11.2 Filing Motions and Hearing Procedures

Before 2015, the Juvenile Code did not contain specific procedures for filing suppression motions in juvenile delinquency cases. However, suppression motions were routinely litigated in juvenile court. *See, e.g., In re V.C.R.*, 227 N.C. App. 80, 87 (2013) (reversing order denying the juvenile's motion to suppress). In 2015, the General Assembly amended several parts of the Juvenile Code. *See* 2015 N.C. Sess. Laws Ch. 58 (H 879). One of the amendments included a new statute—G.S. 7B-2408.5—that defined the procedures for suppression motions. Those procedures are described below.

A. Timing of Motions

G.S. 7B-2408.5 does not set any deadlines for filing suppression motions. Instead, the statute states that a suppression motion may be made either before or during the adjudicatory hearing. G.S. 7B-2408.5(a), (e). The language in G.S. 7B-2408.5 stands in contrast to G.S. 15A-975, the statute for suppression motions in adult court, which states that a defendant must file a suppression motion before trial unless certain limited exceptions apply.

If the motion to suppress would be dispositive if successful—that is, it would exclude evidence necessary for the State to prove the charged offense—the motion should be filed early in the case. If a motion to suppress is granted before the probable cause hearing, the State may be unable to establish probable cause.

There may be tactical reasons in some instances not to file a motion to suppress until the adjudicatory hearing begins. Counsel may decide to defer filing to avoid revealing to the State that certain evidence may not be admissible at adjudication. If the motion to suppress is granted at a later stage, the State may be unable to produce other sufficient evidence to prove the allegations in the petition.

B. Form and Contents of Motion

If counsel makes a suppression motion before the adjudicatory hearing, the motion must be in writing and a copy of the motion must be served on the State. G.S. 7B-2408.5(a). The motion must state the grounds for suppressing the evidence and must be accompanied by an affidavit containing facts supporting the motion. *Id.* Counsel may sign the affidavit based on information and belief rather than having the juvenile sign as long as counsel includes the source of the information and the basis for the belief in the

affidavit. *Id*.; *see also State v. Chance*, 130 N.C. App. 107, 110–11 (1998) (observing that the adult statute governing suppression motions does not require the defendant to sign the affidavit in support of a suppression motion).

It is critical that counsel follow the requirements of G.S. 7B-2408.5(a). If the motion does not allege a legal basis for suppression or the affidavit does not support the ground alleged, the court may summarily deny the motion. G.S. 7B-2408.5(c). In adult cases, the failure to attach an affidavit to the motion waives the right to contest the evidence not only at trial, but also on appeal. *State v. Holloway*, 311 N.C. 573, 578 (1984). Although the reasoning in *Holloway* has not yet been extended to juvenile delinquency cases, counsel should ensure that the suppression motion complies with G.S. 7B-2408.5(a) to avoid waiver of the suppression issue.

If counsel makes a suppression motion during the adjudicatory hearing, the motion may be made "in writing or orally." G.S. 7B-2408.5(e). It is unclear whether a written suppression motion made during the adjudicatory hearing must include an affidavit. G.S. 7B-2408.5(e) states that a suppression motion made during the adjudicatory hearing "may be determined in the same manner as when made before the adjudicatory hearing." Although not specifically stated in the statute, if counsel files a written motion during the adjudicatory hearing, counsel should attach an affidavit to the motion.

The written motion should state both constitutional and statutory grounds for suppression. As part of the 2015 amendments to the Juvenile Code, the General Assembly added language making substantial violations of the G.S. Chapter 15A, the Criminal Procedure Act, a basis for suppression. *See infra* § 11.3C, Substantial Violations of Criminal Procedure Act.

Although not statutorily required, counsel should prepare a memorandum of law supporting the motion to suppress. A memorandum will place before the court the legal authority supporting the motion and will also supplement the record on appeal.

C. Renewal of Objection at Adjudicatory Hearing

If the juvenile files a suppression motion before the adjudicatory hearing and the court denies the motion, the juvenile must renew the motion during the adjudicatory hearing to preserve the motion for appeal. *State v. Grooms*, 353 N.C. 50, 66 (2000). The reason that suppression motions must be renewed is because courts consider pretrial rulings on suppression motions to be "preliminary." *State v. Waring*, 364 N.C. 443, 468 (2010). In practice, this means that the juvenile must object, based on the grounds included in the suppression motion as well as any other applicable grounds, when the State presents the evidence in court. *State v. Golphin*, 352 N.C. 364, 405 (2000).

If the juvenile preserves the suppression issue, but is adjudicated delinquent and appeals, the State bears the burden of proving on appeal that the error was harmless beyond a reasonable doubt. *State v. Robey*, 91 N.C. App. 198, 206 (1988). If the juvenile does not preserve the suppression issue, the issue will be subject to plain error review on appeal.

State v. Stokes, 357 N.C. 220, 227 (2003). Under plain error review, the juvenile must show that the error had a "probable impact" on the trial court hearing. *State v. Lawrence*, 365 N.C. 506, 518 (2012). The difference between the two standards is critical and could affect the outcome of the appeal. *See, e.g.*, *State v. Pullen*, 163 N.C. App. 696, 702 (2004) (stating that the court "might reach a different result" if the error were preserved and the State bore the burden of proving that the error was harmless beyond a reasonable doubt). Thus, it is crucial that counsel renew the motion to suppress at the adjudicatory hearing when the State presents the evidence that was at issue in the suppression motion.

By amendment to the North Carolina Rules of Evidence in 2003, the General Assembly tried to eliminate the requirement that counsel must renew an objection when evidence that was the subject of an unsuccessful motion to suppress is presented at the adjudication. N.C. R. Evid. 103(a)(2). The Court of Appeals initially enforced this rule. *See State v. Rose*, 170 N.C. App. 284, 288 (2005) (defendant not required to renew objection when evidence is offered at trial after motion to suppress denied before trial); *In re S.W.*, 171 N.C. App. 335, 337 (2005) (to same effect). The Court of Appeals thereafter held, however, that the General Assembly impermissibly interfered with the North Carolina Supreme Court's exclusive authority to make rules of practice and procedure for appeals. *State v. Tutt*, 171 N.C. App. 518, 524 (2005). Counsel should therefore continue to object if evidence that has been the subject of a previous motion to suppress is offered at the adjudication.

Counsel should also object during the hearing if evidence that has been ordered suppressed is presented, whether by design or inadvertence. The evidence has been ruled inadmissible and should be excluded from consideration by the court. An objection should also be made during the hearing if evidence that is subject to suppression is introduced by the State without prior notice that it will be offered. If necessary, counsel should request a continuance to research and present legal authority supporting suppression.

D. Appeal of Denial of Motion to Suppress Following Admission

The juvenile's right to appeal the denial of a motion to suppress after admitting the allegations in the petition is subject to multiple rules imposed by statute and case law. Counsel should take great care to comply with the rules to preserve the juvenile's right to challenge the denial of a suppression motion on appeal.

First, the right to appeal an order denying a motion to suppress is limited by statute. According to G.S. 7B-2408.5(g), the juvenile has the right to appeal an order denying a motion to suppress "upon an appeal of a final order of the court in a juvenile matter." G.S. 7B-2408.5(g). A dispositional order is a final order. G.S. 7B-2602; *In re A.L.*, 166 N.C. App. 276, 277 (2004). In contrast, an adjudication order is not a final order. *In re M.L.T.H.*, 200 N.C. App. 476, 480 (2009). G.S. 7B-2602 permits a juvenile to appeal an adjudication order within 70 days if the court does not enter disposition within 60 days. In this instance, the juvenile may be able to challenge an order denying a suppression motion as part of an appeal of an adjudication order. Because the literal terms of G.S. 7B-

2408.5(g) require a "final order," the safer practice is to have the judge enter a disposition order within 60 days.

Second, if the juvenile enters an admission instead of proceeding to an adjudication hearing, counsel should give notice of the juvenile's intent to appeal the suppression order before entering an admission. Under G.S. 15A-979(b), a defendant in adult court has the right to appeal an order denying a motion to suppress after pleading guilty. Courts have construed G.S. 15A-979(b) to mean that the defendant must give notice to the prosecutor and the court of his intent to appeal the suppression order before pleading guilty. *State v. Tew*, 326 N.C. 732, 735 (1990); *State v. Brown*, 142 N.C. App. 491, 492 (2001). Courts have not extended the requirement to juvenile delinquency cases and may never do so because, unlike in adult cases, there are no statutory limitations on the issues juveniles may raise on appeal following an admission. As a best practice, however, counsel should include a statement in the written transcript of admission reserving the right to appeal the order denying the motion to suppress.

Third, counsel must give proper notice of appeal. The juvenile's right to appeal is found in G.S. 7B-2602 and is discussed in more detail *infra* in § 16.3, Right to Appeal. According to G.S. 7B-2602, counsel must give notice of appeal in open court or in writing within 10 days after entry of a final order. In addition, if the juvenile enters an admission, counsel may not rely on the notice of the juvenile's intent to appeal the suppression order as a notice of appeal from a final order. "A Notice of Appeal is distinct from giving notice of intent to appeal." *State v. McBride*, 120 N.C. App. 623, 625 (1995). If the juvenile gives notice of intent to appeal the suppression order before entering an admission, but fails to give notice of appeal from a final order, the appeal will be subject to dismissal for lack of jurisdiction. *State v. Miller*, 205 N.C. App. 724, 725 (2010).

E. State's Right to Appeal Order Granting Motion to Suppress

G.S. 7B-2408.5 does not provide the State with the right to appeal an order granting a motion to suppress. Instead, the State's right to appeal a suppression order is in G.S. 7B-2604(b)(2). According to G.S. 7B-2604(b)(2), the State can only appeal from an order granting a motion to suppress if the order "terminates the prosecution of a petition." In *In re P.K.M.*, 219 N.C. App. 543, 545 (2012), the Court of Appeals dismissed the State's appeal from an order granting a motion to suppress because the trial court did not dismiss the case as part of its order on the motion to suppress. The Court of Appeals noted that an order granting a motion to suppress "does not, standing alone, dispose of a juvenile delinquency case" and suggested that a finding of insufficient evidence might be required to satisfy the requirement that the order terminate the prosecution of a petition. *Id.*