MOTIONS TO SUPPRESS EVIDENCE IN SUPERIOR COURT

Jeff Welty, UNC School of Government (Jan. 2014) (modified handout for Orientation for New Superior Court Judges)

Contents

I. Purpose. 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.

Evidence must be suppressed if:

- Exclusion is required by the United States or North Carolina Constitutions. *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).
    - 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.*, *United States v. Leon*, 468 U.S. 897 (1984) (good faith reliance on a search warrant); *Davis v. United States*, 564 U.S. __ (2011) (good faith reliance on case law that was binding at the time of the search). However, the North Carolina appellate courts have not recognized similar exceptions to the exclusionary rule under the state constitution. *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").
- 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).
    - 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.*
    - 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.*
- 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).

A. Example Issues:

- Whether a search warrant was supported by probable cause.
- Whether an investigative stop was conducted without reasonable suspicion.
- Whether a lineup was conducted in a suggestive manner.
- Whether a defendant's confession was involuntary, or obtained in violation of the defendant's *Miranda* or Sixth Amendment rights.

B. Further Reading: Jeff Welty, *What's a Motion to Suppress*, North Carolina Criminal Law Blog, September 21, 2010, http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1612.

II. Contents.

A. Motions Made Before Trial.

- Must be in writing. *See generally* G.S. 15A-977(a).
- Must be served on the State. *See id.*
- Must state the grounds on which it is made. *See id.*
  - Summary dismissal proper if motion contains only general objections. *See State v. Drakeford*, 37 N.C. App. 340 (1978).

- Must be "accompanied by an affidavit containing facts supporting the motion." 15A-977(a).
  - 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 State v. Chance*, 130 N.C. App. 107 (1998).
  - The affidavit must contain facts, not merely conclusions such as "the facts contained in 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).
  - If no affidavit, or an inadequate affidavit, is filed, the motion to suppress "may . . . be summarily dismissed." *State v. Harris*, 71 N.C. App. 141 (1984).
    - 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*, __ N.C. App. __, 730 S.E.2d 248 (2012).

B. Motions Made at Trial. Motions properly made at trial may be less formal. An affidavit is not required. *See State v. Roper*, 328 N.C. 337 (1991). Nor must such motions be in writing. *See* G.S. 15A-977(e). See Section III, below, for a discussion of the limited circumstances under which a motion to suppress may properly be made at trial.

III. Timing of Motion.

A motion to suppress may be made only after the superior court has acquired jurisdiction. G.S. 15A-972.

A. Before Trial. Generally, a motion to suppress must be made prior to trial. G.S. 15A-975(a) ("only prior to trial," subject to certain exceptions).

B. During Trial. 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 were to contain evidence that either (a) itself was subject to suppression or (b) provided a previously unknown basis for seeking the suppression of other evidence.

A motion to suppress may be made during trial under the special timing rules described in Section III.C., below.

C. Special Timing Rules. Generally, a motion to suppress may be made at any time before trial. G.S. 15A-976(a) ("any time prior to trial," also subject to certain exceptions). Certain motions to suppress are subject to special timing rules. The rules apply to three types of cases, listed in G.S. 15A-975(b):

- Evidence of "a statement made by a defendant,"
- Evidence obtained during a warrantless search, and
- Evidence obtained during a warrant search at which the defendant was not present

1. State's Notice. In such cases, the State may choose to give the defendant advance notice of its intent to use the evidence in question. *Id*.

a. Timing for State's Notice. Notice must be given at least 20 working days before trial. *Id.*

- 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").
- Form AOC-CR-902M, *Notice of Intention to Introduce Evidence at Trial*, may be used for giving notice.

b. Timing for Defendant's Motion. 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).

c. Effect of State's Failure to Give Notice. If the State's 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). 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]

[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.

D. Renewal of Pretrial Motion During Trial. A motion to suppress made and denied before trial may be renewed during trial if:

- The defendant can show that "additional pertinent facts have been discovered," G.S. 15A-975(c), *and*
- The defendant could not reasonably have discovered them before the previous ruling, *see id.*, *and*
- The motion could not have been renewed before trial because of the timing of the discovery of the new facts, *see id.*

Corroborative evidence does not constitute "additional" facts. *See State v. Bracey*, 303 N.C. 112 (1981).

E. Local Rules or Practices. 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.

F. Untimely Motions. Untimely motions may be summarily denied. *See*, *e.g.*, *State v. Detter*, 298 N.C. 604 (1979); *State v. Austin*, 111 N.C. App. 590 (1993).

IV. Answer. The State "may" answer, and must serve the answer if it does. *See* G.S. 15A-977(a).

V. Consideration of Motion. The 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). At least when the motion appears to be significant, the better practice is to consider the motion pretrial, so that the State may appeal an adverse ruling. *See* G.S. 15A-976, official commentary; *see also generally* Section IX. Timing of Ruling, *infra.*

VI. Summary Grant. Summary grant of the motion is 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). Summary grant of the motion is also mandatory if the State stipulates that it will not use the evidence. *See* G.S. 15A-977(b)(2).

VII. Summary Denial. As noted above, summary denial is proper if a motion does not allege specific grounds for suppression, is not accompanied by an affidavit, or is untimely. 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. 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 lack factual support, even taking as true the facts alleged in the affidavit. Summary denial is optional; a judge may hold a hearing despite a facially insufficient motion. *See State v. O'Connor*, __ N.C. App. __, 730 S.E.2d 248 (2012); *State v. Harvey*, 78 N.C. App. 235 (1985).

VIII. Hearing.

A. Generally. If the motion cannot be resolved summarily, a hearing is required. G.S. 15A-977(d). The jury may not be present. G.S. 15A-977(e).

B. Burden. 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). 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]

C. Evidence. Both sides may present evidence. *See* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* 59-60 & n. 218 (6th ed. 2004). All witnesses, including the defendant if he testifies, must be under oath. *See* G.S. 15A-977(d). If the defendant testifies, he is not subject to cross-examination "as to other issues in the case." N.C. R. Evid. 104(d).

Because the burden of proof is on the State, the State should present evidence first. *State v. Williams*, __ N.C. App. __, 738 S.E.2d 211 (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.").

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).

[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*, *e.g.*, 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.").

IX. Timing of Ruling. 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). The better practice is normally to rule at the conclusion of the hearing because:

- Doing so avoids any risk of entering an improper out-of-term, out-of-session, out-of-county order.
- Delaying a ruling creates uncertainty for the parties.
- 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.

Findings of fact and conclusions of law need not be made at the same time as the ruling. *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).

X. Contents of Ruling. The order should contain findings of fact and conclusions of law. *See* G.S. 15A-977(f). If there is no material conflict in the evidence, it is not reversible error to fail to make specific findings of fact, as they will be implied from the evidence. *See*, *e.g.*, *State v. Munsey*, 342 N.C. 882 (1996); *State v. Norman*, 100 N.C. App. 660 (1990). A material conflict exists when "evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Bartlett*, 2013 WL 6623325, __ S.E.2d __, __ N.C. App. __ (2013) (internal quotation marks and citation omitted). However, the order still must contain conclusions of law, i.e., an explanation of the reason for the court's ruling. *See*, *e.g.*, *State v. Williams*, 195 N.C. App. 554 (2009) ; *State v. Baker*, 208 N.C. App. 376 (2010).

Written findings are recommended. "[T]he statute does not, on its face, seem to require written, as opposed to oral, findings of fact." *State v. Toney*, 187 N.C. App. 465 (2007). However, several appellate cases have said that trial judges "must make written findings of fact and conclusions of law." *State v. Grogan*, 40 N.C. App. 371 (1979). *See also*, *e.g.*, *State v. Moul*, 95 N.C. App. 644 (1989) ("As a general rule, after a hearing on a motion to suppress the evidence, the trial court must make written findings of fact and conclusions of law.").

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).

XI. Renewal of Motion. A motion to suppress made and denied before trial may be renewed if:

- The defendant can show that "additional pertinent facts have been discovered," G.S. 15A-975(c), *and*
- The defendant could not reasonably have discovered them before the previous ruling, *see id.*

The motion should be renewed before trial unless that is not possible because of the timing of the discovery of the new facts. *See id.*

Corroborative evidence does not constitute "additional" facts. *See State v. Bracey*, 303 N.C. 112 (1981).

XII. Appeals.

A. By the State. 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). 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. "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).

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

B. By the Defendant. 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). However, the appeal must wait until after final judgment. *See id.*

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). This appears to mean any time prior to the court's acceptance of his guilty plea. *See 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) (oral notice of intent to appeal, provided in court at the time of entry of plea, sufficient).

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). 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).

XIII. 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. Ventris*, 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 matter 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"); 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*, in this Benchbook, http://benchbook.sog.unc.edu/judicial-administration-and-general-matters/one-trial-judge-overruling-another.

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).