, who was actually the second officer to arrive on the scene. The defendant argued that the first officer who arrived on the scene and activated the blue lights on her patrol vehicle lacked reasonable suspicion to seize him. The Court of Appeals held that the defendant was not seized by the mere activation of the first officer's blue lights, and that the trial court therefore did not err by denying the motion to suppress. Activation of an officer's blue lights is a factor in determining whether a seizure has occurred, but where, as here, there was no other action on the part of the officer to stop the vehicle or otherwise impede the defendant, he was not seized.

Vehicle Searches

(1) Trial court properly denied motion to suppress evidence because officer had probable cause to search car based on the odor of burnt marijuana, the passenger's admission that he had smoked marijuana, and the passenger's producing of a partially smoked marijuana cigarette from his sock; (2) The trial court did not err in instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances; (3) The trial court did not err by refusing to provide a special jury instruction on knowing possession of a controlled substance as the defendant denied knowing that the vehicle he was driving contained drugs.

State v. Parker, ___ N.C. App. ___, 2021-NCCOA-217 (May. 18, 2021)
In this Cabarrus County case, the defendant was convicted of two counts of felony possession of Schedule I controlled substance and having attained habitual felon status. The charges arose from substances recovered from the vehicle defendant was driving when he was stopped for failing to wear his seatbelt. The officer who approached the car smelled the odor of burnt marijuana emanating from the car. The officer told the defendant and his passenger that if they handed over everything they had, he would simply cite them for possession of marijuana. The passenger in the car then admitted that he had smoked a marijuana joint earlier and retrieved a partially smoked marijuana cigarette from his sock. The officer then searched the car and discovered gray rock-like substances that when tested proved to be Cyclopropylfentanyl (a fentanyl derivative compound) and a pill that was N-ethylpentylone (a chemical compound similar to bath salts).

(1) At trial, the defendant moved to suppress evidence of the drugs recovered from his car. The trial court denied the motion. The defendant appealed, arguing that the trial court erred by failing to issue a written order and in finding that the search was supported by probable cause. The Court of Appeals determined that the trial court did not err by failing to enter a written order denying the defendant's motion to suppress as there was no material conflict in the evidence and the trial court's oral ruling explained its rationale. The Court further held that regardless of whether the scent of marijuana emanating from a vehicle continues to be sufficient to establish probable cause (now that hemp is legal and the smell of the two is indistinguishable), the officer in this case had probable cause based on additional factors, which included the passenger's admission that he had just smoked marijuana and the partially smoked marijuana cigarette he produced from his sock. The Court also considered the officer's subjective belief that the substance he smelled was marijuana to be additional evidence supporting probable cause, even if the officer's belief might have been mistaken. The Court rejected the defendant's contention that the probable cause had to be particularized to him, citing precedent establishing that if probable cause justifies the search of a vehicle, an officer may search every part of the vehicle and its contents that may conceal the object of the search.

(2) The defendant argued on appeal that the trial court erred by instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances since those substances are not specifically listed as named controlled substances under Schedule I in G.S. 90-89. The Court rejected the defendant's argument on the basis that the classification of these substances was a legal issue within the province of the trial court. Furthermore, the Court determined that even if the classification was a factual issue, the defendant was not prejudiced because the undisputed evidence demonstrated that the substances were controlled substances fitting within the catch-all provision of Schedule I.

(3) The defendant argued on appeal that because he denied knowing the identity of the substances found in his vehicle the trial court erred in denying his request to instruct the jury that he must have

known that what he possessed was a controlled substance. The Court of Appeals found no error. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs" and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested, namely that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence.

Satellite-Based Monitoring

Order imposing lifetime satellite-based monitoring based on a defendant's status as an aggravated offender complies with the Fourth Amendment and Article 1, Section 20 of the North Carolina Constitution.

State v. Hilton, __ N.C. ___, 2021 NCSC-115 (Sept. 24, 2021)
In this case involving the trial court's imposition of lifetime satellite-based monitoring (SBM) following the defendant's conviction for an aggravated sex offense, the North Carolina Supreme Court held that the order imposing lifetime SBM effected a reasonable search under the Fourth Amendment and did not constitute a "general warrant" in violation of Article 1, Section 20 of the North Carolina Constitution. The Supreme Court thus reinstated the trial court's order, modifying and affirming the portion of the Court of Appeals' decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The defendant was convicted of first-degree statutory rape and first-degree statutory sex offense in 2007. He was released from imprisonment in 2017 and placed on post-release supervision for five years. He was prohibited from leaving Catawba County without first obtaining approval from his probation officer. He nevertheless traveled to Caldwell County on several occasions without that permission. While there, he sexually assaulted his minor niece. After the defendant was charged with indecent liberties based on that assault (but before he was convicted), the trial court held a hearing to determine whether the defendant should be required to enroll in SBM based on his 2007 convictions. The trial court ordered lifetime SBM based on its determination that the defendant had been convicted of an aggravated offense. The defendant appealed. A divided Court of Appeals upheld the imposition of SBM during the defendant's post-release supervision as reasonable and thus constitutionally permissible but struck down as unreasonable the trial court's imposition of SBM for any period beyond his post-release supervision. The State appealed.

The Supreme Court reinstated the trial court's order, modifying and affirming the portion of the Court of Appeals' decision that upheld the imposition of SBM during post-release supervision, and reversing the portion of the decision that held the imposition of post-release SBM to be an unreasonable search.

The Court reasoned that *State v. Grady*, 372 N.C. 509 (2019) (*Grady III*), which held that it was unconstitutional to impose mandatory lifetime SBM for individuals no longer under State supervision based solely on their status as recidivists left unanswered the question of whether lifetime SBM was permissible for aggravated offenders. To resolve this issue, the Court applied the balancing test set forth in *Grady v. North Carolina* (*Grady I*), 575 U.S. 306 (2015) (per curiam) (holding that North Carolina's SBM program effects a Fourth Amendment search). The Court determined that the State's interest in protecting the public—especially children—from aggravated offenders is paramount. Citing authority that SBM helps apprehend offenders and studies demonstrating that SBM reduces recidivism, the court concluded that the SBM program furthers that interest by deterring recidivism and helping law enforcement agencies solve crimes. The Court stated that its recognition of SBM's efficacy eliminated the need for the State to prove efficacy on an individualized basis. The Court then considered the scope of the privacy interest involved, determining that an aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision. The Court noted that sex offenders may be subject to many lifetime restrictions, including the ability to possess firearms, participate in certain occupations, registration requirements, and limitations on where they may be present and reside. Lastly, the Court concluded that lifetime SBM causes only a limited intrusion into that diminished privacy expectation. Balancing these factors, the Court concluded that the government interest outweighs the intrusion upon an aggravated offender's diminished privacy interests. Thus, the Court held that a search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment.
The Court further held that because the SBM program provides a particularized statutory procedure for imposing SBM, including a judicial hearing where the State must demonstrate that the defendant qualifies for SBM, and effecting an SBM search, the SBM program does not violate the prohibition against general warrants in Article 1, Section 20 of the North Carolina Constitution.

Justice Earls, joined by Justice Hudson and Ervin, dissented. Justice Earls criticized the majority for its failure to account for 2021 amendments to the SBM statute "that likely obviate some of the constitutional issues" on appeal. *Id.* ¶ 43. Specifically, she reasoned that though the defendant currently is subject to lifetime SBM, he will not, as of December 1, 2021, be required to enroll in SBM for more than ten years. She also wrote to express her view that the majority's decision could not be reconciled with the Fourth Amendment or with its holding in *Grady III*.