NORTH CAROLINA Judicial COLLEGE

Agenda

The Fourth Amendment: Issues for Superior and District Court Judges

School of Government, Chapel Hill, NC
November 12, 2010

Friday, November 12

10:00 a.m.	Welcome and Introductions Jessica Smith, UNC School of Government
10:10 a.m.	**Warrantless Searches** Jeff Welty, UNC School of Government
10:50 a.m.	Break
11:00 a.m.	**Warrantless Searches, continued**
12:00 p.m.	Lunch (provided)
1:00 p.m.	**Vehicle Stops** Jeff Welty, UNC School of Government
1:50 p.m.	Break
2:00 p.m.	**Searches of Probationers & Parolees** Jamie Markham, UNC School of Government
2:45 p.m.	Break
2:55 p.m.	**Checkpoints & Chemical Analyses** Shea Denning, UNC School of Government
4:10 p.m.	Completion of Evaluations
4:15 p.m.	Adjourn

This training will have 4.5 hours of instruction, all of which will qualify for continuing judicial education credit.

Warrantless Search Problems and Answers

Jeff Welty

UNC SCHOOL OF GOVERNMENT

1. Two homicide detectives employed by the police department of a town built around a mountain lake want to conduct a "knock and talk" at a murder suspect's home. There is a gravel road to the home, but it is faster for the officers to go by boat, so they do. They dock their boat at the suspect's dock, and walk up the dock to a path that leads to the suspect's house. As they go around a bend in the path and approach the back door of the house, they see what looks like a trash pile in the suspect's back yard. Atop the pile is a shirt with rust-colored stains on it. The officers seize the shirt, which turns out to be stained with the victim's blood. The shirt is critical evidence at the trial, and the defendant moves to suppress it.

    a. What is the state's best argument for the validity of the seizure?

    The state can argue that in this community, boat travel is sufficiently common that the deck and path are a "common entranceway," like a sidewalk to a front door in a typical neighborhood. Thus, the shirt was in plain view. Justifying the seizure of the shirt, however, requires more; the mere fact that the officers can see evidence from a common entranceway does not justify an intrusion into the curtilage to seize it, and the garbage has not been dragged to the curb for collection. Perhaps the state could argue that exigent circumstances exist, because the suspect will likely remove the shirt as a result of the officers' visit, but this is somewhat speculative. And it is also possible that a court would find such an exigency to have been created by the police themselves, in deciding to proceed with a knock-and-talk rather than withdrawing to obtain a warrant.

2. A wildlife officer is in a boat, patrolling Jordan Lake in Durham County. He notices several people fishing from a remote beach. He sees one of the people place an object under a rock about 75 feet from the rest of the group. The officer stops to check whether the people have fishing licenses, and finds that they do. He then proceeds to the rock, finds a margarine tub underneath it, and opens the tub, finding drugs.

    a. Did the officer's decision to open the tub violate the Fourth Amendment?

    Arguably. This scenario is based on Anderson v. State, 209 S.E.2d 665 (Ga. Ct. App. 1974). In that case, a majority of the court held that the margarine tub was abandoned, and indeed, that the defendant "sought to place the [drugs] out of his possession" as the police approached. By contrast, the dissenters reviewed in the container as hidden, not abandoned, and argued that "under these circumstances [the officer] had no more right to open [the container] than he would have had to open the defendant's wallet if the defendant had left it under the rock while he went for a swim."

3. An officer suspects that Frank is growing marijuana. Frank lives in a semi-rural area, on a five acre lot. The officer parks down the street from Frank's house, and approaches it on foot. The entire lot is surrounded by a barbed wire fence. "No trespassing" signs are attached to the fence every 50 feet. Nonetheless, the officer climbs through the fence and approaches Frank's house.

The area is heavily wooded, and the officer cannot see anything until he is within 100 feet of the house, at which point the trees stop and a clearing begins. Hiding behind the last tree, the officer can see a garden plot about 10 feet from the back door to the house. There are tall spiky plants growing in the garden; the officer recognizes the plants as marijuana.

a. At this point, has the officer violated the Fourth Amendment?

No. The woods surrounding Frank's house are open fields. Although they are fenced and posted with "no trespassing" signs, they are simply too far from the house to be part of the curtilage. Because the officer has remained behind the last tree, he has not entered the clearing, which is the outermost possible boundary of the curtilage on these facts. The marijuana plants are in plain view.

b. Can the officer legally approach the house and seize the plants?

No. The garden is clearly within the curtilage of the house. A warrant is presumptively required to enter the curtilage. The officer does not have a warrant, and no exception to the warrant requirement applies.

4. Two officers are patrolling a high-crime area when they stop a Ford Mustang for going 42 m.p.h. in a 35 m.p.h. zone. As the Mustang pulls to the curb, the passenger door opens and a young man jumps out. He takes a step away from the car, pitches a small object back into the car, and takes off running. One officer chases him, but can't catch him. The other officer searches the car, over the driver's objection, and finds a small bag of cocaine between the driver's seat and the console. The driver is charged with possession of cocaine, and he moves to suppress.

a. Is this search valid? If so, on what theory? If not, why not?

It is probably valid under the vehicle exception to the warrant requirement. The area, the flight of the passenger, and the pitching of the object likely provide probable cause to search the vehicle. Note that the search cannot be justified on the basis that the passenger abandoned the object – even assuming arguendo that the object was abandoned, the search was of the car, which was not abandoned, not of the object.

b. Now assume that the person who ran from the vehicle was caught two blocks away and arrested based on an outstanding warrant. Would a vehicle search be justified as a search incident to arrest?

No. Until recently, the answer to this question was yes: the passenger compartment of a vehicle could be searched incident to the arrest of any recent occupant, and given that the passenger was arrested only two blocks from the vehicle and presumably just a minute or two after exiting it, he likely would have qualified as a recent occupant. After Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710 (2009), however, a search would be improper: the arrestee has no access to the vehicle, since he is two blocks away, and since he was arrested on a warrant for an earlier offense, it's unlikely that there will be evidence of the offense of arrest in the car.

5. An officer suspects that Dave is selling pirated DVD movies. He walks up a sidewalk to Dave's front door, knocks, and when Dave's wife answers, the officer explains his suspicions and asks to search the house. When she says that she's not sure she should let him, he responds, "well, I can always apply for a search warrant," although he's unsure whether he has probable cause to support a warrant. Dave's wife says that he can go ahead and search the house. He searches the interior of the house and then the back deck, finding nothing. From the deck, he sees a dog kennel 40 feet from the house. He searches that, too, and finds 100 copies of *Big Momma's House* that are obviously pirated. Dave is eventually charged, and moves to suppress the DVDs.

    a. Is Dave's wife's consent sufficient to support the search?

    There are two issues here. First, is Dave's wife's consent voluntary in light of the officer's comment about the warrant? Although there is authority suggesting that "[b]aseless threats to obtain a search warrant may render consent involuntary," United States v. White, 979 F.2d 539 (7th Cir. 1992), the officer's threat here is not completely without foundation, and he only said he could "apply for" a warrant, not that he would get a warrant. Given the lack of any other coercive circumstances, the consent is likely voluntary. Cf. State . Kuegel, 195 N.C. App. 310 (2009) (consent to search was given voluntarily and though officer said that if consent was denied he "would leave two detectives at the residence and apply for a search warrant"); State v. Fincher, 309 N.C. 1 (1983) (the defendant consented voluntarily where he "was told that although he did not have to give permission to search, if he refused the officers would obtain a search warrant and conduct a search").

    Second, does her consent to "search the house" include consent to search the kennel? Although there is a split of authority about this issue nationally, in North Carolina the answer is yes. State v. Hagin, __ N.C. App. __, 691 S.E.2d 429 (2010) (holding that consent to search a dwelling normally includes consent to search any outbuildings within the curtilage).

    b. Is there any theory other than consent on which the search of the kennel may be valid?

    The state might argue that the kennel is far enough from the house that it is in an "open field" rather than within the curtilage. This is doubtful given the short distance, though distance is not the only factor. Furthermore, even if the kennel were in an open field, actually entering the kennel might be a "search," depending on the construction of the kennel and whether it was locked.

6. Two officers are trying to serve an arrest warrant on a suspect. The warrant charges him with PWISD cocaine. The officers go to the suspect's home, but rather than approaching the home immediately, they decide to conduct surveillance. A minute or two later, a car arrives at the residence, the driver honks the horn, and the suspect comes out of the house for a brief conversation with the driver, after which the driver departs. The same thing happens three other times in the next thirty minutes. The officers then decide to serve the warrant. They knock and announce, receive no answer, and break down the front door. They smell marijuana immediately, and arrest the suspect in the living room. They proceed to search the house, finding no one else

present, but locating a stash of marijuana in a dresser drawer in a back bedroom, which the suspect (now defendant) eventually moves to suppress.

a. Is this search valid? If so, on what theory? If not, why not?

The search is not valid. It is not valid as a search incident to arrest, as the back bedroom is not within the arrestee's "grab space." Nor is it valid as a protective sweep, because an assailant could not hide in a dresser drawer. Finally, there are no exigent circumstances because no one else is present to attempt to destroy evidence.

7. An officer stops a vehicle for unsafe movement based on failure to use a turn signal. The officer orders both the driver and the passenger out of the vehicle, and both comply. The passenger says, unprompted, "man, I'm on probation, I'm not doing anything, and I don't need to be in any trouble." The passenger also seems nervous to the officer. Because it is late at night and the officer is alone, he is concerned for his safety. He frisks both the driver and the passenger. While frisking the passenger's jacket pocket, the officer feels a small hard object that is too small to be a weapon but that the officer thinks could be a crack pipe. He pulls it out of the passenger's pocket, and it is, in fact, a pipe, complete with what appears to be drug residue on it. The passenger is charged with possession of drug paraphernalia, and he moves to suppress.

a. Was the officer justified in deciding to frisk either or both occupants? Why or why not?

Under Arizona v. Johnson, 555 U.S. __ (2009), the officer was entitled to frisk anyone he had reason to suspect might be armed and dangerous. He had no reason to suspect the driver, so that frisk was improper. The frisk of the passenger likely was proper given the late hour, the fact that the passenger was on probation, and the passenger's apparent nervousness and unprompted exclamation.

b. Assuming that the frisk of the passenger was justified, was the officer justified in seizing the pipe? Why or why not?

No. The officer knew that the object in the passenger's pocket was not a weapon, so he could have seized it only if he immediately developed probable cause to believe that it was evidence of a crime; in such a case, the seizure would be justified under the "plain feel" doctrine. State v. Williams, 195 N.C. App. 554 (2009). Here, however, the officer only thought that the object "could be" a pipe, which is insufficient.

8. An officer suspects a 17-year-old of selling marijuana. The officer goes to the 17-year-old's home at 4:00 p.m., and the teenager is there alone, although the officer knows that the teenager's parents live there too. The officer asks if he can search the house for marijuana, and the 17-year-old says yes. The officer searches the teenager's room and finds nothing, but arrests him in the room anyway based on reports the officer received from the teenager's drug customers. The 17-year-old's parents come home as the officer is completing the arrest; they ask what the officer is doing and he says that he is arresting their son for selling drugs. They sit down in shock. After the arrest, the officer continues the search, finding marijuana in a vase in the family room. The teenager is charged with PWISD marijuana, and he moves to suppress the drugs.

a. What is the defendant's best argument that the 17-year-old's consent does not validate the search?

The defense should argue that the 17-year-old is not in possession of the house and so cannot consent to a search.

b. Is there any set of facts under which the state could argue that the 17-year-old's consent was valid?

Perhaps, if the 17-year-old had substantial authority over the home (e.g., he was often allowed to stay there alone, he had his own key, etc.). Given that he is almost of age, a court might treat him as an adult for purposes of consent if the facts showed that he was treated as an adult within his family.

c. Other than consent, are there other bases on which the state might argue for the validity of this search?

It might argue that the search was valid as a search incident to arrest, but since the arrest did not take place in the family room, the vase was not in the suspect's "grab space." It would be better off arguing that exigent circumstances support the search, in that the parents might destroy any evidence left in the home. This argument is likely to succeed if there is evidence that the parents are involved in, or support, their son's drug activities; absent such evidence, some courts will infer a risk of destruction of evidence from the family relationship alone, while others will not.

9. Several officers are having lunch together at a sandwich shop. A man walks in, and one of the officers recognizes him as the subject of an outstanding arrest warrant for statutory rape. The man is wearing a backpack. The officer instructs the man to put down the backpack and to put his hands in the air. The man complies. The officer tells the man that he is under arrest and that he should come to the officers' table. Again, the man complies. The officer handcuffs the man. Another officer retrieves the backpack and opens it. He finds evidence of identity theft.

a. Was the search of the backpack justified?

Probably not. The issue is whether the search was proper incident to the man's arrest. If Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710 (2009), applies to personal property, the search would be justified only if (1) the arrestee were unsecured and able to reach the backpack, or (2) there were reason to believe that evidence of the crime of arrest would be found within the backpack. The first condition is not met because the man was away from the backpack, in handcuffs, and in the presence of several officers at the time of the search. The second condition is not met because there is nothing to suggest that evidence of the rape will be inside the backpack. Even if Gant does not apply to personal property, the search may be improper because at the time of the search, the backpack was not within the man's "grab space." The court of appeals has been skeptical about whether officers may search an arrestee's luggage incident to arrest. State v. Thomas, 81 N.C. App. 200 (1986).

10. An officer is conducting a traffic stop. He asks the driver to step out of his vehicle, and the driver does so. The officer asks the driver whether he would mind if the officer frisked him for the officer's safety. The driver says that he wouldn't mind. The officer pats him down and feels what the officer recognizes as a marijuana pipe in his pocket. The officer removes the pipe, and a small bag of marijuana comes with it. The officer arrests the driver, handcuffs him, and puts him in the officer's car. The officer then searches the driver's vehicle.

    a. Did the officer do anything wrong prior to searching the car?

    No. The frisk was consensual, and the removal of the pipe was justified under the plain feel doctrine.

    b. Was the search of the car proper?

    Yes. There are two possible bases for the search. First, under the search incident to arrest doctrine, the search was proper if there was reason to believe that the car contained evidence of the crime of arrest. Second, under the vehicle exception to the warrant requirement, the search was proper if there was probable cause to believe that evidence of a crime would be found in the car. Just as the odor of marijuana emanating from a vehicle provides probable cause to search the car, see, e.g., State v. Schiffer, 132 N.C. App. 22 (1999), the fact that the driver was in possession of drugs likely provides probable cause to search the vehicle. See State v. Kizer, 2010 WL 916343 (N.C. Ct. App. Mar. 16, 2010) (unpublished) ("The cocaine found in defendant's pocket provided the officers with probable cause to search the defendant's vehicle."); United States v. Johnson, 383 F.3d 538 (7th Cir. 2004) (holding that an officer's "discovery of [drugs] on [the defendant's] person clearly provided him with probable cause to search the trunk of the vehicle, including any containers"). The lower standard that applies to searches incident to arrest was therefore also met.

Warrantless Searches

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Objectives

- Review the legal rules
- Discuss emerging issues
- Evaluate fact patterns

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Two Types of Warrantless "Searches"

- Actions that are not "searches" at all
  - No reasonable expectation of privacy
  - The Fourth Amendment does not apply
- Searches that fall within an exception to the warrant requirement

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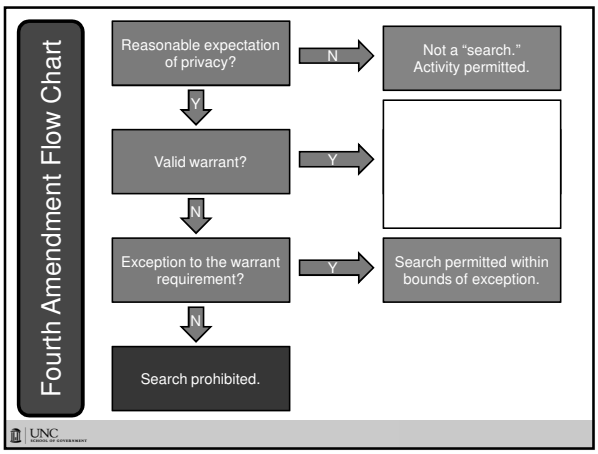

Actions That Are Not "Searches"

- Fourth Amendment prohibits unreasonable "searches"
- A "search" means a governmental intrusion on a "reasonable expectation of privacy"
  - Subjective component
  - Objective component

Open Fields

- **Curtilage:** The area "directly and intimately connected with the [home] and in proximity" to it.
  - State v. Courtright, 60 N.C. App. 247 (1983)
- **Open fields:** Anything outside the curtilage.
- **No REP in Open Fields.** "[A]n open field is not . . . entitled to Fourth Amendment privacy protection"
  - State v. Nance, 149 N.C. App. 734 (2002)

Common Entranceways

- "The absence of a closed or blocked gate . . . creates an invitation to the public . . . Thus, we will not extend [the defendant's] expectation of privacy to his driveway, walkway or front door area."
  - United States v. Lakoskey, 462 F.3d 965 (8th Cir. 2006)
- Determinations can be fact-intensive
- Has this doctrine gone too far?

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Plain View

- "[W]hen a[n] officer is able to detect something by . . . his senses while lawfully present at the vantage point where those senses are used," it is not a Fourth Amendment search.
  - Wayne R. LaFave, Search and Seizure § 2.2.
- Enhancing the senses
- Beyond enhancing the senses

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Abandoned Property and Garbage

- "Abandoned property is not subject to Fourth Amendment protection."
  - United States v. Pitts, 322 F.3d 449 (7th Cir.2003)
- When is real property abandoned?
- When is personal property abandoned?
  - Discarded property
  - Denial of ownership

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Exceptions to the Warrant Requirement

- "Warrantless searches are presumptively unreasonable."
  - United States v. Karo, 468 U.S. 705 (1984)
- "[E]xceptions to the warrant requirement are few in number and carefully delineated."
  - Welsh v. Wisconsin, 466 US 740 (1984)

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Consent

- "Another exception to the warrant requirement is a search which follows . . . voluntary consent . . . [T]he essence of this exception is a waiver of the constitutional right to privacy."
  - United States v. Stone, 471 F.2d 170 (7th Cir. 1972)
- Who may consent?
- Validity of consent
- Scope of consent

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Exigent Circumstances

- "[T]he exigent circumstances exception . . . may apply . . . where there is a compelling need for official action and no time to secure a warrant."
  - State v. Phillips, 151 N.C. App. 185 (2002)
- Requires probable cause plus exigency
- When does exigency dissipate?
- Emerging issue: officer-created exigency

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Vehicles

- Exception is justified because of "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility."
  - California v. Carney, 471 U.S. 386 (1985)
- Can be searched on PC alone
- Scope is limited by the PC
  - But not by locked containers

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Searches Incident to Arrest

- Justified by officer safety and need to prevent the destruction of evidence
- Requires a valid custodial arrest
  - But search may precede arrest
- Extends to "grab space"
  - Gant and vehicles
- Emerging issues
  - Gant and personal effects
  - Digital devices

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Terry Frisks

- "[A] reasonable search for weapons [is permitted] for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual."
  - Terry v. Ohio, 392 U.S. 1 (1968)
- Requires valid stop and reasonable suspicion
- Scope and plain feel
- Emerging issue: Arizona v. Johnson

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Other Exceptions

- Probation searches
- Border searches
  - Emerging issue: laptops
- Impoundment/inventory searches
- Checkpoints and other "special needs" searches

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Learn More

- Robert L. Farb, *Arrest, Search and Investigation in North Carolina* (3rd ed. 2003)
- Wayne R. LaFave, *Search and Seizure* (4th ed. 2004)
- North Carolina Criminal Law Blog, sogweb.sog.unc.edu/blogs/ncclaw/

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Warrantless Searches

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Stopping a Vehicle

Jeff Welty

November 2010

General Principles

Legal Standard. "Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). Of course, reasonable suspicion is also the standard for investigative stops based on more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968).

Pretextual Stops. If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant). It follows from this that whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

When Reasonable Suspicion Must Exist. Normally, a law enforcement officer will attempt to develop reasonable suspicion *before* instructing a person to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the suspect's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver ignores the blue lights, continues driving, and weaves within his lane before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1212 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n. 170 (collecting cases).

Common Issues

Weaving. G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Weaving within a single lane does not appear to violate G.S. 20-146 and so is not itself a crime. However, in some circumstances, weaving within a single lane may contribute to reasonable suspicion that a driver is impaired or is driving carelessly. In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour; and driving in the proximity of drinking establishments. The short version of Fields, then, is that moderate weaving within a single lane does not provide reasonable suspicion, but that "weaving plus" may do so. See also generally State v. Peele, 196 N.C. App. 668 (2009) (no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" DWI, then saw the defendant "weave within his lane once"); State v. Simmons, __ N.C. App. __, 698 S.E.2d 95 (2010) (stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"); State v. Brown, 2010 WL 3860440 (N.C. Ct. App. Oct. 5, 2010) (unpublished) (stop was supported by reasonable suspicion where the defendant was weaving within her lane and traveling 10 m.p.h. under the speed limit at 1:40 a.m.).

Sitting at a Stoplight. Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But like weaving, it may contribute to reasonable suspicion that the driver is impaired. An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light, at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

Unsafe Movement/Lack of Turn Signal. Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle),

with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the staute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle."), and State v. McRae, __ N.C. App. __, 691 S.E.2d 56 (2010) (similar).

Late Hour, High-Crime Area. The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a suspect is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). But the stop in Brown took place at noon. What about presence in a high-crime area at an unusually late hour? That's still not enough. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, __ N.C. App. __ , 684 S.E.2d 477 (2009), aff'd per curiam, __ N.C. __ (Oct. 8, 2010) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

Informants. Whether information from an informant provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Information from an anonymous tipster is usually insufficient unless (1) the tip itself contains strong indicia of reliability, such as very detailed information, or (2) the police are able to corroborate the tip in a meaningful way. State v. Johnson, __ N.C. App. __, 693 S.E.2d 711 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 96 N.C. App. 668 (2009) (an anonymous tip that defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). On the other hand, where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, the information is much more likely to provide reasonable suspicion. State v. Maready, 362 N.C. 614 (2008). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").

Driver's Identity. "[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, __ N.C. App. __, 693 S.E.2d 711 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process.

Investigation During Traffic Stops

Jeff Welty
November 2010

Officer Ollie Ogletree is on patrol one Saturday night at about 10:00 p.m. He's driving along a major commercial road in a lower-middle-class section of town when he sees a 2002 Chevrolet Malibu with three occupants turn without signaling, causing a following car to brake suddenly. Although an accident does not result, Officer Ogletree activates his blue lights and pulls the Malibu over for unsafe movement in violation of G.S. 20-154(a). The Malibu pulls over promptly. The driver is a male in his late 20s. The front-seat passenger is a female of the same age. The rear-seat passenger is a teenage female.

1. Officer Ogletree orders all of the occupants out of the vehicle. OK?

Yes. In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers).

2. The occupants comply with Officer Ogletree's order to exit the vehicle. Although they are compliant, he is concerned for his safety. A fellow officer was shot the week before during a traffic stop, it is nighttime, and the vehicle has multiple occupants. Officer Ogletree decides to frisk the two adults. OK?

No, unless the subjects consent. A frisk does not follow automatically from a valid stop, or from an officer's subjective safety concerns. In order for a frisk to be justified, Officer Ogletree needs reasonable suspicion that the subjects to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). Officer Ogletree's concerns here are general in nature, and provide no reason to believe that the driver or the passenger is armed or dangerous. Note that if Officer Ogletree did have reason to believe that the passenger was armed and dangerous, the fact that he does not suspect her of criminal activity would not preclude a frisk. Arizona v. Johnson, __ U.S. __, 129 S. Ct. 781 (2009).

3. Officer Ogletree asks for, and receives, the driver's license and registration. Still, something about the demeanor of the vehicle's occupants makes Officer Ogletree suspect that they are up to no good. He decides to ask the occupants a few questions unrelated to the traffic stop itself, including whether there are any drugs in the car. He does this while he's examining the license and registration, so it doesn't prolong the stop. Is it OK for Officer Ogletree to ask about unrelated matters?

Yes. Although some commentators have argued that "questioning during a traffic stop must be limited to the purpose of the traffic stop," 4 Wayne R. LaFave, Search and Seizure 391 (4th ed. 2004), the United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that the police may question someone who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who

was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning appears to apply in the traffic stop setting. The United States Supreme Court has recognized as much. Arizona v. Johnson, __ U.S. __, 129 S. Ct. 781 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

4. Even after he finishes looking at the license and registration, Officer Ogletree continues questioning the vehicle's occupants, for about five minutes. Does the duration of the questioning pose a problem?

Unclear. The questioning at issue in Muehler did not prolong the suspect's detention at all, while in our scenario, Officer Ogletree's continued questioning does prolong the detention of the vehicle's occupants. This may be prohibited by State v. Jackson, __ N.C. App. __, 681 S.E.2d 492 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions). However, Jackson is somewhat at odds with the court of appeals' rulings concerning the use of drug-sniffing dogs, discussed below, which allow a traffic stop to be extended briefly for investigative activity unrelated to the original purpose of the stop. Jackson is also inconsistent with most post-Muehler federal cases, which generally conclude that a de minimis delay is permissible. Compare United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"), and United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable), with United States v. Peralez, 526 F.3d 1115 (8th Cir.2008) (extending traffic stop by ten minutes to ask drug-related questions was unreasonable). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving towards a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions). Of course, even if a de minimis extension of the stop is permissible, it is not clear that a five-minute extension is de minimis.

5. The occupants deny having any drugs and don't say anything especially suspicious. Officer Ogletree returns to his vehicle to write a citation for the driver. This takes him an additional five minutes. Is there any problem with the total duration of the stop, which is about twelve minutes so far?

No. Although there is no bright-line rule regarding the length of traffic stops, courts routinely allow stops longer than twelve minutes. See, e.g., United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes). As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 29 (3rd ed. 2003).

6. Officer Ogletree can't shake the idea that something is amiss. So, as he is finishing up the citation, Officer Ogletree asks the dispatcher to send a K-9 unit to the scene. Officer Ogletree ends up sitting in his cruiser for about two minutes after finishing the citation before the K-9 unit arrives. It takes an additional minute for the dog to sniff around the exterior of the vehicle. OK?

Yes. Having the dog sniff the car is not a search and so requires no quantum of suspicion. Illinois v. Caballes, 43 U.S. 405 (2005). Although it would be unreasonable for Officer Ogletree to prolong the stop for a substantial period of time in order to allow the dog to arrive and sniff, the three-minute delay here is de minimis under State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis). The Brimmer court did not say exactly how long a delay must be before it is no longer de minimis, but it described a 15-to-20 minute delay as "lengthy." Compare United States v. Blair, 524 F.3d 740 (6th Cir. 2008) (unreasonable to extend traffic stop by thirteen minutes to allow drug dog to arrive and sniff).

7. The dog doesn't alert. But Officer Ogletree is nothing if not thorough. As he is about to hand the citation to the driver, he asks if the driver would consent to a search of the vehicle. The driver hesitates for a moment, then says "I guess so." Officer Ogletree searches the car. OK?

Not clear. Because Officer Ogletree has not yet handed the citation to the driver, the traffic stop is ongoing. Requests to search made during a traffic stop probably should be analyzed just like using a drug dog or asking questions about matters unrelated to the purpose of the stop: most courts find such requests to be proper if they do not significantly extend the duration of the stop. 4 Wayne R. LaFave, Search and Seizure 391 (4th ed. 2004). However, at least one North Carolina Court of Appeals case has stated, albeit on somewhat shaky authority, that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity," which is not present here. State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that any extension of the stop, no matter how minimal, is otherwise unreasonable, a position that is hard to reconcile with Brimmer, supra.

Note that if Officer Ogletree had already handed the citation to the driver, and had returned the driver's license and registration, the traffic stop would be over and any further interactions between Officer Ogletree and the driver would be, legally, a consensual encounter. Jackson, supra ("Generally, an initial stop concludes and the encounter becomes consensual only after an officer returns the detainee's license and registration."). In that case, it would be entirely proper for Officer Ogletree to ask for consent to search the vehicle.

THE FOURTH AMENDMENT: SEARCHES OF PROBATIONERS

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I. Searches of supervised offenders, generally

Many offenders on probation, parole, or other form of supervised release are subject to a condition requiring them to submit to warrantless searches by probation officers, law enforcement officers, or both. Courts generally uphold these conditions on the basic premise that offenders under community supervision "do not enjoy the absolute liberty to which every citizen is entitled." Griffin v. Wisconsin, 483 U.S. 868 (1987). As the leading cases below demonstrate, courts analyze such searches differently depending on the purpose of the search and who is doing the searching.

A. Supervisory searches by a probation officer: Special needs

Griffin v. Wisconsin, 483 U.S. 868 (1987). Probation officers searched a probationer's home without a warrant pursuant to a state administrative regulation that allowed such searches with "reasonable grounds" to believe the offender possessed contraband. The Court upheld the search, reasoning that a "State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement." Because a probation officer not only enforces the law, but is also "supposed to have in mind the welfare of the probationer," the Court deemed it reasonable to dispense with the warrant requirement.

B. Investigatory searches by a law enforcement officer: Reasonableness

United States v. Knights, 534 U.S. 112 (2001). As part of a criminal investigation, a law enforcement officer searched the home of a man he knew to be on probation. The officer also knew the probationer was subject to a search condition that required him to submit to searches "at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The officer found evidence related to the criminal investigation, which the probationer then sought to suppress. He argued that the warrantless search was improper under *Griffin* because it was for investigatory rather than supervisory purposes.

The Court upheld the search, but not under a "special needs" rationale. Instead, it applied a traditional reasonableness inquiry, balancing "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." As to the intrusion into the probationer's privacy, the Court noted that "[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." Moreover, the probation condition itself—of which Knights was "unambiguously informed"—further diminished his expectation of privacy. As to the governmental interest, the Court stressed that probationers are "more likely than the ordinary citizen to violate the law." The court held that the "balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." Because the search at issue in the case was supported by individualized suspicion, the Court did not have to consider whether a suspicionless search by a law enforcement officer would be reasonable.

Samson v. California, 547 U.S. 843 (2006). With no individualized suspicion at all, a law enforcement officer searched a parolee who had agreed, as required by state law, "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." The officer found drugs, which the parolee sought to suppress. Picking up where it left off in *Knights*, the Court upheld the search. As in *Knights*, the search condition itself further diminished the parolee's already-reduced expectation of privacy. Moreover, on the continuum of state-imposed punishments, "parolees have fewer expectations of privacy than probationers." Therefore, even a suspicionless search of a parolee is not unreasonable under the Fourth Amendment.

II. Search Conditions in North Carolina

A. Warrantless searches as a regular condition of probation

Legislation passed in 2009 made warrantless searches by probation officers and by law enforcement officers in certain circumstances default conditions of supervised probation under G.S. 15A-1343(b). S.L. 2009-372. The conditions apply unless the presiding judge specifically exempts the defendant by striking them from the form. This is a change from prior law, under which a warrantless search condition applied only if added by the judge as a special condition under G.S. 15A-1343(b1), and which authorized only probation officer searches.

*Old law: **Special** warrantless search conditions (offenses committed before December 1, 2009)*

G.S. 15A-1343(b1)(7). Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, **for purposes specified by the court** and ***reasonably* related** to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

*New law: **Regular** warrantless search conditions (offenses committed on or after December 1, 2009)*

G.S. 15A-1343(b)(13). Submit at reasonable times to warrantless searches by a probation officer of the probationer's **person** and of the probationer's **vehicle** and **premises** while the probationer is present, **for purposes *directly* related to the probation supervision**, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

G.S. 15A-1343(b)(14). Submit to warrantless searches by a **law enforcement officer** of the probationer's **person** and of the probationer's **vehicle**, upon a **reasonable suspicion** that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court.

1. The probation officer search condition

The new probation officer warrantless search provision uses nearly the same language as the old special condition, with minor (though perhaps not insignificant) changes. Under prior law, warrantless searches could only be conducted "*for purposes specified by the court* and *reasonably related* to the probation supervision." G.S. 15A-1343(b1)(7) (emphasis added). The new law broadens the search condition by dropping the limitation to searches conducted "for purposes specified by the court," eliminating the need for the judge to check the box on form AOC-CR-603 or AOC-CR-604 (next to what was previously special condition 13) to specify whether searches may be conducted for stolen goods, controlled substances, contraband, child pornography, or some other purpose. At the same time, the condition is narrowed by replacing the term "*reasonably* related" with "*directly* related."

The new law does not spell out a level of suspicion required for a probation officer to conduct a search without a warrant (it does for law enforcement searches, described below). Does silence in the probation officer search condition amount to tacit approval of suspicionless searches? There is no clear answer in North Carolina. In *State v. Robinson*, 148 N.C. App. 422 (2002), the court of appeals referred to and seemed to endorse the reasonable suspicion standard from *Knights*, even in the context of a warrantless search led by a probation officer. In *United States v. Midgette*, however, the Fourth Circuit suggested (albeit in dicta) that suspicionless searches are acceptable as part of a program that is, considered as a whole, reasonably tailored. 478 F.3d at 624 (4th Cir. 2007).

2. The law enforcement officer condition

The law enforcement officer warrantless search provision allows officers to search a probationer's person and vehicle with reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or deadly weapon without court permission. Requiring probationers to submit to warrantless searches by a law enforcement officer is a new feature in North Carolina law—at least in the General Statutes. Prior to 1977, courts frequently added supervision conditions allowing searches by law enforcement officers. With the enactment of G.S. 15A-1343 in 1977, however, the legislature ended this practice, limiting warrantless searches to those conducted by a probation officer. *See* State v. Grant, 40 N.C. App. 58, 60 (1979) (invalidating on statutory grounds a probation condition allowing warrantless searches by any law enforcement officer).

The prior statutory prohibition on law enforcement searches was not, however, required as a constitutional matter. To the contrary, probation conditions allowing warrantless searches by law enforcement officers have generally been upheld, including by the Supreme Court in *Knights*. *See also* Wayne R. LaFave, *Search and Seizure*, Vol. 5, § 10.10(c). By design, North Carolina's new law enforcement warrantless search provision tracks the Court's holding in *Knights*: it limits law enforcement searches to circumstances in which an officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon. In fact, it is more limited than the one at issue in *Knights* in that it does not allow officers to search a probationer's home without a warrant.

If either search condition (probation officer or law enforcement officer) is challenged, the State may argue that its reasonableness is beside the point, as it is consented to as a prerequisite to being on probation in the first

place. This contract theory view of probation may at one time have been appropriate in North Carolina; there are older cases analyzing probation searches as "consent searches." *See, e.g.*, State v. Mitchell, 22 N.C. App. 663 (1974). However, legislation passed in 1995 (S.L. 1995-429) removed from the law provisions allowing a defendant to "elect to serve" an active sentence. With that law repealed, a defendant probably cannot be said to consent to the conditions of his or her probation, and no rights should be deemed waived.

B. Law enforcement participation in probation officer searches

By policy, probation officers will seek the assistance of law enforcement officers to conduct a search when they feel their safety is in jeopardy. That practice is uniformly upheld. Sometimes, however, the police seek assistance from probation in conducting a search. Probationers occasionally argue that the police are improperly capitalizing on a probation officer's special search authority to evade the Fourth Amendment's usual warrant and probable cause requirements. Although a probation officer may not serve as a "stalking horse" for the police, the following cases illustrate that the presence and participation of police officers in a search conducted by a probation officer does not, standing alone, render the search invalid.

State v. Howell, 51 N.C. App. 507 (1981). A police sergeant contacted a probation officer to tell her that a probationer had drugs and stolen merchandise in her possession. The same day, the probation officer and four police officers searched the probationer's home. The court of appeals held that a probation officer's warrantless search is not necessarily invalid due to the presence, or even participation of, police officers in the search. The court noted that the probation officer had received a tip about the probationer's drug use a week before the sergeant contacted her, and that the probation officer testified that she would have asked for police help with the search in any event out of concern for her safety.

State v. Church, 110 N.C. App. 569 (1993). A warrantless probation search was initiated by SBI agents and conducted by nine law enforcement officers and only one probation officer. The court of appeals upheld the search noting that the probation officer did not commit to searching the premises until she saw marijuana plants growing outside the probationer's building, thus exercising her own independent judgment.

State v. Robinson, 148 N.C. App. 422 (2002). A law enforcement agent told a defendant's probation officer that the defendant was suspected of a crime and asked the probation officer to help search the defendant's home. The defendant argued that the agent improperly used the probation officer's search authority in lieu of obtaining a search warrant. The court of appeals disagreed. The information the agent provided to the probation officer was not only about a new crime—it would also have been a violation of probation. Therefore, it "clearly furthered the supervisory goals of probation." Moreover, the Fourth Amendment does not, after *Knights*, limit searches pursuant to probation conditions to those that have a "probationary purpose."

C. Drug screens as a warrantless search

On the old (pre–December 1, 2009) probation judgment forms, special condition #15 read "Supply a breath, urine and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol, when instructed by the defendant's probation officer." That condition is not on the new forms. It may certainly be

added in box #20, "Other," as an ad hoc condition. But does it need to be added? Drug testing is, after all, a kind of search. *See* Schmerber v. California, 384 U.S. 757 (1966). The new search condition even includes the following language: "Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse [DOC] for the actual cost of drug screening and drug testing, if the results are positive." G.S. 15A-1343(b)(13). Thus, the condition clearly contemplates drug tests as one kind of search that may be done without a warrant. As discussed above, however, it is uncertain whether the regular warrantless search condition allows a probation officer to test for drugs *randomly*, or whether some form of individualized suspicion is required. Given this uncertainty, a court that intends for a probationer to be subject to *random* drug testing could say so explicitly in an ad hoc special condition.

D. Special conditions for sex offenders

Under G.S. 15A-1343(b2)(9), a special warrantless search provision applies for probations who are required to register as sex offenders or who committed "an offense involving the physical, mental, or sexual abuse of a minor." The condition is mandatory for offenders who fall in either category. Those offenders must:

> Submit at reasonable times to warrantless searches by a probation officer of the probationer's **person** and of the probationer's **vehicle** and **premises** while the probationer is present, **for purposes specified by the court** and **reasonably related** to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's **computer or other electronic mechanism** which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

Page Two, Side Two of form AOC-CR-603 includes check-boxes for the court to impose this condition when required. Note that this condition is like the old warrantless search special condition in that the judge must specify the purposes for which the search may be conducted.

It is not clear which crimes involve the "physical, mental, or sexual abuse of a minor." The same language, likewise undefined, appears in the satellite-based monitoring law. G.S. 14-208.40. If cases arising in that context can be any guide, the following crimes involve sexual abuse of a minor: indecent liberties with children, State v. Morrow, __ N.C. App. __, 683 S.E.2d 754 (2009), *aff'd*, No. 461A09, 2010 WL 3934237 (N.C. Oct. 8, 2010); solicitation to commit indecent liberties, State v. Cowan, No. COA09-1415, 2010 WL 3965099 (N.C. Ct. App. Sept. 21, 2010); and statutory rape of a victim who is 13, 14, or 15 years old by a defendant who is at least 6 years older than the victim, State v. Smith, __ N.C. App. __, 687 S.E.2d 525 (2010).

III. The Exclusionary Rule and Probation Hearings

The exclusionary rule does not apply at probation revocation hearings in North Carolina. State v. Lombardo, 306 N.C. 594 (1982). In *Lombardo* the Supreme Court of North Carolina ruled that improperly obtained evidence that had been excluded from a criminal trial in Florida could nonetheless be admitted at a probation violation hearing in North Carolina. The court reasoned that excluding evidence from probation hearings would damage

the viability of the probation system "by allowing those like Lombardo, who show a total disregard for the system, to exclude evidence of their personal probation violations." The court also pointed out that excluding the evidence would not further the interest of deterring police misconduct when the Florida law enforcement officers who improperly seized the defendant were unaware of his supervision status. In a subsequent appeal by the same defendant, the court of appeals ruled that the latter rationale was not essential to the supreme court's holding. State v. Lombardo, 74 N.C. App. 460, 463 (1985) ("[T]he Court did not expressly qualify its holding to exclude the [exclusionary] rule's application to such proceedings upon the law enforcement official being unaware of the probationer's status."

Older Fourth Circuit case law held that the exclusionary rule applied in federal probation revocation hearings. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978). That rule was overturned in United States v. Armstrong, 187 F.3d 392 (4th Cir. 1999) (refusing to apply the exclusionary rule in a federal supervised release hearing) on the basis of the Supreme Court's decision in Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998) (holding that the exclusionary rule does not apply in a state parole revocation hearing).

Shea Denning
November 12, 2010

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.

*** * ***

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.

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Magistrate Procedures for Ordering Civil License Revocations and the Seizure and Impoundment of Motor Vehicles

Shea Riggsbee Denning

I. Introduction

Several recent issues in this series have focused on the procedures magistrates should follow in conducting initial appearances. The procedures involving criminal cases generally are described in detail in *Administration of Justice Bulletin* No. 2009/08 ("Criminal Procedure for Magistrates"). Criminal cases involving implied consent laws, such as a charge of suspicion of impaired driving or an alcohol-related offense, may require magistrates to carry out several additional processes during the initial appearance. For example, magistrates may be required to revoke the defendant's driver's license, order that a vehicle driven by the defendant be seized and impounded, consider whether the defendant should be detained because his or her impairment poses a danger to others, and inform the defendant of the procedure for having witnesses appear at the jail to observe his or her condition or perform additional chemical analyses. The applicability of these procedures depends on the existence of factors specific to each.

The procedures for detaining impaired drivers and for informing defendants of their right to secure witnesses and to obtain further chemical analyses are described in *Administration of Justice Bulletin* No. 2009/07 ("What's *Knoll* got to do with It? Procedures in Implied Consent Cases to Prevent Dismissals under *Knoll*"). This bulletin focuses on the aforementioned procedures governing civil license revocation and the seizure and impoundment of motor vehicles. This discussion is flanked at the beginning by a review of police processing procedures in implied consent cases and at the end by two appendixes. Appendix A contains Administrative Office of the Courts (AOC) forms referenced in the discussion, and Appendix B presents flowcharts illustrating the processes for ordering the revocation of a civil license and the seizure of motor vehicles.

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II. Police Processing Duties in Implied Consent Cases

To understand the procedures applicable in connection with an initial appearance for an implied consent offense, one must first consider the activities undertaken by law enforcement officers and chemical analysts before that appearance.

When a person is arrested for an implied consent offense, or if criminal process has been issued, including a citation, a law enforcement officer who has reasonable grounds to believe that the person charged has committed the offense may require that person to undergo chemical analysis.[1] The officer is authorized to transport the accused to any location within North Carolina for the purposes of administering one or more chemical analyses.[2]

North Carolina law defines chemical analysis as a test or tests of the breath, blood, or other bodily fluid or substance of a person performed in compliance with statutory requirements to determine the person's blood–alcohol level or the presence of an impairing substance.[3] The concentration of alcohol in a person is expressed either as grams of alcohol per 100 milliliters of blood or as grams of alcohol per 210 liters of breath.[4] The results of a defendant's alcohol concentration determined by a chemical analysis are reported to the hundredths, with any result between hundredths reported to the next lower hundredth.[5]

Before any type of chemical analysis is administered, a person charged with an implied consent offense must be taken before a chemical analyst, defined as a person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform such analyses.[6] The analyst must first tell the person, and provide notice in writing of, the following rights:

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver's license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
2. The test results, or the fact of your refusal, will be admissible in evidence at trial.
3. Your driving privilege will be revoked immediately for at least thirty days if you refuse any test or if the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of twenty-one.
4. After you are released, you may seek your own test in addition to this test.
5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than thirty minutes from the time you are notified of these rights. You must take the test at the end of thirty minutes even if you have not contacted an attorney or your witness has not arrived.[7]

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1. Section 20-16.2(a) of the North Carolina General Statutes (hereinafter G.S.).
2. G.S. 20-38.3(2).
3. G.S. 20-4.01(3a).
4. G.S. 20-4.01(1b). The alcohol concentration for breath tests is based on an assumption that a breath–alcohol concentration of .10 grams per 210 liters of breath is equivalent to a blood–alcohol concentration of .10 percent, or, in other words, a 2100 to 1 blood–breath ratio. *See* State v. Cothran, 120 N.C. App. 633, 635, 463 S.E.2d 423, 424 (1995).
5. *Id*.
6. G.S. 20-4.01(3b).
7. G.S. 20-16.2(a).

If a law enforcement officer has reasonable grounds to believe that a person has committed an implied consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusing the test, the officer may direct the taking of a blood sample or the administration of any other type of chemical analysis that may be effectively performed.[8] There is no requirement in the North Carolina General Statutes (hereinafter G.S.) that the chemical analyst inform such a person of the implied consent rights in G.S. 20-16.2(a) or that the person be asked to submit to the analysis pursuant to G.S. 20-16.2(c).[9]

The law enforcement officer or the chemical analyst designates the type of test or tests to be administered, that is, a test of blood, breath, or urine.[10] The officer or chemical analyst then asks the person to submit to the designated type of chemical analysis.[11] A person's refusal prevents testing under the implied consent laws but does not preclude testing pursuant to other applicable procedures of law,[12] such as pursuant to a search warrant or the exigency exception to the search warrant requirement of the Fourth Amendment.[13]

Chemical analyses are most frequently obtained through utilization of a breath-testing instrument.[14] The North Carolina Department of Health and Human Services approves breath-testing instruments on the basis of results of evaluations by the department's Forensic Tests for Alcohol Branch.[15] The breath-testing instrument currently authorized and used is the Intoximeter, Model Intox EC/IR II.[16] The operational procedures for the instrument are prescribed by administrative regulation.[17] The regulations require that the person being tested be observed to

8. G.S. 20-16.2(b).

9. *Id*.

10. G.S. 20-16.2(c). Tests of urine are the only type of test of "other bodily fluid[s] or substances[s]" currently conducted pursuant to the implied consent procedures.

11. *Id*.

12. *Id*.; *see* State v. Davis, 142 N.C. App. 81, 87, 542 S.E.2d 236, 240 (2001) (holding that results of blood and urine tests obtained pursuant to search warrant issued after defendant refused blood test were properly admitted at defendant's impaired driving trial, as "the General Assembly does not limit the admissibility of competent evidence lawfully obtained").

13. *See* G.S. 20-139.1(d1) (providing that if a person refuses to submit to a test, a law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine for analysis if the officer reasonably believes that the delay necessary to obtain a court order would result in the dissipation of the percentage of alcohol in the person's blood or urine) and State v. Fletcher, ___ N.C. App. ___, ___S.E.2d ___ (Jan. 19, 2010) (finding exigent circumstances warranting blood draw and upholding G.S. 20-139.1 as constitutional); *see also* Schmerber v. California, 384 U.S. 757 (1966) (concluding that warrantless taking of defendant's blood incident to his arrest for driving while impaired was constitutional under the Fourth Amendment where the officer reasonably believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the dissipation of alcohol in the defendant's blood and blood was taken in a hospital environment according to accepted medical practices); State v. Steimel, 921 A.2d 378 (N.H. 2007) (upholding as constitutional warrantless blood draw to detect drugs incident to defendant's arrest for aggravating driving while intoxicated and refusing to distinguish between metabolization of alcohol and controlled drugs for purposes of applying the Fourth Amendment's exigency exception); People v. Ritchie, 181 Cal. Rptr. 773 (Cal. App. 1982) (upholding as constitutional warrantless blood draw to detect drugs incident to defendant's arrest for driving under the influence of drugs).

14. 10A N.C.A.C. 41B .0101(2).

15. 10A N.C.A.C. 41B .0313.

16. 10A N.C.A.C. 41B .0322.

17. *Id*.

ensure that he or she has not ingested alcohol or other fluids or regurgitated, vomited, eaten, or smoked in the fifteen minutes immediately prior to the collection of a breath specimen[18] as well as the collection of two breath samples in which alcohol concentrations do not differ by more than 0.02.[19]

A person's willful refusal to submit to a chemical analysis may, depending on other factors, result in the revocation of his or her driver's license.[20] A person is considered to have willfully refused a chemical analysis when that person (1) is aware that he or she has a choice to take or refuse to take the test, (2) is aware of the time limit within which he or she must take the test, (3) voluntarily elects not to take the test, and (4) knowingly permits the prescribed thirty-minute time limit to expire before electing to take the test.[21]

At the law enforcement officer's discretion, a person may be asked to submit to a chemical analysis of his or her blood or urine in addition to or in lieu of a chemical analysis of the person's breath.[22] If a subsequent chemical analysis is requested, the person must again be advised of the implied consent rights under G.S. 20-16.2(a).[23] When a law enforcement officer specifies a blood or urine test as the type of chemical analysis to be conducted, a physician, registered nurse, emergency medical technician, or other qualified person must withdraw the blood sample or obtain the urine sample.[24] A person's willful refusal to submit to a blood or urine test is a willful refusal under G.S. 20-16.2.[25]

In an implied consent case in which a defendant is asked to submit to a chemical analysis, the law enforcement officer and chemical analyst (who may be the same person) complete an AOC-CVR-1A (Affidavit and Revocation Report; see Appendix A) averring that the implied consent testing procedures have been followed. The affidavit, which in certain cases (discussed below) serves also as a revocation report, typically is sworn and subscribed before the magistrate at the initial appearance.

After completing all investigatory and other specified procedures, crash reports, and chemical analyses, a law enforcement officer must take the person before a judicial official for an initial appearance.[26]

The procedures set forth in Article 24 of Chapter 15A of the General Statutes govern initial appearances in implied consent cases just as they do in other criminal cases, except where those procedures are modified by the implied consent offense procedures set forth in Article 2D of Chapter 20. The implied consent offense procedures permit a magistrate to hold an initial appearance at any place within the county and require, "to the extent practicable," that a magistrate "be available at locations other than the courthouse when it will expedite the initial appearance."[27] To determine whether there is probable cause to believe a person charged with an implied consent offense is impaired, a magistrate may review all alcohol screening tests[28]

18. 10 N.C.A.C. 41B s .0101(6).
19. G.S. 20-139.1(b3).
20. G.S. 20-16.2(d).
21. Etheridge v. Peters, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980).
22. G.S. 20-139.1(b5).
23. *Id*.
24. G.S. 20-139.1(c).
25. G.S. 20-139.1(b5).
26. G.S. 20-38.3(5).
27. G.S. 20-38.4(a)(1).
28. A valid alcohol screening test must be performed with an approved portable breath-testing device, such as an ALCO-SENSOR. G.S. 20-16.3(b), (c); 10A N.C.A.C. 41B .0501-.0503. A law enforcement officer

and chemical analyses, and may receive testimony from any law enforcement officer concerning impairment and the circumstances of the arrest.[29] The magistrate also may observe the person arrested.[30]

III. Civil License Revocations

State law requires the immediate civil revocation of driver's licenses of certain persons charged with implied consent offenses.[31] When the results of a chemical analysis or reports indicating a refusal to submit to a chemical analysis are available at the time of the initial appearance, the law enforcement officer and chemical analyst must execute a revocation report before the magistrate.[32] The magistrate must, after completing any other proceedings involving the person, determine whether there is probable cause to believe that the conditions requiring civil license revocation are met.[33]

A. Conditions Requiring Civil License Revocation

A person's driver's license is subject to civil revocation under G.S. 20-16.5 if each of the following four conditions is satisfied:

1. A law enforcement officer has reasonable grounds to believe that the person has committed an implied consent offense (see sidebar, p. 6).
2. The person is charged with an implied consent offense.
3. The law enforcement officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and -139.1 in requiring the person to submit to or in procuring a chemical analysis.
4. The person:
   a. willfully refuses to submit to the chemical analysis,
   b. has an alcohol concentration of .08 or more within a relevant time after the driving,
   c. has an alcohol concentration of .04 or more at any relevant time after the driving of a commercial motor vehicle, or
   d. has any alcohol concentration at any relevant time after the driving and the person is under twenty-one years of age.

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may use "[t]he fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result," in determining probable cause for an implied consent offense. G.S. 20-16.3(d). An officer also may use a driver's refusal to submit to an alcohol screening test in determining probable cause. *Id*.

A different rule governs the use of alcohol screening tests in cases in which a defendant is charged with driving by a person less than twenty-one years old after consuming alcohol. *See* G.S. 20-138.3(b2). In such cases, a law enforcement officer, court, or administrative agency may use the results of an alcohol screening test to determine whether alcohol was present in the driver's body. *Id*. Thus not only may the results of the test be used in such cases, but reliance on the results also is not limited to determining probable cause.

29. G.S. 20-38.4(a)(2).
30. *Id*.
31. G.S. 20-16.5.
32. G.S. 20-16.5(c).
33. G.S. 20-16.5(e).

Implied Consent Offenses

1. Impaired driving (G.S. 20-138.1),
2. Impaired driving in a commercial vehicle (G.S. 20-138.2),
3. Habitual impaired driving (G.S. 20-138.5),
4. Any death by vehicle or serious injury by vehicle offense under G.S. 20-141.4 when based on impaired driving or a substantially similar offense under previous law,
5. First- or second-degree murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving,
6. Driving by a person less than twenty-one years old after consuming alcohol or drugs (G.S. 20-138.3),
7. Violating no-alcohol condition of limited driving privilege (G.S. 20-179.3),
8. Impaired instruction (G.S. 20-12.1),
9. Operating commercial motor vehicle after consuming alcohol (G.S. 20-138.2A),
10. Operating school bus, school activity bus, or child care vehicle after consuming alcohol (G.S. 20-138.2B),
11. Transporting an open container of alcohol (G.S. 20-138.7(a)),
12. Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f)).

Note: *See* G.S. 20-16.2(a1); -4.01(24a).

Although normally a person submits to chemical analysis only after he or she is arrested and charged with an implied consent offense, a person who is stopped or questioned by a law enforcement officer who is investigating whether that person may have committed an implied consent offense may request that a chemical analysis be administered before any arrest or other charge is made.[34] Upon such a request, the officer must afford the person the opportunity to have a chemical analysis of his or her breath, if available, in accordance with the procedures required by G.S. 20-139.1(b).[35] The notice of rights required prior to administration of a pre-charge test is prescribed by statute and differs slightly from the notice provided in a case in which the person already has been charged with an implied consent offense.[36] A precharge chemical analysis can give rise to a license revocation if the following conditions are satisfied:[37]

1. The person requested a precharge chemical analysis pursuant to G.S. 20-16.2(i) and
2. The person has
   a. an alcohol concentration of .08 or more at any relevant time after driving,
   b. an alcohol concentration of .04 or more at any relevant time after driving a commercial vehicle, or
   c. any alcohol concentration at any relevant time after driving and the person is under twenty-one years of age, and
3. The person is charged with an implied consent offense.

34. G.S. 20-16.2(i).
35. *Id*.
36. *Id*.
37. G.S. 20-16.5(b1).

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Motor Vehicle Checkpoints

Jeffrey B. Welty

Introduction

The purpose of this bulletin is to summarize and clarify the rules regarding checkpoints used to enforce the state's motor vehicle laws. It is intended for use by judges, lawyers, and law enforcement officers. Except incidentally, it does not address other types of checkpoints, such as immigration checkpoints[1] or checkpoints designed to gather information about a recently committed crime.[2]

The United States Supreme Court upheld sobriety checkpoints against a Fourth Amendment challenge in *Michigan Department of State Police v. Sitz*.[3] Motor vehicle checkpoints have been widely employed by law enforcement agencies since that time. In North Carolina, they are expressly authorized and regulated by Section 20-16.3A of the North Carolina General Statutes (hereinafter G.S.). But questions remain regarding when, where, and how checkpoints may be conducted. This bulletin employs a question-and-answer format to address some of these issues.

Establishing a Checkpoint

1. Are motor vehicle checkpoints permitted?

Yes, in appropriate circumstances. As noted above, the United States Supreme Court has held that sobriety checkpoints do not violate the Fourth Amendment. The General Statutes go further and allow checkpoints to be used "to determine compliance with the provisions of" Chapter 20.[4] In other words, the statute allows checkpoints to be used to detect violations of any

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1. *See, e.g.,* United States v. Martinez-Fuerte, 428 U.S. 453 (1976) (authorizing permanent immigration checkpoints near national borders).

2. *See, e.g.,* Illinois v. Lidster, 540 U.S. 419 (2004) (authorizing such checkpoints under certain circumstances).

3. 496 U.S. 444 (1990). The Court had previously suggested in *dicta* that motor vehicle checkpoints were permissible. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

4. G.S. 20-16.3A(a).

motor vehicle law, not just the impaired driving laws. By contrast, checkpoints may not be used for general crime control.[5]

The court of appeals initially expressed some doubt about whether the broad checkpoint authority contained in G.S. 20-16.3A passes constitutional muster. In *Veazey I*,[6] the court stated that

> it is unclear whether a primary purpose of finding any and all *motor vehicle* violations is . . . lawful. . . . One reason that a checkpoint is an appropriate tool for helping police discover certain types of motor vehicle violations is that police cannot discover such violations simply by observing a vehicle during normal road travel. . . . However . . . [m]any violations of North Carolina's motor vehicle laws are readily observable and can be adequately addressed by roving patrols when officers develop individualized suspicion of a certain vehicle.[7]

In *Veazey II*,[8] however, the court seems to have concluded that "enforcement of the State's Motor Vehicle laws" is a lawful purpose for a checkpoint. As a practical matter, many checkpoints are conducted either for the purpose of detecting impaired drivers—a purpose expressly approved by *Sitz*—or for the purpose of detecting license and registration violations, which are not readily observable. Therefore, whether a checkpoint established for the purpose of detecting any violation of the motor vehicle laws is constitutional may be academic.

2. Must officers obtain a warrant before establishing a checkpoint?

No. Although one leading commentator has argued that officers "would be well advised" to obtain a warrant before establishing certain checkpoints,[9] that view has generally been rejected by courts across the country,[10] and no North Carolina case supports it.

3. Must officers establish a checkpoint pursuant to a checkpoint policy?

Yes. Under G.S. 20-16.3A(a), a law enforcement agency conducting a checkpoint "must . . . [o]perate under a written policy." As a constitutional matter, it may not be essential that the policy be in writing, but it is essential that the checkpoint be conducted pursuant to a policy that limits individual officers' discretion regarding which vehicles to stop.[11] An agency that does not have its own checkpoint policy may adopt, in writing, the policy of another agency.[12]

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5. City of Indianapolis v. Edmond, 531 U.S. 32 (2000). *Edmond* casts grave doubt on *State v. Grooms*, 126 N.C. App. 88 (1997), which had approved a checkpoint designed in part to detect "individuals who have arrest warrants outstanding."

6. State v. Veazey, 191 N.C. App. 181 (2008) (*Veazey I*).

7. *Id.* at 189–90.

8. State v. Veazey,____ N.C. App.____ , 689 S.E.2d 530, 533–34 (2009) (*Veazey II*).

9. 5 Wayne R. LaFave, Search and Seizure § 10.8(d) (4th ed. 2004) (stating that "a rather good argument may be made in favor" of requiring a warrant for impaired driving checkpoints). *But see id.* § 10.8(a) (arguing otherwise for license and registration checkpoints).

10. *Id.* § 10.8(d) n.149 and accompanying text.

11. The Supreme Court of North Carolina held in *State v. Mitchell*, 358 N.C. 63 (2004), that "neither *Sitz* nor the Fourth Amendment requires police departments to have written guidelines before conducting driver's license checkpoints, nor do we find any such requirement under our state constitution." However, *Mitchell* was a 4–3 decision, and changes in the court's composition since it was decided raise the possibility that the issue might be resolved otherwise if it arose again today.

12. G.S. 20-16.3A(2a). *See also* State v. Colbert, 146 N.C. App. 506, 515 (2001) (concluding that "nothing in the . . . checkpoint statute or case law" supports the argument that the officers who operate a

Some agencies have a blanket checkpoint policy that applies to all checkpoints, perhaps with a supplemental written plan for each specific checkpoint,[13] while other agencies effectively create a unique checkpoint policy for each checkpoint that is conducted.[14] Either approach appears to be permissible.

4. What must the policy contain?

The only thing that the statute requires is that the policy provide "guidelines for the pattern," i.e., the pattern "both for stopping vehicles and for requesting drivers that are stopped to produce drivers license, registration, or insurance information."[15] However, the pattern itself need not be in writing.[16] It is not clear what "guidelines for the pattern" means, short of actually specifying the pattern. As a result, most checkpoint policies simply dictate the pattern. Typically, the pattern is to stop every vehicle, though a pattern of stopping every vehicle approaching the checkpoint in a certain numerical sequence—such as every tenth vehicle—also would be permitted.[17]

The policy *may* include "contingency provisions for altering either pattern" based on traffic conditions, so long as no individual officer is thereby given authority to determine which vehicles are stopped or which drivers are questioned.[18] Other issues that checkpoint policies sometimes address include who may authorize a checkpoint, permitted locations for a checkpoint, how drivers are to be given notice of a checkpoint, and how a checkpoint is to be staffed and operated.

5. Must officers obtain prior authorization from a supervisor before establishing a checkpoint?

Not necessarily. Neither the statute nor the case law requires such prior authorization.[19] Of course, prior authorization may be required under the checkpoint policy or as a matter of a law enforcement agency's general regulations and procedures. And, as discussed later in this bulletin, the absence of supervisory approval may be considered by a court in assessing the reasonableness of a checkpoint.[20]

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checkpoint must be members of the agency that drafted the checkpoint policy).

13. The Governor's Highway Safety Program, part of the Department of Transportation, follows this model. The program's model checkpoint policy and individual checkpoint plan are available at www.ncdot.gov/programs/GHSP/lawenforcement/default.html (last visited August 4, 2010).

14. The checkpoint plans at issue in *State v. Burroughs*, 185 N.C. App. 496 (2007), and *State v. Colbert*, 146 N.C. App. 506 (2001), both of which were submitted as part of the record on appeal and so are publicly available, are of this type.

15. G.S. 20-16.3A(2a), (2).

16. G.S. 20-16.3A(2a).

17. Some checkpoint policies state that there shall be a pattern and that it shall consist *either* of stopping every vehicle *or* of stopping every third—or fifth or tenth—vehicle. Perhaps this constitutes "provide[ing] guidelines for the pattern."

18. G.S. 20-16.3A(2a).

19. State v. Mitchell, 358 N.C. 63, 67–68 (2004) (upholding checkpoint conducted pursuant to "standing permission" from a supervisor); State v. Tarlton, 146 N.C. App. 417, 422 (2001) ("There is no constitutional mandate requiring officers to obtain permission from a supervisory officer before conducting a . . . checkpoint.").

20. *See infra* pp. 11–12.

6. Where may a checkpoint be located?

Under G.S. 20-16.3A(d), the "placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity." Presumably a location is "statistically indicated" if there is reason to believe it has more problems than other locations "with unlicensed or unregistered drivers," impaired drivers, or motor vehicle violations in general.[21] However, there has been little litigation about this issue, perhaps because the statute provides that a violation of its provisions regarding the location of checkpoints "shall not be grounds for a motion to suppress."[22]

Operating a Checkpoint

7. Which officers may operate a checkpoint?

Any officer with territorial and subject-matter jurisdiction may participate in the operation of a checkpoint.[23] So may any officer acting pursuant to a mutual aid agreement.[24] Thus officers from several agencies may participate in a single checkpoint.[25] All the officers need not come from the agency that established or adopted the checkpoint policy.[26]

However, for both legal and practical reasons, it is advisable to have a single agency in charge of the checkpoint. The checkpoint should operate under that agency's checkpoint policy, and a supervisory officer from that agency should be responsible for determining whether, e.g., traffic is backed up so far that it is necessary to deviate from the pattern for stopping vehicles. Furthermore, if many of the officers involved in a checkpoint have primary responsibilities other than the enforcement of the motor vehicle laws, a court may consider that fact when determining the primary programmatic purpose of the checkpoint, as discussed below.[27]

Sometimes, a magistrate also will be present at a checkpoint, typically in a mobile unit that includes an instrument for conducting chemical analyses of drivers' breath and office space for a magistrate.[28] Such arrangements are permitted by statute,[29] though of course the magistrate must remain neutral and independent.

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21. State v. Rose, 170 N.C. App. 284, 291–92 (2005). For example, an area with a large concentration of bars may be "statistically indicated."

22. G.S. 20-16.3A(d). This subsection is discussed *infra* p. 13.

23. For a discussion of territorial and subject-matter jurisdiction, see Robert L. Farb, Arrest, Search, and Investigation in North Carolina 14–17 (3d ed. 2003). If an officer participates in the operation of a checkpoint outside his or her territorial jurisdiction, the defendant may argue that evidence obtained at the checkpoint should be suppressed. There is little support for this position in the case law. *Id.* at 248–49 (collecting and summarizing cases).

24. Mutual aid agreements are authorized by G.S. 160A-288 *et seq. See also* Farb, *supra* note 23, at 18.

25. Thus in *White v. Tippett*, 187 N.C. App. 496 (2007), a state trooper "saw several [Charlotte] police officers conducting a checkpoint, so he pulled over to assist them."

26. State v. Colbert, 146 N.C. App. 506, 515 (2001) (upholding checkpoint involving "eight organizations" and stating that "nothing in the . . . statute or case law" precludes the involvement of officers from agencies other than the one that established or adopted the checkpoint policy).

27. *See* State v. Rose, 170 N.C. App. 284, 290 (2005) (noting that four of the five officers involved in a checkpoint were narcotics officers and treating that as a relevant factor in determining the purpose of the checkpoint).

28. Such mobile units are commonly called "BATmobiles," a partial acronym for Breath Alcohol Testing Mobile Units.

29. G.S. 20-38.4(a)(1) (directing magistrates to conduct initial appearances in impaired driving cases "at locations other than the courthouse when it will expedite the initial appearance" and is practicable).

8. Must officers notify the public of a checkpoint?

Yes, to an extent. By statute, officers must "[a]dvise the public that an authorized checking station is being operated by having, at a minimum, one law enforcement vehicle with its blue light in operation during the conducting of the checking station."[30] No further notification, such as "checkpoint ahead" signs, is required.[31]

Some type of readily observable show of authority is likely a constitutional requirement as well. The Supreme Court has stated that checkpoint stops are less intrusive and frightening than roving-patrol stops in part because "[a]t traffic checkpoints, the motorist can see that other vehicles are being stopped [and] can see visible signs of the officers' authority."[32] The blue light requirement in the statute appears to satisfy this constitutional command.

Whether advance publicity of a checkpoint is required is a different question. Some have argued that such publicity both helps to diminish the apprehension that drivers might otherwise feel upon encountering a checkpoint and serves to deter motor vehicle violations and that such publicity may therefore be desirable or even constitutionally required.[33] There are no North Carolina cases on point.[34] Out-of-state cases generally conclude that advance notice is helpful but not mandatory.[35] The checkpoint statute, of course, imposes no such requirement.

9. How long may a driver be stopped at a checkpoint?

Checkpoint stops must be "brief[]."[36] Unless an officer develops reasonable suspicion justifying further detention, as soon as the officer completes the license and registration check, sobriety screening, or other actions necessitated by the purpose of the checkpoint, the driver should be permitted to depart.[37] Nor should the officer in charge of a checkpoint permit traffic to back up

30. G.S. 20-16.3A(a)(3).

31. State v. Sanders, 112 N.C. App. 477 (1993) (finding "no Fourth Amendment violation" in the operation of a checkpoint, despite the fact that the officers "posted no signs warning the public that a license check was being conducted").

32. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (internal quotation marks and citations omitted).

33. *See generally* LaFave, *supra* note 9, § 10.8(d) (arguing that this issue "has been given insufficient attention in the cases").

34. However, the presence or absence of advance publicity could be a factor in the balancing test discussed *infra* pp. 11–12.

35. *See, e.g.*, Brouhard v. Lee, 125 F.3d 656 (8th Cir. 1997) ("The Motorists further argue that the lack of . . . advance publication of checkpoint locations[] renders the checkpoints unreasonable. We disagree."); United States v. Dillon, 983 F. Supp. 1037 (D. Kan. 1997) ("While advance publicity may be one effective measure to protect the rights of the individual, it is not an absolute requirement."); People v. Banks, 863 P.2d 769 (Cal. 1993) (advance publicity, while desirable, is not a constitutional prerequisite); State v. Bates, 902 P.2d 1060 (N.M. Ct. App. 1995) ("Whether or not there is advance publicity is not dispositive of the reasonableness of a DWI roadblock."); State v. Williams, 909 N.E.2d 667 (Ohio Ct. App. 1 Dist. 2009) ("Although advance publicity is not absolutely required in planning checkpoints . . . [it] serves to give even greater notice of the checkpoint and results in a lesser intrusion of privacy."); State v. Hicks, 55 S.W.3d 515 (Tenn. 2001) ("Although the absence of publicity will not invariably render a checkpoint invalid if other measures satisfy [concerns regarding deterrence and the minimization of surprise and fear], the advanced publicity requirement . . . must nevertheless be regarded as a key aspect of a minimally intrusive roadblock.").

36. *Sitz*, 496 U.S. at 451 ("[T]he measure of the intrusion on motorists stopped briefly at sobriety checkpoints [] is slight.").

37. LaFave, *supra* note 9, § 10.8(a).

extensively. In several out-of-state cases, a lengthy traffic delay resulting from a checkpoint was held to result in an unreasonable seizure.[38]

10. What steps may an officer take to detect motor vehicle violations at a checkpoint?
There is no single laundry list of permitted investigative techniques. Generally, an officer's actions must be "reasonably related . . . to the circumstances which justified" the checkpoint.[39] Therefore, an officer may certainly ask to see a driver's license and registration at a license and registration checkpoint, although it is unclear whether an officer may conduct a computer check regarding an apparently valid driver's license.[40] Likewise, at a sobriety checkpoint, an officer may attempt to detect impaired drivers using nonintrusive techniques like those described in *State v. Colbert*, where officers "observe[d] the driver's eyes for signs of impairment[, e]ngage[d] the driver in conversation to determine if the driver ha[d] an odor of alcohol on his or her breath or if his or her speech pattern indicate[d] the possibility of impairment, [and o]bserve[d] the driver's clothing."[41]

Absent reasonable suspicion, it is not appropriate for an officer to order a driver out of his or her vehicle,[42] order the driver to undergo field sobriety testing, or require the driver to submit to an Alcosensor test.[43] Once reasonable suspicion is established, however, a checkpoint stop effectively becomes a standard traffic stop, with all the investigative authority that accompanies such suspicion-based seizures.[44]

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38. State v. Barcia, 562 A.2d 246 (N.J. Super. Ct. App. Div. 1989) (roadblock that caused a "traffic morass of monumental proportions," leading over a million vehicles to come to a complete stop, some for several hours, unreasonably inconvenienced motorists); Merrett v. Dempsey, 1993 WL 774466 (N.D. Fla. Apr. 2, 1993) (unpublished) (although a roadblock was generally legal, an "unlawful seizure occurred when traffic was heavy, when officers failed to waive enough vehicles through the roadblock to avoid the formation of a long line, when an officer refused to permit a motorist to leave the line that formed, and when—as a result—the motorist was forced to endure an unreasonable delay in his travels").

39. Terry v. Ohio, 392 U.S. 1, 20 (1968).

40. The North Carolina case that bears most closely on this issue suggests that the answer is no. State v. Branch, 162 N.C. App. 707 (2004) (apparently requiring, and finding on the specific facts of the case, "reasonable suspicion to justify investigation of the validity of the license" presented by a driver at a checkpoint), *vacated and remanded on other grounds*, 546 U.S. 931 (2005). However, *Branch* does not discuss the issue in detail, and there is contrary authority from other jurisdictions. *See, e.g.,* Price v. Commonwealth, 483 S.E.2d 496 (Va. Ct. App. 1997) (appearing to allow a computer license *and warrant* check of every driver); Mullinax v. State, 920 S.W.2d 503 (Ark. Ct. App. 1996) (approving checkpoint where, for every fifth vehicle, "officers would call in the driver's license number and the radio operator would inform them if the license was valid"). Certainly a computer check would be reasonable when a driver is unable to produce a facially valid license.

41. 146 N.C. App. 506, 510 (2001).

42. LaFave, *supra* note 9, § 10.8(a).

43. State v. Colbert, 146 N.C. App. 506, 514 (2001) (requiring every driver to take an Alcosensor test "would violate the third prong of the balancing test as set forth in *Sitz*" because it would be unduly intrusive). If an officer develops reasonable suspicion, however, the officer may require a driver to submit to an approved alcohol screening test, subject to certain limitations. G.S. 20-16.3.

44. For a discussion of the law of traffic stops, see my October 27, 2009, post "Traffic Stops" on the North Carolina Criminal Law Blog, http://sogweb.sog.unc.edu/blogs/ncclaw/?p=806.

An interesting issue is whether several individually permitted investigative actions can together become so intrusive that the combination is prohibited. There is some out-of-state authority supporting that idea,[45] but the issue has not been conclusively resolved in North Carolina.[46]

11. May an officer look for evidence of non–motor vehicle crimes?

Generally, no. Unless the driver consents,[47] an officer at a checkpoint may not engage in investigative activity designed to discover evidence of non–motor vehicle crimes rather than to discover motor vehicle violations. Thus, the court of appeals has questioned the constitutionality of a checkpoint where "one officer would . . . ask for the license and registration, while a second officer would scan the inside of the vehicle and walk around it," in an apparent effort to look for "possible criminal activity."[48] However, an officer is not required to ignore evidence of non–motor vehicle crimes that he or she happens to observe in plain view during a checkpoint stop.[49]

12. May an officer stop a driver who legally avoids a checkpoint?

Yes. In *State v. Foreman*,[50] the defendant made a legal left turn away from a checkpoint, just prior to a sign giving notice of the checkpoint. An officer followed the defendant, ultimately arresting her for DWI and other offenses. The court of appeals opined that "a legal left turn at the intersection immediately preceding a posted DWI checkpoint, without more, does not

45. LaFave, *supra* note 9, § 10.8(a) n.67 and accompanying text (citing State v. DeBooy, 996 P.2d 546 (Utah 2000) (checkpoint for licenses, registration, insurance, license plates, impaired driving, etc., became a "pretext to stop all vehicles to search for any and all violations of the law that might be apparent" and was too intrusive); State v. Abell, 70 P.3d 98 (Utah 2003) (checkpoint allowing for eleven different inquiries was unconstitutional under *DeBooy*, notwithstanding thirty-second limit on stops: "we doubt that it is possible to conduct all of the inquiries authorized at this checkpoint in just thirty seconds without investing officers with significant discretion to include or omit items authorized by the checkpoint plan").

46. As noted *supra* p. 2, *Veazey II* appears to have concluded that "enforcement of the State's Motor Vehicle laws" is a permitted purpose for checkpoints, but even if that is so, it does not necessarily follow that an officer may comprehensively assess a single driver's or vehicle's compliance with every imaginable motor vehicle regulation during a single checkpoint stop.

47. If the driver consents, of course, an officer's investigative activity is constrained only by the limits of the consent. *Cf.* State v. Pulliam, 139 N.C. App. 437, 441 (2000) ("[T]he initial check point stop and the driver's consent to the search of his vehicle provided sufficient constitutional justification for [the passenger's] removal from the car.").

48. State v. Rose, 170 N.C. App. 284, 292 (2005). The court's apparent disapproval of conduct that does not alone amount to a Fourth Amendment search suggests that similar activity, such as having a drug dog sniff a vehicle at a checkpoint, also would be improper because it, too, would suggest that the purpose of the checkpoint was not related to motor vehicle offenses. However, if a driver is legally detained at a checkpoint beyond the initial screening—for example, for further investigation of a possible motor vehicle offense—having a drug dog sniff the driver's vehicle appears to be permitted under *State v. Branch*, 177 N.C. App. 104 (2006). *But see, e.g.,* United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990) (use of a drug dog at a license checkpoint was permitted where the duration of the stop was not extended by the use of the dog).

49. City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) ("[P]olice officers [may] act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose.")

50. 351 N.C. 627 (2000).

justify an investigatory stop," suggesting instead that an officer should follow a driver who legally avoids a checkpoint and watch for other evidence of illegal activity.[51] The supreme court disagreed:

> [T]he purpose of any checkpoint . . . would be defeated if drivers had the option to "legally avoid," ignore or circumvent the checkpoint . . . by turning away upon entering the checkpoint's perimeters. Further, it is clear that the perimeters of the checkpoint or "the area in which checks are conducted" would include the area within which drivers may become aware of its presence by observation of any sign marking or giving notice of the checkpoint. Therefore, we hold 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.[52]

The inclusion of the phrase "in light of and pursuant to the totality of the circumstances" in the *Foreman* opinion has resulted in some doubt about whether a legal turn away from a checkpoint alone justifies a stop, or whether there must be other "circumstances" in addition to the turn. In *State v. Bowden*,[53] the court of appeals appeared to suggest the latter, identifying several factors "[i]n addition to the fact of defendant's legal turn immediately prior to the checkpoint" that "combined to allow [an officer] to make a reasonable inquiry to determine whether defendant was trying to evade the checkpoint," including the late hour, the abruptness of the defendant's turn, and the defendant's strange driving after he turned. However, while some of the same factors were present in *Foreman*, the supreme court did not appear to rely on them. The most natural reading of the holding in *Foreman* is that a legal turn away from a checkpoint, from within the checkpoint's perimeters, is alone sufficient justification for a stop.[54]

13. May an officer deviate from the patterns contained in the checkpoint policy?

Yes, pursuant to the policy's "contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated."[55] Typically, such contingency provisions address traffic backups caused by the checkpoint. The contingency provisions may not give any

51. State v. Foreman, 133 N.C. App. 292, 296 (1999), *affirmed as modified*, 351 N.C. 627 (2000).

52. *Foreman*, 351 N.C at 632–33.

53. 177 N.C. App. 718, 724 (2006).

54. A good argument can be made for the view that whether a legal turn away from a checkpoint is sufficient to provide reasonable suspicion depends on the circumstances. For example, if officers establish a checkpoint so that the perimeters of the checkpoint include several major intersections, the fact that a driver turns at one of the intersections may not, by itself, provide reasonable suspicion. But if officers establish a checkpoint on a rural highway, the fact that a driver makes a U-turn may suffice for reasonable suspicion. *Cf., e.g.,* State v. Anaya, 217 P.3d 586 (N.M. 2009) ("The conclusion that a driver is attempting to avoid a checkpoint may be unreasonable in light of the circumstances of the stop—the time of day, the proximity of the turn to the checkpoint, or whether the driver's actions were typical considering the layout of the area and the normal flow of traffic."); Taylor v. State, 549 S.E.2d 536 (Ga. Ct. App. 2001) ("[A]bnormal or unusual actions taken to avoid a roadblock may give an officer a reasonable suspicion of criminal activity even when the evasive action is not illegal. By contrast, completely normal driving, even if it incidentally evades the roadblock, does not justify a *Terry*-type . . . stop.").

55. G.S. 20-16.3A(a)(2a).

individual officer discretion regarding which vehicles will be stopped or which drivers will be required to produce license and registration information.[56] It is not clear how detailed the policy must be in order adequately to restrain officers' discretion. For example, consider a provision that states: "The officer in charge of the checkpoint may let vehicles through without stopping if traffic is backed up extensively." Does that give the officer in charge too much discretion? Must the policy instead provide, for example: "Once twenty or more vehicles are backed up at the checkpoint, officers will let vehicles through without stopping until there is no backup"? No cases shed light on this issue, but the more detailed the provisions, and the less they leave to an officer's judgment, the less vulnerable they are to attack.[57]

Presumably circumstances other than traffic flow also may justify deviations from the patterns. For example, at a checkpoint operated by a small number of officers it may be permissible to let traffic flow freely when an officer is busy writing a citation and therefore unavailable to screen vehicles at the checkpoint.[58] Again, this should be done systematically and consistently to minimize the discretion given to individual officers. If officers deviate from the pattern arbitrarily, the checkpoint may violate the Fourth Amendment.

Litigating a Checkpoint

14. How may a defendant challenge the legality of a checkpoint?

A defendant in a criminal case may challenge the legality of a checkpoint through a motion to suppress evidence obtained as a result of the checkpoint. In district court, such motions are typically made during trial,[59] except in impaired driving cases when the special timing rules of G.S. 20-38.6 apply.[60] In superior court, such motions usually are, and often must be, made before trial.[61]

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56. *Id.*

57. For an interesting discussion of this issue and an illustration of how reasonable minds may differ about how much discretion is constitutionally permissible, see *Commonwealth v. Worthy*, 957 A.2d 720 (Pa. 2008) (reversing lower courts and upholding the constitutionality of a checkpoint despite the discretion given to officers regarding when traffic was excessively congested).

58. *Cf.* State v. Tarlton, 146 N.C. App. 417, 421 (2001) (describing a checkpoint where officers "checked every vehicle in both directions except when they were writing citations," though the propriety of this was not the issue in the case).

59. G.S. 15A-973.

60. G.S. 20-38.6(a) ("The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial."). *See generally* Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after* State v. Fowler *and* State v. Palmer, Admin. of Justice Bulletin 2009/06 (Dec. 2009), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf.

61. G.S. 15A-975 (requiring motions to suppress to be made prior to trial except in specified circumstances).

Occasionally, the constitutionality of a checkpoint is raised in civil contexts, such as in connection with the suspension of a driver's license[62] or in a suit brought for the purpose of testing the legality of checkpoints.[63]

15. How should a court determine the constitutionality of a checkpoint?

It is a two-step process. "In evaluating the constitutionality of a checkpoint, a reviewing court must first determine the primary programmatic purpose of the checkpoint, and if the purpose is valid, must consider whether the checkpoint was reasonable under the balancing test articulated in *Brown v. Texas*."[64] These two steps are discussed immediately below.

16. How should a court determine the purpose of a checkpoint?

As discussed above, officers may establish a checkpoint for the purpose of detecting motor vehicle violations but not, for example, for the purpose of general crime control.[65] Normally the state may establish the purpose of the checkpoint simply by having an officer who participated in planning or operating the checkpoint testify about it. The officer need not be a supervisor.[66] If there is no evidence to contradict the officer's testimony, that alone is sufficient to show the checkpoint's purpose.

However, "where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose" but instead must carry out a close review of that purpose.[67] In such a case, the court must also make findings regarding the purpose of the checkpoint.[68] Evidence sufficient to trigger a searching review may consist, for example, of an officer's conflicting testimony about

62. *See, e.g.,* White v. Tippett, 187 N.C. App. 285 (2007). However, it is questionable whether the legality of a checkpoint may properly be raised in civil revocation proceedings. By statute, hearings regarding such revocations are limited to five enumerated issues, none of which concern the constitutionality of a checkpoint at which a driver may have been stopped. G.S. 20-16.2(d).

63. *See, e.g.,* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

64. State v. Veazey, ____ N.C. App.____ , 689 S.E.2d 530, 533 (2009) (*Veazey II*).

65. Technically, a court must determine the *primary programmatic purpose* of a contested checkpoint. The focus on the primary purpose is important because "a checkpoint with an unlawful primary purpose will not become constitutional when coupled with a lawful secondary purpose." State v. Gabriel, 192 N.C. App. 517, 520 (2008).

66. State v. Burroughs, 185 N.C. App. 496, 498–503 (2007).

67. State v. Veazey, 191 N.C. App. 181, 187 (2008) (*Veazey I*).

68. State v. Jarrett, ____ N.C. App. ____ , ____ , 692 S.E.2d 420, 424 (2010) ("Because variations existed in [the officer's] testimony regarding the primary purpose of the checkpoint, the trial court was required to make findings regarding the actual primary purpose."); *Veazey I*, 191 N.C. App. at 190 (given the conflicting evidence regarding the purpose of the checkpoint, "the trial court was required to make findings regarding the actual primary purpose of the checkpoint and it was required to reach a conclusion regarding whether this purpose was lawful"); *Gabriel*, 192 N.C. App. at 521; State v. Rose, 170 N.C. App. 284, 289–90 (2005).

the purpose of a checkpoint[69] or of evidence that the checkpoint was conducted in a manner suggestive of an improper purpose.[70]

17. How should a court determine whether a checkpoint passes the balancing test?

If a checkpoint has a proper purpose, the next step is to determine whether it appropriately balances "the public's interest and an individual's privacy interest."[71] This balancing requires the consideration of three factors: "(1) the gravity of the 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."[72]

The first factor is straightforward. Binding precedent establishes that detecting motor vehicle violations, including impaired driving, is a matter of substantial public concern.[73]

The second factor asks whether "the checkpoint [is] appropriately tailored to meet" the public purpose the checkpoint is intended to serve.[74] The court of appeals has explained the application of this factor as follows:

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.[75]

The third factor requires the court to consider both the intrusiveness of the checkpoint and the extent to which the checkpoint empowers officers to act in an arbitrary, unconstrained, and discretionary manner. Factors the court of appeals has held are relevant in this analysis are

> the checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by

69. *Jarrett*, ____ N.C. App. at ____ , 692 S.E.2d at 424 (determination of purpose required "[b]ecause variations existed in [the officer's] testimony regarding the primary purpose of the checkpoint"); *Veazey I*, 191 N.C. App. at 189 (officer testified both that the checkpoint was for the purpose of detecting motor vehicle violations and that it was for the purpose of detecting all criminal violations); *Gabriel*, 192 N.C. App. at 521 (officer testified both that the checkpoint was established because of several recent robberies in the area and in order to detect motor vehicle violations).

70. *Rose*, 170 N.C. App. at 290–93 (questioning the purpose of a checkpoint because most of the officers operating the checkpoint were narcotics officers, and when a vehicle was stopped, one of the officers would walk around the vehicle and scan its interior).

71. *Id.* at 293.

72. *Id.* at 293–94 (quoting Illinois v. Lidster, 540 U.S. 419 (2004)).

73. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); State v. Veazey, 191 N.C. App. 181, 191 (2008) (*Veazey I*) (noting that "[b]oth the United States Supreme Court as well as our Courts" have found that license and registration checks and other efforts to ensure compliance with the motor vehicle laws serve an important public interest).

74. State v. Rose, 170 N.C. App. 284, 294 (2005).

75. *Veazey I*, 191 N.C. App. at 191.

> officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint.[76]

A trial judge need not address every listed factor in rendering a decision regarding the legality of a checkpoint.[77] It seems that a motor vehicle checkpoint conducted in a professional manner and in compliance with G.S. 20-16.3A will usually pass the balancing test. In fact, our appellate courts have never invalidated a checkpoint under the balancing test in a published opinion.[78]

18. Must the state introduce a copy of the checkpoint policy?

No. This question generally arises when a defendant has filed a motion to suppress, questioning the legality of a checkpoint.[79] In order to establish compliance with G.S. 20-16.3A, the state must show that the checkpoint was conducted pursuant to a written policy[80] and that the policy provided guidelines for the patterns for stopping vehicles and for requesting license and registration information from drivers. But an officer with knowledge can testify to these facts without ever introducing the policy. At trial, perhaps testimony about the contents of the policy would violate the best evidence rule, but the rules of evidence do not apply at suppression hearings.[81]

Although not required, it may be advisable for the state to introduce a copy of the checkpoint policy. Some judges may be put off by the state's failure to do so, or may question the credibility of an officer who testifies about a policy that the officer cannot produce.[82]

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76. *Id.* at 193. The court emphasized that these are not the only possible relevant factors. Further, it is clear that no single factor is dispositive. For example, as discussed *supra* p. 3, the lack of supervisory approval does not necessarily render a checkpoint unreasonable.

77. State v. Jarrett, ____ N.C. App. ____ , ____ , 692 S.E.2d 420, 425–26 (2010).

78. Nor have they invalidated a checkpoint for any other reason. The court of appeals was plainly skeptical of the checkpoint that gave rise to *Rose* but ultimately remanded the case for further findings.

79. Absent such a motion, it is obvious that the state need not introduce a copy of the policy, as it is not essential to establish the elements of any crime.

80. In *State v. Tarlton*, 146 N.C. App. 417, 422 (2001), the court of appeals wrote that it "disagree[d] with the contention that the State's failure to introduce the [policy] into evidence required the court to find the stop unconstitutional." But that holding was based on the premise that a no written policy was required at all, a premise that is not correct—at least as a statutory matter—under the current version of G.S. 20-16.3A. Thus, while the conclusion reached in *Tarlton* remains correct, the reasoning is suspect.

81. The best evidence rule is N.C. R. Evid. 1002 ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."). Under N.C. R. Evid. 1101(b)(1), however, the rules of evidence do not apply when determining "questions of fact preliminary to admissibility of evidence."

82. When offered at trial, the checkpoint policy is not hearsay because it is not admitted for the truth of the matter asserted. This also obviates any Confrontation Clause issue.

19. Can a driver who is stopped for evading a checkpoint challenge the checkpoint's legality?
Probably not, under *White v. Tippett*.[83] In that case, a driver stopped briefly at a checkpoint, then drove off without permission and was later apprehended. The driver argued that the checkpoint was unconstitutional because it had an impermissible purpose. The court of appeals rejected this argument, stating that challenges to a checkpoint's purpose are appropriate "only where the petitioner or defendant has in fact been stopped at a checkpoint. Here, [the driver] was not stopped at the checkpoint, and as such her argument . . . is irrelevant. . . . [T]he validity of the checkpoint is not at issue here."[84]

It may be worth noting that a different panel of the court of appeals reached a different conclusion in *State v. Haislip*,[85] but the case was vacated by the supreme court based on the inadequacy of the record. Thus, *White* is the only authority on point, though the vacated result in *Haislip* suggests that the issue may not be completely settled.[86]

20. When is suppression of evidence an appropriate remedy?
When the police violate the Fourth Amendment, evidence obtained as a result of the violation is generally suppressed. Thus if a checkpoint is operated in an unconstitutional manner, evidence obtained at the checkpoint will normally be subject to suppression. But what if a checkpoint is operated in compliance with the Fourth Amendment yet in violation of G.S. 20-16.3A? Is suppression then required?

Clearly not, if the violation in question concerns the location of the checkpoint. Subsection (d) of the statute, which constrains the placement of checkpoints, includes a provision that it "shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station."

As to other statutory violations, however, the answer is not clear. There is no statutory exclusionary rule in Chapter 20, in contrast to Chapter 15A.[87] But perhaps a court under its inherent authority could suppress evidence obtained in violation of G.S. 20-16.3A. There is no case law on point, possibly because judges tend to find statutory and constitutional violations in tandem.[88]

The applicability of the exclusionary rule when an officer participates in the operation of a checkpoint outside his or her territorial jurisdiction is discussed above.[89]

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83. 187 N.C. App. 285 (2007).

84. *Id.* at 288.

85. 186 N.C. App. 275 (2007), *vacated and remanded*, 362 N.C. 499 (2008). The court of appeals ruled that a defendant stopped "pursuant to a checkpoint plan" for turning away from a checkpoint, rather than under the totality of the circumstances, "has standing to challenge the constitutionality of the plan by which she was 'snared.'" *Id*. at 280.

86. There are a number of out-of-state cases on point, a majority of which seem to be in accordance with the holding in *White. See, e.g.*, United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002) (driver who made an illegal U-turn in an attempt to avoid a checkpoint "was not seized for Fourth Amendment purposes by the show of police authority by virtue of the checkpoint signs or the checkpoint itself"); Gary v. State, 603 S.E.2d 304 (Ga. Ct. App. 2004) ("Although [the defendant] challenges the legality of the roadblock, we need not consider this contention because the evidence shows that he was not stopped at the roadblock" but, rather, was stopped for evading it); State v. Skiles, 938 S.W.2d 447, 454 (Tex. Ct. Crim. App. 1997) (citing cases from several states, all of which reach the same conclusion as *White*).

87. G.S. 15A-974(2).

88. For a detailed discussion of this issue, see Shea Denning's May 4, 2009, post "Stick to the Plan (er, Policy)," on the North Carolina Criminal Law Blog, http://sogweb.sog.unc.edu/blogs/ncclaw/?p=326.

89. *Supra* note 23.

Conclusion

Checkpoints are controversial. Hopefully this bulletin will help to clarify which controversies remain and which have been resolved.

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