14.7 Appeal of Suppression Motions
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14.7 Appeal of Suppression Motions

A. State's Interlocutory Right to Appeal

From superior court's ruling. One of the few instances in which the State has the right to appeal in a criminal case is when a pretrial suppression motion is granted in superior court. The State may only appeal the granting of a pretrial suppression motion if the prosecutor certifies that the appeal is not taken for the purpose of delay and the suppressed evidence is essential to the case. *See* G.S. 15A-979(c). The burden is on the State to show it has complied with the statutory prerequisites for appeal. *See State v. Judd*, 128 N.C. App. 328 (1998) (finding that Court of Appeals had no jurisdiction to hear State's appeal where there was no indication in record that prosecutor followed requirements of G.S. 15A-979(c)); *State v. Blandin*, 60 N.C. App. 271 (1983) (State's appeal dismissed where prosecutor did not timely file certificate); *see also State v. Oates*, 366 N.C. 264 (2012) (describing time frame in which State must file notice of appeal from trial court's ruling on suppression motion). *But cf. State v. Romano*, 268 N.C. App. 440 (2019) ("*Romano II*") (State was not precluded from proceeding to trial without suppressed evidence despite its earlier representation in appeal of grant of motion to suppress that the evidence was critical to its case).

From district court's ruling. With the exception of the preliminary granting of a suppression motion in an implied-consent case, discussed below, the State has no right to appeal a district court judge's granting of a motion to suppress even if the motion to suppress was heard before trial. *See* G.S. 15A-1432 (describing grounds for appeal by State from district to superior court). Although rare, the State may be able to file a writ of certiorari in superior court, under Rule 19 of the General Rules of Practice for the Superior and District Courts, to obtain review of a pretrial ruling by a district court on a motion to suppress. If the motion to suppress is granted during trial in district court, however, the State may have insufficient evidence to withstand a motion for nonsuit, which is not reviewable.

If the district court suppresses evidence at a probable cause hearing in a felony case (*see supra* § 3.5B, Rules of Evidence) and the State thereafter indicts the defendant, the district court's ruling has no legal effect and the defendant must timely refile the suppression motion in superior court. *See State v. Lay*, 56 N.C. App. 796 (1982).

Implied-consent cases. The Motor Vehicle Driver Protection Act of 2006 created an interlocutory right to appeal for the State in the context of suppression motions. Following a hearing on the defendant's motion to suppress evidence in district court, the district court judge must make written findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. *See* G.S. 20-38.6(f). Where the judge indicates that the motion should be granted, the State may appeal to superior court within a reasonable time. *See* G.S. 20-38.7(a); *State v. Fowler*, 197 N.C. App. 1 (2009) (time by which the State must give notice of appeal depends on the circumstances of each case); *State v. Palmer*, 197 N.C. App. 201 (2009) (G.S. 15A-1432(b) may be used as a procedural guideline for giving notice of appeal but is not binding). No final order may be entered until the State has either appealed or indicated that it does not intend to do so. *See* G.S. 20-38.6(f). If the State appeals, the superior court must consider the merits of the motion and then remand to district court for entry of judgment. Where the superior court affirms the district court's preliminary indication that the evidence should be suppressed and remands for entry of judgment, the State may not appeal from the remand order or from the district court's final judgment suppressing the evidence. *See Fowler*, 197 N.C. App. at 18; *State v. Rackley*, 200 N.C. App. 433 (2009) (following *Fowler*); *see also* Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after State v. Fowler and State v. Palmer*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/06 (UNC School of Government, Dec. 2009).

B. Appeal after Guilty Plea

Superior court. Generally, a plea of guilty acts as a waiver of the defendant's right to appeal adverse rulings on pretrial motions in superior court. An exception exists for adverse rulings on suppression motions. A defendant may plead guilty and preserve the right to appeal from the denial of a suppression motion. *See* G.S. 15A-979(b); *see also State v. Davis,* 227 N.C. App. 572 (2013) (where defendant reserves right to appeal on guilty plea, defendant may appeal order denying motion to suppress uncounseled convictions under G.S. 15A-980).

To preserve the right of appeal, the defendant must expressly communicate his intent to appeal the denial of the suppression motion to the prosecutor and the court at the time of the guilty plea. *See State v. Stevens*, 151 N.C. App. 561 (2002) (defendant waived right to appeal from denial of suppression motion where he entered plea of guilty without notifying court and prosecution of intent to appeal); *State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996); *cf. State v. Brown*, 217 N.C. App. 566, 570 (2011) (defendant gave sufficient notice of intent to appeal denial of motion to suppress by stating at close of State's evidence and before changing not guilty to guilty plea that defendant "would like to preserve any appellate issues that may stem from the motions in this trial"; trial court understood motion defendant wished to appeal and reentered findings of fact on defendant's motion to suppress).

To be safe, the conditional nature of the guilty plea should be put on the record before the plea is entered and should appear in the written transcript of plea. The defendant must

appeal from the judgment of conviction itself after the guilty plea, not from the denial of the motion to suppress. *See State v. Miller*, 205 N.C. App. 724 (2010) (defendant's appeal dismissed for lack of jurisdiction where defendant failed to appeal from final judgment of conviction).

For a further discussion, see "Preserving right to appeal from denial of suppression motion" in 2 NORTH CAROLINA DEFENDER MANUAL § 23.6B, Appeal from Superior Court (June 2018).

District court. A guilty plea in district court does not act as a waiver of a defendant's right to make a motion to suppress on appeal for trial de novo in superior court. *See* G.S. 15A-979 Official Commentary (right to trial de novo guarantees defendant right to renew motions in superior court even after guilty plea in district court); *see generally* G.S. 7A-290; *State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court is entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court).

C. Renewing Objection at Trial

To preserve the right to appeal the denial of a suppression motion in superior court, counsel must contemporaneously object when the evidence is offered at trial. *See State v. Golphin*, 352 N.C. 364 (2000) (since motion to suppress is type of motion in limine, counsel must object to admission of evidence at time offered at trial to preserve right to appeal); *see also generally State v. Ray*, 364 N.C. 272 (2010) (abrogating *State v. Herrera*, 195 N.C. App. 181 (2009), and holding that defendant must make contemporaneous objection when evidence is offered at trial, not just at hearing outside presence of jury before actual offer of evidence); *State v. Hill*, 347 N.C. 275 (1997) (defendant required to contemporaneously object to admission of evidence after motion in limine denied). In objecting, counsel should indicate that the objection is based on the previous motion to suppress.

D. Grounds for Appeal

A defendant may not assert on appeal a new theory for suppression that was not asserted at trial in superior court. *See State v. Benson*, 323 N.C. 318 (1988) (defendant may not "swap horses" on appeal), *abrogation on other grounds recognized in State v. Hooper*, 358 N.C. 122 (2004); *State v. Hernandez*, 227 N.C. App. 601 (2013) (defendants failed to preserve challenge to vehicle stop based on stop being impermissibly extended where theory on appeal differed from theory argued at trial court, that is, that anonymous tip was insufficient to support stop); *State v. Smarr*, 146 N.C. App. 44 (2001) (to same effect). Thus, trial counsel should raise all possible grounds for suppressing evidence when making the motion. *See also State v. Phillips*, 151 N.C. App. 185 (2002) (State's abandonment of argument at trial level that defendant did not have standing waived appellate review of issue); *State v. Cooke*, 306 N.C. 132 (1982) (State may not assert on appeal ground against suppression that it did not assert at trial level). *But see State v. Hester*, 254 N.C. App. 506, 516 (2017) (noting that the bar on asserting a new theory on

appeal applies only to the party carrying the burden on appeal; a party arguing for the trial court's ruling to be upheld may "run *any* horse" on appeal in support of the trial court's judgment) (emphasis in original) (citations omitted).