Chapter 4:
Motions and Motions Procedures in Implied Consent Cases

Shea Denning

DRAFT VERSION: October 10, 2013

Contents

I. Introduction

Special trial procedures apply to misdemeanor implied consent offenses that are litigated in district court. This chapter discusses the procedures that govern motions to suppress evidence and dismiss charges in these implied consent cases as well as the permissible bases for such motions in implied consent cases generally.

As in other criminal cases, defendants charged with implied consent offenses frequently move to suppress evidence and dismiss charges. Procedural rules in Chapter 15A, the Criminal Procedure Act, generally govern the making, hearing and consideration of such motions. In superior court, a defendant generally must move to suppress evidence prior to trial, though certain exceptions apply.[1] Motions to dismiss, in contrast, generally may be made in superior court at any time,[2] though, again, some exceptions apply.[3] In misdemeanor prosecutions in district court, motions to suppress evidence and to dismiss charges ordinarily are made upon arraignment or during the course of trial.[4] An exception to this rule applies to motions to suppress and motions to dismiss in implied consent cases.

II. Trial Procedures for Implied Consent Offenses

Article 2D of Chapter 20 of the General Statutes sets forth procedure for the investigation, processing and trial of implied consent offenses. The trial procedures apply to any implied-consent offense[5] litigated in district court.[6] Two statutes codified in this article—G.S. 20-38.6 and G.S. 20-38.7—govern the making and consideration of motions to suppress evidence and dismiss charges in implied consent cases tried in district court as well as the procedures for ruling upon such motions and appealing from district court determinations. In a departure from the procedures that normally apply in district court, they require that motions to suppress evidence or dismiss charges in implied consent cases be raised before trial, with the exception of (1) motions based upon newly discovered facts, which may be raised during trial, and (2) motions to dismiss for insufficient evidence, which may be raised at the close of the State's evidence and at the close of all the evidence. They also afford the State an opportunity to appeal a district court's determination that a motion to suppress or dismiss should be granted.

A. Motor Vehicle Driver Protection Act of 2006

The genesis of the legislation resulting in the enactment of G.S. 20-38.6 and 20-38.7 was a 2005 report issued by the Governor's Task Force on Driving While Impaired, which made numerous recommendations for improving "North Carolina's DWI system."[7] One recommendation was that "District Court trial procedure . . . be formalized for DWI and related offenses" through the enactment of legislation requiring that motions to suppress and motions to dismiss evidence in implied consent cases litigated in district court be filed before trial.[8] The report further recommended the enactment of statutory provisions permitting the State to appeal to superior court any pretrial district court order suppressing evidence or dismissing charges. These recommendations were based upon the following observations:

- Currently in Superior Court, motions to suppress are accompanied by an affidavit and are required before the trial. There is no such law in District Court, which is where the majority of DWI cases are tried. Also, the State is not allowed to appeal orders of suppressions to the

[1]. G.S. 15A-975.
[2]. G.S. 15A-954.
[3]. G.S. 15A-952(b).
[4]. G.S. 15A-953.
[5]. A list of these offenses is set forth in Chapter 1, Table __.
[6]. G.S. 20-38.1.
[7]. Governor's Task Force on Driving While Impaired, *Final Report to Governor Michael F. Easley* (January 14, 2005), 7.
[8]. *Id.* at 24, 62–63.

Superior Court.

- Defense attorneys are allowed to argue any motion without prior notice to the District Attorney (DA), and the DA does not have an opportunity to prepare a response to the motion as allowed in Superior Court.
- Many DWI cases are resolved when the court rules on these motions to dismiss or suppress.
- The proceedings of District Court should be modified to require:
    1. Motions to suppress and dismiss evidence (such as Intoxilyzer results) must be made in writing and filed seven days prior to the trial.
    2. There are no statutes defining when evidence can be suppressed or dismissed as there is in Superior Court. District Court procedure should be modeled to more closely resemble Superior Court.
    3. District Court judges make written findings of fact and conclusions of law when evidence is suppressed or cases are dismissed.
    4. The State is allowed to appeal District Court orders dismissing a case or suppressing evidence to Superior Court.[9]

By requiring that motions to suppress and motions to dismiss charges generally be filed before trial begins, the implied consent offense procedures that subsequently were enacted as part of the Motor Vehicle Driver Protection Act of 2006 and codified at G.S. 20-38.6 and G.S. 20-38.7 provide for determinations of such pretrial motions before jeopardy attaches, thereby removing double jeopardy as a potential bar to the State's ability to challenge on appeal a district court order suppressing evidence or dismissing charges. Yet the enactment of these provisions did more than create a pretrial motions-and-appeals process for implied consent cases heard in district court that would mirror procedures applicable in superior court. Indeed, they created a new type of ruling for such motions—the preliminary determination.[10]

B. Summary Rulings

Not all rulings on motions to suppress and motions to dismiss entered in district court in an implied consent case must be preceded by a preliminary determination. A district court judge must summarily grant a motion to suppress evidence if the State stipulates that the evidence will not be offered in any criminal action or proceeding against the defendant.[11] A district court judge may summarily deny a

[9]. *Id.* at 24–25.

[10]. Given that pretrial rulings eviscerate any double jeopardy concerns, why would the legislature have also required district courts to rule on such motions by preliminary determination rather than final orders? One potential explanation (which was rejected by the North Carolina Court of Appeals in *State v. Fowler*, discussed infra) is that the legislature required the entry of preliminary determinations rather than final judgments in order to preserve the State's right to file an interlocutory appeal from a district court ruling granting a motion to suppress during trial. Before the court held otherwise in *State v. Fowler*, one might have interpreted G.S. 20-38.7(a) as allowing the State to appeal to superior court a district court's midtrial preliminary determination granting a motion to suppress, thereby allowing the superior court to review the determination before it could result in the suppression of critical evidence that might later lead to entry of a dismissal resolving factual elements of the offense. The North Carolina Court of Appeals read the provisions differently in *Fowler*, leaving unanswered, and perhaps rendering rhetorical, the query regarding the necessity of a preliminary determination of motions in implied consent cases.

[11]. G.S. 20-38.6(c).

motion to suppress evidence if the defendant fails to make the motion pretrial when all material facts were known to the defendant.[12]

C. Preliminary Determinations

If the motion is not determined summarily, the district court judge must conduct a hearing on the motion and make findings of fact.[13] Then, rather than entering a ruling granting or denying the motion as a court would in any other case, the judge must issue a written order, termed a *preliminary determination*, that contains findings of fact and conclusions of law and preliminarily indicates whether the motion should be granted or denied. If the preliminary ruling indicates the motion should be denied, the district court judge may enter a final judgment denying the motion.
If, on the other hand, the preliminary determination indicates the motion should be granted, the district court judge may not enter a final judgment on the motion until after the State is afforded an opportunity to appeal to superior court for review of the district court's preliminary determination.[14]

D. Appeal

A second statutory provision, G.S. 20-38.7, grants the State the right to appeal to superior court a district court's preliminary determination that a motion to suppress or dismiss should be granted. While G.S. 20-38.7 authorizes such an appeal, it does not prescribe the procedure for entering such an appeal, the method for providing notice of appeal, or any time limitation for appeal. Nor does it expressly incorporate the appeal provisions of the Criminal Procedure Act. Nevertheless, a pair of opinions published by the court of appeals within a few years of the statute's enactment sheds light on the proper procedure for appeal.

The court of appeals' opinion in *State v. Fowler*[15] resolved several significant challenges to the then-new implied consent motions procedures, upholding G.S. 20-38.6 and G.S. 20-38.7 as constitutional and explaining the circumstances and manner in which they apply. *State v. Palmer*,[16] decided the same day, clarified the mechanism by which the State may appeal from a district court's preliminary determination.[17]

1. Time Limitation

The court of appeals in *State v. Fowler* considered, and ultimately rejected, the defendant's contention that the implied consent procedures codified in G.S. 20-38.6 and G.S. 20-38.7 were unconstitutional. Among the arguments raised by the defendant in *Fowler* was that the absence of a time limit for appealing under G.S. 20-38.7 infringed upon the fundamental right to a speedy trial of a defendant charged with an implied consent offense in district court. The court acknowledged the absence of an express time limitation, but recited its earlier ruling in a different context recognizing that "[i]n the absence of a statute or rule of court prescribing the time for taking and perfecting an appeal, an appeal

---

[12]. G.S. 20-38.6(d).
[13]. G.S. 20-38.6(e).
[14]. G.S. 20-38.6(f).
[15]. 197 N.C. App. 1, 676 S.E.2d 523 (2009).
[16]. 197 N.C. App. 201, 676 S.E.2d 559 (2009).
[17]. For a detailed review of both opinions, see Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after State v. Fowler and State v. Palmer*, Administration of Justice Bulletin 2009/06 (December 2009).

must be taken and perfected within a reasonable time."[18] Accordingly, the court determined that the legislature's failure to establish a time by which the State must give notice of appeal requires a case-by-case examination to determine whether the State acted in violation of a defendant's right to a speedy trial by subjecting that defendant to undue delay. The court held that mere fact of the State's appeal from a preliminary determination in an implied consent case does not infringe on a defendant's fundamental right to a speedy trial.[19]

2. No Appeal After Jeopardy Attaches

Fowler also considered whether the State may appeal under G.S. 20-38.7 from a district court's preliminary determination granting a motion to suppress or dismiss made *after jeopardy has attached*. The court first addressed rulings on motions to dismiss for insufficient evidence made at the close of evidence, holding that the State may not appeal the granting of any such motion.[20] Noting that G.S. 20-

[18]. 197 N.C. App. at 23, 676 S.E.2d at 542.

[19]. *Id.* at 24, 676 S.E.2d at 542.

[20]. State v. Fowler, 197 N.C. App. 1, 18, 676 S.E.2d 523, 539 (2009); *see also* Evans v. Michigan, 133 S. Ct. 1069 (2013) (trial court's erroneous dismissal for insufficient evidence was an acquittal for double jeopardy purposes and appeal was therefore barred). State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545 (2008), a case involving the dismissal of implied consent charges that were not governed by the procedures enacted in 2006, demonstrates the application of the bar against double jeopardy to prevent the State from appealing the dismissal of such charges if the basis for the decision is insufficiency of the evidence, even where the lack of evidence results from erroneous findings. In *Morgan*, the district court dismissed charges of impaired driving because the notary's seal on the affidavits giving rise to probable cause seemed to be missing the date on which the notary's commission would expire. The State appealed the dismissal to superior court, which determined that although "'the State had begun to present . . . evidence on the charge in the District court when that court dismissed the case,'" the district court "'dismissed the charge on grounds unrelated to the Defendant's guilt or innocence.'" *Id.* at 718, 660 S.E.2d at 547 (quoting superior court's order). The superior court held that, accordingly, the State's appeal was not barred on double jeopardy grounds. The superior court further concluded that "'the seals on the arrest affidavit and the revocation reports contain all of the necessary information, including the expiration date of the notary's commission.'" *Id.* Thus, the superior court granted the State's appeal and reinstated the impaired driving charges against the defendant, remanding the case to district court for trial.

The court of appeals reversed, determining that while the affidavits were suppressed due to perceived "technical violations . . . not substantively related to Defendant's guilt or innocence," the dismissal of the charges "arose from the lack of evidence to support the charge of DWI once the District Court disallowed the affidavits based on what now appears to be the erroneous finding of a technical violation." *Id.* at 721, S.E.2d at 549. The appellate court noted that suppression of the affidavits by itself did not warrant dismissal of the charge. Instead, the dismissal resulted from the lack of any other evidence to support the charge once the affidavits were suppressed (the defendant had declined a breath test and refused to submit to any field sobriety tests). The court characterized the officer's affidavits as the "only evidence that Defendant was driving while impaired." *Id* at 722, S.E.2d at 549.

The conclusion of the court of appeals that there was no evidence other than the affidavits is curious given that the arresting officer, whose affidavits were under attack, testified in district court regarding the notarization of the affidavits. The court of appeals did not explain why the officer could not have provided evidence in support of the State's case by testifying about the events he observed before arresting the defendant. It also is unclear from the court's description of the proceedings below whether the State was afforded an opportunity to present other evidence in support of its case after the district court suppressed the affidavits. Perhaps the court's conclusion may be attributed in part to the apparent agreement by the State and the defendant "that the basis for the decision was insufficiency of the evidence—even if for technical reasons." *Id.* Regardless of the reasons underlying the court's conclusion that the dismissal was based on sufficiency of the evidence, Morgan clearly stands for the

38.6(a) excepted from its pretrial requirements motions to dismiss for insufficient evidence, the court explained that a determination by the district court that the State presented insufficient evidence to establish the defendant's guilt constitutes an acquittal for purposes of the Double Jeopardy Clause. Accordingly, when a court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution that might result in a second trial or in further proceedings devoted to resolving the factual issues related to the elements of the offense charged.

The court then addressed the more difficult question—whether the State is statutorily and constitutionally authorized to appeal a district court's rulings on other types of motions to dismiss or suppress raised during trial. Characterizing G.S. 20-38.6(a) and (f) and G.S. 20‑38.7(a) as "not expressly preclud[ing] the State from appealing motions to suppress or dismiss made by defendants *during* trial based on newly discovered facts" and noting that statutes authorizing an appeal by the State in a criminal case must be strictly construed, the court of appeals concluded that the State may appeal a district court's preliminary determination in favor of the defendant to superior court only when: (1) the preliminary determination is made and decided in district court at a time before jeopardy has attached and (2) the preliminary determination is entirely unrelated to the sufficiency of the evidence as to any element of the offense or to defendant's guilt or innocence.[21] "In other words," the court explained, "G.S. 20-38.6(a),(f), and 20-38.7(a) should not be construed to grant the State a right of appeal to superior court when the district court grants a defendant's motion to suppress evidence or dismiss charges during trial based on 'facts not previously known' which are only discovered by defendant 'during the course of the trial.'"[22]

The test articulated by the court is stricter than that required by the Double Jeopardy Clause, which does not bar the State's appeal from an order suppressing evidence, given that such orders are founded on a legal determination that a defendant's statutory or constitutional rights have been violated rather than upon a defendant's factual guilt or innocence. Moreover, principles of double jeopardy do not prohibit an appeal by the State from an order dismissing charges on grounds unrelated to a defendant's factual guilt or innocence or the retrying of a defendant if such an order is reversed on appeal—even if the order dismissing the charges is entered after jeopardy has attached.[23] For example, the North Carolina Court of Appeals held in *State v. Priddy*[24] that the State's appeal from a superior court order dismissing an habitual impaired driving charge on jurisdictional grounds after trial began was not barred by double jeopardy and that the defendant could be retried on the charge. Accordingly, G.S. 15A-1432(a)(1) grants the State a right to appeal from district to superior court when there has been a decision or judgment dismissing criminal charges as to one or more counts unless the rule against double jeopardy prohibits further prosecution. Thus, the State may appeal to superior court a district court order dismissing charges on grounds unrelated to the defendant's factual guilt or innocence, even when such an order is entered after trial begins. However, as the implied consent offense procedures are interpreted in *Fowler*, the State has no such right to appeal a district court's midtrial granting of a motion to suppress.

---

proposition that dismissal of charges on sufficiency of the evidence grounds after jeopardy has attached is not reviewable on appeal.

[21]. 197 N.C. App. at 19, 676 S.E.2d at 539 (quotation omitted).

[22]. *Id.* Though the court relied in part upon the task force report as support for its conclusion, the report made no recommendations regarding the issuance of preliminary determinations or midtrial appeals.

[23]. *See* United States v. Scott, 437 U.S. 82 (1978) (holding that the Double Jeopardy Clause did not bar the government's appeal of trial court's midtrial dismissal of charges upon defendant's motion on grounds of preindictment delay and unrelated to the legal sufficiency of the evidence).

[24]. 115 N.C. App. 547, 445 S.E.2d 610 (1994).

With respect to the requirement that preliminary determinations subject to appeal by the State be entirely unrelated to the sufficiency of the evidence, the court opined that that the General Assembly intended pretrial motions under G.S. 20-38.6(a) to address only procedural matters such as "delays in the processing of a defendant, limitations imposed on a defendant's access to witnesses, and challenges to the results of a [chemical analysis of the defendant's breath]."[25] Presumably the court considers a Fourth Amendment challenge such as the one raised by *Fowler* among motions addressing procedural matters rather than the sufficiency of the evidence, as the court did not indicate that the superior court lacked authority to consider the State's appeal from the preliminary determination.

Given the *Fowler* court's holding that G.S. 20-38.7 does not permit the State to appeal from motions granted midtrial, the requirement that a district court rule by "preliminary determination" affords the State no right of appeal additional to what would be constitutionally permissible were the district court to issue such pretrial rulings by final order.

3. Appeal Procedures

The court of appeals in State v. Palmer,[26] decided the same day as *Fowler*, considered the proper method for appealing under G.S. 20-38.7. In approving the method utilized by the State in that case, *Palmer* provides direction that is difficult to glean from the spartan appeal provisions of G.S. 20-38.7(a). *Palmer* noted courts' authority, when a statute regulating appeals to the superior court fails to prescribe rules, to look to statutes regulating appeals in analogous cases and to give them such application as the particular case and statutory language warrant.[27] *Palmer* considered G.S. 15A-1432, which regulates appeals by the State to superior court from a district court's final order dismissing criminal charges to be analogous to G.S. 20-38.7. Thus, Palmer looked to the procedures in G.S. 15A-1432(b) to determine whether the State properly appealed pursuant to G.S. 20-38.7(a). Following the *Fowler* court's determination that the legislature failed to establish a time by which the State must give notice of appeal, however, *Palmer* "decline[d] to engraft upon [G.S. 20-38.7(a)] the ten-day time limit for making an appeal specified in [G.S. 15A-1432(b)]."[28]

Then, assuming without deciding that the State was required to file written notice of appeal, the *Palmer* court examined whether the State's written notice in that case sufficiently conformed to the remaining requirements of G.S. 15A-1432(b), which requires appeal by written motion specifying the basis of the appeal. Motions for appeal under this provision must be filed with the clerk and served upon the defendant.[29] The *Palmer* court found the State's appeal proper. The State filed a document captioned "State's Appeal to Superior Court," including in the caption the defendant's name and address and the case file number.[30] The document stated that the State "appeals to the superior court the district court preliminary determination granting a motion to suppress or dismiss," enumerated the issues raised in the defendant's motion, and recited "almost verbatim all of the district court's findings of fact."[31] The

---

[25]. *Fowler*, 197 N.C. App. at 19, 676 S.E.2d at 540–41.
[26]. 197 N.C. App. 201, 676 S.E.2d 559 (2009).
[27]. *Id.* at 205, 676 S.E.2d at 562.
[28]. *Id.* at 206, 676 S.E.2d at 562.
[29]. Service on the attorney of record of a motion specifying the basis of appeal pursuant to GS 15A-1432 is proper. *See* G.S. 15A-951(b) (providing for service of written motions on attorney of record or upon the defendant if he is not represented by counsel).
[30]. 197 N.C. App. at 206, 676 S.E.2d at 562-63.
[31]. *Id*.

appellate court rejected the superior court's conclusion that the State's failure to provide the date of the preliminary determination rendered its notice of appeal insufficient. The court likewise rejected the defendant's contention that the State's failure to include the month on its certificate of service rendered the State's appeal insufficient as a matter of law, noting that the defendant was not misled or prejudiced by the error.

4. Standard of Review

If the State appeals a preliminary determination in the defendant's favor and the findings of fact are disputed, the superior court determines the matter de novo.[32] If there is no dispute, the district court's findings of fact are binding on the superior court and should be presumed to be supported by competent evidence.[33] After considering the matter according to the appropriate standard of review, the superior court does not itself enter a final ruling on the motion. Instead, the superior court must remand the matter to district court with instructions to finally grant or deny the motion.[34]

5. No Appeal from Superior Court's Remand Order

Any appeal beyond the appeal of the preliminary determination is governed by Article 90 of Chapter 15A of the General Statutes.[35] No provision of this Article allows the State to appeal from the superior court's interlocutory order remanding an implied consent case to district court for entry of a final order on a motion to suppress or dismiss; thus, the State has no right to appeal at this juncture. [36] Nevertheless, the court of appeals has, on numerous occasions, granted certiorari review of such interlocutory orders at the State's request.[37]

6. Appeal from District Court's Final Order

---

[32]. G.S. 20-38.7(a).

[33]. State v. Fowler, 197 N.C. App. 1, 11, 676 S.E.2d 523, 535 (2009).

[34]. G.S. 20-38.6(f) provides that "the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal." The court of appeals in *Fowler*, 197 N.C. App. at 11-12, 676 S.E.2d at 535, construed this provision to require that the superior court remand the case to district court for entry of a final judgment on the motion.

[35]. G.S. 20-38.7(a).

[36]. *Fowler*, 197 N.C. App. at 5-6, 676 S.E.2d at 531-32 (concluding that G.S. 15A-1445(a)(1), which allows the State to appeal to the appellate division from a superior court's entry of a judgment dismissing criminal charges, did not confer upon the State the right to appeal from the superior court's interlocutory order remanding the case for entry of a dismissal by the district court; further holding that G.S. 20-38.7(a) did not confer upon the State the right to appeal the superior court's remand order to the appellate division); *Palmer*, 197 N.C. App. at 203-04; 676 S.E.2d at 561 (holding, pursuant to *Fowler*, that State had no statutory right of appeal from superior court's interlocutory order remanding matter to district court for entry of a final order suppressing evidence).

[37]. *See, e.g.,* Fowler, 197 N.C. App. at 8, 676 S.E.2d at 533; Palmer, 197 N.C. App. at 204, 676 S.E.2d at 561; State v. Osterhoudt, __ N.C. App. __ , 731 S.E.2d 454, 458 (August 21, 2012). *But see* State v. Rackley, 200 N.C. App. 433, 684 S.E.2d 475 (2009) (declining to issue a writ of certiorari to address merits of State's appeal from superior court order agreeing with district court's preliminary determination that defendant's motion to suppress should be granted).

A defendant may not appeal a district court's denial of a pretrial motion to suppress or dismiss.[38] If the defendant is convicted, he may appeal to superior court for trial de novo.[39] The defendant may again move to suppress evidence or dismiss charges in that forum. As a general rule, no motion in superior court is prejudiced by any ruling upon the subject in district court.[40] It is unclear, however, how that rule comports with the special implied consent procedures that afford the superior court interlocutory review of the determinations of the district court. The appellate courts have not addressed whether a superior court has the authority, even if so inclined, to enter a subsequent ruling upon the trial of the matter that differs from the earlier interlocutory order.[41]

The State may appeal to superior court a district court's final judgment dismissing charges if the appeal does not violate the Double Jeopardy Clause.[42] If the superior court reverses a district court's dismissal of charges, it must reinstate the charges and remand the matter to district court. The defendant may appeal this order to the appellate division.[43] If the superior court affirms a district court's final judgment dismissing charges, the State may appeal to the appellate division.[44]

The State may not appeal a district court's entry of a final order suppressing evidence but, pursuant to Rule 19 of the General Rules of Practice, may file in superior court a petition for writ of certiorari.

III. Motions to Suppress

Since motions to suppress in implied consent cases must in most circumstances be raised before trial, it is important to identify what types of motions are included within this definition. Given that the term "motion to suppress" is not defined by statute, the statutory provision granting the remedy of suppression is a good point of reference for the types of motions contemplated by this term.[45] G.S. 15A-974 provides:

> Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
> b. The extent of the deviation from lawful conduct;
> c. The extent to which the violation was willful;

[38]. G.S. 20-38.7(b).
[39]. G.S. 7A-290.
[40]. G.S. 15A-953.
[41]. For a discussion of potential arguments in favor of and opposed to additional superior court review, see Shea Denning, *State v. Osterhoudt and motions procedures in implied consent cases*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 23, 2012), available at http://nccriminallaw.sog.unc.edu/?p=3836.
[42]. G.S. 15A-1432(a).
[43]. G.S. 15A-1432(d).
[44]. G.S. 15A-1432(e).
[45]. *See* Jeff Welty, What's a motion to suppress?, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sep. 21, 2010), available at http://nccriminallaw.sog.unc.edu/?p=1612.

> d. The extent to which exclusion will tend to deter future violations of this Chapter.
>
> Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.[46]

The statutory exposition of limited grounds for suppression distinguishes motions to suppress from more general objections to the introduction of evidence. While both motion to suppress and objections to the introduction of evidence seek the exclusion of evidence from trial, only evidence kept out under a ground for suppression is deemed "suppressed," and thus subject to the pretrial motions requirement. G.S. 15A-974(a)(1) makes clear that motions to bar the introduction of evidence obtained in violation of a defendant's Fourth Amendment rights and subject to the exclusionary rule are motions to suppress within the meaning of G.S. 20-38.6. Thus, a defendant who alleges that his blood was withdrawn over his objection and without a search warrant and that a warrant could have been obtained without significant delay must move to suppress the evidence before his trial on impaired driving charges begins (unless the motion is based on facts not previously known).

It likewise is clear that a defendant's request that the court exclude evidence obtained as a result of a substantial violation of his or her rights under Chapter 15A is properly deemed a motion to suppress, subject to the pretrial motions provisions of G.S. 20-38.6. So, for example, a defendant who alleges based on facts known before trial that the police officer who arrested her for impaired driving willfully acted beyond the scope of her territorial jurisdiction under G.S. 15A-402 and that all evidence resulting from the arrest should therefore be suppressed must so move before trial.

Yet, despite the broad language of G.S. 15A-974 not all attempts by a defendant to bar the State from introducing evidence whose "exclusion is required by the Constitution," are properly deemed motions to suppress that must be made before trial pursuant to G.S. 20-38.6.[47] A defendant may, for example, object during trial to the introduction of a report from a chemical analyst who is not present to testify at trial on the basis that introduction of the analyst's report without testimony from the analyst violates his right to confront a witness under the Confrontation Clause of the Sixth Amendment.[48] Such motions generally are not considered the proper subject of a motion to suppress, even though founded on an exclusion that is required by the Constitution. Indeed, the commentary to G.S. 15A-974 indicates that the type of exclusion referred to by the rule is exclusion resulting from the *gathering* of evidence in violation of constitutional rights rather than the *introduction* of evidence in violation of constitutional rights that apply at trial.[49]

---

[46]. G.S. 15A-974.

[47]. *See* Welty, What's a motion to suppress?, *supra* note 45.

[48]. U.S. Const. Amend. VI. (providing that in all criminal prosecutions a defendant shall be afforded the right to cross examine witnesses against him). Note that a defendant may waive his right to object to introduction of the report if the State provides notice of the report before trial pursuant to G.S. 20-139.1 and the defendant fails to provide timely written notice of his objection to its introduction. The notice and demand procedures applicable to implied consent testing are discussed in Chapter ---.

[49]. See G.S. 15A-974, Criminal Code Commission Commentary (noting that "subdivision (1) only requires suppression of evidence if its *exclusion* is constitutionally required" and recognizing that "[i]t is possible then that

One Fourth Amendment scholar has noted that the federal courts' consideration of suppression motions as concerning "the 'application of the exclusionary rule of evidence,' or matters of 'police conduct not immediately relevant to the question of guilt'" comports with North Carolina case law,[50] lending support to the notion that "'motion to suppress' means something like 'motion seeking to exclude evidence as a sanction for police misconduct in obtaining it . . . .'"[51]

In addition, the North Carolina courts have identified a basis for suppression of evidence in implied consent cases that is ***not*** expressly included in G.S. 15A-974. While G.S. 15A-974(2) requires the suppression of evidence obtained as a result of a substantial violation of Chapter 15A, no statute requires the suppression of evidence obtained in violation of Chapter 20, which contains the provisions governing implied consent. Nevertheless, in opinions spanning four decades, North Carolina's appellate courts have suppressed chemical analysis results based upon statutory violations related to their administration. The line of cases providing this remedy begins with State v. Shadding,[52] a case decided a few years after the legislature's enactment of the statute requiring that a person be informed of certain implied consent rights before administration of a chemical analysis. In *Shadding*, the court held that upon objection by a defendant to evidence of the results of a breath test on the grounds that he or she was not notified of the right to call an attorney and select a witness, a trial court must conduct a hearing and find as a fact whether the defendant was so notified. If the trial court finds that a defendant was notified, it must also determine whether the "test was delayed (not to exceed thirty minutes from time defendant was notified of such rights) to give defendant an opportunity to call an attorney and select a witness to view the testing procedures, or whether defendant waived such rights after being advised of them."[53] Reasoning that "[s]uch rights of notification, explicitly given by statute, would be meaningless if the breathalyzer test results could be introduced into evidence despite non-compliance with the statute," the court held that the State's failure to offer evidence regarding whether the defendant was advised of his rights under G.S. 20-16.2(a) rendered results of the breath test inadmissible.[54] Furthermore, the court explained that when a defendant is advised of such rights, and does not waive them, "the results of the test are admissible in evidence only if the testing was delayed (not to exceed thirty minutes) to give defendant an opportunity to exercise such rights."[55]

In *State v. Fuller*,[56] the court relied upon *Shadding* in holding that the results of the defendant's breath test were improperly admitted into evidence. In *Fuller*, the officer who administered the test testified that he advised the defendant of his right to refuse to take the test, his right to have witnesses and an attorney present, and that he would be afforded thirty minutes to obtain the witness. The defendant alleged, however, that he was not advised of his right to have an additional test administered by a qualified person of his own choosing. Holding that the State's failure to prove that the defendant was

---

evidence may be gathered in violation of constitutional rights, but suppression is not the sanction to be applied unless authoritative case law so declares."); *see also* Welty, What's a Motion to Suppress?, *supra* note ___ (citing case law supporting the notion that the term "'motion to suppress' means something like 'motion seeking to exclude evidence as a sanction for police misconduct in obtaining it'").

[50]. *Welty, What's a Motion to Suppress, supra* note 49 (citation omitted).

[51]. *Id.*

[52]. 17 N.C. App. 279, 194 S.E.2d 55 (1973).

[53]. *Id.* at 283, 194 S.E.2d at 57.

[54]. *Id.* at 282-83, 194 S.E.2d at 57.

[55]. *Id.* at 283, 194 S.E.2d at 57.

[56]. 24 N.C. App. 38, 209 S.E.2d 805 (1974).

accorded this statutory right rendered the test results inadmissible, the court commented that if the failure to advise of the rights set forth in G.S. 20-16.2 "is not going to preclude the admission in evidence of the test results, the General Assembly must delete the requirement."[57]

Not surprisingly, the court of appeals has deemed denial of the rights promised in the notice required by G.S. 20-16.2(a), like denial of notice itself, to require suppression of test results. Thus, in State v. Myers,[58] the court held that breath test results were improperly admitted as the defendant was denied the right to have his wife witness the breath test. Myers told the officer that he wanted his wife to come into the breath testing room and the officer said "that might not be a good idea because she had been drinking also."[59] The court found the officer's statement "tantamount to a refusal of that request," which barred admission of the results at trial.[60] Likewise, in State v. Hatley,[61] the court held that suppression of the defendant's breath test results was required as the defendant called a witness who arrived at the sheriff's office within thirty minutes and told the front desk duty officer that she was there to see the defendant and yet was not admitted to the testing room. Neither *Myers* nor *Hatley* demonstrated irregularities in the breath-testing procedures or that having a witness present would have facilitated their defense of the charges. The court of appeals required no such showing, holding that the denial of the right required suppression of the results without any corresponding demonstration of prejudice.

Yet, in a couple of limited instances, the court of appeals has required that the defendant demonstrate prejudice–or at least consequences–resulting from a statutory violation to be entitled to relief. In *State v. Buckner*,[62] the defendant argued that it was error for the court to admit the result of his breath test, which was administered after the arresting officer observed him for only twenty minutes, rather than the thirty minutes provided by statute. The defendant, who made a phone call after being advised of his implied consent rights, argued that the State was required to demonstrate that he waived the right to have an attorney or witness present to introduce the result of the test. The court rejected the defendant's argument, pointing to the defendant's failure to contend that a witness or lawyer was "on the way to the scene of the test" or "that an additional 10 minutes would have resulted in any change of status."[63] The court held that a delay of less than thirty minutes was permissible as there was no evidence "that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes."[64] In so holding, the court effectively elevated the showing required of a defendant in such a case to include the demonstration that being afforded the right would have enabled its exercise.

The court imposed a similar requirement in State v. Green.[65] In that case, the officer "garbled" the notice of the defendant's right to have an independent test performed, implying that the defendant could call a qualified person to administer the initial chemical analysis rather than informing him that he could have a subsequent independent test.[66] The court held that this irregularity did not require

[57]. *Id.* at 42, 209 S.E.2d at 808.
[58]. 118 N.C. App. 452, 455 S.E.2d 492 (1995).
[59]. *Id.*at 453, 455 S.E.2d at 493.
[60]. *Id.* at 454, 455 S.E.2d at 494.
[61]. 190 N.C. App. 639, 661 S.E.2d 43 (2008).
[62]. 34 N.C. App. 447, 238 S.E.2d 635 (1977).
[63]. *Id.* at 450, 238 S.E.2d at 637.
[64]. *Id.* at 451, 238 S.E.2d at 638.
[65]. 27 N.C. App. 491, 219 S.E.2d 529 (1975).
[66]. *Id.* at 495, 219 S.E.2d at 532.

suppression of the breath test results, concluding that "had defendant availed himself of the right given, even as given, the officer would have gotten the person requested and would have undoubtedly known that the purpose was to have an additional test administered."[67] The court further commented: "We cannot see how the defendant could possibly have been prejudiced."[68]

What distinguishes *Buckner* from *Myers* and *Hatley*? *Green* from *Shadding* and *Fuller*? Certainly, they represent different degrees of violation. In *Myers* and *Hatley*, live witnesses were turned away or denied admittance, while in *Buckner* the defendant merely was denied the full thirty minutes afforded him by statute to procure a potential witness's appearance. And in *Shadding* and *Fuller*, notice was all together lacking, not just garbled as it was in *Green*.

IV. Motions to Dismiss

A. Grounds.

Grounds for the dismissal of charges are set forth in G.S. 15A-954. This statute requires the court on motion of the defendant to dismiss the charges in a criminal pleading if it determines that any of the following conditions are satisfied:

> (1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.
> (2) The statute of limitations has run.
> (3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.
> (5) The defendant has previously been placed in jeopardy of the same offense.
> (6) The defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid.
> (7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.
> (8) The court has no jurisdiction of the offense charged.
> (9) The defendant has been granted immunity by law from prosecution.
> (10) The pleading fails to charge an offense as provided in G.S. 15A-924(e).

Other grounds for dismissal applicable solely to indictments are set forth in G.S. 15A-955. And, in State

[67]. *Id.*
[68]. *Id.*

v. Knoll,[69] the North Carolina Supreme Court held that the violation of a defendant's statutory rights to pre-trial release in an impaired driving case that prejudices the defendant requires dismissal of the charges. *Knoll* and its progeny are discussed in Chapter 3.

Two of the grounds for relief set forth in G.S. 15A-954 frequently are alleged in implied consent cases and their application in this context is discussed in greater detail below.

1. The Defendant Has Been Denied a Speedy Trial.

a) State Crime Lab Delays.

The state crime lab and other local laboratories perform nearly 10,000 blood toxicology analyses annually, the vast majority of them in impaired driving cases. Unlike breath analysis results, which the State has in hand before a person's initial appearance in an impaired driving case, several months may elapse after a person's arrest for impaired driving charges before the State receives a toxicology report analyzing the defendant's blood. The reasons for the delay are several. It takes time for the sample to reach the laboratory. The testing process itself is more time-consuming than that associated with a breath-testing instrument's analysis of a breath sample. Laboratory analysts have less time in the laboratory than they did before a defendant's constitutional right to cross examine the author of a forensic laboratory report was recognized in *Melendez-Diaz v. Massachusetts*,[70] since they often must travel to courthouses across the state to testify about their analyses. Furthermore, in recent years there has been a shortage of analysts. As the turnaround time for toxicology reports increases, many have questioned how such delays affect a defendant's right to speedy trial.

A court considering a defendant's motion to dismiss on speedy trial grounds must assess four factors: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) prejudice to the defendant.[71] The length of the delay is a triggering mechanism. When the delay reaches a threshold that is presumptively prejudicial, the court must inquire into the other factors. Given that delays approaching one year are considered to trigger this threshold for purposes of felony charges,[72] and "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge,"[73] the postponement of misdemeanor impaired driving trials for periods approaching a year to allow time for laboratory toxicology testing easily triggers examination of the remaining three factors.

In considering the reason for the delay, *Barker* assigned different weights to different reasons: A deliberate attempt by the State to delay trial in order to hamper the defense weighs heavily against the government. More neutral reasons, such as "negligence or overcrowded courts" weigh less heavily against the government, but nevertheless must be considered "as the ultimate responsibility for such circumstances . . . rest[s] with the government rather than with the defendant."[74] A valid reason, such as a missing witness, justifies appropriate delay. North Carolina's appellate courts have required a

[69]. 322 N.C. 535, 369 S.E.2d 558 (1988).
[70]. 557 U.S. 305 (2009).
[71]. Barker v. Wingo, 407 U.S. 514, 530 (1972).
[72]. *See* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992).
[73]. *See Barker*, 407 U.S. at 531.
[74]. *Id.* at 531.

defendant to offer prima facie evidence that the delay was caused by the neglect or willfulness of the prosecution.[75] Only after the defendant has met this burden must the State offer evidence explaining the reasons for the delay.[76]

Thus, a question central to determining whether a defendant's right to speedy trial has been violated by the delay of trial to obtain toxicology results is whether routine delays for purposes of forensic testing may be attributed to the neglect of the prosecution or, instead, whether such delays are neutral factors. In a 2013 unpublished decision, the court of appeals determined that a defendant's right to a speedy trial was violated by a fourteen month delay in her trial on impaired driving charges.[77] The trial court in *State v. Sheppard* weighed the seven-months of the delay that occurred before the State received the toxicology results "'more neutrally,'" given that the State "'should be given a reasonable amount of time to prepare its case.'" The seven month delay after the lab report was filed, in contrast, weighed more heavily in the balance against the State.

Several years earlier, the court of appeals in *State v. Dorton*,[78] did not disturb the trial court's determination that delay caused by a backlog in testing at the State Bureau of Investigation was "not attributable to the District Attorney's office."[79] The *Dorton* court rejected the defendant's contention that the delay was attributable to the State, noting that the defendant's burden was to show prosecutorial neglect or willfulness. Similarly, the court of appeals for Maryland in Glover v. State[80] considered delay resulting from an eight month wait for DNA test results "a valid justification in these circumstances," given that "DNA evidence is highly technical, often requiring courts to allow more time for completion of the tests and review, by both parties, of the results."[81] The court cautioned, however, that the State has a duty to ensure "that critical discovery materials, such as DNA evidence, are properly monitored and accounted for, and not simply collecting dust in state or federal crime labs."[82]

Courts from several other jurisdictions have weighed delays associated with laboratory testing against the State in the *Barker* balancing test, but not heavily.[83]

---

[75]. *See State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (stating that the constitution does not outlaw good-faith delays that are reasonably necessary for the State to prepare and present its case).
[76]. *Id.*
[77]. State v. Sheppard, ___ N.C. App. ___, 738 S.E.2d 453 (February 19, 2013) (unpublished).
[78]. 172 N.C. App. 759, 617 S.E.2d 97 (2005)
[79]. *Id.* at 765, 617 S.E.2d at 100.
[80]. 792 A.2d 1160, 1169 (Md. 2002)
[81]. *Id.*
[82]. *Id.*
[83]. *See, e.g.*, Ben v. State, 95 So. 3d 1236, 1243, 1247 (Miss. 2012) (noting, with respect to thirteen month attributable to state crime lab, court's reluctance "to weigh heavily against the State investigative delay caused by an instrumentality of the State, such as the state crime lab," and citing relevant authority); State v. Magnusen, 646 So.2d 1275, 1282 (Miss. 1994) (concluding, with respect to a five-month delay for serology reports from the state crime lab, that "the official neglect of an understaffed and overworked crime lab gives this portion of the delay to the defendant but barely."); State v. Tortolito, 950 P.2d 811, 815 (N.M. Ct. App. 1997) (weighing eleven month delay attributable to the DNA testing against the State, but not heavily, where DNA and other evidence requiring scientific analysis was tested in its normal order of priority in the State's crime lab and testing was prolonged in part by the small size of the DNA samples collected from the crime scene); *see also* Vanlier v. Carroll, 535 F. Supp. 2d 467, 479-80 (D. Del. 2008) (determining that State should not be held accountable for typical amount of time needed to conduct DNA test, which court calculated as two months, and holding that remaining ten months of DNA testing period should be weighed against the State, but not heavily, given facts of case), *aff'd*, 384 F. App'x 155 (3d Cir. 2010) (unpublished).

Thus, it seems unlikely that a defendant can establish a speedy trial violation in a misdemeanor impaired driving case based solely on a nearly year-long delay associated with the completion of a toxicology report. Yet, even if crime lab delays approaching a year weigh only slightly or not at all against the State, other factors, such as prejudice to the defendant may tip the balance in the defendant's favor. And while delays of a year or less may be considered neutral or only slightly in the defendant's favor, at some point the delays may become so long that the factor may weigh more heavily against the State.

b) Other Speedy Trial Claims.

For the court's analysis of a defendant's speedy trial claim in the context of the State's refilling of impaired driving charges following a voluntary dismissal, see infra Section III A. 2 (b).

2. The Defendant's Constitutional Rights Have Been Flagrantly Violated.

G.S. 15A-954(a)(4) requires dismissal on the motion of a defendant upon the court's determination that "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." The Official Commentary to the rule notes the assumption "that the drastic relief called for under this motion would be granted most sparingly."[84]

a) Right to Communicate with Counsel and Friends.

(1) State v. Hill

G.S. 15A-954(a)(4) codifies the North Carolina Supreme Court's holding in *State v. Hill* [85] that the denial of a defendant's constitutional right to communicate with counsel and friends at a time when the denial deprives him of the opportunity to confront the State's witnesses with other testimony requires dismissal of the charges. [86]

The *Hill* court held that the defendant's constitutional rights[87] were violated when his brother-in-law, who also was his attorney, was not allowed to see him after his arrest for impaired driving. The jailer holding the defendant refused to release him after his brother-in-law posted bond and further refused to allow the brother-in-law to see the defendant. From the time the defendant was arrested at 11 p.m. until 7 a.m. the next morning, only law enforcement officers saw or had access to him.

The *Hill* court recognized that for offenses "of which intoxication is an essential element," the denial of immediate access to witnesses may deprive "a defendant of his only opportunity to obtain evidence

84. *See* Official Commentary to G.S. 15A-954.
85. 277 N.C. 547, 178 S.E.2d 462 (1971).
86. *See* Official Commentary to G.S. 15A-954. Despite the statement in the official commentary that subdivision (a)(4) is "intended to embody the holding" in *Hill*, the provision adds the requirement that "irreparable prejudice" result from the violation.
87. The *Hill* court cited the North Carolina Constitution's provision that "'every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony and to have counsel for defense.'" *Id.* at 552, 178 S.E.2d at 465 (citing N.C. Const. Art. I, Sec. 23).

which might prove his innocence."[88] Because the guilt or innocence of a defendant charged with impaired driving "depends upon whether he was intoxicated at the time of his arrest," such a defendant "must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest" in order to have "witnesses for his defense."[89] The court held that in the *Hill* defendant's case "the right . . . to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication."[90]

Under these circumstances, the court concluded that "to say that the denial was not prejudicial is to assume that which is incapable of proof."[91]

(2) State v. Ferguson

The court of appeals applied the rule from *Hill* in *State v. Ferguson*,[92] an impaired driving prosecution in which a defendant was denied the right to have a witness observe his breath test and was denied access to his wife who was waiting for him at the jail. After being advised of his right to have a witness observe his breath test, the defendant in *Ferguson* called his wife and told her to arrive at the jail in twenty minutes. When the twenty minutes expired, he refused the test because his wife was not there. He did not see his wife until he was released from jail later that evening. She had arrived at the jail within the twenty minutes and informed the desk officer that she was there to witness her husband's breath test but was told that she was too late. She waited an hour and a half before seeing her husband.

Ferguson moved to dismiss the charges because he was denied his constitutional and statutory right of access to a witness to observe the breath test. While the trial court expressed its "distress" over the "regrettable" circumstances, it denied Ferguson's motion.[93] The court of appeals remanded to the trial court noting that if, upon remand, it found "that Mrs. Ferguson's arrival to the jail was timely and she made reasonable efforts to gain access to the defendant, then defendant was denied access to a potential witness."[94] The appellate court concluded that "[t]he denial of access to a witness in this case—when the State's sole evidence of the offense is the personal observations of the authorities—would constitute a flagrant violation of the defendant's constitutional right to obtain witnesses under N.C. Const. Art. 1 Sec. 23 as a matter of law and would require that the charges be dismissed."[95]

The court of appeals in *State v. Eliason*[96] cited *Ferguson* for the proposition that "if a witness arrived timely under the breathalyzer statute and was unable to gain access to the accused despite reasonable efforts to do so, it would constitute a flagrant violation of defendant's constitutional right to gather witnesses and would require dismissal of all charges."[97] Eliason was charged with a per se violation of the impaired driving statute and alleged that the magistrate's failure to inquire into all of the statutory considerations before setting the conditions of his pretrial release violated his statutory and constitutional rights to access to counsel and friends. The court determined that Eliason failed to show

88. *Id.* at 553, 555, 178 S.E.2d at 466, 467.
89. *Id.* at 553, 178 S.E.2d at 466.
90. *Id.*
91. Id. at 553-54; 178 S.E.2d at 466.
92. 90 N.C. App. 513, 369 S.E.2d 378 (1988).
93. *Id.* at 518–19, 369 S.E.2d at 381.
94. *Id.* at 519, 369 S.E.2d at 382.
95. *Id.* (citing *Hill*, 277 N.C. 547, 178 S.E.2d 462).
96. 100 N.C. App. 313, 395 S.E.2d 702 (1990).
97. *Id.* at 317, 395 S.E.2d at 704.

that he was prejudiced by this denial as required by *State v. Knoll*[98] and was not entitled to relief on constitutional grounds as there was no showing that he was denied access to anyone. The court found that "[t]here was no violation of defendant's constitutional rights which would warrant dismissal of the charges against him."[99]

In subsequent cases in which a defendant has been denied the right to have a witness observe the breath test, however, the court of appeals has characterized this as a denial of a statutory, rather than a constitutional, right. The distinction is significant as the court has held that the denial of statutory rights of this sort requires suppression of chemical analysis results rather than dismissal of charges. In *State v. Myers*[100] the defendant moved to suppress the results of the chemical analysis based upon the officer's statement, after Myers requested that his wife come into the breath-testing room, that "that might not be a good idea because she had been drinking also."[101] Myers's wife then left the police department. The court of appeals held that the breath test results should have been suppressed based on the refusal of Myers's request to have his wife witness the test. Myers did not argue that the case should have been dismissed because of the violation, and the court did not intimate that dismissal would have been an appropriate remedy.

In *State v. Hatley*[102] the defendant likewise moved to suppress the results of a chemical analysis of her breath based upon the denial of her right to have a witness observe the testing procedures. The court of appeals cited *Ferguson* for the proposition that "[a] witness who has been selected to observe the testing procedures must make reasonable efforts to gain access to the defendant."[103] The court held that the denial of this right "requires suppression of the intoxilyzer results" but again did not intimate that dismissal was the appropriate remedy.[104]

Thus, post-*Ferguson* cases suggest that while suppression of a chemical analysis is warranted when defendant is denied the right to have a witness observe the procedures, dismissal of the case is not necessarily warranted upon such a denial. Instead, it appears that there must be outright denial of access to witnesses during the relevant time frame to warrant dismissal based upon a flagrant violation of a defendant's constitutional rights.

b) Dismissal and Refiling

There has long been a tension between a district attorney's authority to calendar cases and to dismiss and refile charges and a judge's control over the court's calendar. The interplay between judicial control and prosecutorial authority often are highlighted when a prosecutor moves to continue a case and the court denies the motion. One potential response by the State, assuming the statute of limitations has not expired, is to dismiss the charges and subsequently refile them. By doing so, the State effectively circumvents the court's order denying the motion to continue. Defendants have alleged that this practice violates various constitutional rights, among them the right to a speedy trial. The North Carolina

---

[98]. 322 N.C. 535, 369 S.E.2d 558 (1988) (holding that the violation of a defendant's statutory rights to pre-trial release in an impaired driving case that prejudices the defendant requires dismissal of the charges). *Knoll* and its progeny are discussed in Chapter 3.
[99]. *Eliason* at 318, 395 S.E.2d at 704.
[100]. 118 N.C. App. 452, 455 S.E.2d 492 (1995).
[101]. *Id.* at 453, 455 S.E.2d at 493.
[102]. 190 N.C. App. 639, 661 S.E.2d 43 (2008).
[103]. *Id.* at 642-43, 661 S.E.2d at 45.
[104]. *Id.* at 643, 661 S.E.2d at 45.

Court of Appeals in *State v. Friend*,[105] however, found that this practice did not violate the defendant's constitutional rights.

The defendant in *Friend* initially was charged with impaired driving on March 7, 2006. The case was continued eleven times, several times based on the unavailability of the State's witnesses and several times upon the defendant's request. On July 18, 2007, the State again moved to continue on the basis that the arresting officer was not in court. When the district court judge denied the State's motion, the state voluntarily dismissed the charge. Nine days later, the state filed new charges based on the same March 7, 2006 incident of impaired driving. The defendant filed a motion to dismiss, which was granted by the district court on October 24, 2007. The State appealed this ruling to the superior court, which remanded the matter for entry of a written order, which the district court judge entered on April 4, 2008. The district court concluded that "a dismissal pursuant to NCGS 15A-931, after the prosecution, in control of the calendar, called the case at its own discretion and asked the Court for a decision [on the] Motion to Continue, involved the inherent authority of the Court, and to exercise a dismissal and reinstatement based on the facts and history of the case . . . violates the separation of powers clause and intrudes upon the authority of the Court, and violates the equal protection and due process rights of the Defendant."[106] The State again appealed to superior court. This time, the superior court reversed the district court's order dismissing the case and remanded for trial. The defendant was convicted in district court of driving while impaired on April 13, 2009. He appealed to superior court for trial de novo and moved in that forum for dismissal of the charges. On February 15, 2010, the superior court denied the defendant's motion to dismiss. Defendant was convicted in superior court on the impaired driving charges on February 17, 2010, nearly four years after the offense occurred.

The defendant argued on appeal that the State's dismissal of the original charges following the district court's denial of the State's motion for a continuance violated the separation of powers provision of the state constitution; therefore, the defendant contended, the superior court erred in not dismissing the subsequent charges. The defendant argued that the district attorney was an executive branch official who was obligated to proceed with trial when the district court denied the State's continuance motion. Allowing the State to voluntarily dismiss the charge allowed the executive branch to subvert the court's ultimate authority to manage its trial calendar, he contended. The appellate court disagreed on two alternative bases. First, the court cited *Simeon v. Hardin*[107] for the proposition that the district attorney is a judicial or quasi-judicial officer; thus, no separation of powers issue arises. Second, the court noted that the *Simeon* court deemed constitutional G.S. 15A-931's allocation of the power to dismiss charges upon the district attorney and opined that, notwithstanding the dismissal, "[t]he trial court retained ultimate control over its calendar."[108] Therefore, the court reasoned, even if two branches of government are at work in the setting of the trial calendar, the defendant's separation of powers claim fails.

The court then addressed the defendant's claims that the filing of the post-dismissal charges violated his rights to due process and a speedy trial. The time limitations imposed by the two-year statute of limitations applicable to misdemeanor criminal offenses was significant in the court's rejection of both constitutional claims. With respect to the defendant's due process claim, the court noted that G.S. 15A-

[105]. ___ N.C. App. ___, 724 S.E.2d 85 (2012).
[106]. State v. Friend, No. COA11-572, Record on Appeal, at 22, *available here* http://www.ncappellatecourts.org/show-file.php?document_id=70641.
[107]. 339 N.C. 358, 451 S.E.2d 858 (1994).
[108]. ___ N.C. App. at ___, 724 S.E.2d at 89.

931(b) provides that dismissal of a charge does not toll the statute of limitations. Thus, while the State's dismissal in *Friend* did not preclude the filing of new charges, the statute of limitations set an outer time limit for when those charges could be filed. In the case of the *Friend* defendant, any misdemeanor charges arising from the March 7, 2006 incident had to be filed by March 7, 2008. Noting that the defendant failed to show bad faith on the part of the State or prejudice to his defense, the *Friend* court determined that the filing of a new charge within the statute of limitations did not violate due process. The defendant further argued that the delay in his trial, which he characterized as running from the offense date until his conviction in superior court infringed upon his constitutional right to a speedy trial. Pursuant to the four-factor analysis established in *Barker* for evaluating such a claim, the court first considered the length of the delay. The court noted that the additional factors—the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant—only were considered if the delay was for a year or more. Given that the defendant in *Friend* made his sole speedy trial demand in superior court, the court computed the delay as consisting of the time that elapsed between the defendant's appeal to superior court (April 13, 2009) and his trial in superior court (February 15, 2010). Because this period was less than one year, the court stated that it was unnecessary to consider additional factors.

Nevertheless, assuming for the sake of argument that the delay exceeded one year, the court applied the additional factors, and again concluded the defendant's claim lacked merit. Even though the State's dismissal resulted from its failure to procure witnesses in court on the day of trial, the court noted that more than half of the earlier continuances were granted at the defendant's behest. The court considered the delays associated with the "bounc[ing] back and forth between District Court and Superior Court" based on the State's appeal of the order dismissing the case and the recusal of the original district court judge to be neutral factors.[109] The court weighed against the defendant's claim his failure to demand a speedy trial until nearly four years after the offense and a year after his conviction in district court. Finally, the court found that the defendant failed to demonstrate that he was prejudiced by the delay. While the defendant argued that he suffered "'anxiety and concern' during the delay," the court noted that the State filed the subsequent charge nine days after dismissing the original charge and "well within the two year statute of limitations for misdemeanors."[110] The court considered the defendant's anxiety as "limited by the statute of limitations" and determined that the prejudice factor weighed against the defendant's claim.[111]

While *Friend* does not preclude or render without merit all constitutional challenges arising from the dismissal and re-filing of misdemeanor charges when the State is denied a desired continuance, it indicates that such claims are not likely to succeed absent extenuating circumstances such as bad faith or prejudice to the defendant. Thus, prosecutors may tactically use the dismissal authority conferred by G.S. 15A-931 to circumvent the denial of a motion to continue in a misdemeanor prosecution.

B. Proper Remedies

The remedies of suppression and dismissal are not interchangeable. Suppression of evidence, for example, is a proper remedy when evidence is obtained in violation of the Fourth Amendment. However, a Fourth Amendment violation, without more, does not provide a basis for dismissal of

[109]. *Id.* at ___, 724 S.E.2d. at 90.
[110]. *Id.* at ___, 724 S.E.2d at 91.
[111]. *Id.*

charges.[112] Likewise, though North Carolina's courts have sanctioned the suppression of chemical analysis results obtained in violation of statutory procedures, dismissal of charges for such statutory violations is not authorized. Indeed, the only context in which dismissal of DWI charges for statutory violations is authorized is when a defendant demonstrates prejudice resulting from a violation of statutory rights related to pretrial release.[113]

[112]. *See* State v. Wilson, ___ N.C. App. ___, 736 S.E.2d 614 (2013) (holding that (1) defendant had no right to dismissal of charges pursuant to G.S. 15A-954(a)(4) for alleged violation of his constitutional rights where the defendant failed to describe the irreparable prejudice that resulted from the violation, the trial court made no finding of irreparable prejudice, and the defendant did not argue on appeal that he was irreparably prejudiced and (2) trial court erred in dismissing impaired driving charges under G.S. 15A-954(a)(1) on grounds that the implied consent testing procedures in G.S. 20-139.1 were unconstitutional as applied; for dismissal of DWI charges to be warranted under G.S. 15A-954(a)(1), a court must conclude that the impaired driving statute itself, G.S. 20-138.1, is unconstitutional).

[113]. See *infra* Chapter 3 for a discussion of State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).