

## 14.2 Warrants and Illegal Searches and Seizures

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## 14.2 Warrants and Illegal Searches and Seizures

### A. Generally

The primary constitutional grounds for excluding evidence obtained through an illegal search or seizure is the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 20 of the North Carolina Constitution.

There are numerous situations in which a search or seizure may violate these provisions. For example, the evidence may have been obtained:

- during a seizure that was not supported by reasonable suspicion or probable cause;
- in a search without probable cause or a valid consent to search;
- through coercive or outrageous police misconduct (in violation of the Fifth Amendment); or
- without a warrant when a warrant was required.

The focus of this section is on the last category: searches and seizures in violation of warrant requirements. Discussed below are some common violations. For a discussion of limits on warrantless searches and seizures, see *infra* Ch. 15, Stops and Warrantless Searches.

### B. Search Warrants

**Warrant requirement and exceptions.** Generally, before entering a person’s home or searching his or her car, personal property, or person, the police must obtain a warrant, based on “probable cause” to believe that the evidence being sought is in the place to be searched. See generally *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam) (“A

warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement[.]” (citation omitted)); N.C. CONST. art. I, sec. 20 (“General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.”).

There are a number of exceptions to the warrant requirement. A warrantless search or entry into a home is permissible, for example, where the officer has probable cause to believe a crime has taken place and where “exigent circumstances,” such as the safety of the officer or the possibility of the destruction of evidence, require an immediate search. *See, e.g., Kentucky v. King*, 563 U.S. 452 (2011) (officers’ warrantless entry to prevent destruction of evidence was lawful; police did not create exigency through actual or threatened Fourth Amendment violation by banging on door and announcing their presence); *Michigan v. Fisher*, 558 U.S. 45 (2009) (officer’s warrantless entry into home did not violate Fourth Amendment where it was reasonable for officer to believe there was an emergency necessitating immediate aid to an occupant).

North Carolina cases have applied the exception in numerous cases. *See State v. Fuller*, 196 N.C. App. 412 (2009) (exigent circumstances supported officers’ warrantless entry and search of defendant’s mobile home where defendant was a flight risk, had previous convictions for armed robbery and drug offenses, and ran out of view when officers announced their presence); *State v. Frazier*, 142 N.C. App. 361 (2001) (exigent circumstances existed to search defendant’s motel room where defendant tried to flee from officers and there was a danger that the controlled substance would be destroyed).

Exigent circumstances combined with probable cause may also justify a warrantless search of a suspect. *See, e.g., State v. Williams*, 209 N.C. App. 255 (2011) (probable cause and exigent circumstances justified warrantless search of defendant’s mouth for drugs during investigatory stop of vehicle). Exigent circumstances are limited to situations involving flight of a suspect, protection of the public from imminent harm, and the need to prevent the destruction of evidence. *See United States v. Curry*, 965 F.3d 313, 321–26 (4th Cir. 2020) (discussing limitations).

Additionally, officers may search a person without a warrant incident to a lawful arrest. *See United States v. Robinson*, 414 U.S. 218 (1973); *State v. Goode*, 350 N.C. 247 (1999). *But see State v. Battle*, 202 N.C. App. 376 (2010) (noting limits on search of person incident to arrest and finding roadside strip search incident to arrest unconstitutional in absence of probable cause and exigent circumstances). Vehicle searches, based on probable cause or arrest of a recent occupant of the vehicle, also may be permissible without a search warrant. *See infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search (discussing grounds for and limits on such searches).

For further discussion of possible exceptions to the warrant requirement for searches, see the general authorities cited at the beginning of this chapter.

**Good faith exception for constitutional violations not valid in North Carolina.** North Carolina does not recognize a “good faith” exception to the warrant requirement—that is, if the officer believes in good faith that he or she has authority to search under a warrant (or a nontestimonial identification order), but the officer is mistaken, the evidence still must be excluded. *See State v. Carter*, 322 N.C. 709 (1988) (relying on state constitution, court declines to follow *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good faith exception to the Fourth Amendment exclusionary rule for certain violations)). North Carolina’s stance is not affected by the U.S. Supreme Court’s decision in *Herring v. United States*, 555 U.S. 135 (2009), holding that exclusion was not required by the U.S. Constitution where an officer arrested the defendant under a mistaken belief that there was an outstanding warrant for the defendant’s arrest, and the officer’s conduct was not deliberate, reckless, grossly negligent, or owing to systemic negligence.

*Carter* remains the law in North Carolina, but it is under pressure. In *State v. Banner*, 207 N.C. App. 729 (2010), the N.C. Court of Appeals cited the N.C. Supreme Court’s decision in *State v. Garner*, 331 N.C. 491 (1992), and questioned whether the North Carolina courts have abandoned *Carter*. The *Garner* decision, however, dealt with whether the State must show lack of bad faith to rely on the inevitable discovery doctrine, discussed further below, as a basis for rendering lawful an otherwise unlawful action. *Garner* does not affect the continued validity of *Carter* and its rejection of a good faith exception to the warrant requirement.

In 2011, the North Carolina General Assembly created a good faith exception for statutory violations in G.S. 15A-974(a)(2), which states: “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.” The word “subdivision” refers to subdivision (2) in subsection (a), the portion of the statute that deals with substantial violations of G.S. Chapter 15A. Thus, the statutory good faith exception applies only to statutory violations and not to constitutional ones. This exception may have little practical impact given that suppression is required under (a)(2) only for *substantial* statutory violations; violations that are substantial are most likely not committed in good faith. For a further discussion of statutory violations, see *infra* § 14.5, Substantial Violations of Criminal Procedure Act.

In a section of the legislation not incorporated into the General Statutes, the General Assembly requested that the N.C. Supreme Court reconsider and overrule its decision in *State v. Carter*. *See* 2011 N.C. Sess. Laws Ch. 6, sec. 2 (H 3). However, the holding in *Carter* remains the law until that Court reconsiders it. *See State v. Springs*, \_\_\_ N.C. App. \_\_\_, 722 S.E.2d 13 (2012) (unpublished) (discussing *Carter* and later decisions and continuing to follow *Carter*); *cf. infra* “Mistake of law” in § 15.3L, Mistaken Belief by Officer (discussing exception recognized by N.C. Supreme Court for good faith misinterpretation of law as basis for stop without warrant). For further discussion of *Carter* and the good faith exception, see Jonathan Holbrook, [Resurrecting the Good Faith Exception in North Carolina?](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (July 14, 2020).

**Plain view doctrine and warrants.** As a matter of federal constitutional law, a seizure is lawful under the plain view doctrine when the officer is in a place he or she has a right to be and it is immediately apparent to the officer that the items are evidence of a crime or contraband. *See Horton v. California*, 496 U.S. 128 (1990); *State v. Lupek*, 214 N.C. App. 146 (2011) (evidence not suppressed where officer responded to a call about a dog shooting, went to defendant’s house to investigate, and saw a bong in plain view inside the home while standing on the front porch); *State v. Carter*, 200 N.C. App. 47 (2009) (officer did not have authority to seize and search papers on seat of defendant’s car under plain view doctrine where it was not immediately apparent that the papers were evidence of crime). North Carolina law includes the additional requirement that when officers are executing a search warrant, evidence in plain view not specified in the warrant must be discovered inadvertently. *See* G.S. 15A-253; *State v. Mickey*, 347 N.C. 508 (1998).

By analogy to the plain view doctrine, North Carolina has also recognized a “plain smell” doctrine (*State v. Corpening*, 200 N.C. App. 311 (2009) (smell of marijuana emanating from vehicle authorized warrantless search)), and a “plain feel” doctrine. *State v. Williams*, 195 N.C. App. 554 (2009) (following *Minnesota v. Dickerson*, 508 U.S. 366 (1993), court holds that officer who is conducting a lawful frisk and immediately develops probable cause that an item he or she feels is contraband may seize it).

**Illegal surveillance.** Whenever law enforcement officers watch or listen in a place where an individual would have a reasonable expectation of privacy, the law enforcement activity constitutes a Fourth Amendment search and is subject to the usual warrant and probable cause requirements. *See Carpenter v. United States*, 585 U.S. \_\_\_, 138 S. Ct. 2206 (2018) (long term monitoring of cell site location data was a search); *United States v. Jones*, 565 U.S. 400 (2012) (government’s installation of GPS tracking device on vehicle and its use to monitor vehicle’s movements on public streets constitutes a “search”); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging or other technology to gather information that would otherwise require physical intrusion into home or other constitutionally protected area is “search”); *Katz v. United States*, 389 U.S. 347 (1967) (person has reasonable expectation of privacy in phone booth); *cf. State v. Rollins*, 363 N.C. 232 (2009) (communication between prisoner and spouse was not protected by marital communications privilege based on lack of reasonable expectation of privacy in public visiting area of prison); *State v. Terry*, 207 N.C. App. 311 (2010) (defendant did not have reasonable expectation of privacy in conversation with wife at county sheriff’s office in interview room where warning signs indicated premises were under surveillance); *State v. Jarrell*, 24 N.C. App. 610 (1975) (no search where police officer hid in attic and watched public areas of restroom; person would have reasonable expectation of privacy in stalls only); *State v. McCray*, 15 N.C. App. 373 (1972) (no error in allowing police officer to testify regarding statements he overheard the defendant make when the defendant was making a phone call while in custody). For additional information on the U.S. Supreme Court’s recent surveillance opinions, see Jeff Welty, [The Supreme Court on GPS Tracking: U.S. v. Jones](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Jan. 24, 2012). *See also generally* Jeff Welty, [Warrantless Searches of Computers and Other Electronic Devices](#) (UNC School of Government, Apr. 2011) (collecting cases); Jeff Welty, [Carpenter, Search Warrants, and Court Orders Based on Probable](#)

[Cause](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 30, 2018); Shea Denning, [Conducting Surveillance and Collecting Location Data in a Post-Carpenter World \(Parts I, II, and III\)](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (various dates).

Federal and state law prevent either private parties or the government from engaging in eavesdropping or wiretapping without a court order. *See* 18 U.S.C. 2510 through 18 U.S.C. 2523; G.S. 15A-286 through G.S. 15A-298. Violation of wiretapping and eavesdropping laws may be the basis of a suppression motion. *See State v. Shaw*, 103 N.C. App. 268 (1991); *see also State v. Price*, 170 N.C. App. 57 (2005) (interception of telephone calls does not violate federal or state wiretapping law as long as one of parties to communication gives prior consent; pretrial detainee and other party were deemed to have consented to recording of phone conversation on jail phone when they kept talking after a message gave notice that the call was subject to recording). Violations of other federal laws may not provide a suppression remedy. *See State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy). *See generally* Jeffrey B. Welty, [Prosecution and Law Enforcement Access to Information about Electronic Communications](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (UNC School of Government, Oct. 2009).

**Inevitable discovery and independent source rules.** Although not an exception to the warrant requirement, the “inevitable discovery” rule is an exception to the exclusionary rule. If the police discover evidence as the result of an illegal search but can prove at a suppression hearing that the evidence would inevitably have been discovered by legal means, the evidence may be admitted at trial. *See Nix v. Williams*, 467 U.S. 431 (1984); *State v. Garner*, 331 N.C. 491 (1992) (following *Nix*); *State v. Wells*, 225 N.C. App. 487 (2013) (trial court erred in finding defendant’s laptop would have inevitably been discovered).

A closely related exception to the exclusionary rule is the independent source doctrine. This rule applies where police obtained evidence from illegal means but also discover the same evidence by lawful means. Under this doctrine, the evidence may still be admitted as long as the lawful discovery of the evidence (or the decision to issue a search warrant) was not influenced by evidence obtained during the illegal search. *Murray v. United States*, 487 U.S. 533 (1988); *Costello v. United States*, 365 U.S. 265 (1961) (fruit of poisonous tree doctrine does not require exclusion of evidence obtained from an independent source).

### C. Arrest Warrants

Generally, a person is “seized” for purposes of the Fourth Amendment when a reasonable person in the suspect’s position would not feel free to leave the presence of the officer. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *see also infra* § 15.2, Did the Officer Seize the Defendant? (discussing general test and circumstances in which a different test may apply).

An arrest is one example of a Fourth Amendment “seizure.” As a general matter, a person may not be seized or arrested without the issuance of a warrant based on “probable cause” to believe the person seized or arrested committed a crime. *See State v. Farmer*, 333 N.C. 172 (1993). There are a number of exceptions to this rule, however. Thus, an officer may make a brief investigative stop, known as a *Terry* stop, without a warrant or probable cause if he or she has “reasonable suspicion” of illegal activity. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also infra* § 15.3, Did the Officer have Grounds for the Seizure? (discussing *Terry* stops and other grounds for warrantless seizures). An officer also may arrest a person without a warrant if the officer has probable cause to believe that the suspect has committed a felony or certain misdemeanors or violated a pretrial release order, or witnesses the suspect commit a misdemeanor. *See* G.S. 15A-401(b); *State v. Dammons*, 128 N.C. App. 16 (1997). For a further discussion of possible exceptions to the warrant requirement for arrests and other seizures, see the general authorities cited at the beginning of this chapter.

#### **D. Search Incident to Arrest**

For a discussion of whether the officer acted within the scope of arrest when conducting a search, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest. Of particular note is the case of *Arizona v. Gant*, 556 U.S. 332 (2009), which overruled prior U.S. Supreme Court and North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. In *Gant*, the United States Supreme Court held that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted and thus able to obtain a weapon or destroy evidence; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *See also State v. Mbacke*, 365 N.C. 403 (2012) (analogizing the “reasonable to believe” standard in the second prong of *Gant* to the “reasonable suspicion” standard of a *Terry* stop, court finds that arresting officers could have reasonably believed that evidence relevant to offense of arrest of carrying a concealed weapon would be found in defendant’s vehicle); *State v. Johnson*, 204 N.C. App. 259 (2010) (applying *Gant* and finding search of defendant’s vehicle unconstitutional; defendant was secured in back of police car before search started and it was not reasonable for officers to believe evidence of defendant’s revoked license would be found); *State v. Carter*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

The U.S. Supreme Court has further limited the applicability of the search incident to arrest exception regarding cell phones. Under *Riley v. California*, 573 U.S. 373 (2014), a search warrant will generally be required for law enforcement to examine the contents of a suspect’s mobile phone and a search incident to arrest will typically not justify the search of such device. For more on *Riley* and cell phone searches, see Jeff Welty, [Supreme Court: Can’t Search Cell Phones Incident to Arrest](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (June 26, 2014).

## E. Knock and Talk

**Validity of the practice.** The “knock and talk” practice is one in which law enforcement officers, acting without a warrant and often without probable cause, knock on the door of a dwelling in order to question its inhabitants and often ask for consent to search their home. *State v. Smith*, 346 N.C. 794, 800 (1997) (“‘Knock and talk’ is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant.”). Officers may approach the front door for a “knock and talk” without a warrant on the theory that occupants generally expect, and therefore implicitly consent to, this sort of intrusion onto their property. *State v. Church*, 110 N.C. App. 569, 573–74 (1993); *see generally State v. Corbett*, 516 P.2d 487, 490 (Ore. App. 1973) (“[i]f one has a reasonable expectation that various members of society may enter the property in their personal and business pursuits, he should find it equally likely that the police will do so”). Because the decision to approach an occupant’s door to conduct a “knock and talk” is recognized under the Fourth Amendment and therefore is not subject to prior judicial review, this practice has been criticized as one that allows the targeting of minorities or other vulnerable populations. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 340 (2010) (observing that “when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail”).

**Limitations on the “knock and talk” practice.** In *Florida v. Jardines*, 569 U.S. 1 (2013), the U.S. Supreme Court approved of the “knock and talk” practice in general, finding that police, like other members of the public, have an implied license to briefly approach the front door of a residence: “This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *Id.* at 8. North Carolina courts also recognize the technique as valid. *State v. Grice*, 367 N.C. 753, 757 (2015) (so stating).

Despite its general validity, there are meaningful limitations to the “knock and talk” practice.

- A “knock and talk” may violate the Fourth Amendment if an officer enters an occupant’s backyard to knock on a defendant’s backdoor. *See, e.g., State v. Huddy*, 253 N.C. App. 148, 152 (2017) (“An officer’s implied right to knock and talk extends only to the entrance of the home that a ‘reasonably respectful citizen’ unfamiliar with the home would believe is the appropriate door at which to knock.”); *State v. Pasour*, 223 N.C. App. 175 (2012) (police violated Fourth Amendment by entering backyard to knock on backdoor after receiving no response to knocks on front and side doors). *Compare State v. Grice*, 367 N.C. 753 (2015) (where front door was completely obscured and side door appeared to be the main entrance to the home, implicit license allowed knock on side door).
- An officer conducting a “knock and talk” may not seize evidence unless he or she has a “lawful right of access” to the evidence itself. *State v. Grice*, 367 N.C. 753, 756–57 (2015) (reviewing elements of plain view doctrine); *State v. Falls*, 275 N.C. App. 239 (2020) (no lawful right of access to evidence in plain view where officers approached

home through the trees instead of the driveway, at night, to conduct knock and talk); *see also State v. Nance*, 149 N.C. App. 734, 742 (the permissibility of knock and talks does not “stand[] for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime”).

- The right to approach an occupant’s front door to conduct a “knock and talk” does not include free license to search the curtilage for evidence or speak to house guests after the officers have been asked to leave. *State v. Ellis*, 266 N.C. App. 115 (2019) (officers peering into a crawlspace was a search and not justified as a knock and talk); *State v. Stanley*, 259 N.C. App. 708 (2018) (knock and talk at back door was improper despite law enforcement’s observation of controlled drug buys at that door; use of back or side door by some people did not give officers implied license to approach back door); *Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001) (questioning house guests, even with reasonable suspicion, was a search of the curtilage that exceeded a mere knock and talk).
- Using a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home is a “search” within the meaning of the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 9–10 (2013).

Attorneys also may raise Equal Protection Clause challenges to race-based decisions to initiate “knock and talks.” Such challenges might be considered, for example, when it appears that police officers are targeting predominantly minority neighborhoods for “knock and talks.” Such challenges should also be raised under article I, section 19 of the N.C. Constitution. For more information on Equal Protection challenges to knock and talks and other police encounters, see ALYSON GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 2.3, Equal Protection Challenges to Police Action (UNC School of Government, 2014).

**Consent to search following a “knock and talk.”** Searches following “knock and talks” are permissible when the occupant freely, voluntarily, and unequivocally consents to the search. Evidence obtained in a consent search will be admitted only when there is “clear and positive testimony that consent was unequivocal and specific and freely given; and . . . [t]he government . . . prove[s] consent was given without duress or coercion, express or implied.” *United States v. Miller*, 933 F. Supp. 501, 505 (M.D.N.C. 1996). Consent must be granted intentionally. In *United States v. Johnson*, 333 U.S. 10, 13 (1948), the Supreme Court characterized a defendant’s alleged permission to search following a “knock and talk” as a “submission to authority rather than as an understanding and intentional waiver of a constitutional right” and rejected it as nonconsensual. *See also Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001) (“The police do not have a right to arrest citizens for refusing to consent to an illegal search.”). Two factors that strengthen a defendant’s argument that his or her consent was invalid are a defendant’s attempts to prevent officers from entering the home and an officer’s coercive tactics, including drawn weapons, raised voices, and intimidating demands. *See Craig M. Bradley, “Knock and Talk” and the Fourth Amendment*, 84 IND. L.J. 1099, 1104 (2009).



## F. Adequacy of Affidavit in Support of Probable Cause

All search and arrest warrants must be based on the issuing magistrate's or judge's determination of "probable cause"—for a search warrant, probable cause to believe that the evidence to be seized is in the place to be searched; and for an arrest warrant, probable cause to believe that the suspect to be arrested committed the crime. (A clerk of court also may issue search and arrest warrants. G.S. 15A-243; G.S. 7A-180; G.S. 7A-181.)

**Adequacy of record.** A finding of "probable cause" for a search warrant must be supported by sufficient credible facts alleged in a supporting affidavit. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *State v. Hyleman*, 324 N.C. 506 (1989) (bare bones, conclusory affidavit insufficient to support finding of probable cause); *accord State v. Bone*, 354 N.C. 1 (2001); *State v. Taylor*, 191 N.C. App. 587 (2008) (magistrate did not have a substantial basis for finding probable cause to issue search warrant); G.S. 15A-244(3) (describing requirements for search warrant application). This means that only the evidence in the affidavit (or other evidence contemporaneously submitted to the issuing official under oath and made part of the record by the issuing official) may be considered in determining the adequacy of the showing of probable cause for the warrant. *See* G.S. 15A-245(a) (stating requirement); *State v. Teasley*, 82 N.C. App. 150 (1986) (officer's oral testimony to magistrate could not be considered in determining sufficiency of evidence for issuance of search warrant because magistrate did not make the statement part of the record); *see also*, Bob Farb, [The Statutory "Four Corners" Rule When Determining Probable Cause for a Search](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 28, 2016).

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**Practice note:** Because the evidence submitted in support of a search warrant is effectively fixed and not subject to change at a suppression hearing, cases involving search warrants present fruitful opportunities for suppression.

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**False information.** If a defendant establishes by a preponderance of the evidence that an affiant made a false statement knowingly or with reckless disregard for the truth, then that false information must be set aside. If the remainder of the affidavit is insufficient to establish probable cause, then the warrant must be voided and the fruits of the search or arrest excluded from trial. *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Moore*, 275 N.C. App. 302 (2020) (applying *Franks* to grant suppression for false and misleading statements); *State v. Severn*, 130 N.C. App. 319 (1998); G.S. 15A-978 (defendant entitled to challenge truthfulness of affidavit supporting search warrant); *see also State v. Martin*, 315 N.C. 667 (1986) (applying *Franks* to arrest warrant); *State v. Pearson*, 356 N.C. 22 (2002) (same rules apply to affidavit in support of nontestimonial identification order); *see also State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated).

A defendant is entitled to introduce evidence at a suppression hearing contesting the truthfulness of the evidence presented to the magistrate. *See* G.S. 15A-978(a); *State v.*

*Monserate*, 125 N.C. App. 22 (1997) (trial court erred in excluding evidence tending to show that police inaccurately reported informant's information to magistrate).

### **G. "Fruits" of Illegal Search or Arrest**

When evidence is obtained as a result of illegal police conduct, not only must that evidence be suppressed, but also all evidence that is the "fruit" of the illegal conduct. For example, if an illegal entry into a person's home or an illegal arrest results in a confession or admission, the statement must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Davis v. Mississippi*, 394 U.S. 721 (1969); *State v. Guevara*, 349 N.C. 243 (1998); *State v. Freeman*, 307 N.C. 357 (1983).

Such derivative evidence is admissible only if the "taint" of the constitutional violation is removed. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Allen*, 332 N.C. 123 (1992) (two-hour lapse between illegal arrest and statement did not purge taint, and confession had to be suppressed); *see also supra* "Inevitable discovery rule" in § 14.2B, Search Warrants (illegally obtained evidence that otherwise would be inadmissible may be admissible under the inevitable discovery rule). Where a person commits a crime subsequent to an illegal seizure, North Carolina has held that evidence of the crime is not subject to suppression. *See State v. Barron*, 202 N.C. App. 686 (2010) (although defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers false identifying information was admissible and not barred by the exclusionary rule).

### **H. Invalid Consent**

A person may consent to a search or a stop by a police officer. However, consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Pearson*, 348 N.C. 272 (1998). The State has the burden of proving voluntariness. *State v. Crenshaw*, 144 N.C. App. 574 (2001). The question of whether consent was voluntary or was the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *See State v. Steen*, 352 N.C. 227 (2000) (citing *Schneckloth*); *State v. McMillan*, 214 N.C. App. 320 (2011) (court finds defendant's consent voluntary to an oral swab, photographing his injuries, and collection of items of clothing after he voluntarily went to sheriff's office, even though officers told defendant he could consent or be detained four or five hours while officers obtained search warrant); *State v. Boyd*, 207 N.C. App. 632 (2010) (defendant's consent to provide saliva sample for DNA testing voluntarily given, even though the defendant was not told he was being investigated for sexual offenses); *State v. Kuegel*, 195 N.C. App. 310 (2009) (defendant's consent to search his residence was voluntary despite officer's untruthful statements that he had been conducting surveillance of the residence and had obtained evidence of drug dealing).

A search or seizure may not extend beyond the scope of the suspect's consent. *See State v. Stone*, 362 N.C. 50 (2007) (defendant's general consent to search did not authorize officer to pull defendant's pants away from his body and shine flashlight on groin area);

*State v. Pearson*, 348 N.C. at 277 (consent to search vehicle did not imply consent to search person); *State v. Schiro*, 219 N.C. App. 105 (2012) (vehicle search based on consent not invalid where officers removed the rear quarter panels from the interior of the trunk); *see also* G.S. 15A-221 through G.S. 15A-223 (statutory provisions on search and seizure by consent).

For a further discussion of consent in the context of a warrantless stop or arrest, see *infra* § 15.4E, Nature, Length, and Purpose of Detention, and § 15.5D, Consent.

### I. Attenuation

Under *Utah v. Strieff*, 579 U.S. \_\_\_, 136 S. Ct. 2056 (2016), even evidence obtained during an illegal stop or seizure may be admissible when the connection between police illegality and the discovery of evidence is distant or broken by intervening circumstances. The U.S. Supreme Court identified three factors relevant to the analysis:

- the closeness in time between the illegal act and the discovery of evidence,
- any intervening circumstances, and
- the “purpose and flagrancy” of the law enforcement misconduct.

*Strieff* involved the impact of an outstanding arrest warrant. The Court held that evidence obtained from an unconstitutional detention was admissible where police discovered a valid, outstanding arrest warrant for the defendant during the encounter—the discovery of the warrant attenuated the evidence from the illegality, in other words. As a result of the ruling, the existence of an outstanding warrant may trigger the attenuation exception and result in the admission of evidence that would otherwise be suppressed. *See* Shea Denning, [Utah v. Strieff and the Attenuation Doctrine](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 6, 2016).

North Carolina courts have adopted the attenuation exception to the exclusionary rule as a matter of Fourth Amendment law. *State v. Hester*, 254 N.C. App. 506 (2017) (new and separate crime was sufficient to attenuate evidence from alleged illegal stop); *State v. Thomas*, 268 N.C. App. 121 (2019) (new crime was sufficient to attenuate illegal search). The North Carolina courts have also recognized limits to the exception. *See State v. Duncan*, 272 N.C. App. 341 (2020) (running from police during illegal search did not constitute separate crime of resisting public officer and was not an intervening circumstance for purposes of attenuation).

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**Practice note:** The question of whether the attenuation doctrine applies to violations of the North Carolina State Constitution is an open one. Consider raising and preserving the argument that the state constitution provides greater protections than the federal constitution on this point, and that attenuation does not apply to state constitutional violations.

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## J. Nontestimonial Identification Orders

When a suspect is not in police custody and police wish to obtain DNA, hair, fingerprints, or other samples from the person, the police may obtain a nontestimonial identification order from a judge on a showing of less than traditional probable cause—that is, probable cause to believe that a felony or Class A1 or 1 misdemeanor has been committed, reasonable suspicion to believe the named person committed the offense, and grounds to believe that the procedure will be of material aid in determining whether the person committed the offense. *See* G.S. 15A-273; G.S. 15A-274. If the suspect is in police custody, police must obtain a search warrant. *See State v. Carter*, 322 N.C. 709 (1988). Further, for more intrusive procedures, such as withdrawing blood, a search warrant, supported by probable cause, is required regardless of whether the person is in custody. *See id.*; *see also* FARB at 249 (so interpreting *Carter*). For a discussion of the statutory authorization to take a DNA sample at the time of arrest for certain offenses, *see infra* § 14.4H, DNA Samples at Time of Arrest.

## K. Breath and Blood Samples in Implied Consent Cases

The U.S. Supreme Court has held that the warrantless taking of a breath sample is permissible as a search incident to arrest. *Birchfield v. North Dakota*, 579 U.S. \_\_\_, 136 S. Ct. 2160 (2016). A blood or urine sample, by contrast, should be obtained by way of a search warrant unless the defendant consents or exigent circumstances exist. *See Schmerber v. California*, 384 U.S. 757 (1966) (an officer who has probable cause to believe a person has committed an offense involving impaired driving, a clear indication that the blood sample will provide evidence of the defendant’s impairment, along with either a search warrant or exigent circumstances, may compel a person to submit to a forced extraction of blood in a reasonable manner); *State v. Fletcher*, 202 N.C. App. 107, 111 (2010) (finding “the exigency surrounding obtaining a blood sample when blood alcohol level is at issue . . . and the evidence of a probability of significant delay if a warrant were obtained” to constitute sufficient evidence of exigent circumstances).

The natural dissipation of alcohol alone does not constitute a per se exigency justifying a warrantless blood draw in all cases under *Missouri v. McNeely*, 569 U.S. 141 (2013). Rather, law enforcement must articulate specific facts and circumstances establishing that obtaining a search warrant was impractical (although the dissipation of alcohol is properly a factor in the exigent circumstances analysis). In *Mitchell v. Wisconsin*, 588 U.S. \_\_\_, 139 S. Ct. 2525 (2019), a plurality of the U.S. Supreme Court held that exigent circumstances will normally excuse the warrant requirement when police encounter an unconscious driver suspected of impaired driving.

G.S. 20-139.1(d1) provides that if a person charged with an implied consent offense refuses testing, “any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person’s blood or urine.” To the extent this statute purports to authorize a blood or urine test based

on a standard of less than exigent circumstances, or on exigent circumstances based solely on the dissipation of alcohol, *McNeely* renders it unconstitutional under the Fourth Amendment. *See State v. Romano*, 369 N.C. 678 (finding G.S 20-139.1 unconstitutional as applied to the defendant under *McNeely*); *see also* Shea Denning, [State Supreme Court Issues Significant Rulings on HGN Evidence and Blood Draws in DWI Cases](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 14, 2017).