VOIR DIRE ON INTOXIMETER

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Contents

I. Background. Cases involving Intoximeter evidence typically are heard in superior court because the case is

- An appeal from district court for trial de novo.
- Within the superior court's original jurisdiction because it involves:
  (1) a felony (e.g., habitual impaired driving),
  (2) a misdemeanor impaired driving charge transactionally related to a felony (e.g., second-degree murder) under G.S. 15A-926 and G.S. 7A-271(a)(3), or
  (3) a misdemeanor charge brought initially in superior court by presentment and subsequent indictment. State v. Gunter, 111 N.C. App. 621, 625 (1993) (presentment and indictment valid to initiate an impaired driving charge in superior court).
- an appeal by the State under G.S. 20-38.7 of a preliminary ruling by the district court judge to grant a defendant's motion to suppress Intoximeter evidence.

The legal issues involving the State's introduction of evidence obtained from the administration of the Intoximeter or other tests to determine a person's alcohol concentration and the State's appeal of a preliminary ruling by the district court judge are complex and cannot be readily reduced to a few paragraphs here. For a discussion of these rules, see SHEA RIGGSBEE DENNING, THE LAW OF IMPAIRED DRIVING AND RELATED IMPLIED CONSENT OFFENSES IN NORTH CAROLINA, 3-23, 121-30 (2014).

II. When Voir Dire Required. Although case law has not definitively determined which of two challenges is the required method to challenge the admissibility of evidence obtained from an Intoximeter test—a timely motion to suppress versus an evidentiary objection at trial—it appears that a motion to suppress is required and thus an evidentiary objection at trial is insufficient, *See* Jeff Welty, *What's a Motion to Suppress?*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Sept. 21, 2010), http://nccriminallaw.sog.unc.edu/?p=1612.

The motion to suppress normally must be made before trial and must be supported by an affidavit. *See* G.S. 15A-972; 15A-975 through -977; State v. Simmons, 59 N.C. App. 287, 290 (1982) (trial court properly summarily denied suppression motion at trial de novo when defendant failed to make motion before trial as required by G.S. 15A-973), *overruled in part on other grounds by* State v. Roper, 328 N.C. 337, 361 n.1 (1991).

A defendant must state the specific factual grounds for a suppression motion and submit a supporting affidavit. This limits the scope of the voir dire. *See* G.S. 15A-977;

State v. Phillips, 132 N.C. App. 765, 769 (1999) (if suppression motion is not accompanied by an affidavit that alleges a factual basis for the motion, it may be summarily denied); State v. Pearson, 131 N.C. App. 315, 317 (1998) (motion to suppress results of Intoxilyzer test must be accompanied by affidavit).

For more information about these procedural issues, see Motion to Suppress Procedure in this Benchbook.

III. Findings of Fact. If a motion to suppress is not summarily denied, the trial court should conduct a hearing and make findings of fact. State v. Earhart, 134 N.C. App. 130, 134-35 (1999) (noting rule). Note that the trial court's findings of fact should be preceded by a statement that the defendant and his or her counsel were present in open court; that the jury was excused; and that the court had an opportunity to see and observe each witness, and to determine what weight and credibility to give his or her testimony.

The trial court's findings of fact must be supported by a preponderance of the evidence. The trial court should include all relevant facts, and be certain those facts support the conclusions of law. It is recommended that the findings of fact address:

1. The date and time of the offense.
2. The conduct and circumstances leading to the defendant's arrest. Include name(s) of charging officer(s).
3. The charge and whether it is an implied consent offense.
4. The name of the chemical analyst (who may be the charging officer), and whether the analyst possessed a valid permit from the Department of Health and Human Services to conduct a chemical analysis of breath.
5. Whether the chemical analyst informed the defendant both verbally and in writing of his or her rights set out in G.S. 20-16.2(a), and gave the defendant a document listing these rights.
   [a. If a dispute exists about giving rights, make an explicit finding concerning what the operator told the defendant orally and in writing.]
   [b. How much time the defendant had to contact and consult with a lawyer before being required to take the test.]
   [c. Whether the test was delayed thirty minutes from the notification of rights while the defendant made an attempt to secure a witness or contact a lawyer to view the testing procedures.]
   [d. Whether a law enforcement officer assisted the defendant in contacting a qualified person for the purpose of administering an additional test.]
6. Whether the charging officer [in presence of a chemical analyst] requested the defendant to submit to a chemical analysis.
7. [The defendant's conduct indicating a refusal to submit to the analysis.]
8. Whether the analysis was performed according to rules of the Department of Health and Human Services and [including whether observation period requirements were observed, and whether a sequential test or tests were given in accordance with the Department's procedures.]
9. The date and time(s) the test(s) was/were performed.
10. The test results: _____alcohol concentration.
11. [Whether the chemical analyst gave a written record of time of arrest, time of the test, and test results to the defendant or lawyer before trial.]

12. Whether evidence of preventive maintenance on the instrument was required, and, if so, whether it was introduced. G.S. 20-139.1(b2); State v. Howren, 312 N.C. 454, 459-60 (1984) (the lack of preventive maintenance is an affirmative defense; defendant generally has burden to show that machine was not properly maintained).

IV. Conclusions of Law. Provided below is a template for conclusions of law that can be used when denying the motion to suppress. If the motion is granted and the evidence is to be excluded, modify the form order accordingly.

Upon the foregoing findings of fact, the court concludes as a matter of law that:

1. [Name of law enforcement officer] *had probable cause to believe that the defendant committed the implied consent offense of* [name offense.].
2. [*Defendant willfully refused to submit to analysis.]*
3. *Chemical analysis was performed according to the rules of the Department of Health and Human Services.*
4. [*Preventive maintenance was performed in accordance with rules of Department of Health and Human Services.] See* G.S. 20-139.1(b2); *State v. Howren*, 312 N.C. 454 (1984) (State generally not required to introduce evidence of preventive maintenance).

V. Order. Provided below are form orders for ruling on the motion to suppress.

It is ordered that defendant's objection to the evidence concerning the results of the chemical analysis is [overruled] [allowed] and that the evidence [is] [is not] admissible in the trial of this case.

Alternative order when refusal is alleged:

It is ordered that defendant's objection to evidence concerning [his] [her] refusal to submit to a chemical analysis is [overruled] [allowed] and that the evidence [is] [is not] admissible in the trial of this case.