

Motions to Suppress Evidence

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Is the Motion Adequate?

Motion: “The defendant moves to suppress all evidence regarding the defendant’s statement to Officer Smith on 2/18/17. The statement was obtained in violation of the defendant’s Miranda rights because his request for counsel during custodial interrogation was ignored.”

Affidavit: Alleges that the defendant asked for a lawyer during custodial interrogation, but the request was ignored.

Is the Motion Adequate?

1. Yes
2. No



Response	Percentage
Yes	0%
No	0%

Is the Motion Adequate?

As grounds for this Motion, the Defendant shows the Court the following:

1. On July 5, 2009, the Defendant was charged with Driving While Impaired.
2. The Defendant was stopped at an improperly administered checking station.
3. Therefore, the charging officer lacked reasonable suspicion to initiate the traffic stop.
4. Furthermore, the charging officer lacked probable cause to charge a traffic violation and/or arrest the defendant.

Is the Motion Adequate?

1. Yes
2. No



Is the Motion Timely?

In a murder case, the State produces all required discovery material to the defendant at least three months before trial. The morning that trial is to begin, the defendant files a motion to suppress an eyewitness identification, together with an affidavit from counsel asserting that the identification procedure was unduly suggestive.

Is the Motion Timely?

- 1. Yes
- 2. No

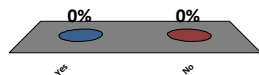


Is the Motion Timely?

Two months before trial, the State provides the defendant with voluminous discovery, including evidence that the defendant confessed, and with a notice of intent to introduce evidence of the confession. A week before trial, the defendant files a motion arguing that the confession was obtained in violation of Miranda.

Is the Motion Timely?

- 1. Yes
- 2. No



Discuss!

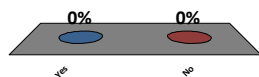
Imagine that you are a defense attorney preparing a motion to suppress evidence. Assume that the special timing rules in G.S. 15A-975 don't apply. How do you decide whether to file the motion months before trial, a week before, or hours before? What factors influence your decision?

Proper Renewal?

Judge A conducts a hearing on a motion to suppress at an administrative setting several months before trial, and denies the motion. Immediately before trial, the defendant asks Judge B, who will be presiding over the trial, to suppress the evidence, based on additional case law that the existed at the time of the administrative setting but that defense counsel did not locate until recently.

Proper Renewal?

- 1. Yes
- 2. No



Subject to Summary Denial?

A female defendant files a motion to suppress, arguing that the officer who stopped and then frisked her, discovering drugs, was male, and that a frisk by a male officer of a female suspect is an inherently unreasonable search under the Fourth Amendment. The motion is supported by an affidavit from defense counsel.

Subject to Summary Denial?

- 1. Yes
- 2. No



Subject to Summary Denial?

A pro se armed robbery defendant files a motion to suppress that says only: "The police lineup violated my rights and should be suppressed." The handwritten affidavit indicates that the clerk of the convenience store that the defendant allegedly robbed picked the defendant out of a photo array, and that the defendant believes the array was suggestive.

Subject to Summary Denial?

- 1. Yes
- 2. No



Discuss!

Under what circumstances, if any, would you choose to hold a hearing on a motion that is subject to summary denial? What would motivate you to do that?

Timely Ruling?

The judge conducts a hearing on a motion to suppress on Tuesday in Wake County, takes the matter under advisement, and rules on Wednesday, still in Wake County.

Timely Ruling?

- 1. Yes
- 2. No

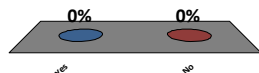


Timely Ruling?

A defendant moves to suppress evidence seized during a search incident to arrest, arguing that the police lacked probable cause to arrest him. The judge conducts a hearing in the morning, immediately prior to trial, but defers ruling until that afternoon, after the state has presented trial testimony from the arresting officer. The judge thought that the officer's trial testimony might contain additional details about the basis for the arrest.

Timely Ruling?

- 1. Yes
- 2. No




Findings Required?

A witness identified the defendant in a photo lineup. The defendant moves to suppress the identification, arguing that the lineup was suggestive.

- The eyewitness testifies that he was shown more than thirty photographs and that after he selected the defendant's photograph, the officer told him that the victim had selected the same picture.
- The officer testifies that he showed the witness eight photographs and that he did not make any statements about the victim's selection.

Findings Required?

1. Yes
2. No



Response	Percentage
Yes	0%
No	0%

Proper Ruling?

The defendant is charged with a drug trafficking crime. He moves to suppress the drugs. At the suppression hearing, he testifies that the suitcase in which the drugs were found belongs to him. The motion is ultimately denied, and at trial, the state seeks to introduce the transcript of the hearing to prove that the drugs belonged to the defendant. The judge rules that the transcript may be admitted.

Proper Ruling?

- 1. Yes
- 2. No



Motions to Suppress Evidence

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Motions to Suppress Evidence in Superior Court

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1) Purpose

- a) A motion to suppress is the exclusive way to seek the exclusion of illegally obtained evidence. See G.S. 15A-979(d), G.S. 15A-974.
- b) Evidence must be suppressed if:
 - i) Exclusion is required by the United States Constitution. See G.S. 15A-974(1).
 - (1) The Fourth Amendment exclusionary rule applies in state court, *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment exclusionary rule applies in state criminal proceedings), as do several other exclusionary rules based in the United States Constitution. However, the United States Supreme Court has recognized an increasing number of exceptions to the exclusionary rule, most of which apply when an officer has acted in good faith. See, e.g., *Davis v. United States*, 564 U.S. 229 (2011) (exclusionary rule did not apply when officer acted in good faith reliance on case law that was binding at the time of the search); *Herring v. United States*, 555 U.S. 135 (2009) (exclusionary rule did not apply when an officer arrested and searched the defendant based on an arrest warrant that turned out to have been recalled; the error was an isolated recordkeeping mistake that did not implicate the purposes of the exclusionary rule); *United States v. Leon*, 468 U.S. 897 (1984) (exclusionary rule did not apply when officer acted in good faith reliance on a search warrant).
 - ii) Exclusion is required by the North Carolina Constitution. See G.S. 15A-974(1); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment exclusionary rule applies in state criminal proceedings).
 - (1) Although it is worded differently from the Fourth Amendment, the general warrants clause of the state constitution, N.C. Const. Art. I, sec. 20, provides “similar,” *State v. Styles*, 362 N.C. 412 (2008), or “parallel,” *In re Stumbo*, 357 N.C. 279 (2003), protections to citizens. Furthermore, North Carolina’s appellate courts have not recognized good faith exceptions to the exclusionary rule under the state constitution, making the state constitution in some way a more robust source for the exclusion of evidence. *State v. Carter*, 322 N.C. 709 (1988) (declining to follow *Leon* and holding that suppression is required to preserve “the integrity of the judicial branch of government”).
 - iii) The evidence was obtained as a result of a substantial violation of the defendant’s statutory rights under Chapter 15A. See G.S. 15A-974(2).
 - (1) Whether a violation is “substantial” depends on the factors set forth in G.S. 15A-974(2), including the “extent of the deviation from lawful conduct” and the “extent to which the violation was willful.” *Id.*

- (2) Even a substantial statutory violation does not warrant suppression if the officer “acted under the objectively reasonable, good faith belief that the actions were lawful.” *Id.*
- iv) Suppression may sometimes be an appropriate remedy for an officer’s nonconstitutional violation of a law other than those located in Chapter 15A. *See, e.g., State v. White*, 232 N.C. App. 296 (2014) (ruling that suppression was an appropriate remedy where officers conducted a motor vehicle checkpoint without a written checkpoint policy as required by G.S. 20-16.3A).
 - c) For suppression to be appropriate, the illegality must have violated the defendant’s rights, not the rights of a third party. *See, e.g. State v. Sanders*, 317 N.C. 602 (1986).
 - d) Example issues that may be litigated through a motion to suppress:
 - i) Whether a search warrant was supported by probable cause.
 - ii) Whether an investigative stop was conducted without reasonable suspicion.
 - iii) Whether a lineup was conducted in a suggestive manner.
 - iv) Whether a defendant’s confession was involuntary, or obtained in violation of the defendant’s *Miranda* or Sixth Amendment rights.
- 2) Contents
- a) Must be in writing. *See generally* G.S. 15A-977(a).
 - b) Must be served on the State. *See id.*
 - c) Must state the legal grounds on which it is made. *See id.* Stating only general objections to how the evidence was obtained is insufficient. *See State v. Drakeford*, 37 N.C. App. 340 (1978) (defendant made only “general objections” to the admission of evidence seized during a search of a motel room; his failure to make a timely motion to suppress in “suitable form” was properly fatal to his suppression argument).
 - d) Must be “accompanied by an affidavit containing facts supporting the motion.” 15A-977(a).
 - i) The affidavit need not be from the defendant, or even from a witness with personal knowledge – it may be from defense counsel, based upon information and belief. *See* G.S. 15A-977; *State v. Chance*, 130 N.C. App. 107 (1998).
 - ii) The affidavit must contain facts, not merely conclusions such as “the discovery materials show that the confession was coerced” or “based on information and belief, the search exceeded the scope of the warrant.” *See State v. Phillips*, 132 N.C. App. 765 (1999).
 - e) A motion properly made at trial may be less formal. (See section 3, below, for a discussion of the circumstances under which a motion to suppress may properly be made at trial.)
 - i) No affidavit is required. *See State v. Roper*, 328 N.C. 337 (1991).
 - ii) The motion need not be in writing. *See* G.S. 15A-977(e).
- 3) Timing
- a) A motion to suppress may be made only after the superior court has acquired jurisdiction. G.S. 15A-972.

- b) Generally, a motion to suppress must be made prior to trial, G.S. 15A-975(a) (“only prior to trial”), and may be made at any time before trial, G.S. 15A-976(a) (“any time prior to trial”), though both principles are subject to certain exceptions.
 - i) A motion to suppress may be made during trial when the defendant did not have a reasonable opportunity to make the motion before trial. G.S. 15A-975(a). This exception might apply, for example, if the State were to provide additional discovery to a defendant after trial began, and the new discovery (a) contained evidence that itself was subject to suppression or (b) provided a previously unknown basis for seeking the suppression of other evidence.
 - ii) A motion to suppress may also be made during trial under the special timing rules described in subsection (c), below.
 - iii) A pretrial motion may be renewed during trial under the circumstances described in subsection (d), below.
- c) Certain motions to suppress are subject to special timing rules.
 - i) Rules apply to three types of cases, listed in G.S. 15A-975(b):
 - (1) Evidence of “a statement made by a defendant,”
 - (2) Evidence obtained during a warrantless search, and
 - (3) Evidence obtained during a warrant search at which the defendant was not present
 - ii) In such cases, the State may choose to give the defendant advance notice of its intent to use the evidence in question. *Id.*
 - (1) Notice must be given at least 20 working days before trial. *Id.*
 - (2) Merely providing the evidence in discovery is not sufficient. *State v. Fisher*, 321 N.C. 19 (1987). *But see State v. Reavis*, 207 N.C. App. 218 (2010) (stating that the defendant’s motion to suppress his statement was not timely because he made “no argument that the State failed to disclose the evidence of his interview or statement in a timely manner”).
 - (3) Form AOC-CR-902M, *Notice of Intention to Introduce Evidence at Trial*, may be used for giving notice.
 - iii) If the State gives proper notice, the defendant must file any motion to suppress within 10 working days of the receipt of the notice. G.S. 15A-976(b).
 - iv) If the State fails to give proper notice of its intent to use the evidence in question, the defendant is permitted to move to suppress the evidence at any time, including during trial. G.S. 15A-975(b).
 - (1) However, if the case is a misdemeanor appeal, the defendant must move to suppress prior to trial even if the State fails to give notice of its intent to use this type of evidence; presumably, the defendant is aware of the evidence as a result of the district court

proceedings. See G.S. 15A-975(c) & commentary; *State v. Simmons*, 59 N.C. App. 287 (1982).¹

- d) Renewal of pretrial motion during trial
 - i) A motion to suppress made and denied before trial may be renewed during trial if:
 - (1) The defendant can show that “additional pertinent facts have been discovered,” G.S. 15A-975(c), but note that corroborative evidence does not constitute “additional” facts, *State v. Bracey*, 303 N.C. 112 (1981), and
 - (2) The defendant could not reasonably have discovered them before the previous ruling, *see id.*, and
 - (3) The motion could not have been renewed before trial because of the timing of the discovery of the new facts, *see id.*
 - ii) In order properly to preserve his or her right to appeal based on a motion to suppress made and denied before trial, a defendant must object to the evidence at issue when it is introduced at trial. *State v. Powell*, ___ N.C. App. ___, 800 S.E.2d 745 (2017); *State v. Ashworth*, ___ N.C. App. ___, 790 S.E.2d 173 (2016).
- e) Some jurisdictions have local rules or practices regarding the timing of motions to suppress, though whether such rules have any force if they are *more* restrictive than the General Statutes is open to doubt.

4) Answer

- a) State “may” answer, and must serve the answer if it does. See G.S. 15A-977(a).

5) Consideration of motion

- a) Motion may be considered “before trial, on the date set for arraignment, on the date set for trial before the jury is impaneled, or during trial.” G.S. 15A-976(c).
- b) At least when the motion appears to be substantial, the better practice is to consider the motion pretrial, so that the State may appeal any adverse ruling. See G.S. 15A-976, official commentary; *see also generally* section 9, Timing of ruling, *infra*.

6) Summary grant

- a) Mandatory if the motion is in proper form, alleges grounds that require suppression, and the State concedes the allegations. See G.S. 15A-977(b)(1).
- b) Mandatory if the State stipulates that it will not use the evidence. See G.S. 15A-977(b)(2); *State v. Wilson*, 225 N.C. App. 246 (2013) (“Given the State’s stipulation that the blood evidence would not be offered in evidence against defendant, the trial court was required to summarily grant defendant’s motion to suppress the blood evidence.”).

¹ It appears that the defendant may move to suppress at any time prior to trial in superior court, unless the state gives notice of its intent to use the evidence at least 20 days before trial.

7) Summary denial

- a) A motion may be summarily denied if it does not meet the content requirements set forth in section (2) of this outline, above.
 - i) Summary denial is proper if no affidavit, or an inadequate affidavit, is filed. *State v. Harris*, 71 N.C. App. 141 (1984) (such a motion “may . . . be summarily dismissed”).
 - ii) Summary denial is also proper if the motion “does not allege a legal basis for the motion.” G.S. 15A-977(c)(1). This appears to apply to motions that are specific but legally defective, e.g., a motion seeking suppression of a confession on the basis that it was made on a Sunday.
 - iii) Summary denial is also proper if the affidavit “does not as a matter of law support the ground alleged.” G.S. 15A-977(c)(2). This appears to apply to motions that cite a proper legal basis for suppression but lack factual support, even taking as true the facts alleged in the affidavit. For example, in *State v. Williams*, __ N.C. App. __, 804 S.E.2d 570 (2017), a defendant moved to suppress evidence obtained after an investigative stop that the defendant contended was not supported by reasonable suspicion. However, the motion was properly summarily denied where the recitation of events in the defendant’s own affidavit “clearly laid out alleged facts giving rise to a reasonable suspicion.”
- b) Untimely motions may also be summarily denied. *See, e.g., State v. Smith*, __ N.C. App. __, 789 S.E.2d 873 (2016) (affirming a superior court judge’s summary denial of a defendant’s motion to suppress; the evidence in question was obtained using a search warrant that was executed outside the defendant’s presence and so was subject to the special timing rules in G.S. 975(b) and G.S. 15A-976(b); the State gave notice of its intent to use the evidence more than five months before trial but the defendant did not file his motion to suppress until the eve of trial); *State v. Dettner*, 298 N.C. 604 (1979); *State v. Austin*, 111 N.C. App. 590 (1993).
- c) Summary denial is “encouraged” when it is proper. *State v. Williams*, __ N.C. App. __, 804 S.E.2d 570 (2017). However, a judge also “has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if [the judge] chooses to do so.” *State v. O’Connor*, 222 N.C. App. 235 (2012); *State v. Harvey*, 78 N.C. App. 235 (1985).
- d) When a motion to suppress is denied summarily, the judge is not required to make findings of fact. *State v. Williams*, __ N.C. App. __, 804 S.E.2d 570 (2017).

8) Hearing

- a) If the motion cannot be resolved summarily, a hearing is required. G.S. 15A-977(d).
- b) The jury may not be present. G.S. 15A-977(e).
- c) The burden initially is on the defendant to show that the motion to suppress is timely and in proper form. *See, e.g., State v. Jones*, 157 N.C. App. 110 (2003).

- d) Once the defendant has done so, the burden shifts to the State to establish, by a preponderance of the evidence, that the challenged evidence is admissible. *See, e.g., State v. Breeden*, 306 N.C. 533 (1982); *State v. Barnes*, 158 N.C. App. 606 (2003).²
- e) Both sides may present evidence. *See* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* 59-60 & n. 218 (6th ed. 2004).
 - i) All witnesses, including the defendant if he or she testifies, must be under oath. *See* G.S. 15A-977(d).
 - ii) If the defendant testifies, he or she is not subject to cross-examination “as to other issues in the case.” N.C. R. Evid. 104(d).
 - iii) The defendant’s affidavit is not evidence. *State v. Williams*, __ N.C. App. __, 804 S.E.2d 570 (2017). Therefore, for the information in the affidavit to be considered, the defendant must call a witness to testify to that information.
- f) Because the burden of proof is on the State, the State should present evidence first. *State v. Williams*, 225 N.C. App. 636 (2013) (stating that “[s]ince the State has the burden of proof, it should proceed with presenting evidence to the court,” though finding no reversible error where, after “some confusion . . . counsel for defendant volunteered to” present evidence first). *See also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence*, 63 & n. 216 (7th ed. 2011) (similarly noting that “it is not necessarily prejudicial error to require the defense to introduce evidence first” and collecting cases); Wayne R. LaFave, *Search and Seizure* § 11.2(d) (4th ed. 2004) (noting that “[t]he order of [the] presentation [of evidence] will be governed largely by the law in the jurisdiction as to who has the burden of going forward.”).

² There is a plausible argument to be made that, when the motion to suppress challenges a search that was conducted pursuant to a search warrant, the burden remains with the defendant because a presumption of validity attaches to the warrant. This is the rule in some other jurisdictions, *see generally* Wayne R. LaFave, *Search and Seizure* § 11.2(b) (4th ed. 2004) (“[M]ost states follow the rule . . . utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant, the burden of proof is on the prosecution.”), and there are a few North Carolina cases that lend a modicum of support to the argument, *see State v. Cooke*, 306 N.C. 132 (1982) (holding that the State bears the burden of establishing the validity of a *warrantless* search because it must show “how the [warrantless search] was exempted from the general constitutional demand for a warrant”; this reasoning may suggest that a different allocation of burdens is appropriate in cases involving a warrant); *State v. Walker*, 70 N.C. App. 403 (1984) (“A search warrant is presumed to be valid unless irregularity appears on its face. . . . If defendant had evidence to rebut the presumption of validity of the warrant, it was his obligation to go forward with his evidence.”). However, the greater weight of North Carolina authority suggests that the burden falls on the State even when the search was conducted with a warrant. *See, e.g., State v. Hicks*, 60 N.C. App. 116 (1982) (stating, in a case involving a search warrant, that at a “hearing [on a motion to suppress,] the burden of proof is on the State”); *State v. Gibson*, 32 N.C. App. 584 (1977) (holding, in a case involving a warrant, that the affidavit requirement “does no more than shift to the defendant the burden of going forward with evidence when the State’s warrants appear to be regular. The State still has the burden of proving that the evidence was lawfully obtained.”).

- g) The rules of evidence do not apply at the hearing, except the rules relating to privileges. See N.C. R. Evid. 104(a), 1101(b); *State v. Ingram*, 242 N.C. App. 173 (2015) (rejecting the argument that a trial judge improperly considered hearsay evidence at a suppression hearing and noting “that Rules 104(a) and 1101(b)(1) of the North Carolina Evidence Code state explicitly the rules of evidence do not apply in suppression hearings”).

9) Timing of ruling

- a) The judge may rule at the conclusion of the hearing, or may withhold a ruling until a later time. See *State v. Love*, 131 N.C. App. 350 (1998).
- b) The better practice normally is to rule at the conclusion of the hearing.
 - i) Avoids any risk of entering an improper out-of-term, out-of-session, out-of-county order.
 - ii) Delaying a ruling creates uncertainty for the parties.
 - iii) Delaying a ruling until the trial has begun deprives the State of its right to appeal an adverse ruling. See G.S. 15A-976, official commentary.
- c) Findings of fact and conclusions of law need not be made at the same time as the ruling. *State v. Wilson*, 225 N.C. App. 498 (2013) (“Defendant appears to contend that the trial court should make findings immediately after the suppression hearing. However, the statute does not require the trial court to do so.”); *State v. Lippard*, 152 N.C. App. 564 (2002) (although “the trial court’s findings of fact and conclusions of law were entered long after the suppression hearing” and the judge’s ruling on the motion, “a delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error”; the statute does not require that the findings be made at the time of the ruling, and the purpose of the findings requirement – to facilitate appellate review – “is not thwarted by the subsequent order”). In fact, so long as the ruling itself is made in a timely manner, it is not reversible error to enter a subsequent written order containing findings of fact and conclusions of law even after a session of court has concluded, *State v. Hicks*, 79 N.C. App. 599 (1986) (so holding, citing *State v. Horner*, 310 N.C. 274 (1984), and noting that “since written findings and conclusions are required to facilitate appellate review, that purpose is not hampered by an order entered subsequent to trial,” or even out of session), or even after the State has appealed an adverse ruling, *State v. Walker*, __ N.C. App. __, 806 S.E.2d 326 (2017) (superior court judge granted a defendant’s motion to suppress orally at the conclusion of a suppression hearing, and immediately entered a brief written order that reflected the ruling and that did not contain findings of fact and conclusions of law; the State appealed one week later; about a month after that, the judge entered a written order with finding of fact and conclusions of law; the court of appeals determined that the judge did not lack jurisdiction to enter the order as it was not a “new order affecting the merits, but, rather, [was] a chronicle of the findings and conclusions decided at the hearing”).

10) Contents of ruling

- a) Generally, an order resolving a motion to suppress should contain findings of fact and conclusions of law. See G.S. 15A-977(f); G.S. 15A-974(b) (“The court, in making a determination

whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record . . .”).

- b) However, explicit findings of fact are not required when there is no material conflict in the evidence. In that circumstance, findings will be implied from the evidence. *See, e.g., State v. Bartlett*, 368 N.C. 309 (2016) (“only a material conflict in the evidence . . . must be resolved by explicit factual findings”); *State v. Munsey*, 342 N.C. 882 (1996); *State v. Norman*, 100 N.C. App. 660 (1990).
 - i) A material conflict is “one that potentially affects the outcome of the suppression motion.” *State v. Bartlett*, 368 N.C. 309 (2016).
 - ii) Findings of fact should resolve all the material conflicts, i.e., should address all the issues necessary to determine the matter before the court correctly. *State v. Thompson*, ___ N.C. App. ___, __ S.E.2d ___, 2018 WL 256241 (Jan. 2, 2018) (remanding for further findings of fact where defendant alleged that he was improperly seized but trial court’s findings of fact did “not resolve the question of whether the law enforcement officers returned defendant’s license after examining it, or instead retained it”); *State v. Ingram*, 242 N.C. App. 173 (2015) (remanding for further findings of fact where a judge granted a motion to suppress a statement made by an injured defendant without determining the defendant’s “mental condition” and “understanding” and “failed to resolve the material conflict in evidence as to whether police coercion occurred, which is a material consideration in a voluntary analysis”).
- c) Conclusions of law, i.e., an explanation of the reason for the court’s ruling, are always required. *See, e.g., State v. Williams*, 195 N.C. App. 554 (2009); *State v. Baker*, 208 N.C. App. 376 (2010).
 - i) The explanation need not be lengthy but simply stating the ultimate result, such as that an officer “was justified in stopping” the defendant’s vehicle is not enough. *State v. Baskins*, ___ N.C. App. ___, 786 S.E.2d 94 (2016) (conclusions of law, as opposed to a “statement of law,” require the application of law to facts; in this case, the ruling was deficient because it did “not specifically state that the stop was justified based upon any specific violation of a traffic law”).
- d) Findings and conclusions may be oral or written, though the latter is the better practice. *State v. Bartlett*, 368 N.C. 309 (2016) (stating that “[a] written determination setting forth the findings and conclusions is not necessary,” and that a trial court may “trial court to make these findings either orally or in writing”; but stating that a written order is a “better practice”); *State v. Oates*, 366 N.C. 264 (2012) (“While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing.”).
- e) If the court rules that tangible property was taken from the defendant during an illegal search, the court must order the property returned to the defendant at the conclusion of the trial and any appeal, unless the property is contraband “or otherwise subject to lawful retention by the State or another.” G.S. 15A-979(a).

11) Appeals

a) By the State

i) A pretrial order granting a motion to suppress is appealable “prior to trial” to the appellate court that would have jurisdiction over the appeal if the defendant were convicted of the most serious charge and received the maximum sentence. G.S. 15A-979(c).

(1) In other words, such appeals are to the state supreme court in capital cases; otherwise, they are to the court of appeals. *See* G.S. 7A-27.

(2) “Prior to trial” means before jeopardy attaches, *see* G.S. 15A-979, official commentary, which means before the jury is empaneled and sworn, *see State v. Brunson*, 327 N.C. 244 (1990).

ii) In order to take such an appeal, the State must certify to the superior court that “the appeal is not taken for the purpose of delay and that the evidence is essential to the case.” G.S. 15A-979(c).

(1) The certificate must be filed prior to the certification of the record on appeal. If it is not, the State’s appeal will be dismissed. *See State v. Blandin*, 60 N.C. App. 271 (1983).

b) By the defendant

i) The defendant may appeal an order denying a motion to suppress, whether the defendant pleads guilty or is convicted at trial. *See* G.S. 15A-979(b).

ii) The appeal must wait until after final judgment. *See id.*

iii) If the defendant pleads guilty, he must notify the State and the court that he intends to appeal “before plea negotiations are finalized.” *State v. Reynolds*, 298 N.C. 380 (1979) (reasoning that a guilty plea generally “bars the later assertion of constitutional challenges”; while North Carolina, by statute, allows the appeal of motions to suppress after a guilty plea, it is fair to require that the defendant “give notice of his intention [to appeal] to the prosecutor and the court,” lest the prosecution be “trapped” into agreeing to a plea, “and then have the defendant contest that bargain”).

(1) It is probably sufficient if the defendant provides notice prior to the court’s acceptance of his guilty plea. *See State v. Cottrell*, 234 N.C. App. 736 (2014) (ruling that the defendant must give notice “prior to finalization of the guilty plea”); *State v. Parker*, 183 N.C. App. 1 (2007) (“[D]efendant preserved his right to appeal from the trial court’s denial of the motion to suppress by expressly communicating his intent to appeal the denial to the trial court at the time he pleaded guilty.”); *State v. Christie*, 96 N.C. App. 178 (1989) (notice of intent to appeal, provided in court at the time of entry of plea, was sufficient).

(2) Rather general statements have been deemed sufficient notice. *State v. Brown*, 217 N.C. App. 566 (2011) (in a case where the defendant pled guilty mid-trial, it was sufficient for defense counsel to state the defendant’s desire to “preserve any appellate issues that may stem from the motions in this trial”).

(3) It is unclear whether the defendant’s notice must be in writing. *Compare State v. Harris*, 243 N.C. App. 137 (2015) (dismissing a defendant’s appeal of his motion to suppress

because he had failed to “file” notice of intent to appeal), *with State v. Christie*, 96 N.C. App. 178 (1989) (denying a motion to dismiss a defendant’s appeal because the defendant provided sufficient “verbal notice [of his intent to appeal]. . . in open court”), *and State v. Washington*, 228 N.C. App. 139 (2013) (unpublished) (finding that a defendant “provided proper notice of his intent to appeal” when his attorney mentioned the defendant’s intention in open court).

- iv) If the defendant proceeds to trial, no special notice is required. *Cf. State v. McDougald*, 181 N.C. App. 41 (2007), *rev’d in part*, 362 N.C. 224 (2008) (the court of appeals ruled that the defendant, who was convicted at trial of one count and subsequently pled guilty to two related counts, could not appeal the denial of his suppression motion because, *inter alia*, he failed to notify the State and the court in connection with his guilty plea that he intended to appeal the ruling; the state supreme court reversed, concluding that the procedural grounds on which the court of appeals relied were meritless; the State confessed error before the supreme court); *State v. Grogan*, 40 N.C. App. 371 (1979) (considering appeal of motion to suppress after defendant was convicted at trial; no indication that the defendant had given any notice other than a standard notice of appeal).
 - (1) As noted above, the defendant must also renew his objection to the evidence when it is introduced, or he will be deemed by the appellate courts to have waived his motion to suppress. *See, e.g., State v. Golphin*, 352 N.C. 364 (2000).

12) Special procedural issues

- a) **Use of suppressed evidence for impeachment.** Depending on the basis for suppression, some suppressed evidence may not be used for any purpose, while other suppressed evidence may be used to impeach the defendant if he testifies. *Compare, e.g., Mincey v. Arizona*, 437 U.S. 385 (1978) (involuntary statements may not be used for any purpose), *with, e.g., Kansas v. Venstris*, 556 U.S. 586 (2009) (statements obtained in violation of the Sixth Amendment right to counsel may be used for impeachment, so long as they are voluntary); *United States v. Havens*, 446 U.S. 620 (1980) (evidence suppressed in response to a Fourth Amendment violation may be used for impeachment; in this case, a t-shirt with interior pockets used for drug smuggling, which was illegally seized from the defendant, was properly introduced to impeach the defendant’s denial of involvement in making such a shirt). *Harris v. New York*, 401 U.S. 222 (1971) (same, as to statements obtained in violation of *Miranda*).
- b) **Use of defendant’s suppression hearing testimony at trial.** If the defendant testifies at a hearing on a motion to suppress, the State may not use that testimony in its case in chief at trial, but may use it to impeach the defendant if he elects to testify. *See Simmons v. United States*, 390 U.S. 377 (1968); *State v. Bracey*, 303 N.C. 112 (1981). Remember that if the defendant testifies at a hearing on a motion to suppress, cross-examination should be limited to matters relevant to the motion, not other issues in the case. Rule 104(a).
- c) **Effect of district court proceedings in misdemeanor appeals.** Neither the denial of a motion to suppress in district court, nor failure to file such a motion, nor even a defendant’s guilty plea in

district court, precludes a defendant from filing a motion to suppress in superior court. See 15A-953 (motions in superior court not “prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court”); G.S. 15A-979, official commentary (guilty plea in district court does not preclude motion to suppress in superior court).

- d) **Appeals of “preliminary determinations” by district court judges in DWI cases.** In DWI cases in district court, defendants must move to suppress before trial. If the district court judge is inclined to grant the motion, he must make a “preliminary determination” of the motion, which the State may appeal to superior court. G.S. 20-38.6, 20-38.7. Review is *de novo* if there are disputed facts.
- e) **One judge overruling another.** When one judge rules on a motion to suppress pretrial, another judge, presiding over the trial, may not reverse that ruling unless additional facts come to light that bear on the disposition of the motion. See generally Michael Crowell, *One Trial Judge Overruling Another*, Administration of Justice Bulletin 2008/02.
- f) **Franks hearings.** A defendant may assert that a search warrant was invalid because the applicant gave false information to the issuing official. See generally *Franks v. Delaware*, 438 U.S. 154 (1978); G.S. 15A-978. Although it is not clear from the statute, before a hearing is required on such a claim, the defendant must make a substantial preliminary showing that the application contained intentional or reckless material falsehoods. See, e.g., *State v. Pelham*, 164 N.C. App. 70 (2004).

Article 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

As used in this Article the following definitions apply unless the context clearly requires otherwise:

- (1) Evidence. - When referring to matter in the possession of or available to a prosecutor, any tangible property or potential testimony which may be offered in evidence in a criminal action.
- (2) Potential Testimony. - Information or factual knowledge of a person who is or may be available as a witness. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant who is aggrieved may move to suppress evidence in accordance with the terms of this Article. (1973, c. 1286, s. 1.)

§ 15A-973. Motion to suppress evidence in district court.

In misdemeanor prosecutions in the district court, motions to suppress evidence should ordinarily be made during the course of the trial. A motion to suppress may be made prior to trial. With the consent of the prosecutor and the district court judge, the motion may be heard prior to trial. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

(a) Upon timely motion, evidence must be suppressed if:

- (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
- (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
 - a. The importance of the particular interest violated;
 - b. The extent of the deviation from lawful conduct;
 - c. The extent to which the violation was willful;
 - d. The extent to which exclusion will tend to deter future violations of this Chapter.

Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.

(b) The court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f). (1973, c. 1286, s. 1; 2011-6, s. 1.)

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

(a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

- (1) Evidence of a statement made by a defendant;
- (2) Evidence obtained by virtue of a search without a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the notice required by this section. (1973, c. 1286, s. 1.)

§ 15A-976. Timing of pretrial suppression motion and hearing.

(a) A motion to suppress evidence in superior court may be made at any time prior to trial except as provided in subsection (b).

(b) If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State.

(c) When the motion is made before trial, the judge in his discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial. He may rule on the motion before trial or reserve judgment until trial. (1973, c. 1286, s. 1.)

§ 15A-977. Motion to suppress evidence in superior court; procedure.

(a) A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated. The State may file an answer denying or admitting any of the allegations. A copy of the answer must be served on the defendant's counsel, or on the defendant if he has no counsel.

(b) The judge must summarily grant the motion to suppress evidence if:

- (1) The motion complies with the requirements of subsection (a), it states grounds which require exclusion of the evidence, and the State concedes the truth of allegations of fact which support the motion; or
- (2) The State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(c) The judge may summarily deny the motion to suppress evidence if:

- (1) The motion does not allege a legal basis for the motion; or
- (2) The affidavit does not as a matter of law support the ground alleged.

(d) If the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. Testimony at the hearing must be under oath.

(e) A motion to suppress made during trial may be made in writing or orally and may be determined in the same manner as when made before trial. The hearing, if held, must be out of the presence of the jury.

(f) The judge must set forth in the record his findings of facts and conclusions of law. (1973, c. 1286, s. 1.)

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

(a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-

examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

(b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

- (1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or
- (2) There is corroboration of the informant's existence independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

(c) This section does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant. (1973, c. 1286, s. 1.)

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(a) Upon granting a motion to suppress evidence the judge must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground of an unlawful search and seizure and excludes tangible property unlawfully taken from the defendant's possession, and when the property is not contraband or otherwise subject to lawful retention by the State or another, the judge must order that the property be restored to the defendant at the conclusion of the trial including all appeals.

(b) An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(d) A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 723.)

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

(a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:

- (1) Increase the degree of crime of which the defendant would be guilty; or
- (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
- (3) Result in a lengthened sentence of imprisonment.

(b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

(c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a). (1983, c. 513, s. 1.)