

## It's official: Good-faith exception part of state law

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As Rep. Paul Stam sees it an injustice to the people of North

Carolina has been righted with the passage of an act to provide for the adoption of the good-faith exception to the exclusionary rule into state law.

"In some cases, a murderer, rapist or drug dealer will not go free. In other cases, like the victim in *State v. Carter*, an elderly rape victim won't have to testify twice because of an unjust suppression of evidence," Stam, R-Wake, said.

But Charlotte criminal defense attorney Bill Powers said the rationale for the exclusionary rule is not to protect guilty criminals.

"The purpose of the rule is to protect everyone else in the community from the police," he said.



Powers

Powers said that while a vast majority of law enforcement officers try to do the right thing, he cited the 4th Circuit's March 2 decision in *United States v. Foster* as an example of the "mental gymnastics the government is willing to effectuate to attempt to establish reasonable suspicion or probable cause."

Durham attorney C. Scott Holmes, who represented defendant David Deshawn Foster in the case, told Lawyers Weekly that the opinion “gives some hope that there is still some life left in the Fourth Amendment.”

Writing for the court, Circuit Judge Roger L. Gregory noted his “concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.”

Powers said *Foster* reinforces the importance of the exclusionary rule. “The exclusionary rule is part of our system of checks and balances. Without it, a significant check against potential abuse is removed,” he said.

Judge Gregory seemed to agree, writing in *Foster* that “we would be remiss if we did not acknowledge that the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone - whether he or she is one of the most affluent or most vulnerable members of our community.”

Gov. Bev Perdue signed the act March 18 and it became law on March 21. The act will apply to all hearings or trials commencing on or after July 1.

Under the act, if a trial court finds a “substantial violation” of Chapter 15A, “[e]vidence shall not be suppressed ... if the person committing the violation ... acted under the objectively reasonable, good faith belief that the actions were lawful.”

When a trial court determines “whether or not evidence shall be suppressed ... [it] shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. § 15A-977(f).” That statute sets forth the procedures for motions to suppress evidence.

While the good-faith exception to the exclusionary rule will now apply to motions to suppress under Chapter 15A, it does not apply to motions to suppress brought under the state Constitution.

The act reflects the legislature’s opinion that the good-faith exception should be adopted under state constitutional law. But that requires the N.C. Supreme Court to overrule *State v. Carter*, 322 N.C. 709 (1988).

In the act, the legislature asked the Supreme Court to “reconsider, and overrule, its holding in *State v. Carter*.” But it will take a genuine case or controversy on appeal to get the justices to reconsider.

University of North Carolina School of Government Professor Robert L. Farb told Lawyers Weekly he is aware of at least one such case pending on appeal, but he could not provide the name with certainty or identify the county from which the appeal was made.

Stam said he hopes the attorney general’s office will include appeals of successful suppression motions in cases before the appellate courts in order to expedite reconsideration of *Carter*.

### **Warrants or no warrants**

Stam said the exception should apply to all searches and seizures executed in good faith, regardless of whether they were executed on the basis of a warrant. He referenced a search incident to arrest as an example of a non-warrant search that would be covered by the good-faith exception.

“The constitution only prohibits unreasonable searches and seizures,” he said. “It does not prohibit all warrantless searches.”



Pell

H. Alan Pell, a staff attorney in the Research Division of the North Carolina General Assembly, wrote a Jan. 21 memorandum of law to Stam that was considered in the House Judiciary Subcommittee D with the act.

Staples S. Hughes, the N.C. State Appellate Defender, told Lawyers Weekly the materials provided to the committee primarily discussed *United States v. Leon*, 468 U.S. 897 (1984) - the U.S. Supreme Court case that first set out the good-faith exception - and *State v. Carter*.

"The rationale of the good-faith exception was that in those cases in which law enforcement acted in good-faith reliance on a magistrate's finding of probable cause, suppression of evidence wasn't necessary," Hughes said.

"Unless you are talking about an analogous situation where an officer is relying on a judicial ruling from a magistrate or a judge," Hughes added, "you are not talking about the good-faith exception as it is known in *Leon* or *Carter*."

But Pell said the legislature was aware of other cases referenced in his memo, like *Herring v. United States*, 129 S. Ct. 695 (2009), where there wasn't a warrant. *Herring* involved a police officer who mistakenly thought there was a warrant.

### ***Foster* a sea change?**

The 4th Circuit's *Foster* decision caught Charlotte criminal defense attorney Noell Tin by surprise.

"If you told me five years ago the 4th Circuit would be reversing the denial of a suppression motion at the same time the North Carolina state legislature was adopting the good-faith exception, I would have said you were crazy," Tin said.

Foster, of Henderson, was convicted of possession with intent to distribute cocaine. The cocaine was found after Foster was seen by a plain-clothes detective appearing "from a crouched position" in the passenger seat of a parked car and making "frenzied arm movements, including the movement of his arms down toward the floor of the car."

The government argued that these movements were sufficient to create reasonable suspicion in the officer's mind. The 4th Circuit disagreed, vacating Foster's conviction and remanding the case to the Eastern District.

Judge Gregory wrote that the court was "deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception."

Tin said he was impressed with the court's analysis, especially given its history as one of the most conservative circuits in the country. *Foster* may signal a change in the manner in which the 4th Circuit analyzes Fourth Amendment claims, he said.

Powers foresees a different kind of change in state courts.

"Ecclesiastes says there is nothing new under sun. We've been fighting [the search and seizure] issue since North Carolina was a colony," Powers said, referencing the colonial general writ.

"We had the guts to stand up to the crown then, and we have the guts to stand up to it now," he said. "The only difference is that one was called King George and this one is called the State of North Carolina."