MOTIONS TO SUPPRESS

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PROCEDURE:

Governed entirely by statute. N.C.G.S. 15A-971 et seq. A motion to suppress is the exclusive method of challenging evidence obtained against the defendant in an alleged unlawful manner. The conduct must violate the defendant's rights, not the rights of another. State action is required, not the act of a private party.

Suppression can be granted because of a constitutional violation, or a substantial violation of defendant's statutory rights. The latter, but not the former, is subject to a good faith exception. Factors to consider are enumerated in N.C.G.S. 15A-974(2):

- The extent of deviation from lawful conduct;
– the willfulness of the conduct;
–the deterrent effect of suppression;
–the importance of the interest violated;

Even considering all these factors, the evidence shall not be suppressed (under the statute only) if the officer acted under an objectively reasonable, good faith belief that the actions were lawful.

REQUIREMENTS:

- Must be in writing;
- Be served on the State;
- State factual grounds, not conclusions.
- Be supported by affidavit. (can be signed by counsel) Motions made properly at trial (see timing below) need not be supported by an affidavit. S. v. Roper 328 NC 337 (1991)

Motions not meeting these requirements are subject to summary dismissal. S. v. Harris 71 NCApp 141 (1984) (no affidavit) S. v. Phillips 132 NCApp 765 (1999) (conclusions, not facts)

TIMING:

Must be made at any time before trial, unless the defendant had no reasonable opportunity to make the motion before trial, or in the trial judge's discretion.

If the State intent to introduce evidence of a statement from the defendant, or evidence from a warrantless search, or evidence from a search where the defendant was not present, the State must give at least 20 working days' notice of its intent to use the evidence at trial. This is not satisfied by merely producing the evidence in discovery. If the State does so, the defendant must file any applicable

motion to suppress within 10 working days. The failure of the State to follow these rules allows the defendant to challenge the proffered evidence at any time. As a practical matter in most cases, the defendant will be able to challenge these three types of evidence though a motion to suppress made at any time. See 15A-975 and 976.

Upon a misdemeanor appeal the defendant must move to suppress prior to trial. 15A-975(c)
This is a common fact pattern. (DWI appeals- motions to suppress based on an improper stop- see below).

HEARING

The hearing is conducted in the absence of the jury or the prospective jury panel. If the motion is in proper form (see above), the burden is on the State to prove that the challenged evidence was properly obtained. S. v. Barnes 158 NCApp 606 (2003). Therefore the State should present evidence first. All evidence is taken under oath.

Both sides have the right to present evidence. If the defendant testifies on the narrow issue of the lawfulness of the search or seizure, the defendant may not be cross examined as to the other issues in the case. N.C.R. Evidence 104(d)

The Rules of Evidence as to admissibility do not apply, except for privilege. N.C.R. Evidence 104(a), 1101(b).

Even if the State concedes the motion, or says a hearing is not necessary because the evidence will not be offered, GRANT the motion. This is mandatory. 15A-977(b)(1) and (b)(2).

As noted above, summary denial is also proper if the motion is not properly served, is not supported by an affidavit, or is not in proper form. However, a judge in his or her discretion may hold an evidentiary hearing in spite of a deficient motion.

Practice Tips:

- Read the motion (and any cases) before you start the evidence
- Have Jeff Welty's summary "Motions to Suppress" open during the hearing from the Superior Court Judge's Bench book (www.sog.unc.edu) (benchbook.sog.unc.edu click on "Criminal", then "Motions to Suppress")
- Bring Arrest, Search, and Investigation in North Carolina (Farb) with you. Open it to the relevant section based on the motion.
- Subscribe to Prof. Jessica Smith's same day email service of new criminal appellate decisions and new legislation. Available at www.sog.unc.edu. Read it.
- Treat the hearing like a trial. Ask for briefs. Give each side a closing argument, and give them the same order they would have in a trial. (No evidence, right to open and close)
- Take careful notes of all the testimony. Go back over your notes with a highlighter to pick out your findings of fact.

Contents of the Ruling:

The order should contain findings of fact and must contain conclusions of law. Where there is "no material conflict in the evidence", the order need not contain findings of fact. The ruling should be reduced to a written order. Ruling may be reserved until a later time. S v. Wilson (CoA 2/5/2013-

written order entered the day of the jury verdict, hearing held at some earlier time- implication in opinion is that the hearing was a long time prior). You must base your FOFs on the evidence under oath, not on matters sworn to in the affidavit supporting the motion to suppress. S. v. Salines (NCSC 6/14/2012)

Practice Tips:

Don't reserve ruling. If you need to make up your mind or read briefs/cases, take a break for as long as necessary, and rule. Advantages: 1) It gives the State a chance for an appeal. 2) If a written order is never produced, maybe the court of appeals will deem your order in the transcript to be a sufficient ruling. i.e. there's no material conflict in the evidence, etc. At worst, the CoA will probably just remand for entry of the written findings. See S. v. Morgan (CoA 3/5/2013). 3) It's not going to get any better. You know more about it now than you will next week. 4) You don't have to be perfect. As long as your written order is supported by the evidence and consistent with your oral ruling, you are fine. For an example of FOFs not supported by the evidence, see S. v. Weaver (12/17/2013)

The written order:

- If you grant the motion, the defense attorney has every incentive to get you a written order as soon as possible. The Asst. D.A. probably has more on his/her plate. You have to make a practical decision, based on your experience in your district, as to who is going to draft the written order.
- If the parties draft the order, have them give you an order in both paper and electronic formats.
- Save your notes from the hearing until the order is signed.

The ruling on the issue becomes the law of the case. If the case is mistried all pre-trial issues are de novo. However, what happens when the case comes back from the appellate court on an unrelated issue? In S. v. Lewis (NCSC 2012) the defendant unsuccessfully moved to suppress his identification. That issue was affirmed on appeal, but the case was remanded for a new trial on a different issue. Before his second trial, the defendant moved to suppress based on new evidence, and the trial judge denied the motion on the principle that the first ruling was the law of the case as it had been affirmed on appeal. The Supreme Court affirmed the Court of Appeals reversal on this issue, ruling that the subsequent motion was based on new evidence should unavailable to the defense at the first trial.

SUBSTANTIVE ISSUES

Motions to suppress can be made for any alleged constitutional or statutory reason. Common issues that arise before the Superior Court include:

- Vehicle stops and investigation pursuant to the stop
- Line-ups and identifications
- Search warrants
- Confessions and statements of the defendant

VEHICLE STOPS

Reasonable suspicion under Terry v. Ohio is the standard for the stopping of a motor vehicle. S. v. Styles 362 NC 412 (2008) (Rejecting the argument that probable cause is needed if the vehicle is being stopped for a particular criminal offense that results in an arrest for that offense)

If reasonable suspicion exists for the stop, it is immaterial that the officer subjectively hopes to gather information related to an unrelated crime. A prolonged extension of the stop, so as to render the stop merely a pretext, is unconstitutional. Whren v. US 517 US 806 (1996)

If reasonable suspicion does not exist at the initiation of the attempted vehicle stop, the fact that the vehicle flees from the officer can provide the necessary reasonable suspicion. California v. Hodari 499 US 621 (1991). Turning around in obvious response to a check point, (even if the check point itself is arguably invalid), supplies objective reasonable suspicion. S. v. Griffin (NCSC 4/13/2013)

A substantial body of law has developed about factors that, STANDING ALONE, do NOT provide a law enforcement with reasonable suspicion. Many of these factors are present in many cases.

SPEEDING

"Slight" speeding may not provide reasonable suspicion. US v. Edwards 690 F.3d 583 (stopping a vehicle for travelling 5 mph over the limit, motion to suppress allowed. However, officer had trouble with basic math calculations at the hearing) US v. Mubdi 691 F.3d 334 (>8-10 mph stop upheld)

An officer may provide, upon a proper basis, a visual estimate of speed. S. v. Barnhill 166 NCApp 228 (2004) (visual estimate of 40 in a 25- motion to suppress denied). The fact that the visual estimate was made based on a 3 to 5 second time period does not necessarily render the estimate untrustworthy. S. v. Royster (CoA 12/18/2012)

Conversely, NOT speeding, or travelling below the limit, standing alone, does not provide reasonable suspicion. See GS 20-141(h) - No vehicle shall travel at such a slow speed such that the vehicle impedes the normal and reasonable movement of traffic. Therefore, if other traffic is affected, or if a minimum speed is violated (less that 45 on the interstate), reasonable suspicion for a stop may be present.

EXTENDED STOPS/NERVOUSNESS

Even if the initial stop is justified, prolonging the stop unreasonably may render the stop unconstitutional. The nervousness of the occupants alone is not enough to prolong the stop. The Supreme Court has recognized in several cases that any citizen might be nervous during a traffic stop, as has the North Carolina Supreme Court. (e.g. S. v. McClendon 350 NC 360 (1999), stating in dicta that many people become nervous with law enforcement, even if innocent of all wrong-doing.)

A representative case on nervousness is S. v. Phifer (CoA 4/2/13), where the defendant was seen walking in the middle of the street. The officer called the defendant over and warned him not to impede traffic. The defendant appeared nervous and never stopped moving. The officer's stop and frisk was held to be unconstitutional.

The fact that the defendant slowed immediately from 65 to 59, would not look towards the officer when the officer's car when the officer drove alongside, and appeared to be very nervous, did not provide reasonable suspicion. S. v. Canty (CoA 12/18/2012)

The prolonging of the stop may however be de minimus. S. v. Sellars 730 SE2d 208 (CoA 2012) (an almost 5 minute delay to conduct a sniff by a drug dog did not violate 4th amendment) US v. Digiovanni 650 F.3d 498 (4th Circuit 2011) (10 minute delay unreasonable). But longer stops have been upheld. See US v. Everett 601 F.3d 484 (6th Circuit 2010), which analyzes a wide range of cases and says that the analysis depends on all the circumstances, including how interested the officer was in a secondary search, the amount of time the officer delayed the initial stop, the ratio of stop related questioning to secondarily motivated questioning, and the actions of the driver/occupants which gives rise to further inquiry. A representative North Carolina case is S. v. Heien (CoA 2013- affirmed NCSC 11/8/2013) where the stop occurred at 7.55. Discussion ensued about a broken tail light and other issues, driver's licenses and outstanding warrants were checked, and consent to search (asked for, in part, because one occupant would never come out from under a blanket) was requested at 8.08. The officers were polite and non-confrontational, and most of the questioning concerned the reason for the initial stop. Held: no unnecessary prolonging of the stop, valid search.

NO TURN SIGNAL

Failing to signal before turning does not, in itself, provide reasonable suspicion. 20-154(c) provides that a driver shall give a signal when the operation of another vehicle may be affected. Therefore a driver in a right hand lane need not give a signal if the only legal movement that can be made from that lane in a right hand turn. S. v. Ivey 360 NC 562 (2006). The failure to give a turn signal may be within "the normal range of everyday driving behavior".

The "one bad brake light is not illegal" case was reversed in S. v. Heien 737 SE2d 351 (2012), where the Supreme Court stated that a mistaken but objectively reasonable and honest belief in the illegality of the defendant's actions could supply the requisite reasonable suspicion.

SITTING AT A STOP LIGHT

The failure to proceed from a stoplight after it changes from red to green does not, by itself, provide reasonable suspicion. S v. Roberson 163 NCApp 129 (an 8 to 10 second delay in proceeding does not provide reasonable suspicion. Interestingly, this happened at 4.30 a.m. near several bars.) Compare with S.v Barnard 362 NC 244 (a 30 second delay at 12.15 a.m. near several bars in a high crime area provided reasonable suspicion).

LATE HOUR/BARS/HIGH CRIME

The presence of a driver in a high crime area at an unusual hour does not in itself provide reasonable suspicion. Brown v. Texas 433 US 47 (1979). In S. v. Murray 192 NCApp 684 (2008), the court found no reasonable suspicion to stop a vehicle driving in a commercial area with a high incidence of property crimes at 3.41 a.m. Evasive action or other indicia of suspicious activity may provide the necessary reasonable suspicion.

An interesting "high crime area" case is S v. Sutton (CoA 3/4/2014) where the Court of Appeals affirmed the denial of a motion to suppress. The officer noted a man walking in a high crime housing project in Kinston, where the officer had previously heard shots, and saw the man clutch his hand to his waist or his side, as if he was concealing an item. The Court contrasted other cases (which to this author seem very similar) where the searches had been held to be unconstitutional. The Court gave great deference to the trial court's findings of fact.

WEAVING/WEAVING "PLUS"

Weaving entirely within one's lane without affecting other traffic does not constitute reasonable suspicion. GS 20-146(d)(1) states that a motorist shall drive entirely within his/her lane of travel and not move from that lane without ascertaining that such movement can be made in safety.

Even moving out of one's lane of travel may not constitute reasonable suspicion. S v. Derbyshire 745 SE2d 866 (2013)- travelling once outside of the right lane towards the right is not outside the bounds of normal driving behavior. Contrast this with S v. Kochuk (NCSC 6/13/2013) where the Supreme Court, reversing the Court of Appeals, held that reasonable suspicion existed where the officer saw the defendant cross over the dotted while line with both right wheels for three to four seconds, and also saw the defendant drive on top of the line twice.

This is often called the 'weaving plus' doctrine. The case often cited for this proposition is S. v. Fields 195 NCApp 740 (2009), which gives a good overview of this area of the law.

Crossing the center line is a violation of Chapter 20 and provides reasonable suspicion.

"Bad weaving" within one's lane can give rise to reasonable suspicion. In S. v. Fields (same name, different case) 723 SE2d 777 (2012) the defendant's weaving caused evasive action by other drivers, and was described by the office as "like a ball bouncing in a small room"

In S. v. Peele 196 NCApp 668 (2009) an anonymous tip was given to an officer, who then located the described vehicle and observed it weaving within the lane. The Court held the stop invalid.

ANONYMOUS TIPS

An anonymous tip must 1) contain sufficient reliable evidence of illegal activity, and 2) be corroborated by sufficient observation of illegality by the police.

See Florida v. JL 529 US 266 (2000). The Court rejected the argument that the tip was reliable because the description of the suspects visual attributes were accurate, stating that the tip must be reliable in its assertion of illegality, not just in its tendency to identify a particular person. The Court reserved the issue of whether a report of a person carrying a bomb in an urban area must bear the same indicia of reliability. The Court contrasted Alabama v. White 496 US 325 (1990), where an anonymous called stated that the defendant would be leaving a specified apartment at a specified time in a Plymouth with a broken tail light and delivering an ounce of cocaine to a specific hotel. These predictions were proven correct by the officer's observations, and the Court held that the callers ability

to predict future events, combined with the officer's corroboration of the details, were sufficient to justify the stopping of the defendant's vehicle en route to the hotel. However, a tip that the future defendant would be selling marijuana at a certain location later in the day in a white vehicle was deemed insufficient by our CoA in S. v. Harwood (7/2/2012), when the officer did not observe any illegal activity when following the vehicle on that date. The Court of Appeals discussed White and contrasted the wealth of details supplied in White with the scarce details provided by the caller in the case before them.

The prong of reliability may be satisfied when the caller identifies themselves or places their anonymity at risk. In S. v. Maready, 362 NC 614, a driver who allowed the police to see her vehicle license plate, notwithstanding the fact that she did not identify herself, provided sufficient evidence for the court to uphold the subsequent stopping of the defendant. However, in S. v. Coleman (CoA 6/18/2013), a caller, who identified herself, stated that a driver had alcohol in a cup in a particular car in a parking lot. The officer stopped the car on the street and arrested the driver for DWI. Held: no reasonable suspicion, in part because the parking lot was a public vehicular area (where by statute the possession of an open container in a vehicle is not illegal) and the officer observed no bad driving by the defendant. The Court distinguished the Supreme Court decision in Heien by noting that the statutes about operable brake lights are confusing, while the plain reading of the open container law only applies the law to public streets or highways.

Similarly, in S. v. Blankenship (CoA 10/15/2013) a taxi driver, who could be identified, called in to say that a driver was drunk. Held: no reasonable suspicion because the officer observed no bad driving.

The USSC may change this area of the law in Navarette v. California, now pending decision, where the court is considering whether the 4th amendment requires an officer who was provided with an anonymous tip regarding a drunk driver needs corroboration of dangerous driving before initiating a stop. If the court rules that the officer does not, S. v. Peele and S v. Blankenship above would probably no longer be good law.

VEHICLE SEARCHES AFTER A STOP

Once a vehicle is stopped, the officer may either order the occupants out of the car or order the occupants to remain in the car. May the officer search the individuals also? The answer is no unless the occupants provide independent reasonable suspicion for a subsequent search, or unless the officer has reasonable suspicion that the individual is armed and dangerous. This suspicion may be supplied by belligerence or non-compliance with reasonable officer requests.

A drug dog alert on the driver's side door does not justify a pat down search of a passenger secured outside the car. S. v. Smith (CoA 8/7/2012). Similarly, a valid search of the driver and the car does not justify a passenger search without independent reasonable suspicion. S. v. Malunda (CoA 11/5/13)

If a search of the occupants is justified, the search extends to areas of the car within reach of the occupants. Michigan v. Long 463 US 1032 (1983)

Furthermore, a search of the vehicle is justified if objects in plain sight (or plain smell, such as the odor of marijuana coming from the vehicle) provide probable cause for the search.

However, a search incident to arrest is subject to the limitations of Arizona v. Gant, 129 S.Ct. 1710 (2009), where the Court ruled that officers may search a vehicle incident to an arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment or it is reasonable to belief that evidence relevant to the crime of arrest might be found in the vehicle.

INTERROGATIONS

A defendant's statement must be voluntary, and a custodial confession must be accompanied by appropriate warnings under Miranda v. Arizona.

Factors relevant to the issue of whether a statement is voluntary include

- Mental or physical coercion
- Intelligence and education, or lack thereof
- Promises of leniency
- Whether the statement was actually the product of the officers (for example, pressure from relatives urging a confession

An involuntary statement may not be used for impeachment.

Miranda motions often focus on the issue of custody. A person is in custody when he is placed under arrest or his freedom is curtailed to an equivalent degree. The fact that a person is not free to immediately leave is not dispositive (i.e. a driver is not in custody just because he is detained during a routine traffic stop. Questions during a routine stop are not custodial interrogation. S. v. Braswell CoA 6/19/2012). The fact that the defendant is an inmate does not mean he is in custody for the purposes of questioning. Furthermore, an incriminating statement must be in response to questioning. Therefore a volunteered statement is not the result of interrogation. Similarly, statements made in response to routing booking questions, even after the defendant is unquestionably in custody, are not the result of interrogation.

Statements made in violation of Miranda may be used for impeachment.

IDENTIFICATIONS

Line-ups and shows up are governed by 15A-284.52 et seq. Eyewitness identifications may also violate the Constitution. The test is whether the line up or show up is so impermissibly suggestive so as to give rise to a very substantial likelihood of a misidentification. The Court should undertake a two-step inquiry, and consider

1) Whether the totality of the circumstances reveal a pre-trial procedure unnecessarily suggestive, and
2) Whether this procedure created a substantial likelihood of irreparable misidentification.

Representative cases are S v. Hannah, 312 NC 286 (1984), and S v. Wilson (CoA 2/5/2013)