

ROLL CALL TRAINING
FROM NORTH CAROLINA'S 24/7 POLICE
ATTORNEY LAW FIRM

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TOPIC:

UNARREST UNDER THE NORTH CAROLINA STATUTES AND THE UNITED STATES CONSTITUTION

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FOREWARD, PART ONE: GS 15A-401

Having a need or desire to **unarrest** someone presupposes that the law enforcement officer has either formally arrested that person, or has submitted him to a level of custody that is the equivalent to an arrest.

A formal arrest occurs when “the person submits to the control of the arresting officer who has indicated his intention to arrest.” [GS 15A-401(c)(1)a]

And, although we do not often think of it this way, “an arrest is [also] complete when the arresting officer, with the intent to make an arrest, takes a person into custody by physical force.” [GS 15A-401(c)(1)b] This type of arrest, without a formal declaration of “You are under arrest!” occurs when you handcuff someone, tackle or wrestle them to the ground and hold them, or point a firearm at them, or some such similar behavior. Instead of your oral declaration it is your physical behavior that indicates to a reasonable person that he is under arrest.

Now, GS 15A-401(c)(2) indicates that after an arrest you must identify yourself as a law enforcement officer, inform the arrestee that he is under arrest, and tell him why you arrested him. But there is a second statute that also controls your behavior after an arrest.

FORWARD, PART TWO: GS 15A-501, POLICE PROCESSING AND DUTIES UPON ARREST GENERALLY.

In this particular statute, the North Carolina General Assembly requires you to complete the following duties after your arrest: inform the arrestee of the charges against him (exactly as in GS 15A-401), take him without unnecessary delay before a judicial official, and advise him of his right to communicate with counsel and friends (and allow him reasonable time and opportunity to do so).

NOW, A LITTLE SOMETHING FIRST LINE SUPERVISORS SHOULD KNOW ABOUT UNARREST:

1. It is an action consistent with constitutional law.
2. There are times when it should be done, times when it may be done, and times, we think, when it should not be done.

CONSTITUTIONAL UNARREST IN NORTH CAROLINA:

There was a rumor going around that sooner or later there would be a third edition of Bob Farb's book *Arrest, Search and Investigation in North Carolina*. Our evaluation of that rumor is that it was true, as a new edition has appeared! And this is what Mr. Farb has to say on the subject of **unarrest** on page 45 of the third, or newest edition of his book:

Sometimes officers arrest a person with probable cause but receive further information after the arrest – but before taking the person to a magistrate – that clearly shows that probable cause no longer exists to charge the person with a crime; for example, they learn that the arrestee is not the person who is wanted for the crime. North Carolina statutory law [GS 15A-501] literally requires officers to take the person to a magistrate for an initial appearance despite clear evidence that probable cause no longer exists.

However, federal constitutional law appears to require that officers must release an arrestee when probable cause clearly no longer exists. In such a situation, because federal constitutional law would override North Carolina statutory law, officers should release the arrestee in a safe place instead of continuing to take the arrestee to a magistrate.

If you face this situation, should you **unarrest** the person? We believe that you should, unless your agency policy prohibits such an action, or doing so would be in direct contravention of a superior's order.

SR&S TEAM TIPS: **First**, if you **unarrest** someone where probable cause no longer exists, inform them that you are releasing them from arrest and custody, and why. Then carefully explain that they have a right under state statute to appear before the magistrate when they are arrested. Tell them that you will transport them to the magistrate if they consent to go and explain there the reason for their arrest and subsequent **unarrest** and release, and that you will inform the magistrate that you wish no criminal process issue for this person. But make it clear to them that, either way, they are free to go, and are released. Most people will be satisfied and will not want to take the trouble to go “downtown.”

Secondly, if they have no transportation, offer them a ride to any location in your agency's territorial jurisdiction. Just think about it for a moment. Then do it.

WHEN YOU MAY UNARREST IN NORTH CAROLINA:

You may also **unarrest** for “good cause shown.” Suppose you make an arrest, probable cause still exists, but there develops a legitimate need to **unarrest**, write a citation, and move on. There are obviously many situations where this need might arise, but consider this one: there is an emergency somewhere in your city or county and all cars are needed. Unless your arrest is for a felony or a serious misdemeanor (or a misdemeanor where common sense tells you not to unarrest, such as a DWI), then there is a legitimate, good faith need for the **unarrest**. The decision is yours or your immediate superior's, assuming your agency policy does not prohibit such action. You may **unarrest** here, but the decision is one that calls for common sense and good judgment.

WHEN YOU SHOULD NOT UNARREST IN NORTH CAROLINA:

Suppose you make a pretextual arrest, an arrest made as a pretext to accomplish some other purpose unrelated to the stop. Now, there are a number of cases holding pretextual stops valid and reasonable. Briefly, the Supreme Court of the United States held in *Whren v. US* in 1996 that “subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” And our state supreme court adopted that reasoning in *State v. McClendon* in 1999. Once again, the United States Supreme Court revisited the issue in *Arkansas v. Sullivan* in 2001 with the same results.

We have no argument with pretextual stops or arrests. So long as your law enforcement action is one any other officer **could** have taken, fine; it does not matter if another officer probably would not have taken the action. If your action is legal and constitutional, your subjective intentions are simply not relevant.

But you should never make a pretextual arrest with the idea in mind that if it does not bear fruit you will simply unarrest the person. You cannot use unarrest to cover weak probable cause. If you do it, you probably will not be “called to task” on it. You will get away with it on most occasions. That however is no reason for such behavior. Everyone knows that there is the letter of the law and the spirit of the law. And using unarrest in a pretextual arrest meets the letter of the law, but certainly does an injustice to the spirit of the law. Unarrest should only be used when you have clear probable cause and for whatever reason, it dissipates; or when you are called away from a arrest by a more compelling need that the one for which you made the arrest.

IN SUMMARY:

Unarrest is an action consistent with constitutional law in North Carolina. There are times when it should be done (dissipation of probable cause); times when it may be done (“for good cause shown”); and times, we think, when it should not be done (to cover your ... posterior when your probable cause is weak). An unarrest can serve the best interests of justice. If you use it, see that it does.