
14.6 Procedures Governing Suppression Motions

A. Timing of Motion

General timing rules in superior court. In superior court, a suppression motion ordinarily must be made before trial. *See* G.S. 15A-975(a); *State v. Satterfield*, 300 N.C. 621 (1980) (a defendant who should have but did not raise suppression issue before trial waives right to have issue heard); *State v. Reavis*, 207 N.C. App. 218 (2010) (motion to suppress untimely where not made until trial and State disclosed evidence in timely manner); *see also State v. Langdon*, 94 N.C. App. 354 (1989) (motion filed on day case calendared for trial but before jury selection deemed timely). *But cf. State v. Hill*, 294 N.C. 320 (1978) (defendant's motion to suppress deemed not timely where filed just before jury selection, the evidence in question was of the type listed in G.S. 15A-975(b), and defendant failed to comply with time limits of G.S. 15A-976(b), discussed below).

A suppression motion may be made at trial in superior court only if:

- the defendant did not have a "reasonable opportunity to make the motion before trial"; or
- the State failed to give notice of certain types of evidence (discussed under "Special timing rules for certain types of evidence in superior court," below, in this subsection A.). *See* G.S. 15A-975(a), (b); *State v. Fisher*, 321 N.C. 19 (1987) (defendant could raise suppression issue at trial when he was unaware State intended to introduce certain evidence against him).

The N.C. appellate courts have strictly construed the requirement that, where possible, suppression motions be made before trial. *See, e.g., State v. Hill*, 294 N.C. 320 (1978) (upholding court's denial of untimely suppression motion where court made finding that defendant had reasonable opportunity before trial to make motion); *State v. Jones*, 157 N.C. App. 110 (2003) (miscalculating strength of State's case is not sufficient excuse for failing to make motion to suppress pretrial); *State v. Austin*, 111 N.C. App. 590 (1993). Therefore, if you know or have good reason to believe that the State intends to rely on evidence that may be the subject of a suppression motion, the safest course is to file a pretrial motion objecting to the admission of the evidence.

The requirement that motions to suppress be filed before trial applies only to motions to suppress made pursuant to G.S. 15A-974 (violation of state or federal constitution or substantial violation of Criminal Procedure Act). Motions to exclude evidence on nonconstitutional evidentiary grounds, such as lack of authentication of evidence or unreliable scientific tests, may be made for the first time at trial. *See State v. Tate*, 300 N.C. 180 (1980) (discussing which types of motions must be made before trial). Again, however, if you know or have good reason to believe that the State intends to rely on evidence that may be subject to exclusion, such as evidence of prior bad acts, you may want to file a motion in limine and seek a ruling before the trial commences. *See supra* § 13.1F, Motions in Limine. For a further discussion of the difference between motions to suppress and other objections to admissibility, see Jeff Welty, *What's a Motion to Suppress?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 21, 2010). *see also* PHIL DIXON, DEFENSE MOTIONS AND NOTICES IN SUPERIOR COURT (UNC School of Government, 2017).

Special timing rules for certain types of evidence in superior court. The following types of evidence are subject to special timing rules for motions to suppress:

- statements by the defendant,
- evidence obtained through a search without a search warrant, and
- evidence obtained pursuant to a search warrant when the defendant was not present during execution of the search warrant.

See G.S. 15A-975(b); G.S. 15A-976(b).

If the State gives notice at least 20 working days before trial of its intent to introduce such evidence at trial, then the defendant must move to suppress the evidence within 10 working days of receipt of the notice. *See* G.S. 15A-976(b); *State v. Paige*, 202 N.C. App. 516 (2010) (defendant's motion to suppress during trial was untimely where the State gave more than 20 working days notice); *State v. Ford*, 194 N.C. App. 468 (2008) (to same effect); *see also State v. Davis*, 97 N.C. App. 259 (1990) (where defendant given permission to refile suppression motion in a form meeting procedural requirements, ten-day limit applied to refiling), *aff'd per curiam*, 327 N.C. 467 (1990).

If the State does not notify the defendant at least 20 working days before trial, then the defendant may move to suppress the types of evidence listed above at trial. *See* G.S. 15A-975(b); *State v. Patterson,* 335 N.C. 437, 456 (1994) (noting that defendant may move during trial to suppress custodial statement of defendant where State does not provide notice 20 days before trial of intent to offer statement at trial); *State v. Roper*, 328 N.C. 337 (1991) (failure of State to notify defendant that it would seek to admit at trial evidence obtained from consent search of defendant's residence entitled defendant to make suppression motion at trial, but defendant failed to make oral motion in a proper form where he did not specify it was a motion to suppress, request a voir dire, or provide a factual or legal basis); *State v. Battle*, 136 N.C. App. 781 (2000) (failure of State to notify defendant of intent to offer cocaine seized in warrantless search entitled defendant to raise suppression issue at trial).

Practice note: Prosecutors may include in their response to the defendant's discovery request a notice of intent to use the above types of evidence, starting the clock on the 10 working days in which the defendant must file motions to suppress. Examine the form and substance of the State's notice to ensure it appropriately addresses the evidence of the case. Where it does not provide proper notice, consider arguing that the 10 working days limit does not apply if necessary.

Misdemeanor appeals. A defendant who wishes to have evidence suppressed on de novo appeal from a misdemeanor conviction must file a suppression motion before trial in superior court if, as in most cases, the defendant knows of the evidence based on the proceedings in district court. *See* G.S. 15A-975 Official Commentary; *State v. Simmons*, 59 N.C. App. 287 (1982), *overruled on other grounds by State v. Roper*, 328 N.C. 337 (1991). The exceptions set forth in G.S. 15A-975(b) do not apply to misdemeanor appeals—that is, the State is not required to give notice of its intent to introduce the types of evidence listed in the subsection when a misdemeanor is appealed for trial de novo in superior court. The 10-working day deadline therefore does not apply, but the motion still must be filed before trial. *See* G.S. 15A-975(c).

Timing rules in misdemeanor cases in district court. Suppression motions in misdemeanor cases tried in district court (other than impaired driving and other implied-consent offenses, discussed below) are not subject to the time limits applicable to suppression motions in superior court. The governing statute provides that suppression motions should ordinarily be made during trial, although they may be made beforehand. *See* G.S. 15A-973 (motions to suppress in district court). In cases other than implied consent offenses, the motion will usually be made during trial, whenever the challenged evidence arises. Defense counsel may object and ask to conduct a voir dire of the witness regarding the evidence, and the court considers the suppression argument. *See infra* "When evidentiary hearing required" in § 14.6D, Disposition of Motion. On the other hand, filing a written motion and requesting a pretrial hearing is permitted and may have strategic advantages, such as conveying the strength or complexity of legal issues to the prosecutor or judge.

Implied-consent offenses. Offenses involving impaired driving, misdemeanor death by vehicle, and certain other alcohol-related offenses are considered implied-consent offenses. *See* G.S. 20-16.2(a1). The N.C. General Assembly has enacted procedures for motions practice that are specific to implied-consent offenses. Generally, in cases involving implied-consent offenses, the defendant must move to suppress or dismiss the charges before trial even where the matter is in district court. *See* G.S. 20-38.6(a). The court may summarily deny a motion to suppress made during trial where the defendant knows all facts material to the motion before trial and fails to make the motion before trial. *See* G.S. 20-38.6(d). However, where the defendant discovers facts during the course of the trial that were not known before trial, he or she may move to suppress or dismiss during the course of the trial. Unlike suppression motions made pursuant to G.S. 15A-975, motions to suppress in district court under G.S. 20-38.6 do not require an affidavit or a written motion, only that the motion be made before trial (although if the case is appealed to superior court, a written motion with an affidavit should be filed). For

additional procedural requirements in implied-consent cases, see *supra* "Implied-consent offenses" in § 13.3A, Misdemeanors. For a discussion of the appeal procedure for suppression motions in implied consent cases, see *infra* § 14.7A, State's Interlocutory Right to Appeal.

Local practice. Counsel also should be aware of local timing policies in addition to the statutory deadlines. For example, as of the time of this writing, an agreement in Mecklenburg County between the prosecutor's and public defender's office requires that defense counsel file a suppression motion in felony cases in superior court within ten days of arraignment rather than within ten days of notification by the State of its intent to introduce certain evidence. The purpose of this rule is to avoid the unnecessary filing of motions before it is determined whether the case will be resolved through a plea or trial. Local rules of court may similarly extend the statutory motions deadlines.

B. Renewal of Motion

Superior court proceedings. If a motion to suppress is denied before trial, the defendant may renew the motion before or at trial if:

- additional pertinent facts have been discovered, and
- those facts could not have been discovered through due diligence before the previous determination of the motion.

See G.S. 15A-975(c); *State v. Wade*, 198 N.C. App. 257 (2009) (alleged inconsistencies between officers' testimony at suppression hearing and during trial did not constitute additional pertinent information warranting reconsideration of motion); *State v. Moose*, 101 N.C. App. 59 (1990) (previously undiscovered facts may entitle defendant to renew suppression motion at trial; motion not allowed under circumstances because defendant did not allege new facts); *see also supra* § 13.2H, Renewing Pretrial Motions (discussing authority of trial judge to reconsider own pretrial ruling and limitations on one trial judge overruling or modifying the ruling of another).

For a discussion of renewing suppression motions at a second trial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.10B, Rulings from Previous Trials (Dec. 2018).

Practice note: The defendant must renew his or her objection to the evidence when the State offers the evidence at trial to preserve the right to appeal the denial of an earlier suppression motion. Otherwise, any objection to use of the evidence may be waived. *See infra* § 14.7C, Renewing Objection at Trial.

Misdemeanor appeals. If a motion to suppress is denied in a misdemeanor case in district court (or if the defendant makes no suppression motion at all), the defendant has the right to make the motion in superior court regardless of whether there are any additional facts to support the motion. *See* G.S. 15A-953 ("no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court"). If the defendant prevails on a suppression motion in district court but is

nevertheless convicted, the defendant must timely refile the motion in superior court on appeal for a trial de novo.

C. Contents of Motion

Pretrial motion. A pretrial suppression motion in superior court must:

- be in writing;
- state the legal grounds for the motion; and
- be accompanied by an affidavit setting forth facts that support the legal grounds.

See G.S. 15A-977(a); *State v. Phillips*, 132 N.C. App. 765 (1999) (if motion to suppress fails to allege legal or factual basis for suppressing evidence, it may be summarily dismissed); *State v. Creason*, 123 N.C. App. 495 (1996) (defendant waives right to contest search by not attaching affidavit to suppression motion), *aff'd per curiam*, 346 N.C. 165 (1997); *State v. Williams*, 98 N.C. App. 405 (1990) (upholding trial court's denial of suppression motion accompanied by affidavit that did not support alleged ground for suppression), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Harris*, 71 N.C. App. 141 (1984) (court may summarily dismiss suppression motion that is not accompanied by affidavit); *State v. Summerlin*, 35 N.C. App. 522 (1978) (noting requirement that suppression motion be in writing). *Cf. State v. O'Connor*, 222 N.C. App. 235 (2012) (while trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so).

Practice note: The affidavit supporting a motion to suppress need not and generally should not be attested to by the defendant. The defendant's lawyer can attest to the truthfulness of the affidavit based on information and belief. *See State v. Chance*, 130 N.C. App. 107 (1998).

Motion made during trial. A motion to suppress made during trial may be made orally or in writing. *See* G.S. 15A-977(e). An affidavit is not required for a motion that is timely made at trial (*see supra* § 14.6A, Timing of Motion), although the defendant must articulate the legal grounds for suppression. *See State v. Roper*, 328 N.C. 337 (1991) (overruling case law that suggested an affidavit is required for motions made at trial, but upholding admission of evidence because defendant failed to specify that he was making motion to suppress and failed to state any legal or factual basis for exclusion of evidence).

D. Disposition of Motion

Summary granting of motion. Under G.S. 15A-977(b), the trial court *must* summarily grant a motion to suppress if the motion complies with statutory procedural requirements and

- the motion states grounds that require suppression of the evidence and the State concedes the truth of the allegations, or
- the State stipulates that the evidence that is sought to be suppressed will not be offered in any trial or proceeding against the defendant.

When evidentiary hearing required. The court must allow an evidentiary hearing on a contested motion to suppress if the motion

- is timely filed,
- alleges a legal basis for suppression, and
- is accompanied by an affidavit that sets out facts supporting the ground for suppression.

See G.S. 15A-977(a), (d); *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for trial court to summarily deny suppression motion that complied with all statutory requirements; court required to conduct hearing and make findings of fact), *abrogation by statute on other grounds recognized in State v. Salinas*, 366 N.C. 119 (2012); *State v. Battle*, 136 N.C. App. 781 (2000) (defendant's right to due process and statutory right to make a motion to suppress denied where trial court would not allow defendant to state his grounds or present evidence in support of his motion); *State v. Kirkland*, 119 N.C. App. 185 (1995) (error, harmless on these facts, for court to admit evidence without holding hearing on defendant's suppression motion), *aff'd per curiam*, 342 N.C. 891 (1996); *State v. Martin*, 38 N.C. App. 115 (1978) (reversible error to fail to hold hearing on suppression motion).

When the defendant's motion to suppress is made during trial, the court must conduct a voir dire hearing outside the presence of the jury before admitting the evidence. *See* G.S. 15A-977(e); *State v. Butler*, 331 N.C. 227 (1992); *State v. James*, 118 N.C. App. 221 (1995).

Summary dismissal. The trial court may summarily dismiss a suppression motion that is untimely filed, fails to adequately state the legal grounds or the factual basis of the claim, or includes an affidavit that does not support the grounds alleged. *See* G.S. 15A-977(c); *State v. Satterfield*, 300 N.C. 621 (1980) (summary denial proper where motion was inadequate); *State v. Blackwood*, 60 N.C. App. 150 (1982) (upholding court's summary dismissal of motion where accompanying affidavit did not allege facts that would support suppression of evidence); *State v. Smith*, 50 N.C. App. 188 (1980) (upholding trial court's summary dismissal of suppression motion where affidavit did not support motion).

While the burden is on the State in most cases to show that the evidence was properly obtained (*see* "State's burden of proof" in subsection E., below), the burden is on the defendant to demonstrate that he or she has complied with the statutory procedures governing suppression motions. *See State v. Holloway*, 311 N.C. 573 (1984) (noting burden on defendant to show compliance with procedural requirements for suppression motions), *habeas corpus granted sub nom.*, *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987); *State v. Satterfield*, 300 N.C. 621 (1980) (same).

E. Conduct of Evidentiary Hearing

Generally. A hearing on a motion to suppress made pursuant to G.S. 15A-974 must be conducted out of the presence of the jury. *See* G.S. 15A-977(e); N.C. R. EVID. 104(c). Testimony at a suppression hearing must be under oath. *See* G.S. 15A-977(d); *State v. Dorsey*, 60 N.C. App. 595 (1983) (testimony presented by defendant at hearing must be under oath); *see also State v. Salinas*, 366 N.C. 119 (2012) (trial judge may not rely on allegations in defendant's affidavit as evidence to support findings of fact).

State's burden of proof. Once the defendant properly raises a suppression issue, the State ordinarily has the burden of proving by a preponderance of the evidence that the challenged evidence is admissible. *See, e.g.*, *State v. Johnson*, 304 N.C. 680 (1982) (stating preponderance of the evidence standard); *State v. Breeden*, 306 N.C. 533, 539 (1982) (reversible error for court to deny defense motion to suppress "for failure of proof"), *abrogation by statute on other grounds recognized in State v. Salinas*, 366 N.C. 119 (2012); *State v. Tarlton*, 146 N.C. App. 417 (2001) (burden on State to show admissibility of challenged evidence); *State v. Nowell*, 144 N.C. App. 636 (2001) (State has burden to prove warrantless search constitutional once defendant moves to suppress), *aff'd per curiam*, 355 N.C. 273 (2002); *see also State v. Williams*, 225 N.C. App. 636 (2013) (while the party who bears the burden of proof typically presents evidence first, that defendant presented evidence first at suppression hearing did not itself establish that burden of proof was shifted to defendant).

There is a partial exception when police acted under a warrant. Unless its invalidity appears on the face of the record, a warrant is presumed valid, and the defendant has the burden to show otherwise. Thus, a defendant has the burden of proof on a *Franks* claim—that is, a claim that an affiant made a knowingly or recklessly false statement to obtain a warrant. *See State v. Walker*, 70 N.C. App. 403 (1984) (defendant must rebut presumption of validity); *see also supra* § 14.2F, Adequacy of Affidavit in Support of Probable Cause. However, the State would still have the burden of establishing the adequacy of the probable cause allegations in the search warrant affidavit itself. *See State v. Hicks*, 60 N.C. App. 116 (1982); *see also State v. Kornegay*, 313 N.C. 1 (1985) (affidavit part of warrant).

Hearsay at suppression hearing. Hearsay evidence that would be inadmissible at trial is admissible in a suppression hearing. *See* N.C. R. EVID. 104(a) (on preliminary questions of admissibility court is not bound by rules of evidence except with respect to privileges); *State v. Melvin*, 32 N.C. App. 772 (1977) (hearsay statements by officer about what joint occupant said in consenting to search of premises admissible at voir dire hearing to determine validity of consent). Additionally, most courts that have considered the issue have ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), which generally bars admission of testimonial hearsay statements made out of court unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine, does not apply to suppression or preliminary hearings. *See, e.g., People v. Felder*, 129 P.3d 1072 (Colo. Ct. App. 2005); *see also* Jessica Smith, *Does Crawford Apply in Pretrial Proceedings,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 31, 2015).

Defendant's testimony at suppression hearing. The State may not offer the testimony of the defendant from a suppression hearing as evidence of guilt at the defendant's trial; the rationale behind this rule is that the defendant should not have to jeopardize one constitutional right, the privilege against self-incrimination, to protect others. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). However, where a defendant waives his privilege against self-incrimination by taking the stand at trial, the State may use the defendant's suppression hearing testimony to impeach the defendant. *See State v. Bracey*, 303 N.C. 112 (1981).

Right to disclosure of identity of confidential informant. A defendant is entitled to disclosure of a confidential informant's identity, usually for purposes of trial, if necessary to defend against the merits of the charge or otherwise essential to a fair determination of the case. *See Roviaro v. United States*, 353 U.S. 53 (1957); *State v. Watson*, 303 N.C. 533 (1981); *see also* JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA 49–51 (Institute of Government, 2001) (discussing cases in which court has ordered disclosure of confidential informant's identity in entrapment and other cases).

A defendant is generally not constitutionally entitled to disclosure of the identity of a confidential informant for a pretrial hearing to challenge the validity of a search or arrest. *See McCray v. Illinois*, 386 U.S. 300 (1967). A defendant is statutorily entitled, however, to disclosure of the identity of an informant in the following circumstances: (a) the defendant is contesting the truthfulness of the testimony presented to establish probable cause, (b) the search (or arrest underlying a search incident to arrest) was without a warrant, and (c) there is no independent corroboration of the informant's existence. *See* G.S. 15A-978(b).

For a further discussion of disclosure of confidential informants, see *supra* § 4.6D, Identity of Informants.

F. Required Findings

Findings of fact. As a general rule, following a hearing on a suppression motion in superior court, the trial court must set forth in the record findings of fact and conclusions of law. *See* G.S. 15A-977(f); *State v. Chamberlain*, 307 N.C. 130 (1982) (duty of trial court to resolve factual conflicts by making findings of fact); *State v. Clark*, 301 N.C. 176 (1980) (after hearing evidence on admissibility of pretrial identification procedures, court must make findings of fact before allowing in-court identification of defendant); *State v. Biggs*, 289 N.C. 522 (1976) (new trial awarded where court admitted defendant's statements without making finding that defendant had knowingly and intelligently waived his right to counsel before making statements); *State v. Rollins*, 200 N.C. App. 105, 110 (2009) (error not to make findings); *cf. State v. Munsey*, 342 N.C. 882 (1996) (if there is no conflict in the evidence on a fact, it is not error to fail to find that fact); *State v. Ladd*, 308 N.C. 272 (1983) (if conflicts in evidence are immaterial and have no effect on inadmissibility, not error to omit factual findings, although it is better practice to make factual findings).

For a further discussion of the rules on making findings of fact, *see supra* § 13.2G, Disposition of Motions (discussing general rules regarding pretrial motions).

Remand as remedy for inadequate fact finding. If the superior court fails to make adequate findings, the appellate court may either reverse the conviction and order a new trial or, more commonly, remand to the trial court for further findings of fact. *See State v. Smith*, 346 N.C. 794 (1997) (court remands for findings of fact on voluntariness of consent to search); *State v. Booker*, 306 N.C. 302 (1982) (remand to superior court for proper findings of fact to resolve conflict in evidence adduced at suppression hearing); *State v. Neal*, 210 N.C. App.645 (2011) (reversing denial of motion to suppress and remanding for further findings of fact rather than new trial where trial court failed to make findings of fact to resolve material conflict in evidence); *State v. Rollins*, 200 N.C. App. 105 (2009) (remand for new suppression hearing where superior court failed to provide basis for denial of defendant's motion).