Shea Denning
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The Fourth Amendment: Issues for Superior and District Court Judges
Motions to Suppress Checkpoints and Chemical Analyses—**Discussion Points**

1. The inquiry into the constitutionality of the checkpoint consists of two parts. First the court must determine the primary programmatic purpose of the checkpoint and whether it is permissible. If the primary purpose is legitimate, court must then judge reasonableness of stop by weighing (1) the gravity of public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional.

   Stopping vehicles to determine whether they are operated in compliance with motor vehicle laws is a constitutionally permissible purpose. Moreover, the court of appeals upheld a trial court's conclusion—based on facts similar to those set forth above—that a checkpoint was reasonable under the three-part balancing test. State v. Veazey, __ N.C. App. __, 689 S.E.2d 530 (December 8, 2009).

   The statutory inquiry is separate from the constitutional inquiry. To satisfy statutory requirements, a checkpoint established to detect traffic violations must be conducted pursuant to a written policy that provides guidelines for the pattern for stopping vehicles and for asking drivers to produce driver's license, registration, or insurance information. The pattern itself need not be in writing but must be established in advance. The pattern may include contingency provisions for altering the pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped, which driver is requested to produce driver's license, registration or insurance information.

   The public must be notified that a checking station is being operated by having at least one law enforcement vehicle with its blue light in operation during the conducting of a checking station.

   G.S. 20-16.3A(b) provides that the operator of any vehicle stopped at a checking station may be requested to submit to an alcohol screening test under G.S. 20-16.3 if the officer determines the driver has previously consumed alcohol or has an open container in the vehicle. The officer shall consider the results of any alcohol screening test or the driver's refusal in determining if there is reasonable suspicion to investigate further.

   G.S. 20-16.3A(d) requires that the placement of checkpoints be random or statistically indicated, and requires that agencies avoid placing checkpoints repeatedly in the same location or proximity.

Violations of subsection (d) are not grounds for a motion to suppress or a defense to charges arising out of the operation of a checkpoint.

2. In State v. Jarrett**,** ___ N.C. App. ___, 692 S.E.2d 420 (May 4, 2010), the court upheld as constitutional a driver's license checkpoint conducted by sheriff's deputies pursuant to written sheriff's department policy in which six officers with flashlights, two in each lane of traffic, stopped every car coming through the checkpoint to determine if driver's possessed a valid driver's license and vehicle registration. Deputies were in uniform, and a supervising officer was present. Sheriff's department vehicles at the checkpoint had their blue lights activated.

   Testimony from the deputy who stopped the defendant varied as to the primary purpose of the checkpoint. The deputy testified that the purpose was to check for licenses and registrations and that officers were "'looking for 'evidence that's in plain view of other crimes' and '[any sign of criminal activity.'" The deputy also testified that the checkpoint's location was chosen because drivers who "'don't have a license or . . . [h]ave been drinking or . . . want to get somewhere quickly and speed . . . '" would be likely to be in the area. The appellate court explained that because variations existed in the deputy's testimony, the trial court was required to make findings regarding the actual primary purpose of the checkpoint. The trial court did so, finding that the primary purpose was to determine if drivers were complying with driver's license laws and to deter violations of such laws. The court of appeals determined that this finding was supported by the testimony and that the purpose was lawful.

   The appellate court further affirmed the trial court's determination that the checkpoint was reasonable under the three-prong test. The checkpoint's purpose satisfied the first prong. The checkpoint satisfied the second prong by being appropriately tailored as evidenced by the fact that it was regularly conducted, resulted in charges for license violations, and operated for about two hours. Finally, the checkpoint did not unduly interfere with individual liberty as it was marked by the activation of blue lights, manned by uniformed deputies and a supervisor, situated in a site where officers had visibility, conducted pursuant to sheriff's department policy, and all cars were stopped.

   Finally, the deputy possessed reasonable suspicion justifying the questioning of the defendant and his passenger about the contents of a beer can that the passenger had attempted to conceal at the checkpoint stop.

   Cf. State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005). Defendant appealed drug and firearm convictions, alleging that evidence uncovered during an unlawful checkpoint stop should have been suppressed. Five police officers in Onslow County decided to "spontaneously throw a checkpoint up" for the stated purpose of checking licenses and registrations. The officers noted that passengers in Rose's car "seemed nervous" and, after questioning them, discovered they had marijuana and a gun. The officers' statements regarding the purpose of checkpoint were belied by other facts. No plan was created for the checkpoint or approved beforehand. The state offered no evidence as to

why there was a particular need for checkpoint in this area of the county. Four of five officers were narcotics detectives, and the arrest was for drugs, not a license violation. A second officer was positioned to scan cars during the stop. Thus, evidence showed that actual purpose of checkpoint was to check for possible criminal activity – specifically narcotics possession. The court of appeals held that the trial court was required to make findings of fact as to the checkpoint's purpose. The trial court could not simply accept the State's invocation of a proper purpose, but had to closely review the scheme at issue. Moreover, even if the court determines that the primary programmatic purpose is lawful, it must determine the reasonableness of stop under the three-part balancing test. The court noted that the tailoring of the checkpoint was in question given that the checkpoint was spontaneous and no evidence was presented regarding why the location was chosen. The severity of the interference, specifically the amount of discretion afforded field officers, also appeared to be an issue since the evidence suggested a lack of any limitation on the officers' discretion in the field other than the requirement that they stop every car.

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Recall also that G.S. 20-16.3A requires that the pattern for stopping vehicles and for requiring drivers to produce license and registration be established in advance. The policy must provide guidelines for the pattern. The officer in Case Problem 2 did not testify about the pattern for requiring drivers to produce license and registration. Assume that you find no such pattern was established in advance. What is the remedy, if any, for a violation of the checkpoint statute? May or must a court suppress evidence obtained from a checkpoint that is not conducted in compliance with statutory requirements?

The answer with respect to at least one statutory requirement is no. G.S. 20-16.3A(d) requires that the placement of checkpoints be random or statistically indicated and that agencies avoid placing checkpoints repeatedly in the same area. Subsection (d) specifies, however, that a violation of "[t]his subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of the checking station."

No such statutory direction is provided with respect to the other requirements. Cases decided under previous iterations of G.S. 20-16.3A may, however, provide some guidance. In *State v. Barnes*, 123 N.C. App. 144 (1996), the court considered whether stopping and detaining the defendant at a checkpoint established by the state highway patrol to "detect driver's license and registration violations as well as other motor vehicle violations including driving while impaired" was constitutional. The trial court had concluded that the checkpoint failed to meet guidelines established by G.S. 20-16.3A and a directive of the state highway patrol and thus was an unreasonable seizure under the Fourth Amendment. The court of appeals reversed, determining that the trial court's findings showed "substantial compliance" with G.S. 20-16.3A and the patrol's directive, and thus no Fourth Amendment violation.

In *State v. Colbert*, 146 N.C. App. 506 (2001), the court of appeals likewise reversed the trial court's granting of the defendant's motion to suppress evidence obtained as a result of an impaired driving checkpoint stop upon finding the checkpoint plan constitutionally permissible and in compliance

with G.S. 20-16.3A. Thus, in both *Barnes* and *Colbert*, for checkpoints governed by G.S. 20-16.3A, consideration of whether the requirements of G.S. 20-16.3A were followed was central to the court's analysis of the constitutionality of the checkpoint and the propriety of suppression of the evidence.

In *State v. Tarlton*, 146 N.C. App. 417 (2001), the defendant appealed from the trial court's denial of his motion to suppress evidence obtained as a result of a license checkpoint stop, arguing in part that the state failed to prove the constitutionality of the checkpoint because the written policy by which the checkpoint was conducted was not admitted into evidence. The court of appeals affirmed the trial court, holding that a written plan was not a constitutional requirement, and that the license check was not governed by former G.S. 20-16.3A (1999), which, as previously noted, applied only to impaired driving checks. It is unclear whether a court would reach the same conclusion for a checkpoint governed by current G.S. 20-16.3A for which there was no written policy.

While a court conceivably could construe noncompliance with G.S. 20-16.3A as rendering a checkpoint unconstitutional under the theory that the statutorily required procedures act as a substitute for the Fourth Amendment reasonableness inquiry, such a theory is unsupported by any state law precedent, and seems unlikely to be adopted. Other courts have concluded that checkpoint policies serve such a purpose. *See*, *e.g.*, *State v. McDermott*, 1999 WL 1847364 (Del. Ct. Comm. Pleas April 30, 1999) (concluding that the Delaware State Police Policy was created to ensure compliance with the reasonableness requirement of the Fourth Amendment) (unpublished op.); *see also Commonwealth v. Anderson*, 547 N.E.2d 1134 (Mass. 1989) (noting that "[o]nce the Department of Public Safety and the State police have adopted such standard, written guidelines for the conduct of roadblocks, which have been accepted as a sufficient substitute for the usual Fourth Amendment 'reasonableness' demands, it follows that the Commonwealth must carefully comply with them."). It seems more likely that courts confronted with suppression motions based on noncompliance with current GS 20-16.3A will distinguish statutory compliance from constitutionality. And in such cases, there is no explicit statutory authority for ordering suppression based merely upon a statutory, rather than a constitutional, violation. The expanded exclusionary rule codified in G.S. 15A-974(2) requires suppression of evidence for a substantial violation of Chapter 15A, but there is no corresponding statutory exclusionary rule encompassing violations of Chapter 20.

Notwithstanding the lack of explicit statutory authority to suppress, suppression may still be an appropriate remedy for substantial noncompliance with G.S. 20-16.3A. After all, courts have held that suppression of test results is the appropriate remedy for statutory violations related to administration of a chemical analysis under the implied consent laws even though no statute explicitly grants the authority to suppress evidence for such a violation. *See, e.g., State v. Hatley*, 661 S.E.2d 43 (2008); *State v. Myers*, 118 N.C. App. 452 (1995). Thus, a court might reasonably conclude that suppression likewise is the appropriate remedy for statutory violations related to checkpoints, except, of course, for violations of the type for which the legislature has stated that suppression is not an appropriate remedy.

3. In State v. Foreman, 351 N.C. 607 (2000), the defendant made a legal (though "quick") left turn away from a checkpoint immediately before passing the sign giving motorists notice of the checkpoint. An officer assigned the task of following drivers who avoided the checkpoint followed the defendant, ultimately finding her slumped down in the seat of the car in a driveway on another street. On appeal the court of appeals found no error, concluding that though a legal left turn immediately preceding a checkpoint did not justify an investigatory stop, it was constitutionally permissible for an officer to follow such a vehicle to determine if other factors raised a reasonable suspicion that an occupant of the vehicle is engaged in criminal activity, which, in defendant's case, they did. The supreme court granted discretionary review. And though it affirmed the court of appeals' conclusion that the defendant's constitutional rights had not been violated, it disapproved of the court of appeals' conclusion that a legal left turn away from a DWI checkpoint, upon entering the checkpoint's perimeters, cannot justify an investigatory stop.

   After determining that the DWI checkpoint met all the statutory requirements, the court held that "it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away." *Id.* at 632-33.

   In State v. Bowden, 177 N.C. App. 718 (2006), the court of appeals relied upon the "totality of the circumstances" language from *Foreman* as support for the stop of a defendant who turned away from a checkpoint once it came into view. The court held that "in addition to the fact of defendant's legal turn immediately prior to the checkpoint" the officer's stopping of the defendant was justified based upon: (1) the late hour; (2) the sudden braking of the truck when the checkpoint came into view; (3) the abruptness of the turn into the nearest apartment complex; and (4) defendant's behavior within the parking complex of backing into one space, pulling out and proceeding toward the exit and then re-parking when he saw the patrol car approaching.

   It is unclear why the court of appeals continues post-*Foreman* to view additional facts beyond the turn away from the checkpoint as necessary to support the stop. It may be the case, however, that whether a legal turn away from a checkpoint is sufficient to provide reasonable suspicion depends upon the circumstances associated with the turn, such as the nature of the turn, the type of road turned onto and the number of intersecting roads within the perimeter of the checkpoint.

4. Courts from various jurisdictions have found no Fourth Amendment violation arising from the use of "ruse checkpoints."

   See U.S. v. Rodriguez-Lopez, 444 F.3d 1020 (8th Cir. 2006) (Officers established decoy checkpoint by posting signs that said "Narcotics Enforcement Ahead," "Police Drug Dogs in Use," and "Be Prepared to Stop Ahead." Defendant exited before decoy checkpoint, then changed lanes without signaling, in violation of a state statute. The stop of defendant was valid under the Fourth Amendment.); U.S. v. Carpenter, 462 F.3d 981 (8th Cir. 2006) (Officers established ruse checkpoint by posting signs on interstate stating, "Drug Enforcement Checkpoint Ahead ¼ Mile" and "Drug Dogs In Use." Defendant exited, saw a police car behind him, made a U-turn and stopped on the side of road. Officer approached and, based on conversation with defendant and other observations, developed reasonable suspicion for detaining defendant while a drug dog sniffed the vehicle. Court notes that the mere act of exiting just after ruse checkpoint signs is not, standing alone, a sufficient basis to justify a seizure);U.S. v. Flynn, 309 F.3d 736 (10th Cir. 2002) (Signs were posted for ruse drug checkpoint. Defendant exited road and at the top of the exit ramp a passenger dropped a large sack from the car. Officers hidden in underbrush at top of ramp looked in the back, which contained "a lot of dope." Defendant was stopped further down the road. Court states that the creation of a ruse to cause the defendant to abandon an item is not illegal.); State v. Hedgcock, 765 N.W.2d 469 (Neb. 2009) (Defendant pulled into a rest area immediately after seeing ruse checkpoint signs indicating that drug checkpoint was further down road. Five police officers in plain clothes were situated at the rest stop to observe people for indication of possible drug activity. The court rejected the defendant's argument that there was a de facto drug checkpoint at stop. The court found no Fourth Amendment violation arising from an officer's questioning of defendant and the subsequent search of defendant's vehicle with defendant's consent. The court determines that "the use of a ruse checkpoint, without an unreasonable seizure for Fourth Amendment purposes, is not unconstitutional simply because it is a ruse."); People v. Roth, 85 P.3d 571 (Colo. App. 2003) (finding that use of fictitious ruse checkpoint did not violate the defendant's rights under Fourth Amendment).

5. 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, 17 N.C. App. 279 (1973), a case decided four 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." *Id.* at 283. Reasoning that "[s]uch rights of notification, explicitly given by statute, would be meaningless if the breathalyzer 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 Shadding was advised of his rights under G.S. 20-16.2(a) rendered results of the breath test inadmissible. *Id.* at 282-83. 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." *Id.* at 283.

   In State v. Fuller, 24 N.C. App. 38 (1974), 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. Fuller 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 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." *Id.* at 42.

   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, 118 N.C. App. 452 (1995), 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. The officer said "that might not be a good idea because she had been drinking also." *Id.* at 453. The court found the officer's statement "tantamount to a refusal of that request," which barred admission of the results at trial. *Id.* at 454. Likewise, in State v. Hatley, 190 N.C. App. 639 (2008), 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, 34 N.C. App. 447 (1977), 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 delayed the test 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." *Id.* at 450. 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." *Id.* at 451. 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, 27 N.C. App. 491 (1975). 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. *Id.* at 495. The court held that this irregularity did not require 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." *Id.* The court further commented: "We cannot see how the defendant could possibly have been prejudiced." *Id.*

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*. Other than differential treatment based upon severity of the violation, it is not clear why the court looked for harm or, at least a changed status, resulting from the violations in *Buckner* and *Green* but not in the other cases.

Dan Defendant's statutory rights arguably were violated as the officer failed to afford Dan thirty minutes in which to exercise the right to contact an attorney or obtain a witness before taking the test. The question is whether Dan must demonstrate something more to warrant relief. *Buckner* indicates that he must. Given that no one appeared to witness Dan's test within the thirty minutes for which it could have been delayed, Dan cannot demonstrate that the failure to postpone the test an additional three minutes resulted in his inability to have a person witness the test. Thus, denial of Dan's motion to suppress is the appropriate ruling.

6. The withdrawal of the defendant's blood at the law enforcement officer's direction was a search within the meaning of the Fourth Amendment. The exigency created by the dissipation of alcohol excuses the need for a warrant on facts such as these where the defendant already has been transported to the hospital for treatment. *See* Schmerber v. California, 384 U.S. 757 (1956). Moreover, the search is reasonable as the blood was drawn by trained medical personnel in a hospital environment. Thus, there is no Fourth Amendment violation resulting from the withdrawal of defendant's blood. The remaining question is whether there was a statutory violation and, if so, the appropriate remedy, if any, for such a violation.

   The test was not administered in compliance with the implied consent law as set forth in G.S. 20-16.2, which authorizes the obtaining of a chemical analysis from a person "charged with an implied-consent offense." A person is charged with an implied consent offense if the person is arrested for it or if criminal process has been issued. G.S. 20-16.2(a1). This defendant had not been charged.

   The requirement that a person be charged, notified of his implied consent rights, and requested to submit to a chemical analysis does not apply if the defendant is unconscious or otherwise in a condition that makes the person incapable of refusing so long as the law enforcement officer has reasonable grounds to believe the person has committed an implied-consent offense. See G.S. 20-16.2(b). In considering the constitutionality of this exception for unconscious defendants, the court in State v. Hollingsworth, 77 N.C. App. 36 (1985), noted that "[t]he formality of arrest helps insure that the police will not arbitrarily invade an individual's privacy, it sharply delineates the moment at which probable cause is determined, and it triggers certain responsibilities of the arresting officer and certain rights of the accused, *e.g., Miranda* rights." *Id.* at 43. *Hollingsworth* held that this argument lost force when applied to the "delirious defendant," who could not appreciate the seriousness of the action. *Id.* at 43-44. Thus, *Hollingsworth* held that a blood alcohol test performed on blood seized from unconscious defendant at the direction of a law enforcement officer who had probable cause to believe that the defendant had committed an implied-consent offense did not violate the defendant's Fourth Amendment rights.

   In considering whether the version of G.S. 20-16.2 then in effect required an arrest before testing of an unconscious defendant, *Hollingsworth* found "strong support . . . for the proposition that the Legislature's intended focus was upon an officer's having 'reasonable grounds' to suspect commission of an 'implied consent' offense," rather than that the unconscious person be arrested. *Hollingsworth* relied in part on State v. Eubanks, 283 N.C. 556 (1973), a case in which the state supreme court held that the exclusion of the defendant's breath test results was not required on the basis that the test was performed pursuant to an arrest that was constitutionally valid but illegal for the officer's failure to first obtain an arrest warrant.

   No North Carolina case addresses the question of whether the failure to arrest the defendant before administration of a chemical analysis requires suppression of the results. One could argue that under the rationale employed by North Carolina appellate courts to deal with other statutory violations related to administration of a chemical analysis, suppression of the test results is the

appropriate remedy. (See the cases listed in the Discussion Points for Case Problem 5 above.) A contrary argument is that the failure to arrest the defendant is not a basis for suppression as the officer's articulated probable cause to support the arrest functions as a proxy for a formalized arrest.