July - August 2011 Volume 16.4

Police Law Bulletin

City Attorneys' Office Toni M. Smith, Assistant City Attorney

In this issue:

Removing Recyclable Material From Recycling Bins

On occasion, the question has arisen as to whether it is a violation of the law for a person to remove items left for recycling from a City recycling bin.

N.C.G.S. 160A-317(b)(3) provides that if a person places recyclable material in receptacles or delivers recyclable materials to specific locations, receptacles and facilities that are owned or operated by the City or its designee, then ownership of these materials is transferred to the City or its designee. Consequently, removal of the materials from such locations, receptacles or facilities, without the permission of the City or its designee, with the intent to permanently deprive the City or its designee of the materials, would constitute the offense of larceny.

In addition, there are a couple of City ordinances that specifically address taking away or tampering with recyclable materials set out for collection by the City. Durham City Code Section 58-3 states that no person other than a person under the authority of the director [of solid waste] shall haul away any refuse or recyclables set out for collection by the City. And, Durham City Code Section 58-132 provides that no unauthorized person shall meddle with or interfere with the contents of any receptacle set out for removal by the City. However, neither of these ordinances subjects an offender to criminal penalties. Violators are only subject to civil remedial fees as may be established by Council resolution.

Interference With Private Tows

Generally, the towing of a vehicle off of private property is a civil matter between the owner or agent of the property owner and the vehicle owner. Therefore, officers should not assist in either effectuating or preventing a tow off of private property. However, persons may not engage in conduct that would constitute a criminal offense in the course of attempting to tow, or preventing the tow, of a vehicle. Whether or not the conduct would provide probable cause that a criminal

offense has occurred will depend upon the facts of the situation. The following are some examples:

1Q. A tow company, authorized to act as an agent of an apartment complex, attempts to tow a vehicle from the apartment complex parking lot. Upon seeing the tow truck, the owner of the vehicle runs into the parking lot identifying herself as the owner of the car stating that she will move the vehicle. The tow truck operator nonetheless indicates that he will be towing the vehicle. Consequently, the owner gets into the car and refuses to abandon the vehicle. The tow truck operator proceeds to then hook up the car and threatens to, although he does not actually, drive away. If called to the scene and able to corroborate the foregoing events, what, if anything, may an officer do?

1.A. The tow truck operator has been designated by the property owner, or its agent, to remove unauthorized vehicles from the property, which is, in and of itself, lawful conduct. Upon discovering that her vehicle was about to be towed, the vehicle owner got into her car, which is, in and of itself, also lawful conduct. Once the vehicle owner gained lawful possession of her vehicle, the tow truck operator cannot engage in conduct constituting a crime in an attempt to have her relinquish possession. Therefore, hooking up the car while the owner is in it appears to meet the elements of false imprisonment. Because this is unlawful conduct, an officer could certainly order the tow truck operator to stop engaging in such conduct i.e. unhook the car, and the tow truck operator's failure to do so would constitute resist, delay and obstruct. Depending upon the specific words and actions of the parties, the elements of other offenses such as disorderly conduct or communicating threats may be appropriate. Of course, officers are encouraged to make reasonable attempts to negotiate the situation before resorting to criminal charges, particularly arrest.

2.Q. Assume the same facts exist as presented in scenario 1.Q. above, except that the tow truck operator actually begins to drive the tow truck away from the scene with the vehicle owner inside of the vehicle he is towing. What, if anything, may an officer do?

2.A. As previously explained, the tow truck operator has been designated by the property owner, or its agent, to remove unauthorized vehicles from the property, which is, in and of itself, lawful conduct. Upon discovering that her vehicle was about to be towed, the vehicle owner got into her car, which is, in and of itself, also lawful conduct. Once the vehicle owner gained lawful possession of her vehicle, the tow truck operator cannot engage in conduct constituting a crime in an attempt to have her relinquish possession. Therefore, hooking up the car while the owner is in it and then moving the vehicle appears to meet the elements of felonious restraint and reckless driving (kidnapping would not be an appropriate charge since it is unlikely an officer could articulate probable cause that the restraint of the vehicle owner by the tow operator was for one of the purposes set forth in G.S. §14-39). Because this is unlawful conduct, an officer could order the tow truck operator to stop engaging in such conduct i.e. stop the vehicle and unhook the car, and the tow truck operator's failure to do so would constitute resist, delay and obstruct. Depending upon the specific words and actions of the parties, the elements of other offenses such as disorderly conduct or communicating threats may be appropriate. Again, officers are encouraged to make reasonable attempts to negotiate the situation before resorting to criminal charges, particularly arrest.

3.Q. A tow company, authorized to act as an agent of an apartment complex, begins to tow a vehicle from the apartment complex parking lot. Upon seeing the tow truck, the owner of the vehicle runs into the parking lot identifying herself as the owner of the car stating that she will move the vehicle. However, the tow truck operator has already hooked up the vehicle and indicates that he intends to proceed with the tow. If called to the scene and able to corroborate the foregoing events, what, if anything, may an officer do?

3.A. The tow truck operator has been designated by the property owner, or its agent, to remove unauthorized vehicles from the property. Therefore, the tow operator has not engaged in unlawful conduct and is in lawful possession of the vehicle. Just as a tow operator cannot engage in unlawful conduct to regain possession of a vehicle from its owner (see scenarios 1. and 2. above), neither can a vehicle owner engage in unlawful conduct in order to regain possession of his or her vehicle taken during an otherwise lawful tow. The vehicle owner may protest the tow, but if he or she commits a criminal offense in an attempt to regain possession of the car, such as an assault, communicating threats or disorderly conduct, then the vehicle owner may be charged accordingly.

4.Q. An officer is called to the parking lot of an apartment complex. Upon his arrival, he sees a vehicle hooked to a tow truck with an occupant inside of the car. The tow truck operator is insisting that the vehicle owner relinquish possession of her vehicle; the vehicle owner is insisting that the tow truck operator unhook her car. What, if anything, may the officer do?

4.A. An officer should attempt to make a reasonable determination, based upon statements from the parties and any witnesses, as well as physical observations, as to the course of events and consequently, whether any criminal conduct occurred. If the officer cannot make such a determination, then the situation remains a civil matter. The parties can "wait each other out" if they so choose, but if the tow operator drives off with the vehicle and its occupant in tow, he or she may be charged with reckless driving. Note that if the officer is unable to determine whether or not the vehicle owner got into the car after it was already hooked up, felonious restraint would not be an appropriate charge since this offense requires probable cause that the restraint occurred without the restrained party's consent.

5.Q. Would the presence or absence of signage referred to in G.S. §20-219.2 alter any of the above scenarios?

5.A. G.S. §20-219.2 makes it an infraction for a person to park a vehicle in a private parking lot without the express permission of the owner or lessee if the private lot is clearly designated as such by a sign no smaller than 24" x 24" prominently displayed at the lot's entrance, stating the name and telephone number of any towing and storage company. The presence or absence of such signage would not change the above analysis, except that the owner of the vehicle may be subject to a citation carrying a maximum fine of $100. for improperly parking in an appropriately marked lot. He or she would not be subject to arrest.

Note that G.S. §20-219.2 does not state that it is unlawful for a properly designated tow company to remove unauthorized vehicles from private property if the private property has not been posted with a sign at least 24" x 24" stating the name and telephone number

of the towing and storage company. Rather, the statute subjects a person who parks without authorization in such a designated lot to being charged with an infraction, in addition to being subject to having his or her vehicle towed.

6.Q. A citizen contacts the police complaining about the fees that a tow company is requiring in order for him to reclaim his car which was towed without his consent off of private property. What, if anything, may the officer do?

6.A. Durham City Code Section 50-391 states that no person providing vehicle towing services shall charge the owner of any vehicle which is towed without the owner's consent an amount for towing and storage in excess of those fees prescribed in the schedule of nonconsensual towing fees adopted by the City Council. Resolution #8949 sets the current maximum fee for a nonconsensual tow of an automobile, van, pick-up or motorcycle at $125.; release of the vehicle or personal property outside the tow operator's normal business hours at $35.; and storage at $25. per day. There are additional fees allowed, but capped, for time and labor under unusual or extraordinary circumstances; dolly or winching services; and the use of absorbent material. A violation of Sec. 50-391 is a misdemeanor.

Evidence Sufficient to Convict Defendant of Stalking and Harassing Phone Calls

***State v. Van Pelt,* No. COA09-1361 (7 September 2010).**

In 2001, Dr. Phillip Shadduck had a medical appointment with defendant. After the appointment, he had no further contact with defendant until January 2006 when a plant was delivered to Dr. Shadduck's office with a sticky note that had defendant's name and telephone number on it. In February 2006, defendant brought a poem to Dr. Shadduck's office and inquired about his children. The following month, defendant began repeatedly paging the doctor at work. In April of 2006, defendant called Dr. Shadduck at home at night "just wanting to talk." The doctor informed defendant that it was inappropriate to call him for personal reasons at home and the conversation ended. A few minutes later, defendant called Dr. Shadduck's home again. Dr. Shadduck's wife answered the telephone and defendant told her,

> Your husband doesn't love you. Do you think your husband would love you? He is having an affair with me. He has an apartment in Raleigh. I'm not the only woman. There is another woman. Do you really think he loves you? Now tell me, do you think he loves you?

Dr. Shadduck immediately called an acquaintance who was a police officer because this had been going on for about nine weeks and seemed to be developing a pattern of escalation. The level of intrusion had gone from just dropping off gifts, to unscheduled office visits, to calls at the office, to pages after-hours at night, then finally a phone call after-hours at his home at night.

Dr. Shadduck took out a restraining order on defendant. Becoming concerned for the safety of his children, he and his wife requested that school officials remove their children from the school's website.

He instructed his office staff to make sure the office doors were locked, the outside lights were working, and encouraged them to walk in "twos" to their cars.

Defendant was charged with misdemeanor stalking and harassing phone calls. On April 30, 2009, a jury found her guilty of both. Defendant appealed arguing that the State presented insufficient evidence of the crimes charged.

Regarding the offense of stalking, defendant argued that the State's evidence showed that her communications were all to persons other than Dr. Shadduck, except for one occasion. Thus, she did not harass him on more than one occasion. The Court of Appeals overruled this argument. The Court found that all of defendant's communications were "directed to" Dr. Shadduck even though she may have only spoken with him once. For example, the communications made to Dr. Shadduck's office staff were "directed to" Dr. Shadduck because defendant asked that her messages be conveyed to him and that she was seeking to see him.

Regarding the harassing phone calls charge, defendant argued that the State did not establish that she had telephoned another repeatedly because the only calls the State offered into evidence were defendant's calls to the doctor's office, not the calls to his home. The Court held though, that even considering only the calls to the doctor's office, the evidence supported a finding that the defendant telephoned the victim repeatedly for the purpose of annoying and harassing him. It is not necessary for the State to show that defendant actually had a conversation with Dr. Shadduck when she repeatedly called his office. Therefore, the Court of Appeals overruled this argument of defendant's also.

Evidence Sufficient to Convict Defendant of Stalking

***State v. Wooten*, No. COA09-1551 (17 August 2010).**

Keel was a building inspector for the Town of Mt. Olive. Defendant was constructing a building on property that defendant owned in the town. In spring 2006, defendant revealed to Keel during a telephone conversation that he intended to operate a florist in the building, whereupon Keel told defendant that the location was not zoned for commercial activity. In November 2006, defendant sent a fax addressed to the Town of Mt. Olive. The fax referred to Keel's secretary by name and mentioned "the inspector." The letter indicated that defendant, "with the permission of the Ku Klux Klan members of Mt. Olive" wanted to change the classification of his building. Keel replied to defendant by letter informing defendant that it should not be a problem to change his building classification and the steps he needed to take to do so. About a month later, defendant addressed a second fax to the NAACP, but sent the fax to the town offices. The fax referred almost exclusively to Keel. Defendant wrote that "Danny Kill [sic] holds a public position only because he's a white man" and that he "has stirred up problems in the black community with his Keel-a-Niger [sic] attitude." The fax used the moniker "Mr. Kill-a-Niger," or a similar variant thereof, multiple times. After Keel and Wayne County inspector, Joe Nassef, conducted an electrical inspection of defendant's building and noted three problems that needed to be corrected, defendant sent a third fax to town hall. This fax listed no addressee, but alleged that Keel had a personal problem with defendant, that Keel had persuaded Nassef to "join forces with him," and that defendant had bought a shotgun to protect himself from them. A few weeks later, defendant sent a fourth fax to town hall addressed to Danny Keel, listing Keel's home address and telephone number. The body of the fax referenced "Mr. Keel-a-Nigger" and "Danny Keel" and was written in bold, enlarged type repeatedly accusing Keel of lies and discrimination. A fifth fax was sent by defendant to town offices addressed to both "Mr. Keel-a Nigger" and "Danielle," Keel's daughter. Although defendant wrote "this is no threat to you," in his letter, he specifically referenced Keel's widowed mother and father, and stated that allowing

his building to sit would give him time "to learn you, your family and your Mama." Keel filed charges that day.

Defendant was found guilty of stalking. He appealed to the North Carolina Court of Appeals arguing that the State failed to present sufficient evidence that he committed the offense of stalking because, in part, the State failed to show that he had harassed Keel on more than one occasion. The defendant contended that four of the faxes could not constitute harassment because they were not directed specifically at Keel; only one fax was actually addressed to Keel, presenting just a single occasion of potential harassment. The Court of Appeals disagreed. The Court found that at least one of the other faxes had been addressed to "Mr. Keel-a-Nigger," a defamatory name that defendant had used repeatedly in apparent reference to Keel. In addition, while the other faxes were either addressed to other persons or to unnamed recipients, they were transmitted to town hall and referred mostly to Keel. The Court found it reasonable for a jury to conclude that defendant "directed" most, if not all, of these communications to Keel.