2.7 Other Selected Aspects of Warrantless Stops

A. Questioning

To comply with the Fourth Amendment, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. The U.S. Supreme Court has held that an officer may inquire into "matters unrelated to the justification for the traffic stop . . . [without] convert[ing] the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Some North Carolina cases have held that officers need additional reasonable suspicion to extend a stop once the original purpose of the stop has been addressed. *See, e.g.*, *State v. Jackson*, 199 N.C. App. 236 (2009). However, recent cases have found that the Fourth Amendment is not implicated if the delay is de minimis. *See, e.g.*, *State v. Sellars*, __ N.C. App. __, 730 S.E.2d 208 (2012) (finding delay of four minutes and 37 seconds de minimis). The length of any delay caused by questions or investigation unrelated to the purpose of the stop is an important factor in determining whether officers acted within the lawful scope of the stop. *See State v. Branch*, 194 N.C. App. 173 (2008) (ten minute delay unlawful); *United States v. Peralez*, 526 F.3d 1115, 1119–20 (8th Cir. 2008) (thirteen minute delay for questions unrelated to justification for stop unconstitutionally extended the detention). Also, the reason for the delay may be a significant factor. *See also State v. Cottrell*, __ N.C. App. __, 760 S.E.2d 274 (2014) (officer violated the defendant's Fourth Amendment rights by detaining the defendant after the purpose of the traffic stop was met, without having developed reasonable suspicion of criminal activity).

The Fourth Circuit Court of Appeals has adopted a potentially fruitful way to assess questioning and other investigative actions unrelated to the purpose of the stop. The court has held that an officer exceeds the limits of a lawful traffic stop when, without reasonable suspicion, he drops the investigation of the originally suspected traffic offense and "embark[s] on another sustained course of investigation." *United States v. Guijon-Ortiz*, 660 F.3d 757, 766 (4th Cir. 2011) (quotation omitted). Under this approach, the reasonableness of prolonging a traffic stop is judged not merely on the duration of the stop but also on whether the officer diligently pursued the purpose of the stop, during which time it was necessary to detain the defendant. *Id.* at 770 ("Possessing probable cause that a driver has committed a traffic infraction does not give an officer free rein to keep the vehicle and its passengers on the side of the road while the officer investigates any hunch, whether through questioning or other methods, so long as the stop is shorter than the time it would have taken to conduct the ordinary incidents of a traffic stop.")

These principles provide some Fourth Amendment protections to motorists against pretextual stops because they limit an officer's actions following the stop. A lengthy detention following an otherwise routine traffic stop also may raise concerns that the stated reason for the stop masks an actual purpose of generalized criminal investigation in reliance on a criminal profile. For example, a trooper in one case "testified that he began to follow [the defendant] to '*see if I could find a violation*,' and admitted 'in an attempt to find a violation on [defendant's] vehicle . . . *I was going to conduct a pretextual stop*,

stop him for a traffic violation, conduct a brief interview of him, [and] see if I observed any indicators of other criminal activity.'" *United States v. Foreman*, 369 F.3d 776, 786–87 (4th Cir. 2004) (Gregory, J. concurring in part and dissenting in part) (emphasis in original) (internal citation omitted). Admissions such as these will be rare, since, as Judge Davis of the Fourth Circuit Court of Appeals observed, "[a]t an earlier time, some law enforcement officers freely employed the term 'pretextual stop' although, with increased sensitivity over racial profiling, the terms seems to have fallen from favor." *United States v. Mubdi*, 691 F.3d 334, 347 n.3 (4th Cir. 2012) (Davis, J., concurring in part), *rev'd on other grounds*, 133 S. Ct. 2851 (2013). Even with such admissions, the defendant must ultimately show that the stopping officer did not have an objective ground for the stop in order to make out a Fourth Amendment violation (in both *Foreman* and *Mubdi*, the majority found a basis for the stop) and will have to show discriminatory intent and effect to make out an equal protection violation.

Attorneys may want to review police policies regarding traffic stops, if any, to determine the extent to which they permit employing drug-sniffing dogs on traffic stops, asking that vehicle occupants step out of their cars, requesting permission to search, and other techniques that may extend traffic stops and increase their potential consequences. Such a review may reveal areas in which officers are exceeding their authority or treating similarly situated drivers differently, or areas in which officer discretion is unregulated. For example, in a recent Cleveland County case, testimony revealed that the arresting law enforcement officers had followed an informal practice—directly contradicting the Sheriff's written policy—by which deputy sheriffs would turn off the audio recording equipment during a search in order to prevent defense attorneys from discovering the techniques used in executing a search. This and other evidence led the court to discredit the arresting officer's asserted reason for the stop. Order Allowing Motion to Suppress in the Race Materials Bank at www.ncids.org (select "Training & Resources").

Arguments that a delay exceeded the scope of the stop. In arguing that questioning was beyond the scope of the stop, and that information discovered as a result must be suppressed pursuant to the Fourth Amendment and article I, sections 19, 20, and 23 of the N.C. Constitution, the defendant is in the strongest position if the following factors are present:

- The original purpose for the stop was a discrete matter that would not require additional investigation following the stop, e.g., failure to signal.
- The original purpose for the stop was met before the additional questioning began—for example, the officer issued a citation or warning and returned the defendant's driver's license.
- A reasonable person would not have felt free to leave at the time of the questioning, e.g., because officers blocked the defendant's car, maintained possession of the defendant's license or other documents, or instructed him not to leave, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.2A (Consensual Encounters) (2d ed. 2013).
- The questions were not related to the basis for the stop and instead constituted a new criminal investigation, e.g., for drug possession.

- The amount of time spent questioning the defendant on matters unrelated to the basis for the stop was not de minimis.
- The amount of time spent questioning the defendant on matters unrelated to the basis for the stop exceeded the amount of time spent questioning the defendant on matters related to the basis of the stop.
- The officer had not developed reasonable suspicion of additional criminal activity.
- The officer detained the defendant after the purpose of the stop was met to summon a drug-sniffing dog to the scene. *See State v. Cottrell*, __ N.C. App. __, 760 S.E.2d 274 (2014).

See generally State v. Hernandez, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011) (unreasonable to spend ten minutes of a fifteen minute traffic stop asking drug-related questions); *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010) (holding that whether delay is de minimis turns on totality of circumstances, including whether officer is diligently moving toward completion of stop and ratio of stop-related to non-stop-related questions).

Involuntary confessions. Police questioning following a traffic stop may result in confessions, which are admissible only when made voluntarily. *See, e.g.*, *State v. Campbell*, 133 N.C. App. 531, 537–38 (1999) ("Incriminating statements obtained by the influence of hope or fear are involuntary and thus inadmissible."). In some cases, North Carolina defendants have claimed that a law enforcement officer's exploitation of race during questioning rendered their confessions involuntary and therefore inadmissible. *See State v. Graham*, ___ N.C. App. ___, ___ 733 S.E.2d 100, 104 (2012) (where a detective asked the defendant, "brother to brother," to tell the truth, the court rejected the defendant's argument that the detective's reliance on their shared racial background constituted evidence of coercion); *State v. Campbell*, 133 N.C. App. 531, 538 (1999) (while it may have been "manipulative" to select a detective to interrogate the defendant based on his shared race and sex, the defendant did not demonstrate that this choice raised defendant's hopes or fears so as to make defendant's confession involuntary); *State v. White*, 68 N.C. App. 671, 675 (1984) (court rejected Black defendant's argument that his confession was involuntary where he was arrested by four White officers and was alone with one of the officers in an interrogation room at the time of the confession). *See also State v. Wilson*, 322 N.C. 91, 95 (1988) (explaining that in *State v. Whitfield*, 70 N.C. 356 (1874), the defendant's confession "was held involuntary . . . because of the coercive circumstances resulting from racial tension manifest in the confrontation").

Confessions secured following suggestions that, because of a suspect's race, he or she will not be treated fairly by the criminal justice system, may be ruled involuntary and inadmissible. Recently, the Indiana Supreme Court considered a case in which a detective interrogating a Black suspect warned him:

> Don't let twelve people who are from Schererville, Crown Point—white people, Hispanic people, other people that aren't from Gary, from your part of the hood—judge you. Because they're not gonna put people on there who are from your neck of the woods. You know that. They're not gonna be the ones to decide what happens to you. You know that. I know that. Everybody knows that. All they're gonna see is, oh, look at this, another young motherf***** who didn't give a f***.

Bond v. State, 9 N.E.3d 134, 136–37 (Ind. 2014). The court unanimously held that, because the detective suggested that the defendant "might not receive a fair trial because of his race and the likely [racial and ethnic] composition of a prospective jury," the defendant's subsequent confession was involuntary and inadmissible. *Id.* at 138. The *Bond* court found that the detective's statement constituted "an intentional misrepresentation of rights ensconced in the very fabric of our nation's justice system—the rights to a fair trial and an impartial jury, and the right not to be judged by or for the color of your skin—carried out as leverage to convince a suspect in a criminal case that his only recourse was to forego his claim of innocence and confess." *Id*. While the court acknowledged that, in the past, it had allowed the admission of confessions secured in spite of an officer's misleading or deceptive tactics during questioning, it held that such tactics were impermissible where a suspect is "intentionally deceived as to the fairness of the criminal justice system itself because of the color of [the defendant's] skin." *Id.* at 140.

For additional considerations regarding coerced confessions, see 1 NORTH CAROLINA DEFENDER MANUAL § 14.3 (Illegal Confessions or Admissions) (2d ed. 2013).

B. Pretextual Inventory Searches

In certain instances, searches may be challenged as pretextual in violation of the Fourth Amendment's prohibition on unreasonable searches. For example, in *Florida v. Wells*, 495 U.S. 1, 4 (1990), the Court stated that warrantless inventory searches "must not be a ruse for a general rummaging in order to discover incriminating evidence." The Court indicated that inventory searches should be "designed to produce an inventory" and must not be "turned into a purposeful and general means of discovering evidence of crime." *Id*. (internal quotation omitted). *See also Whren v. United States*, 517 U.S. 806, 813 (1996) (noting the Court's disapproval of pretextual inventory searches and administrative inspections); *Fair v. State*, 627 N.E.2d 427 (Ind. 1993) (inventory search violated Fourth Amendment where vehicle presented only a "marginal threat," and "several indicia of pretext" raised a question about whether search was conducted in good faith); *United States v. Matthews*, 591 F.3d 230, 235 (4th Cir. 2009) (inventory searches must be "performed in good faith"). Allegations that an inventory search violates the Fourth Amendment will be stronger where the law enforcement agency responsible for the search has no written policy on impoundment or inventory searches, the State is unable to produce evidence that the officer employed a standardized procedure, and the State fails to identify a legitimate rationale for impoundment. *See United States v. Duguay*, 93 F.3d

346, 352 (7th Cir. 1996) ("An impoundment must either be supported by probable cause, or be consistent with the police role as 'caretaker' of the streets and completely unrelated to an ongoing criminal investigation.").

C. Vehicle Consent Searches

In recent years, "consent searches" during traffic stops have become increasingly commonplace. *See* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005) (reporting that "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment"). In a case reviewed by the Fourth Circuit Court of Appeals concerning the voluntariness of a defendant's consent to search, a state trooper testified that he searches 97% of the cars he pulls over, suggesting to one judge that the trooper "rarely takes no for an answer." *U.S. v. Lattimore*, 87 F.3d 647, 653 n.1 (4th Cir. 1996) (en banc) (Hall, J., dissenting). "Consent searches are no longer an occasional event" in which people suspected of a crime may inform the police of their willingness to be searched; they are "now a wholesale activity accompanying a great many traffic stops." 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 9.3, at 397 (3d ed. 2007).

In deciding when to ask for consent to search, law enforcement officers have broad discretion. Some drivers have raised challenges in racial profiling lawsuits to the alleged misuse of this discretion. *See Maryland State Conference of NAACP Branches v. Maryland State Police*, 454 F. Supp. 2d 339, 353–54 (D. Md. 2006) (rejecting state troopers' motions for summary judgment on plaintiffs' claims that (1) trooper stopped African-American motorist in violation of Fourteenth and Fourth Amendments and (2) trooper coerced African-American motorist's consent to search in violation of the Fourth Amendment). Concerns about misuse of this discretion have prompted some states to pass legislation banning the use of consent searches; and the California Highway Patrol voluntarily adopted a policy prohibiting its officers from requesting consent to search from drivers. Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187–88 (2006). In North Carolina, the Fayetteville City Council issued a moratorium on consent searches amid concerns about racial profiling. Following a court order temporarily halting the ban, the Mayor announced that police officers would begin using consent forms requiring a driver's signature when seeking consent to search. *See, e.g.*, Andrew Barksdale, *City Manager Dale Iman's reversal on Fayetteville police consent searches stirs criticism*, FAYETTEVILLE OBSERVER, March 3, 2012 (reporting concerns that 75% of motorists whose vehicles were searched by police in Fayetteville in 2011 were minorities). In Durham, the City's Human Relation Commission (HRC), charged by Durham Mayor Bill Bell with investigating allegations of racial profiling by the Durham Police Department, voted to recommend that the city implement a mandatory written consent to search policy for all vehicle consent searches by Durham Police. Jim Wise, *Durham panel urges additional training for Durham police*, NEWS AND OBSERVER (Raleigh), March 11, 2014. After this proposal received support from the City Council, City Manager Tom Bonfield ordered the implementation of a new policy, effective

October 1, 2014, requiring officers to receive written consent before conducting consent searches of a vehicle or building. Ray Gronberg, *City adopts written-consent policy for searches*, THE HERALD SUN (Durham), September 16, 2014.

Practice note: The North Carolina Department of Justice makes traffic stop data available to the public, as required by G.S. 114-10.01. If you are developing a claim that an officer's request for consent to search your client's vehicle constituted a denial of his or her right to equal protection, you will want to discover data concerning the use of consent searches by the officer or police department responsible for the search. You may obtain data on the race and ethnicity of motorists and passengers searched by particular law enforcement agencies during specific time periods by running reports on the NC DOJ's website. The search data on the NC DOJ's website currently is disaggregated by basis for search (for example, consent, probable cause, or search incident to arrest), but currently "basis for search" data is not disaggregated by race and ethnicity (although this information may be obtained by requesting SBI-122 forms directly from the State Bureau of Investigation). The web tool currently under development by the Southern Coalition for Social Justice will eventually allow users to determine the race and ethnicity of motorists and passengers asked for consent to search. *See supra* "Data sources relevant to North Carolina traffic stops" in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

North Carolina appellate decisions may impose an important limitation on an officer's ability to ask for consent to search. In *State v. Parker*, 183 N.C. App. 1, 9 (2007), the North Carolina Court of Appeals stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." In that case, the court determined that, because the request for consent to search was "based on reasonable articulable suspicion that [the officer] would find additional contraband . . . his request did not exceed the scope of the traffic stop and continuation of the detention to complete the search did not violate the Fourth Amendment." *Id.* at 13. *See also State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete), *aff'd per curiam*, 362 N.C. 344 (2008). *Parker* suggests that requests for consent to search may differ from other types of questioning, which are not impermissible if they do not unduly prolong the stop. *See supra* § 2.7A, Questioning; "Requests for consent and questioning" *in* 1 NORTH CAROLINA DEFENDER MANUAL § 15.4E (Nature, Length, and Purpose of Detention) (2d ed. 2013); *see also State v. Cottrell*, __ N.C. App. __, 760 S.E.2d 274 (2014) (consent to search vehicle was not valid where officer had addressed original purpose of stop and obtained defendant's consent by threatening to conduct dog sniff that officer did not have legal right to conduct; intrusion was not justified as "de minimis"). Other decisions indicate that the issue is in dispute in North Carolina. *See, e.g., State v. Jacobs*, 162 N.C. App. 251 (2004) (holding that, despite defendant's contention that reasonable suspicion is required to request defendant's consent to search, "[n]o such showing is required"). The U.S. Supreme Court has not specifically addressed the question.

Other states have specifically recognized that reasonable suspicion of additional criminal activity is required if the request for consent to search is not related to the initial purpose of the stop. *See, e.g., State v. Estabillio*, 218 P.3d 749, 757–61 (Haw. 2009); *Commonwealth v. Torres*, 674 N.E.2d 638, 641-43 (Mass. 1997); *State v. Fort*, 660 N.W.2d 415, 418–19 (Minn. 2003); *State v. Elders*, 192 N.J. 224, 927 A.2d 1250, 1260–61 (N.J. 2007). A smaller number of states have held that consent searches in the context of traffic stops are valid unless the duration of the seizure is unduly extended. *See, e.g., State v. Jenkins*, 3 A.3d 806, 826 (Conn. 2010).

For additional considerations regarding consent to search, such as factors bearing on the voluntariness or withdrawal of consent, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.4E (Nature, Length, and Purpose of Detention) and 15.5D (Consent) (2d ed. 2013).

D. Roadside Searches of Individuals

The decision to conduct roadside searches or strip-searches represents a discretionary determination that may, at times, be influenced by race. *See* Baumgartner Study at 5 (concluding that Black and Hispanic individuals are more likely to be searched following a traffic stop). In determining whether the decision to search your client may have been influenced by race, consider:

- Was the search conducted in accordance with the law enforcement agency's policies concerning roadside searches?
- Do any of the facts of the client's case suggest that race may have been a factor in the search? For example, was your client asked to step out of the car for a search while another passenger of a different race was not?
- Was the officer's unit tasked with using routine traffic stops to search for indicators of criminal activity?
- How frequently do officers from the arresting law enforcement agency conduct roadside searches of drivers and passengers stopped? This information may be obtained by running a report of "Drivers and Passengers Searched by Sex, Race, and Ethnicity" by the relevant law enforcement agency on the NC Department of Justice's Traffic Stop Statistics website. In addition to accessing data about searches through the NC DOJ website, attorneys may obtain the underlying information used to create the reports required under G.S. 114-10.01 by submitting a request to the SBI Traffic Stop Unit for the information collected on SBI-122 forms. *See* SBI-122 Traffic Stop Form in the Race Materials Bank at www.ncids.org (select "Training & Resources"). The information on the forms extends beyond what is currently accessible through generating a report on the NC DOJ website, and includes (1) the type of search; (2) the basis for the search; (3) the person/s or vehicle searched; and (4) the sex, race, and ethnicity of each person searched. This sort of information will eventually be available on the website under construction by the Southern Center for Social Justice. *See supra* "Data sources relevant to North Carolina traffic stops" in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

Interviews with clients and witnesses, discovery requests, and public records requests may prove useful in obtaining the information identified above. For a discussion of legal restrictions on roadside searches of individuals, *see* "Warrant requirement and exceptions" *in* 1 NORTH CAROLINA DEFENDER MANUAL § 14.2B (Search Warrants) (2d ed. 2013); "Strip search during search incident to arrest" *in* 1 NORTH CAROLINA DEFENDER MANUAL § 15.6C (Other Limits on Searches Incident to Arrest) (2d ed. 2013); "Strip searches based on probable cause" *in* 1 NORTH CAROLINA DEFENDER MANUAL § 15.6D (Probable Cause to Search Person) (2d ed. 2013).

E. Arrests

Equal protection claims based on arrest patterns. If an individual officer or law enforcement agency engages in a discriminatory pattern of arresting drivers following traffic stops, this action may be challenged under the Equal Protection Clause and article I, section 19 of the North Carolina Constitution as an unconstitutional selective enforcement of the law. A recent study of data made available as a result of G.S. 114-10.01, which reviewed 13 million traffic stops conducted between January 1, 2000 and June 14, 2011, indicated that minorities are more likely to be arrested, and correspondingly less likely to be issued a warning, for the same offenses as whites. According to the study, "disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues." Baumgartner Study at 2. Arrest data disaggregated by race and ethnicity may be accessed by running a report of "Enforcement Action Take by Driver's Sex, Race, and Ethnicity" concerning the relevant law enforcement agency on the NC Department of Justice's Traffic Stop Statistics website. For data reflecting arrests of passengers as well as drivers, attorneys may submit a request to the SBI Traffic Stop Unit for the information collected on SBI-122 forms. *See* SBI-122 Traffic Stop Form in the Race Materials Bank at www.ncids.org (select "Training & Resources"). This sort of information will eventually be available on the website under construction by the Southern Center for Social Justice. *See supra* "Data sources relevant to North Carolina traffic stops" in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims. Additional arrest statistics reflecting the number of arrestees by race, age, sex, law enforcement agency, year, and offense type is collected by the U.S. Bureau of Justice Statistics and is searchable on the Bureau's website.

To establish a Fourth Amendment or equal protection violation, counsel will need additional supporting information. The courts have found that the Fourth Amendment does not prohibit a pretextual arrest if objective grounds exist for the arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court held that an officer's decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002)). Therefore, consistent with the approach discussed previously for stops (*see supra* § 2.6, Traffic and Pedestrian Stops), counsel will need to show either that grounds did not exist for the arrest or that the officer engaged in selective enforcement within the meaning of equal protection law.

Arrests in reliance on descriptions of suspect's race. A description of a suspect that is based on race alone is not sufficient to justify a seizure. *See supra* "Officer's 'hunch' is not reasonable suspicion, especially where informed by race" in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops; § 2.6F, Seizures in Reliance on Descriptions of Suspect's Race; *see also Washington v. Lambert*, 98 F.3d 1181, 1183–84 (9th Cir. 1996) (invalidating arrest of two Black individuals whose only resemblance to wanted robbery suspects was their race, noting that the descriptions were "exceedingly vague and general" and that such general descriptions could lead to demeaning treatment of African Americans). An arrest requires probable cause, a higher level of justification than the reasonable suspicion required for a stop. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (rejecting State's argument that suppression was erroneous because officer had reasonable suspicion to conduct an investigatory stop and finding that an arrest, not an investigatory stop, had occurred, and that no probable cause supported the arrest). Thus, even more meaningful similarities between a suspect and a description, beyond a general race-based description, may be required to justify an arrest.