Chapter 15

# Stops and Warrantless Searches

## 15.1 General Approach

### A. Five Basic Steps

This chapter outlines a five-step approach for analyzing typical "street encounters" with police. It covers situations involving both pedestrians and occupants of vehicles. This chapter does not attempt to catalogue the many decisions issued each year by the courts. Rather, it highlights the major principles at each step of the analysis for warrantless police encounters.

For a fuller discussion of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (6th ed. 2020) [hereinafter LAFAVE, SEARCH AND SEIZURE] and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 5th ed. 2016) [hereinafter FARB]. Additional resources on North Carolina law are: SHEA RIGGSBEE DENNING, CHRISTOPHER TYNER & JEFFREY B. WELTY, PULLED OVER: THE LAW OF TRAFFIC STOPS AND OFFENSES IN NORTH CAROLINA (UNC School of Government, 2017); Jeff Welty, *Traffic Stops* (UNC School of Government, Mar. 2013) [hereinafter Welty, *Traffic Stops*] (reviewing permissible grounds for and actions during traffic stop); and Jeffrey B. Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/04 (UNC School of Government, Sept. 2010) [hereinafter Welty, *Motor Vehicle Checkpoints*].

The five steps are:

1. Did the officer seize the defendant?
2. Did the officer have grounds for the seizure?
3. Did the officer act within the scope of the seizure?
4. Did the officer have grounds to arrest or search?
5. Did the officer act within the scope of the arrest or search?

Generally, if an officer lacks authorization at any particular step, evidence uncovered by the officer as a result of the unauthorized action is subject to suppression. A flowchart outlining these steps is attached to this chapter as Appendix 15-1.

### B. Authority to Act without Warrant

In many (although not all) of the situations described in this chapter, an officer may act without first obtaining a warrant. The courts have long expressed a preference, however, for the use of both arrest and search warrants—even in situations where a warrant is not required. *See State v. Hardy*, 339 N.C. 207, 226 (1994) ("search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to warrant requirement"); *State v. Nixon*, 160 N.C. App. 31, 34–35 (2003), *relying on Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964) ("informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" (citation omitted)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983); *see also Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (court states that "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement"; court rejects any "homicide crime scene" exception to warrant requirement); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause").

### C. Effect of Constitutional and State Law Violations

Most of this chapter deals with violations of the U.S. Constitution, for which the remedy is suppression of evidence that is unconstitutionally obtained.

To the extent it provides greater protection, state constitutional law provides a basis for suppression of illegally obtained evidence. In the search and seizure context, the North Carolina courts have found that protections under the North Carolina Constitution differ from federal constitutional protections in limited instances. *See State v. Carter*, 322 N.C. 709 (1988) (rejecting good faith exception to exclusionary rule under state constitution); *see also supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation). Several states have recognized additional circumstances in which their state constitutions provide greater protections than under the U.S. Constitution. Examples are

cited in this chapter. North Carolina defense counsel should remain alert to opportunities for differentiating the North Carolina Constitution from more limited federal protections and should be cognizant of the need to argue violations under both the state and federal constitutions.

Unlike the good faith exception for federal constitutional violations, North Carolina has adopted other exceptions to the exclusionary rule, whereby even illegally obtained evidence may nonetheless be admissible. These include the attenuation doctrine, reasonable, inevitable discovery, and independent source doctrine, among others. Counsel should be familiar with these and other common exceptions when preparing suppression arguments. Exceptions to the exclusionary rule are discussed *supra* in Chapter 14, Suppression Motions.

Substantial statutory violations also may warrant suppression under Section 15A-974 of the North Carolina General Statutes (hereinafter G.S.). In 2011, the N.C. General Assembly amended G.S. 15A-974, effective for trials and hearings commencing on or after July 1, 2011, to provide a good-faith exception to the exclusionary rule for statutory violations. *See* G.S. 15A-974(a)(2). For a further discussion of statutory violations and the effect of the 2011 legislation, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants, and § 14.5, Substantial Violations of Criminal Procedure Act.

Violations of other states' laws, not based on federal constitutional requirements or North Carolina law, generally do not provide a basis for suppression. *See State v. Hernandez*, 208 N.C. App. 591, 604 (2010) (declining to suppress evidence for violation of New Jersey state constitution); *see also Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *cf. 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).

## 15.2 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping, or "seizing," a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. *See* FARB at 26–28. It is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

### A. Consensual Encounters

**"Free to leave" test.** As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S.

491 (1983); *see also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter).

The "free to leave" test used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to *Miranda* warnings. *See State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *see also infra* § 15.4G, Does *Miranda* Apply? (discussing circumstances in which *Miranda* warnings may be required following a seizure).

A seizure clearly occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter may be considered "consensual" and not a seizure, however, if a person willingly engages in conversation with an officer.

**Factors.** Factors to consider in determining whether an encounter is consensual or a seizure include:

- number of officers present,
- display of weapon by officer,
- physical touching of defendant,
- use of language or tone of voice indicating that compliance is required,
- holding a person's identification papers or property,
- blocking the person's path, and
- activation or shining of lights.

*See State v. Farmer*, 333 N.C. 172 (1993) (discussing factors); *see also* Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010) (suggesting that use of blue light is "conclusive" as to existence of seizure when the suspect stops and heeds the lights).

Cases finding a seizure include: *State v. Steele,* ___ N.C. App. ___, 858 S.E.2d 325 (2021) (officer's hand gesture from marked, moving police car for the defendant to stop as defendant attempted to exit a parking lot at a late hour was a seizure; reasonable person would not have felt free to leave given the time and place of the encounter and the authoritative gesture from a moving police car); *State v. Icard*, 363 N.C. 303 (2009) (defendant was seized where officer initiated encounter, telling occupants of vehicle that the area was known for drug crimes and prostitution; was armed and in uniform; called for backup assistance; illuminated vehicle in which defendant was sitting with blue lights; knocked twice on defendant's window; and when defendant did not respond opened car door and asked defendant to exit, produce identification, and bring purse; backup officer also illuminated defendant's side of vehicle with take-down lights); *State v. Haislip*, 186 N.C. App. 275 (2007) (defendant was seized where officer fell in behind defendant, activated blue lights, and after defendant parked car, got out, and began walking away,

approached her and got her attention), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

Cases not finding a seizure include: *State v. Wilson,* 250 N.C. App. 781 (2016) (no seizure where officer approached defendant's truck on foot and waved his arms for the defendant to stop as the truck was exiting driveway; officer did not make any other show of authority indicating a command to stop, did not impede defendant's movement, and the encounter took place in the defendant's "unconfined" driveway; *State v. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked her car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if she could speak with him; after talking with defendant, officer asked defendant to "hold up" while officer transmitted defendant's name to dispatcher; assuming that this statement constituted seizure, officer had developed reasonable suspicion by then to detain defendant); *State v. Williams*, 201 N.C. App. 566, 571 (2009) (officer parked his patrol car on the opposite side of the street from the driveway in which defendant was parked, did not activate the siren or blue lights on his patrol car, did not remove his gun from its holster, or use any language or display a demeanor suggesting that defendant was not free to leave); *State v. Johnston*, 115 N.C. App. 711 (1994) (defendant was not seized where trooper drove over to where defendant's car was already parked, defendant voluntarily stepped out of car before trooper arrived, and trooper then exited his car and walked over to defendant).

### B. Actions During Pursuit

**Chases.** Even if a reasonable person would not have felt "free to leave," the U.S. Supreme Court has held that a seizure does not occur until there is a physical application of force or submission to a show of authority. *See California v. Hodari D.*, 499 U.S. 621 (1991) (when police are chasing person who is running away, person is not "seized" until person is caught or gives up chase); *State v. Leach*, 166 N.C. App. 711 (2004) (following *Hodari D.* and holding that officers had not seized defendant until they detained him after high speed chase).

For example, under *Hodari D.*, if an officer directs a car to pull over, a seizure occurs when the driver stops, thus submitting to the officer's authority. A seizure also could occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (defendant initially agreed to speak with officer and produced identification at officer's request, but then declined request for consent to search and tried to leave; officer effectively seized defendant by following defendant and repeatedly asking for consent to search); *see also infra* § 15.3D, Flight (flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

The application of physical force with intent to stop a suspect is also a seizure under the Fourth Amendment, regardless of whether the use of force is successful in stopping the suspect. *Torres v. Madrid*, ___ U.S. ___, 141 S. Ct. 989 (2021) (when a fleeing suspect

was shot by officers attempting to stop her, she was seized for Fourth Amendment purposes, despite escaping the officers).

Generally, evidence observed or obtained before a seizure is not subject to suppression under the Fourth Amendment. *See State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills; because defendant abandoned baggie in public place and seizure had not yet occurred, officer's recovery of baggie did not violate Fourth Amendment). If a defendant discards property as a result of illegal police action, however, he or she may move to suppress the evidence as the fruit of illegal action. *See State v. Joe*, 222 N.C. App. 206 (2012) (officers did not have grounds to arrest defendant for resisting an officer for ignoring their command to stop; bag of cocaine cannot be held to have been voluntarily abandoned by defendant when abandonment was product of unlawful arrest; suppression motion granted).

**Running tags.** *See State v. Chambers*, 203 N.C. App. 373, at *2 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment.").

**Installation of GPS tracking device.** *See United States v. Jones*, 565 U.S. 400 (2012) (Government's attachment of GPS device to vehicle to track vehicle's movements was search under the Fourth Amendment); *see also* Jeff Welty, *Advice to Officers after Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 30, 2012) (observing that *Jones* requires that officers ordinarily obtain prior judicial authorization to attach GPS device to vehicle).

### C. Race-Based "Consensual" Encounters

If officers select a defendant for a "consensual" encounter because of the defendant's race, evidence obtained during the encounter potentially could be suppressed on equal protection and due process grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as race); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also United States v. Washington*, 490 F.3d 765 (9th Cir. 2007) (in totality of circumstances, encounter between two white police officers and African-American defendant was not consensual, as a reasonable person in defendant's circumstances would not have felt free to leave; court relied on, among other things, strained relations between police and African-American community and reputation of police among African-Americans).

If an officer's actions amount to a stop, racial motivation also may undermine the credibility of non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.3K, Race-Based Stops; *see also* ALYSON A. 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).

In recognition of the potential for racial profiling, North Carolina law requires the N.C. Department of Public Safety to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 143B-903. This statute also requires the Department to collect statistics on many local law enforcement agencies. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992).

## 15.3 Did the Officer Have Grounds for the Seizure?

### A. Reasonable Suspicion

Officers may make a brief investigative stop of a person—that is, they may seize a person—if they have reasonable suspicion of criminal activity by the person. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also State v. Styles*, 362 N.C. 412 (2008) (holding that U.S. Constitution allows traffic stop based on reasonable suspicion). For a further discussion of the standard for traffic stops, see *infra* § 15.3E, Traffic Stops.

Factors to consider in determining reasonable suspicion include:

- the officer's personal observations,
- information the officer receives from others,
- time of day or night,
- the suspect's proximity to where a crime was recently committed,
- the suspect's reaction to the officer's presence, including flight, and
- the officer's knowledge of the suspect's prior criminal record

*See also United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) (in holding that stop was not supported by reasonable suspicion, court stated, "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception").

### B. High Crime or Drug Areas

Presence in a high crime or drug area, standing alone, does not constitute reasonable suspicion. Other factors providing reasonable suspicion must be present. *See Brown v. Texas*, 443 U.S. 47 (1979) (defendant's presence with others on a corner known for drug-related activity did not justify investigatory stop); *State v. Fleming*, 106 N.C. App. 165 (1992) (following *Brown*).

Courts have sometimes scrutinized the characterization of a neighborhood as a high crime area and have required the State to make an appropriate factual showing. *See State v. Holley*, 267 N.C App. 333 (2019) (factual finding that stop occurred in high crime area

unsupported by the evidence); *State v. Horton*, 264 N.C. App. 711 (2019) (general description of break-ins and vandalism in the area without explanation of how officer knew or when prior crimes occurred insufficient to corroborate tip). The First Circuit Court of Appeals has held that, when considering an officer's testimony that a stop occurred in a "high crime area," the court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

Representative cases finding a stop in a "high-crime" area not to be based on reasonable suspicion (in addition to *Holley* and *Horton*, above) include:

*State v. White*, 214 N.C. App. 471 (2011) (reasonable suspicion did not exist where officers responded to a complaint of loud music in a location they regarded as a high crime area but officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music; that the defendant was running in the neighborhood did not establish reasonable suspicion; "[t]o conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running")

*State v. Hayes*, 188 N.C. App. 313 (2008) (reasonable suspicion did not exist where defendant and another man were in area where drug-related arrests had been made in past, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe they lived in the neighborhood, and the officer observed in the car they had exited a gun under the seat of the defendant's companion but not of the defendant)

Representative cases finding a stop in a "high-crime" area to be justified by additional factors showing reasonable suspicion include:

*State v. Goins,* 370 N.C. 157 (2017), *rev'g per curiam for reasons stated in dissenting opinion,* 248 N.C. App. 265 (2016) (defendant was in a high crime neighborhood, driving slowly around a parking lot in an apartment complex known for drug activity and appeared to be meeting a man standing outside one of the buildings within the complex known for drug activity; when the person standing outside yelled towards the defendant's car, it exited the parking lot at faster rate of speed; this "unbroken sequence of observed events" was sufficient to establish reasonable suspicion)

*State v. Jackson,* 368 N.C. 75 (2015) (presence in area known for drug activity, consistent with evasive behavior known to the officer to be consistent with drug transactions established reasonable suspicion)

*State v. Butler*, 331 N.C. 227 (1992) (presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant, were sufficient to form reasonable suspicion to stop)

### C. Proximity to Crime Scenes or Crime Suspects

A factor similar to presence in a high-crime area, discussed in subsection B., above, is proximity to a crime scene. Without more, this factor does not establish reasonable suspicion. *See State v. Brown*, 217 N.C. App. 566 (2011) (proximity to area in which robbery occurred four hours earlier insufficient to justify stop); *State v. Chlopek*, 209 N.C. App. 358 (2011) (no reasonable suspicion to stop truck that drove into subdivision under construction and drove out thirty minutes later at a time of night when copper thefts had been reported in other parts of the county); *State v. Murray*, 192 N.C. App. 684 (2008) (officer did not have reasonable suspicion to stop vehicle when officer was on patrol at 4:00 a.m. in area where there had been recent break-ins; vehicle was not breaking any traffic laws, officer did not see any indication of any damage or break-in that night, vehicle was on public street and was not leaving parking lot of any business, and officer found no irregularities on check of vehicle's license plate); *State v. Cooper*, 186 N.C. App. 100 (2007) (no reasonable suspicion where defendant, a black male, was in vicinity of crime scene and suspect was described as a black male); *compare State v. Campbell*, 188 N.C. App. 701 (2008) (court states that proximity to crime scene, time of day, and absence of other suspects in vicinity do not, by themselves, establish reasonable suspicion; however, noting other factors, court finds that reasonable suspicion existed in the circumstances of the case).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, 193 N.C. App. 670 (2008) (defendant drove to and entered home of person who was wanted for several felonies; defendant and person came out of house a few minutes later and drove to nearby gas station, parked in lot, and got out of car, where officers arrested other person and ordered defendant to stop; trial court's finding that officer had right to make investigative stop of defendant because he transported wanted person was erroneous as matter of law).

### D. Flight

**Generally.** In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court held that the defendant's headlong flight on seeing the officers, along with his presence in an area of heavy narcotics trafficking, constituted reasonable suspicion to stop. The Court reaffirmed that mere presence in a high drug area does not constitute reasonable suspicion and cautioned that reasonable suspicion is based on the totality of the circumstances, not any single factor. *See also In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw a Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car).

**Flight from consensual or illegal encounter not RDO.** If an officer has grounds to seize a person, the person's flight may constitute resisting, delaying, or obstructing an officer in the lawful performance of his or her duties (RDO). *See, e.g., State v. Lynch*, 94 N.C. App. 330 (1989). If the initial encounter between an officer and defendant is consensual and not a seizure, however, a defendant's attempt to leave would not constitute RDO. *See, e.g., State v. Joe*, 222 N.C. App. 206 (2012); *State v. White*, 214 N.C. App. 471 (2011) (so holding); *In re A.J. M.-B.*, 212 N.C. App. 586 (2011) (same); *State v. Sinclair*, 191 N.C. App. 485, 490–91 (2008) ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties."); *compare State v. Washington*, 193 N.C. App. 670 (2008) (officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO). For a discussion of the difference between consensual encounters and seizures, see *supra* § 15.2A, Consensual Encounters.

Likewise, if an officer illegally stops a person, the person's attempt to leave thereafter ordinarily would not give the officer grounds to stop the person and charge him or her with RDO. *See, e.g.*, *White,* 214 N.C. App. 471 (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *Sinclair*, 191 N.C. App. 485 (same); *State v. Swift*, 105 N.C. App. 550 (1992) (recognizing that person may flee illegal stop or arrest); JOHN RUBIN, THE LAW OF SELF-DEFENSE IN NORTH CAROLINA 137–38 (UNC Institute of Government, 1996) (person has limited right to resist illegal stop). *But cf. State v. Branch*, 194 N.C. App. 173 (2008) (officer had reasonable suspicion to stop defendant but did not have grounds to continue detention after completing purpose of stop; defendant had right to resist continued detention but used more force than reasonably necessary by driving away while officer was reaching into vehicle; officer therefore had probable cause to arrest defendant for assault).

## E. Traffic Stops

**Standard for making stop.** An officer may not randomly stop motorists to check their driver's license or vehicle registration; an officer must have at least reasonable suspicion of criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Police may establish systematic checkpoints, without individualized suspicion, under certain conditions. *See infra* § 15.3I, Motor Vehicle Checkpoints.

The N.C. Supreme Court has held that reasonable suspicion, not probable cause, is sufficient for a traffic stop, regardless of whether the traffic violation is readily observed or merely suspected. *See State v. Styles*, 362 N.C. 412 (2008); *see also* G.S. 15A-1113(b) (an officer who has probable cause of a noncriminal infraction may detain the person to issue and serve a citation). *But see State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation). Under some circumstances, a mistaken but reasonable belief that a crime is occurring can support reasonable suspicion

for a traffic stop. *See infra* § 15.3J, Mistaken Belief by Officer (discussing mistakes of law and fact).

**Standing of passenger to challenge stop.** In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a passenger in a car is seized under the Fourth Amendment when the police make a traffic stop, and the passenger may challenge the stop's constitutionality. *Accord State v. Canty*, 224 N.C. App. 514 (2012). Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence.

If a stop is valid, a passenger's standing to challenge actions taken during the stop (such as frisks or searches) will depend on whether the officer's actions infringe on the passenger's rights. *See State v. Franklin,* 224 N.C. App. 337 (2012) (although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle).

**Delay at light.** *Compare, e.g., State v. Barnard*, 362 N.C. 244 (2008) (driver's unexplained thirty-second delay before proceeding through green traffic light gave rise to reasonable suspicion of impaired driving in all the circumstances), *with State v. Roberson*, 163 N.C. App. 129 (2004) (defendant's eight to ten second delay after light turned green did not give officer reasonable suspicion to stop for impaired driving).

**Failure to use turn signal.** *Compare, e.g., State v. Ivey*, 360 N.C. 562 (2006) (failure to use turn signal when making turn did not give officer grounds to stop; failure to signal did not affect operation of any other vehicle or any pedestrian), *with State v. Styles*, 362 N.C. 412 (2008) (failure to use turn signal gave officer grounds to stop because failure could affect operation of another vehicle, in this case vehicle driven by officer, which was directly behind defendant).

**Speeding or slowing.** *See, e.g., State v. Canty*, 224 N.C. App. 514 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car, and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Royster*, 224 N.C. App. 374 (2012) (officer had sufficient time to form opinion that defendant was speeding); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer's estimate that defendant was going 40 m.p.h. in 25 m.p.h. zone justified stop ); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also* Welty, *Traffic Stops*, at 3 (noting that "if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop"; citing cases).

**Weaving.** Numerous cases address "weaving" in one's own lane. While weaving is not a traffic violation and alone may not provide reasonable suspicion, it may provide reasonable suspicion to stop when combined with other factors or when severe. *See also* Jeff Welty, *Weaving and Reasonable Suspicion*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 19, 2012).

Cases not finding grounds for a stop include: *State v. Canty*, 224 N.C. App. 514 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Peele*, 196 N.C. App. 668 (2009) (single instance of weaving in own lane, without more, did not constitute reasonable suspicion to stop; officer's reliance on dispatcher's report of impaired driving in the area, in addition to officer's observation of weaving, did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *State v. Fields*, 195 N.C. App. 740 (2009) (weaving in own lane three times, without more, did not establish reasonable suspicion to stop for impaired driving; defendant violated no other traffic laws, was driving at 4:00 p.m. in afternoon, which was not unusual hour, and was not near places that furnished alcohol).

Cases finding grounds for a stop include: *State v. Kochuk*, 366 N.C. 549 (2013), *rev'g per curiam for reasons stated in dissenting opinion*, 223 N.C. App. 301 (2012); *State v. Otto*, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving for three quarters of a mile at 11:00 p.m. on Friday night); *State v. Fields*, 219 N.C. App. 385 (2012) (officer followed defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ally] to prompt evasive maneuvers from other drivers"); *State v. Jacobs*, 162 N.C. App. 251, 255 (2004) (court recognizes that "defendant's weaving within his lane was not a crime," but finds that all of the facts—slowly weaving within own lane for three-quarters of a mile, late at night, in area near bars—justified stop); *State v. Thompson*, 154 N.C. App. 194 (2002) (weaving within the lane and touching the centerline with both left tires, combined with speeding and other factors, justified stop); *State v. Watson*, 122 N.C. App. 596 (1996) (driving on center line and weaving in own lane at 2:30 a.m. near nightclub justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also State v. Hudson*, 206 N.C. App. 482 (2010) (crossing center line and fog line twice provided probable cause for stop for violation of G.S. 20-146(a), which requires driving on right side of highway).

**Proximity to bars.** *See, e.g., State v. Roberson*, 163 N.C. App. 129 (2004) (driving at 4:30 a.m. in area with several bars and restaurants did not increase level of suspicion and justify stop; by law, those establishments must stop serving alcohol at 2:00 a.m.); *State v. Watson*, 122 N.C. App. 596 (1996) (proximity to nightclub at 2:30 a.m., combined with driving on center line and weaving in own lane, justified stop).

**Anonymous tip of impaired driving.** *See infra* § 15.3F, Anonymous Tips.

**Ownership.** Absent information to the contrary, an officer is permitted to make the "commonsense" inference that the driver of a car is the registered owner of the vehicle; an officer therefore may stop a vehicle when the registered owner is not properly licensed. *Kansas v. Glover*, ___ U.S. ___, ___, 140 S. Ct. 1183, 1188 (2020) (where license plate check showed registered owner to have a revoked driver's license and officer had no information to negate the inference that the owner was driving, traffic stop

was supported by reasonable suspicion); *State v. Hess*, 185 N.C. App. 530 (2007) (owner of car had suspended license; absent evidence that owner was not driving car, officer had reasonable suspicion to stop car to determine whether owner was driving).

For a discussion of limitations on an officer's actions after discovering that a car was not being driven by the owner or was not improperly registered, *see infra* § 15.3J, Mistaken Belief by Officer.

**Other registration issues.** *See, e.g., State v. Burke*, 212 N.C. App. 654 (2011) (stop based merely on low number of temporary tag not supported by reasonable suspicion), *aff'd per curiam*, 365 N.C. 415 (2012); *State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that faded, temporary registration had expired and that vehicle was improperly registered); *see also United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (Fourth Amendment does not allow traffic stop simply because vehicle had temporary tags and officer could not read expiration date while driving behind defendant at night).

**Seatbelt violations.** *See, e.g., State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have grounds to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped).

### F. Anonymous Tips

**General test.** Information from informants is evaluated under the "totality of the circumstances," but the most critical factors are the reliability of the informant and the basis of the informant's knowledge. *See Alabama v. White*, 496 U.S. 325 (1990).

When a tip is anonymous, the reliability of the informant is difficult to assess, and the tip is insufficient to justify a stop unless the tip itself contains strong indicia of reliability or independent police work corroborates significant details of the tip. *See State v. Johnson*, 204 N.C. App. 259, 260–61 (2010) (finding tip insufficient under these principles; anonymous caller merely alleged that black male wearing a white shirt in a blue Mitsubishi with a certain license plate number was selling guns and drugs at certain street corner); *see also State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Harwood*, 221 N.C. App. 451, 460 (2012) (uncorroborated, anonymous tip did not provide basis for stop; "tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle"); *State v. Peele*, 196 N.C. App. 668 (2009) (officer's reliance on dispatcher's report of impaired driving in the area along with observation of single instance of weaving did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *see also State v. Coleman*, 228 N.C. App. 76 (2013) (even though caller gave her name, court concluded that information that defendant had open container of alcohol was no more reliable than information provided by anonymous tipster; caller did not identify or describe the defendant, did not provide any way for the officer to assess her credibility, failed to

explain the basis of her knowledge, and did not include any information concerning defendant's future actions).

A tip from a person whom the police fail to identify might not be considered anonymous, or at least not completely anonymous, if the tipster has put his or her anonymity sufficiently at risk. *See State v. Maready*, 362 N.C. 614 (2008) (driver who approached officers in person to report erratic driving was not completely anonymous informant even though officers did not take the time to get her name; also, informant had little time to fabricate allegations); *State v. Hudgins*, 195 N.C. App. 430 (2009) (caller, although not identified, placed his anonymity at risk; he remained on his cell phone with the dispatcher for eight minutes, gave detailed information about the person who was following him, followed the dispatcher's instructions, which allowed an officer to intercept the person who was following the caller, and remained at scene long enough to identify person stopped by the officer); *United States v. Mitchell*, 963 F.3d 385 (4th Cir. 2020) (to same effect).

**Weapons offenses.** In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found that an anonymous tip—stating that a young black male was at a particular bus stop wearing a plaid shirt and carrying a gun—did not give officers reasonable suspicion to stop. The tip lacked sufficient indicia of reliability and provided no predictive information about the person's conduct. The Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal firearm would justify a stop and frisk even if the tip fails the standard test for reasonable suspicion. *See also State v. Hughes*, 353 N.C. 200 (2000) (following *Florida v. J.L.*, court finds anonymous tip insufficient to support stop); *State v. Brown*, 142 N.C. App. 332 (2001) (to same effect).

**Impaired driving cases.** *Florida v. J.L.* indicates that the standard for evaluating anonymous tips should be the same regardless of the type of offense involved, with possible exceptions for certain offenses (such as offenses involving explosives).

In cases in North Carolina in which the police have received a tip about impaired or erratic driving, the courts have applied the same standard for assessing reasonable suspicion as in cases involving other offenses. They have not recognized an exception for impaired driving. *See State v. Maready*, 362 N.C. 614 (2008) (finding in totality of circumstances that tip about erratic driving and other information gave officers reasonable suspicion to stop); *State v. Peele*, 196 N.C. App. 668 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip might not be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See supra* "General test" in this subsection F.

**Drug cases.** An anonymous tip to police that a person is involved in illegal drug sales is not sufficient, without more, to justify an investigatory stop. *See State v. McArn*, 159 N.C. App. 209 (2003) (anonymous tip that drugs were being sold from particular vehicle was not sufficient to justify stop of vehicle); *compare State v. Sutton*, 167 N.C. App. 242 (2004) (tip from pharmacist with whom officer had been working on ongoing basis to

uncover illegal activity involving prescriptions, combined with officer's own observations, provided reasonable suspicion to stop defendant after defendant left pharmacy).

### G. Information from Other Officers

**Generally.** An officer may stop a person based on the request of another officer if:

- the officer making the stop has reasonable suspicion for the stop based on his or her personal observations;
- the officer making the stop received a request to stop the defendant from another officer who, before making the request, had reasonable suspicion for the stop; or
- the officer making the stop received information from another officer before the stop, which when combined with the stopping officer's observations constituted reasonable suspicion.

*See State v. Battle*, 109 N.C. App. 367, 371 (1993) (discussing general standard for stops based on collective knowledge); *State v. Bowman*, 193 N.C. App. 104 (2008) (collective knowledge of team of officers investigating defendant imputed to officer who conducted search of vehicle); *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); *see also State v. Harwood*, 221 N.C. App. 451 (2012) (anonymous tip did not provide basis for stop; court appears to reject argument that officers could rely on outstanding arrest warrant unknown to stopping officers when they stopped defendant); Jeff Welty, *Fascinating Footnote 3*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 13, 2012) (discussing *Harwood*).

**Police broadcasts.** Police broadcasts may or may not be based on an officer's observations. Without any showing as to the basis of the broadcast, it should be given no more weight than an anonymous tip. *See State v. Peele*, 196 N.C. App. 668 (2009) (dispatcher's report of impaired driving was treated as based on anonymous tip, as State provided no evidence that report of driving came from identified caller); *see also supra* § 15.3F, Anonymous Tips.

### H. Pretext

In some limited instances, a court may find that a stop or search is unconstitutional because the purported justification for the stop or search is a pretext for an impermissible reason.

**Stops based on individualized suspicion.** The U.S. Supreme Court has significantly cut back the pretext doctrine. Generally, an officer's subjective motivation in stopping a person or vehicle is irrelevant under the Fourth Amendment if the officer has probable cause to make the stop. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs)

is generally irrelevant if the officer has probable cause for the stop and could have stopped the person for that reason (for example, the person committed a traffic violation). *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution).

*Whren* did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also Hamilton*, 125 N.C. App. 396 (dissent notes that *Whren* left this question open). It seems unlikely, however, that *Whren* would not apply to circumstances in which officers have reasonable suspicion to stop, a lesser degree of proof than probable cause but still a form of individualized suspicion. *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (in upholding validity of material-witness arrest warrant requiring less than probable cause for issuance, Court states that subjective intent is pertinent only in cases not involving individualized suspicion).

**Facts known to officer.** *Whren* and cases following it consider the objective facts supporting a stop. Consequently, if the facts known to an officer amount to a violation of the law, the stop is valid even though the officer may have made the stop for a different reason. *See State v. Barnard*, 362 N.C. 244 (2008) (based on defendant's thirty-second delay after traffic light turned green, officer stopped defendant for impaired driving, for which there was reasonable suspicion, and for impeding traffic, which was not a traffic violation; court upholds stop, reasoning that its constitutionality depends on the objective facts observed by officer, not the officer's subjective motivation); *State v. Osterhoudt*, 222 N.C. App. 620 (2012) (trooper had reasonable, articulable suspicion to stop defendant based on observed traffic violations notwithstanding his mistaken belief that defendant violated different traffic law).

Relatedly, facts unknown to the officer at the time of the stop do not provide a basis for a stop. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest"; officer's subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 67–68 (for actions without warrant, information to be considered is the "totality of facts" available to officer). For a discussion of reliance on the collective knowledge of the investigating officers, see *supra* § 15.3G, Information from Other Officers.

Accordingly, if the facts known to an officer do not satisfy the State's burden of showing grounds for the stop, the stop is invalid. This result does not depend on whether the stop was or was not pretextual, although as a practical matter judges may scrutinize more closely whether grounds existed for the stop if they believe an officer acted for a pretextual reason. *See infra* § 15.3K, Race Based Stops (discussing cases).

**Exceptions.** There are some limits to *Whren.*

- *Whren* itself stated that a defendant may challenge as pretextual inventory searches or administrative inspections because they are not based on individualized suspicion.

- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* "Pretextual checkpoints" in § 15.3I, Motor Vehicle Checkpoints.
- A stop for a traffic violation or other matter still violates the Fourth Amendment if the officer exceeds the scope of the stop—for example, the officer unduly detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. *See infra* § 15.4E, Nature, Length, and Purpose of Detention.
- If an officer stops a defendant because of his or her race, the stop may violate equal protection under the Fourteenth Amendment regardless of whether probable cause exists. *See supra* § 15.2C, Race-Based "Consensual" Encounters. Proof of racial motivation may also undermine the credibility of the officer's stated reason for the stop. *See infra* § 15.3K, Race-Based Stops.

**Effect of not issuing citation.** The failure of an officer to issue a citation for the traffic violation that was the basis of a traffic stop does not affect the stop's validity if objective circumstances indicate that the defendant committed a violation. *See State v. Baublitz*, 172 N.C. App. 801 (2005) (officer's "objective observation" that defendant's vehicle twice crossed center line of highway provided officer with probable cause to stop for traffic violation, regardless of officer's subjective motivation for making stop; court finds it irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine).

## I. Motor Vehicle Checkpoints

The discussion below reviews selected principles governing motor vehicle checkpoints. For an in-depth discussion of checkpoints as well as additional information on some of the issues discussed below, see Welty, *Motor Vehicle Checkpoints*.

**License and registration checkpoints.** In *Delaware v. Prouse*, 440 U.S. 648 (1979), the U.S. Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration; the Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Sanders*, 112 N.C. App. 477 (1993) (upholding license checkpoint under authority of *Prouse*). Motor vehicle checkpoints are authorized in North Carolina under G.S. 20-16.3A, which allows checkpoints for the purpose of determining compliance with G.S. Chapter 20.

A license and registration checkpoint must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. To determine the constitutionality of a checkpoint, courts examine the primary purpose of the checkpoint and whether the checkpoint was operated in a reasonable manner. *State v. Veazey,* 201 N.C. App. 398 (2009). For a further discussion of these limitations, see SHEA RIGGSBEE DENNING, CHRISTOPHER TYNER, & JEFFREY B. WELTY, PULLED OVER: THE LAW OF TRAFFIC STOPS AND OFFENSES IN NORTH CAROLINA (UNC School of Government, 2017); Shea Denning, *State v. McDonald Provides Useful Primer on Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 3, 2015); Welty, *Motor Vehicle Checkpoints*.

**DWI checkpoints.** The U.S. Supreme Court has upheld the constitutionality of impaired-driving checkpoints conducted under guidelines regulating officers' discretion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*.

**Pretextual checkpoints.** A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

**Avoiding checkpoint.** In *State v. Foreman*, 351 N.C. 627 (2000), the North Carolina Supreme Court held that avoidance of a lawful checkpoint constituted reasonable suspicion to stop to inquire why the defendant turned away from the checkpoint. Cases since *Foreman* have looked at the totality of the circumstances, implicitly recognizing that turning away from a checkpoint may not always constitute reasonable suspicion to stop. *See State v. Griffin*, 366 N.C. 473 (2013) (defendant made three-point turn in middle of road, not at intersection, to avoid checkpoint where police lights were visible; court states that "even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion" and finds that "place and manner of defendant's turn in conjunction with his proximity to the checkpoint" provided reasonable suspicion to stop); *White v. Tippett*, 187 N.C. App. 285 (2007) (from a combination of the driver's evasion of the checkpoint, odor of alcohol surrounding the driver, and brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense); *State v. Bowden*, 177 N.C. App. 718 (2006) (defendant broke hard before checkpoint, causing front of car to dip, abruptly turned into parking lot, pulled in and out of parking space, headed toward exit, and pulled into another space when officer drove up; totality of circumstances justified officer in pursuing and stopping defendant's car).

**Challenge to illegal checkpoint by person who turns away.** The N.C. Court of Appeals has held that the illegality of a checkpoint is not relevant when a driver turns away from the checkpoint because the checkpoint is not the basis for the stop in those circumstances. *See State v. Collins*, 219 N.C. App. 374 (2012); *see also White v. Tippett*, 187 N.C. App. 285 (2007) (so stating in civil license proceedings). (These decisions are inconsistent with the decision of another panel of the court of appeals, but the decision of that panel was vacated and remanded for other reasons. *See State v. Haislip*, 186 N.C. App. 275 (2007) (if checkpoint is unconstitutional, turning away from checkpoint would not be grounds to stop defendant), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).)

The above principle does not necessarily end the inquiry. In remanding the case for further findings, the court in *Collins* recognized that an officer must have reasonable suspicion to stop a defendant who turns away from an unconstitutional checkpoint; mere turning away may not be sufficient. *See also State v. Griffin*, 366 N.C. 473 (2013) (stating

that court did not need to address alleged unconstitutionality of checkpoint because in circumstances of case officer had reasonable suspicion to stop defendant). Also at play is the principle that a person has the right to avoid an illegal action. Turning away from an illegal checkpoint, along with other factors, may provide reasonable suspicion, just as running on foot from an unlawful stop, along with other factors, may provide reasonable suspicion. Without more, however, merely failing to obey an unlawful action by the police may not constitute reasonable suspicion. *See supra* § 15.3D, Flight; *see also* Jeff Welty, *Ruse Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 1, 2011) (citing cases holding that a person's avoidance of a "ruse" checkpoint—that is, one in which officers put up signs warning of a checkpoint ahead that does not actually exist or that is illegal so that officers may observe drivers' reactions—does not without more provide reasonable suspicion to stop).

**Limits on detention at checkpoint.** Although motorists may be briefly stopped at an impaired driving checkpoint, detention of a particular motorist for more extensive investigation, such as field sobriety testing, requires satisfaction of an individualized suspicion standard. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For a further discussion of these issues, see Welty, *Motor Vehicle Checkpoints*, at 6–7 (questions 10 and 11).

**Drug and general crime control checkpoints.** Drug checkpoints and general crime control checkpoints are not permissible. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

**Information-seeking checkpoints.** Distinguishing *Edmond,* 531 U.S. 32, which found drug checkpoints unconstitutional, the Court held that brief stops of motorists at a highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

**Public housing checkpoints.** *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional).

### J. Mistaken Belief by Officer

A mistaken belief by an officer may or may not justify a stop depending on the nature of the belief. If a mistake of "law," the mistake generally does not justify a stop; if a mistake of "fact," the mistake may not invalidate the stop. Distinguishing between a mistake of law and mistake of fact may be difficult in some cases.

**Mistake of law.** Generally, a stop based on observed facts that do not amount to a violation of the law—a mistake of "law"—violates the Fourth Amendment. *See State v. McLamb*, 186 N.C. App. 124 (2007) (officer stopped defendant for speeding for going 30

m.p.h. in what the officer thought was a 20 m.p.h. zone; speed limit was actually 55 m.p.h., and stop violated Fourth Amendment); *cf. State v. Osterhoudt*, 222 N.C. App. 620 (2012) (trooper had reasonable suspicion to stop vehicle based on observed traffic violations even where trooper was mistaken about which motor vehicle statute had been violated).

The U.S. Supreme Court has recognized an exception to the rule that a mistake of law will not support a stop. The Court held that if an officer makes a stop based on an objectively reasonable mistake of law, the stop is not invalid because of the mistake. In *Heien v. North Carolina*, 574 U.S. 54 (2014), the defendant was stopped for a single broken brake light. North Carolina law at the time only required one working brake light. After the court of appeals initially overturned the denial of the motion to suppress based on the officer's mistake of law, the North Carolina Supreme Court reversed. It determined that the officer's mistaken belief that two working brake lights were required was objectively reasonable and did not warrant suppression. *State v. Heien*, 366 N.C. 271 (2012). The U.S. Supreme Court agreed. This decision may have a limited impact. The North Carolina Supreme court in *Heien* noted that North Carolina's brake light requirements were particularly ambiguous and, until this case, had not been interpreted by the appellate courts (and were later amended by the legislature to require two lights in S.L. 2015-31 (S 90)). In cases in which the legal requirements are clearer or more established, an officer's mistake would not meet the standard announced in *Heien*. *See State v. Coleman*, 228 N.C. App. 76 (2013) (finding that mistake of law about lawfulness of possession of open container of alcohol in public vehicular area was not reasonable).

**Mistake of fact.** A stop based on an officer's incorrect assessment of the facts—that is, a mistake of fact—does not violate the Fourth Amendment *if* the officer's mistake was reasonable. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding); *see also State v. Williams*, 209 N.C. App. 255 (2011) (officers had reasonable suspicion to stop a vehicle in which defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales, corroborated by the officers, from three reliable informants; the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

A split of authority exists on whether an officer may continue a traffic stop after a mistake of fact such as in *State v. Myers-McNeil*, 262 N.C. App. 497 (2018). There, officers stopped a vehicle based on a license check, which showed the owner of the car was male and had a suspended license. Upon approaching the car, the officer immediately determined the driver was a woman. The *Myers-McNeil* court held that the officer in this circumstance was not required to immediately end the encounter and that it was permissible to perform the normal incidents of a traffic stop, such as a driver's license and warrant check. It is worthwhile to consider making and preserving an argument that a stop should immediately terminate once reasonable suspicion dissipates. *See* Jeff Welty, *Myers-McNeil and What Happens When Reasonable Suspicion Dissipates*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 26, 2018).

## K. Race-Based Stops

The North Carolina appellate courts have taken a closer look at stops that may have been motivated by the defendant's race. Although the Fourth Amendment does not prohibit a stop if the objective facts known to the officer justify the stop (*see supra* "Facts known to officer" in § 15.3H, Pretext), the courts have sometimes found that an officer's asserted, non-racial basis for the stop was not credible or not sufficient to support the stop. *See State v. Ivey*, 360 N.C. 562, 564 (2006) (court states that it could not determine whether stop of car driven by black male was "selective enforcement of the law based upon race," which would be a violation of equal protection; court states, however, that it "will not tolerate discriminatory application of the law" based on race and finds that officer did not have grounds to stop defendant for failure to use turn signal), *abrogated on other grounds by State v. Styles*, 362 N.C. 412 (2008); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car); *State v. Villeda*, 165 N.C. App. 431 (2004) (court reviews at length evidence that trooper's stop of Hispanic driver was racially motivated; court upholds trial court's finding that trooper was not able to observe whether driver was wearing seat belt).

A stop based on race also may violate Equal Protection. *See supra* § 15.2C, Race-Based "Consensual" Encounters; *see also* ALYSON A. 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).

## L. Limits on Officer's Territorial Jurisdiction

If an officer acts outside his or her territorial jurisdiction, the actions may constitute a substantial statutory violation under G.S. 15A-974 and warrant the exclusion of any evidence discovered. *See generally* FARB at 14–18, 97–98 (discussing territorial jurisdiction of city officers, campus officers, and others, and cases addressing motions to suppress); G.S. 20-38.2 ("[a] law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State"); *cf. Parker v. Hyatt*, 196 N.C. App. 489 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

A statutory violation by an officer may be excused if based on an objectively reasonable, good faith belief in the lawfulness of the action. *See* G.S. 15A-974(a)(2); *see also supra* § 14.5, Substantial Violations of Criminal Procedure Act.

### M. Community Caretaking

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of the government agent's community caretaking function and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defendant, who was police officer and was apparently drunk, was in car accident and was taken to local hospital; permissible for other officers to return to car, which had been towed to garage and left outside on street, to look for and retrieve defendant's service revolver from car as public safety measure; *State v. Hocutt*, 177 N.C. App. 341 (2006) (officers were authorized to take defendant to jail to "sober up" under G.S. 122C-303; defendant was very intoxicated and was staggering, barefoot, dirty, and very scratched up on shoulder of highway in isolated area late at night). The U.S. Supreme Court has limited the holding of *Cady* to the context of motor vehicles on public roads. *Caniglia v. Strom*, ___ U.S. ___, 141 S. Ct. 1596 (2021) (rejecting application of community caretaking to warrantless search of home but leaving open the possibility that exigent circumstances may justify warrantless entry of homes under certain urgent conditions).

## 15.4 Did the Officer Act within the Scope of the Seizure?

This section focuses on the restrictions on an officer's investigation following a stop of a person based on reasonable suspicion. The same principles generally apply to stops for traffic violations, whether based on reasonable suspicion or probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("most traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*" (citations omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("the usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest"); *State v. Styles*, 362 N.C. 412, 414 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry*." (citation omitted)).

### A. Frisks for Weapons

**Grounds for frisk.** An officer who has reasonable suspicion to stop a person does not automatically have the right to frisk the person for weapons. The officer must have reasonable suspicion that the person has a weapon and presents a danger to the officer or others. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Pearson*, 348 N.C. 272 (1998) (officer did not have grounds for weapons frisk during traffic stop; defendant's consent to search of car did not authorize frisk of person); *State v. Duncan,* 272 N.C. App. 341 (2020) (presence of pocketknife in center console of car did not render defendant dangerous, and officer otherwise lacked reasonable suspicion for frisk); *State v. Malachi,* 264 N.C. App. 233 (2019) (officers had reasonable suspicion to frisk defendant; anonymous tip reported that defendant had a gun and, when a marked patrol car arrived, defendant "bladed" his body and attempted to move away from the officer); *State v. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed).

**Factors.** Circumstances to consider include:

- the nature of the suspected offense,
- a bulge in the person's clothing,
- observation of an object that appears to be a weapon,
- sudden, unexplained movements by the person,
- failure to remove a hand from a pocket, and
- the person's prior criminal record and history of dangerousness.

An officer likely does not have the authority to direct a suspect to empty his or her pockets as part of the officer's authority to frisk. *See In re V.C.R.*, 227 N.C. App. 80 (2013) (directing juvenile to empty pockets was unlawful, nonconsensual search); Jeff Welty, *Empty Your Pockets*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 29, 2011). A frisk during a consensual encounter likewise would be unauthorized in most circumstances. *See* Jeff Welty, *Terry Frisk During a Consensual Encounter?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 22, 2009).

## B. Vehicles

**Ordering driver to exit vehicle.** On a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *State v. Bullock,* 370 N.C. 256 (2017). *But see* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 467–68 (in context of impaired-driving checkpoints, there is not automatically a need for self-protective measures and therefore an officer may not order a motorist out of a vehicle at such a checkpoint either as a matter of routine or on a hunch); Jeff Welty, *Traffic Stops, Part II*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 28, 2009) (questioning whether officer may routinely require occupant of vehicle to sit in patrol car during stop).

**Ordering passengers to exit or remain in vehicle; frisking of passengers.** In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer making a traffic stop may order the passengers out of the car, without specific grounds, pending completion of the stop. The Court in *Wilson* expressed no opinion on whether an officer may automatically detain a passenger during the duration of the stop. *See Wilson*, 519 U.S. at 415 n.3. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court indicated that officers may detain passengers to frisk them if they reasonably believe the passengers are armed and dangerous, observing that officers are not constitutionally obligated to allow a passenger to depart without first ensuring that they are not "permitting a dangerous person to get behind" them. *Id.* at 334; *see also Owens v. Kentucky*, 556 U.S. 1218 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded). Relatedly, officers may order a passenger to remain temporarily in the vehicle for safety reasons. *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle).

These decisions do not resolve whether officers may continue to detain passengers once they have addressed safety concerns. Cases after *Wilson*, although before *Johnson*, indicate that an officer must have reasonable suspicion to do so. *See State v. Brewington*, 170 N.C. App. 264 (2005) (officer had reasonable suspicion of criminal activity by passenger to require that passenger remain at scene).

Regardless whether officers may detain a passenger during a stop, a passenger may challenge the validity and duration of the stop and thus may suppress the results of any investigation after an invalid stop or unduly extended stop. *See supra* "Standing of passenger to challenge stop" in § 15.3E, Traffic Stops.

**Sweep of interior of vehicle.** Officers may conduct a protective sweep of the passenger compartment of a vehicle in areas where a weapon may be located—in other words, they may conduct a "vehicle frisk" but not a search for evidence—if the officers reasonably believe that the suspect is dangerous and may gain immediate control of a weapon. *See Michigan v. Long*, 463 U.S. 1032 (1983) (stating standard); *State v. Minor*, 132 N.C. App. 478 (1999) (officer had insufficient grounds to search car for weapons); *see also infra* § 15.6B, Search Incident to Arrest (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), which precludes search of vehicle incident to arrest of occupant if purpose is to prevent occupant from obtaining weapon or destroying evidence and occupant has already been secured by officers).

For a further discussion of car sweeps, see Welty, *Traffic Stops*, at 7 (reviewing cases and observing that "North Carolina's appellate courts have been fairly demanding regarding reasonable suspicion in this context, several times finding ambiguously furtive movements, standing alone, to be insufficient").

**License, warrant, and record checks.** *See* Welty, *Traffic Stops*, at 7 (reviewing authorities and observing that "courts have generally viewed these checks, and the associated brief delays, as permissible" during a traffic stop); *see also infra* § 15.4E, Nature, Length, and Purpose of Detention.

### C. Plain View

Generally, observations by officers of things in "plain view" do not constitute a search. Under the Fourth Amendment, a seizure is lawful under the plain view doctrine if the officer is lawfully in a position to observe the items and it is immediately apparent to the officer that the items are evidence of a crime, contraband, or otherwise subject to seizure. *See Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence need not be inadvertent if these two conditions are met). *But see* G.S. 15A-253 (under North Carolina law, discovery of evidence in plain view during execution of search warrant must be inadvertent).

Shining a flashlight into a vehicle that has been lawfully stopped is ordinarily not considered a search, so objects that officers observe thereby are considered to be in plain view. *See Texas v. Brown*, 460 U.S. 730 (1983); *see also* 1 LAFAVE, SEARCH AND

SEIZURE § 2.2(b), at 639–40 (discussing limits on this doctrine—for example, officer may not open door to shine flashlight into car unless officer has grounds to open door); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of sense-enhancing technology—in this case, a thermal imager that detected relative amounts of heat within home—constituted search).

A defendant still may have grounds to suppress plain-view observations if the initial stop was invalid or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop.

### D. "Plain Feel" and Frisks for Evidence

**General prohibition.** An officer who stops a person on reasonable suspicion may not frisk the person for evidence. *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

**"Plain feel" exception.** Under what has come to be known as the "plain feel" doctrine, when an officer conducts a proper weapons frisk and has probable cause to believe that an object is evidence of a crime, then the officer may remove it. But, if an officer does not *immediately* recognize that the object is evidence of a crime, he or she may not manipulate or explore the object further; such action constitutes a search, which is not authorized as part of a weapons frisk. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer's continued exploration of lump until he developed probable cause to believe it was cocaine was an unlawful search); *In re D.B.*, 214 N.C. App. 489 (2011) (during frisk of juvenile for weapons, officer's removal of credit card, which turned out to be stolen, was not permissible; officer could not seize card on basis that juvenile did not identify himself and officer believed that card was identification card); *State v. Williams*, 195 N.C. App. 554 (2009) (under "plain feel" doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient), *abrogated on other grounds by State v. Bartlett*, 368 N.C. 309 (2015); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Beveridge*, 112 N.C. App. 688 (1993) (in frisking defendant for weapons, officer noticed cylindrical bulge that felt like plastic baggie; once officer determined that bulge was not weapon, he could not continue to search defendant to determine whether baggie contained illegal drugs), *aff'd per curiam*, 336 N.C. 601 (1994); *see also State v. Graves*, 135 N.C. App. 216 (1999) (warrantless search of wads of brown paper that fell from defendant's clothing not justified under plain view doctrine because it was not immediately apparent that was contained contraband); *State v. Sapatch*, 108 N.C. App. 321 (1992) (under plain view doctrine, officers did not have probable cause to believe film canisters contained evidence of crime and, therefore, were not justified in opening canisters); *compare State v. Robinson*, 189 N.C. App. 454 (2008) (it was immediately apparent to officer that film canister contained crack cocaine).

Even if an officer has probable cause to remove an object when frisking a person for weapons, the officer may need a search warrant before inspecting the interior of the object. *See infra* "Containers" in § 15.6D, Probable Cause to Search Person.

## E. Nature, Length, and Purpose of Detention

**Generally.** As a general rule, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer*, 460 U.S. 491 (1983) (officers exceeded limits of *Terry*-stop and required probable cause); *see also* G.S. 15A-1113(b) (an officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period of time to issue and serve citation). The U.S Supreme Court has recognized that even a minor or de minimis extension of a detention can result in a Fourth Amendment violation. *Rodriguez v. United States*, 575 U.S. 348, 354–57 (2015) (rejecting de minimis exception and requiring reasonable suspicion or voluntary consent to extend a completed traffic stop; canine sniff of car after the completion of a traffic stop was an illegal seizure). Whether an officer has exceeded this general limit has been the subject of considerable litigation after *Rodriguez*, discussed below.

**Requests for consent and questioning.** In *State v. Bullock,* 370 N.C. 256 (2017), the court held that questions asked during the course of normal incidents of a traffic stop (such as a license and warrant check), including asking for consent to search and investigation of other crimes unrelated to the purpose of the stop, were permissible only if they do not extend the duration of the stop. In *State v. Reed*, 373 N.C. 498 (2020), the court reiterated the duration limit, holding that a traffic stop cannot constitutionally last longer than is needed to carry out the mission of the stop without additional reasonable suspicion of a crime. Where the purpose of the stop's mission has concluded, the defendant's continued detention for questioning and consent to search is unlawful. *See* Jeff Welty, *Supreme Court of North Carolina: Officer Did Not Improperly Extend a Traffic Stop by Frisking a Driver and Ordering the Driver into a Patrol Car*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 6, 2017); Shea Denning, *Court of Appeals Reconsiders State v. Reed and Again Finds a Fourth Amendment Violation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 17, 2018).

Numerous pre-*Rodriguez* cases addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. These cases likely remain relevant after *Rodriguez*. In arguing that questioning or a request for consent were beyond the permissible scope of the stop, and therefore that evidence and information discovered as a result must be suppressed, the defendant is in the strongest position if the following factors are present: (1) the detention had not ended (that is, a reasonable person would not have felt free to leave) at the time of the request for consent or questioning; (2) the request or questions were not related to the basis for the stop; (3) the request or questions prolonged the detention beyond what was necessary to effectuate the purpose of the stop; and (4) the officer had not developed reasonable suspicion of additional criminal activity. *See, e.g., State v. Jackson*, 199 N.C. App. 236 (2009) (driver and passengers were detained when officers had not yet returned license and registration to driver; request for consent to search after reason for stop had ended unconstitutionally prolonged stop); *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; search of

defendant's car was unlawful), *aff'd per curiam*, 362 N.C. 344 (2008); *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); *State v. Jacobs*, 162 N.C. App. 251 (2004) (after traffic stop for erratic driving, officer developed reasonable suspicion that other criminal activity may have been afoot; officer could continue to detain defendant and ask for consent to search for drugs, and officer need not have had specific reasonable suspicion for requesting consent).

There is an additional important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *Rodriguez v. United States*, 575 U.S. 348, 349 (2015) ("Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.").

**Consent after detention has ended.** If the detention has ended and the person is free to leave, an officer generally may request consent to search. *See State v. Heien*, 226 N.C. App. 280 (2013) (over a dissent, majority concluded that after return of documentation by police during traffic stop, defendant was aware that purpose of initial stop had been concluded and that further conversation, including request for and consent to search, was consensual), *overruled on other grounds*, 366 N.C. 271 (2012), *aff'd*, 574 U.S. 54 (2014); *State v. Morocco*, 99 N.C. App. 421 (1990) (trooper did not detain defendant in patrol car longer than necessary to write citation, and after detention ended defendant consented to search); *see also State v. Kincaid*, 147 N.C. App. 94 (2001) (questioning unrelated to traffic stop was permissible where defendant consented to being questioned after detention had ended).

The U.S. Supreme Court has rejected the notion that before requesting consent to search, officers are required to inform a motorist when a traffic stop ends or when the motorist is free to go. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Court held that the voluntariness of a motorist's consent is evaluated under the totality of circumstances. Whether the defendant was informed that he or she was free to leave is still a factor in the analysis. *Florida v. Royer*, 460 U.S. 491, 501–02 (1983). *Robinette* does not affect the law on the permissible duration of a stop. If an officer detains a person longer than necessary to effectuate the purpose of the stop, a request for consent to search may exceed the scope of the stop and violate the Fourth Amendment. *See, e.g., Rodriguez v. United States*, 575 U.S. 348 (2015). Any consent given must also be voluntary. *See infra* § 15.5D, Consent.

The return of paperwork to a driver may signal the end of a traffic stop, but it is not necessarily dispositive. *See* Welty, *Traffic Stops*, at 10 (so stating and reviewing North Carolina decisions and other authorities).

## F. Drug Dogs

**When a drug dog sniff is a search.** Walking a drug dog around a vehicle during a lawful traffic stop (discussed further below) is generally not considered a search. *See Illinois v. Caballes*, 543 U.S. 405 (2005); *State v. Branch*, 177 N.C. App. 104 (2006) (following *Caballes*); *United States v. Place*, 462 U.S. 696 (1983) (use of a drug dog to sniff luggage in public place was not a search under Fourth Amendment). *But cf. Florida v. Jardines,* 569 U.S. 1 (2013) (entering homeowner's property and using drug-sniffing dog on homeowner's porch to investigate contents of home is a "search" within the meaning of the Fourth Amendment). These and other cases suggest that a drug dog sniff of a person would generally be subject to Fourth Amendment limitations. *See* Shea Denning, *Dog Sniffs of People and the Fourth Amendment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2012); 1 LAFAVE, SEARCH AND SEIZURE § 2.2(g), at 727–29 (discussing issue).

**Effect of alert.** An "alert" by a drug dog to a vehicle constitutes probable cause to search the vehicle if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Florida v. Harris,* 568 U.S. 237 (2013) (holding that dog sniff provided probable cause to search vehicle and refusing to set inflexible evidentiary requirements regarding a dog's reliability; also indicating that certification of dog by bona fide organization creates presumption of reliability, which defendant may rebut by other evidence); *see also* Jeff Welty, *Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 20, 2013).

A drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle. *State v. Smith*, 222 N.C. App. 253 (2012). For a discussion of related issues, see *infra* "Drug cases" in § 15.6E, Probable Cause to Search Vehicle.

**Drug dog sniff during traffic stop.** Although a drug dog sniff of the exterior of a vehicle is generally not considered a search, use of a drug dog is impermissible if it prolongs the stop and the officer does not have reasonable suspicion to justify the delay or consent. Under the principles established in *Rodriguez v. United States*, 575 U.S. 348 (2015), even a de minimis extension of stop for a drug dog sniff is impermissible without reasonable suspicion or consent. *See* E., Nature, Length, and Purpose of Detention, above. Older cases permitting a brief or de minimis delay were overruled by *Rodriguez* and are no longer good law. *See, e.g., State v. Brimmer*, 187 N.C. App. 451 (2007) (ninety-second delay for dog sniff was de minimis extension of traffic stop and did not require additional reasonable suspicion).

A drug dog sniff is also impermissible if it intrudes into protected areas—for example, the sniff is of the interior of an occupant. If conducted at a license checkpoint, a drug dog sniff may indicate that the purpose of the checkpoint is general criminal investigation and thus impermissible. *See supra* "Drug and general crime control checkpoints" in § 15.3I, Motor Vehicle Checkpoints.

### G. Does *Miranda* Apply?

A person generally is not entitled to *Miranda* warnings during an investigatory stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Braswell,* 222 N.C. App. 176 (2012) (traffic stops are typically non-coercive in nature and do not amount to custodial interrogations). Once taken into custody or formally arrested, a person is entitled to *Miranda* warnings before police questioning. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (in case involving allegedly impaired driver who had been taken into custody, *Miranda* warnings were required for police question calling for testimonial response).

Some stops may amount to custody for *Miranda* purposes even though the person may not be under arrest. *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); *see also State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *State v. Washington*, 330 N.C. 188 (1991) (on facts presented, defendant was in custody for *Miranda* purposes when officer placed him in back seat of patrol car), *rev'g* 102 N.C. App. 535 (1991); *State v. Hemphill*, 219 N.C. App. 50, 58 (2012) (holding that "a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest").

### H. Field Sobriety Tests

North Carolina cases have assumed (although have not specifically decided) that during a stop based on reasonable suspicion of impaired driving, field sobriety tests and questioning related to possible impairment are within the scope of the stop. *See generally Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App. 2006) (finding field sobriety tests permissible on traffic stop if officer has reasonable suspicion that driver is under the influence of alcohol).

Conversely, if officers do not have reasonable suspicion of impaired driving, field sobriety tests are not within the permissible scope of the stop. *See* Jeff Welty, *Field Sobriety Tests During Traffic Stops*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 14, 2009) (reviewing cases from other jurisdictions).

A person is not required to submit to field sobriety testing in North Carolina. A person's refusal, however, may contribute to probable cause to arrest for impaired driving when other factors are present and is admissible at trial.

Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.4G, Does *Miranda* Apply? Field sobriety tests may not require a testimonial response. *See State v. Flannery*, 31 N.C. App. 617, 623–24 (1976) ("the physical dexterity tests are not evidence of a testimonial or communicative nature . . . and are not within the scope of the *Miranda* decision"; court therefore holds that admitting evidence of defendant's refusal to do tests did not violate

his Fifth Amendment right against self-incrimination; court also notes that *Miranda* warnings are not required for similar reasons before a breath test); *see also State v. White*, 84 N.C. App. 111, 115–16 (1987) (*Miranda* warnings not required before administering a breath test because results not testimonial). On the other hand, where law enforcement questions an in-custody defendant regarding potential evidence in the case (e.g., the last time the person drank, type of alcohol consumed, number of drinks, etc.), *Miranda* warnings are required.

## I. Defendant's Name

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a defendant's conviction under a state statute requiring an individual stopped by police on the basis of reasonable suspicion to identify himself or herself. The Court stated, "Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." *Id.* at 186–87. The Court held in this case that the stop was justified and the request for the defendant's name was reasonably related in scope to the circumstances that justified the stop (a suspected assault); therefore, enforcement of the state law requirement that the defendant give his name during the stop did not violate the Fourth Amendment. The Court also found no violation of the defendant's Fifth Amendment privilege against self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or would furnish a link in the chain of evidence needed to prosecute him.

North Carolina does not have a statute comparable to Nevada's statute requiring a person who is the subject of an investigative stop, other than a person driving a vehicle, to disclose his or her name. *See* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). "Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity . . . ." *State v. Steen*, 352 N.C. 227, 239 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). However, a person's mere refusal to disclose his or her name (when the person is not driving a vehicle) would appear insufficient to support a charge of violating G.S. 14-223 (resisting, delaying, or obstructing officer). *See also In re D.B.*, 214 N.C. App. 489 (2011) (officers may not search person during investigative stop to determine his or her identity); Jeff Welty, *Shooting An Officer the Bird*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 12, 2019) (discussing the issue in part).

## J. VIN Checks

Officers may make a limited warrantless search of a vehicle when they need to determine its ownership. *See New York v. Class*, 475 U.S. 106 (1986) (no reasonable expectation of privacy in vehicle identification number); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on facts of case).

## 15.5 Did the Officer Have Grounds to Arrest or Search?

### A. Probable Cause

**Required for arrest or search.** Although reasonable suspicion is sufficient to support an officer's initial stop and certain investigative actions during the stop, an officer must have probable cause to make an arrest or probable cause or consent to search for evidence. *See, e.g., State v. Joe*, 222 N.C. App. 206 (2012) (officers did not have probable cause to arrest, and evidence discovered as a result of illegal arrest suppressed); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Pittman*, 111 N.C. App. 808 (1993) (initial encounter was consensual and subsequent stop was supported by reasonable suspicion, but officers did not have probable cause to search). *Compare Maryland v. Pringle*, 540 U.S. 366 (2003) (where evidence in a car with multiple occupants indicated involvement in drug dealing and no occupants claimed ownership of the contraband, officers had probable cause to arrest each occupant).

**Scope of search.** The permissible scope of a search depends on whether the officers have probable cause to arrest or probable cause to search. For a further discussion of whether officers have probable cause to arrest or search and the permissible scope of the search, including in drug cases, see *infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search?

### B. Circumstances Requiring Arrest Warrant and Other Limits on Arrest Authority

**Arrest warrant.** Usually, when an officer develops probable cause to arrest during a stop, the officer may make the arrest without a warrant. In some instances, however, a warrant may be required. An officer who has probable cause to arrest for a criminal offense may make an arrest without a warrant in the following circumstances: (a) the crime is committed in the officer's presence; or (b) the crime was not committed by the person in the officer's presence but (i) the crime is a felony; (ii) the crime is one of certain listed misdemeanors; or (iii) the crime is a misdemeanor and, unless arrested immediately, the person will not be apprehended or may cause physical injury or property damage. *See* G.S. 15A-401(b) (also authorizing warrantless arrest for violation of pretrial release conditions).

**Violations not subject to arrest.** The U.S. Supreme Court has held that officers do not violate the Fourth Amendment if they have probable cause to make an arrest for a criminal offense even if state law does not authorize an arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not bar officer from making warrantless arrest for criminal offense

punishable by fine only, in this case a seat belt violation, a misdemeanor under Texas law).

An arrest permitted by the U.S. Constitution but in violation of North Carolina law may still be subject to suppression under G.S. 15A-974. Under North Carolina law, an officer has no authority to arrest for infractions, such as seat belt violations, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 88–89 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore*, 553 U.S. 164 (U.S. Constitution authorizes arrest for minor misdemeanors; Court does not address noncriminal infractions).

An officer has no authority to arrest for a wildlife violation, whether a misdemeanor or infraction, by an out-of-state resident if the other state is a member of the interstate wildlife compact, the person agrees to comply with the terms of any citation, and the person provides adequate identification. *See* G.S. 113-300.6, art. III.

For a further discussion of the effect of state law violations, see *supra* § 14.5, Substantial Violations of Criminal Procedure Act.

### C. Circumstances Requiring Search Warrant

**For search of person.** If officers have probable cause to arrest a person, they may search the person incident to arrest without a warrant. For cases discussing probable cause to arrest and potential limits on a search of a person incident to arrest, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest.

If officers have probable cause to search a person, but not arrest him or her, the officers must have exigent circumstances to conduct the search without a warrant. For a discussion of exigent circumstances and potential limits on searches, see *infra* § 15.6D, Probable Cause to Search Person.

**For search of vehicle.** Generally, if officers have probable cause to search a vehicle, they may search without a warrant. Where a vehicle is parked within the curtilage of a home, however, a search warrant may be required. *Collins v. Virginia*, ___ U.S. ___, 138 S. Ct. 1663 (2018) (holding that the automobile exception does not apply to warrantless entries of a residence or its curtilage; officer needed search warrant to approach covered vehicle parked in the driveway of the defendant's home). For a discussion of probable cause to search a vehicle and limits on such searches, see *infra* § 15.6E, Probable Cause to Search Vehicle.

### D. Consent

Officers may search without probable cause and without a warrant if they obtain consent. For various reasons a purported consent to search may be invalid or insufficient.

**Effect of illegal detention.** If a person is detained illegally, a consent to search obtained thereafter is subject to suppression on two potential grounds. First, the consent is generally considered the fruit of the poisonous tree because the consent is obtained as a result of the illegal seizure. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *see also supra* § 14.2G, "Fruits" of Illegal Search or Arrest. Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention.

**Length of detention.** Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.4E, Nature, Length, and Purpose of Detention.

**Clarity of consent.** "There must be a clear and unequivocal consent" to authorize a consent search. *State v. Pearson*, 348 N.C. 272, 277 (1988) (consent to search of car was not consent to search of person; acquiescence to frisk when officer told defendant he was going to frisk him also was not consent to search).

**Voluntariness of consent.** Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *State v. Crenshaw*, 144 N.C. App. 574 (2001) (State has burden of proving voluntariness); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (reasonable officer would not have believed that Spanish-speaking driver knowingly and voluntarily consented to search of his car; driver's signature on consent-to-search form written in Spanish was not sufficient); *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) (defendant did not give voluntary consent when he said, "You've got the badge, I guess you can" in response to officer's request to search); *see also supra* § 14.2H, Invalid Consent.

A threat to obtain a search warrant may affect the voluntariness of consent in some circumstances. *See* Jeff Welty, *Consent to Search under Threat of Search Warrant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2010) (observing that threat alone may not render consent involuntary but may be considered as part of totality of circumstances); 4 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 87–94 (indicating circumstances in which such a threat may render a consent involuntary).

*Miranda* warnings are not required on a request for consent to search. *See State v. Cummings*, 188 N.C. App. 598 (2008) (so holding in reliance on federal cases, in which courts reasoned that request for consent to search does not constitute interrogation for *Miranda* purposes because the giving of consent is not an incriminating statement).

**Authority to consent.** The person must have authority to consent or, at least, the officer must reasonably believe the person has authority. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990) (officers must reasonably believe person has authority to give consent); G.S. 15A-222 (to same effect); *see also Georgia v. Randolf,* 547 U.S. 103 (2006) (consent to search home by one resident over the objection of another resident invalid).

Whether an officer's belief is reasonable depends on the facts of each case. *See State v. Jones*, 161 N.C. App. 615 (2003) (after seeing police, defendant entered car, removed his jacket, put it on back seat, and then exited, wearing t-shirt in freezing winter weather; driver had authority to give consent to search entire car, including jacket left by defendant); *State v. McDaniels*, 103 N.C. App. 175 (1991) (passenger failed to object when driver consented to search of car and contents; search of contents upheld), *aff'd per curiam*, 331 N.C. 112 (1992); *compare United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008) (female's apparent authority to consent to search of luggage dissipated once officers realized that luggage contained only male's effects). *See also* 4 LAFAVE, SEARCH AND SEIZURE § 8.3(g), at 237–58 (discussing significance of reasonable but mistaken belief by police that third party has authority over place searched).

*See also infra* "Passenger belongings" in § 15.6C, Other Limits on Searches Incident to Arrest; "Passenger belongings" in § 15.6E, Probable Cause to Search Vehicle.

**Scope of consent.** General consent does not necessarily extend to all places within the area to be searched. *See Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to general search of car would lead reasonable officer to believe that consent extended to unlocked containers that might hold object of search); *State v. Stone*, 362 N.C. 50 (2007) (officer exceeded scope of consent by pulling sweat pants away from defendant's body and shining flashlight on defendant's groin area); *State v. Pearson*, 348 N.C. 272 (1998) (defendant's consent to search of car did not authorize search of his person); *State v. Duncan*, 272 N.C. App. 341, (2020) (officer exceeded scope of consent to weapons frisk by conducting a full search of defendant's pockets); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search of van did not authorize officer to pry open wall panel of van; general consent did not include intentional infliction of damage to vehicle), *vacated in part on other grounds*, 360 N.C. 541 (2006) (vacating portion of opinion finding that officers lacked probable cause, independent of consent, to pry open wall panel and remanding case to trial court for further findings of fact); *see also* Jeff Welty, *Scope of Consent to Search a Vehicle*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 15, 2012) (suggesting that consent to search vehicle does not authorize damaging of vehicle).

**Withdrawal of consent.** A person may withdraw consent at any time before completion of the search. *See* 4 LAFAVE, SEARCH AND SEIZURE § 8.1(c), at 52–58. Before withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

## 15.6 Did the Officer Act within the Scope of the Arrest or Search?

### A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

## B. Search Incident to Arrest

**Of person.** Officers may search a person incident to a lawful arrest of that person. *See United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person's possession is discussed further *infra* in "Containers" in § 15.6C, Other Limits on Searches Incident to Arrest.

**Of vehicle.** Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. *See State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant's vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. *See New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); *see also State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. *See State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of occupant of vehicle be only for evidence connected to the crime charged), *vacated and remanded*, 556 U.S. 1218 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the arrestee—they may not search the vehicle based on the first ground identified in *Gant.*

More post-*Gant* cases have involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See 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). Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 252 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, 556 U.S. 1218 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver's license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest

for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address); *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) (where defendant was fully secured, search of car incident to his arrest for the crime of fleeing to elude arrest was improper).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may "not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest." *See State v. Mbacke*, 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, 220 N.C. App. 384 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon).

### C. Other Limits on Searches Incident to Arrest

*Arizona v. Gant*, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle's occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant.*

**Citations.** Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); FARB at 250 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

**Area and people.** Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle's trunk, and not other occupants of the vehicle.

*Gant* does not appear to modify these limitations. *See also Owens v. Kentucky*, 556 U.S. 1218 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, 219 N.C. App. 105 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant's consent).

**Containers.** Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

*Gant* likely limits searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. In *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) the Fourth Circuit applied this prong of the *Gant* rule to a backpack outside of the vehicle, ruling that its search incident to the defendant's arrest was improper because the defendant was fully secured on the ground with his hands handcuffed behind his back. This holding is consistent with an earlier state decision. *State v. Thomas*, 81 N.C. App. 200 (1986) (where defendant was in custody, search of locked luggage incident to arrest was invalid); *see also* Shea Denning, *United States v. Davis: Fourth Circuit Extends Gant to Containers Generally*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 27, 2021).

**Cell phones.** In *Riley v. California,* 573 U.S. 373 (2014), the U.S. Supreme Court disavowed application of the search incident to arrest exception to cell phones. Thus, a search warrant or valid consent is generally required to search a cell phone. *But cf. United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018) (permitting forensic analysis of cell phones based on reasonable suspicion in the context of a customs search at an international airport under the border search exception).

**Strip search during search incident to arrest.** A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, 220 N.C. App. 263 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* "Strip searches based on probable cause" in § 15.6D, Probable Cause to Search Person.

**Recent occupancy.** In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an "occupant" or "recent occupant." In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant.* Thus, if a person is not a "recent occupant" of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant's car incident to arrest; defendant was not "recent occupant" of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to

automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

**Passenger belongings.** A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

### D. Probable Cause to Search Person

**Person.** Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g., State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant's person; exigent circumstances justified immediate warrantless search).

**Containers.** Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 242–43 (discussing rule and exceptions).

**Strip searches based on probable cause.** Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be "exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location." *State v. Fowler*, 220 N.C. App. 263 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* "Strip search during search incident to arrest" in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, 221 N.C. App. 266 (2012) (stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, 220 N.C. App.263

(finding exigent circumstances and upholding strip search). For more on strip searches, see Bob Farb, *North Carolina Court of Appeals Issues Ruling on Strip Search by Law Enforcement Officers*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 23, 2016).

### E. Probable Cause to Search Vehicle

**Generally.** Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. "The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also observing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab").

**Passenger belongings.** In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers' belongings found in the car that are capable of concealing the object of the search.

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers' belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

**Seizure of object.** Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

**Drug cases.** In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what

circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant's tip and officer's observations after stop).

Existing case law holds that the odor of marijuana emanating from a vehicle gives an officer probable cause for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a "ping test" by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire).

These cases are subject to challenge given the existence of legal hemp products in North Carolina that are easily confused with illegal marijuana. *See State v. Parker,* ___ N.C. App. ___, 860 S.E.2d 21 (2021) (questioning continued viability of rule that the sight or odor of marijuana provides probable cause in light of legal hemp products which are identical in sight and odor to marijuana); *see also* Phil Dixon, *Hemp or Marijuana?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 21, 2019).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, 222 N.C. App. 253 (2012) (drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle); *see also Bailey v. United States,* 568 U.S. 186 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, 224 N.C. App. 171 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

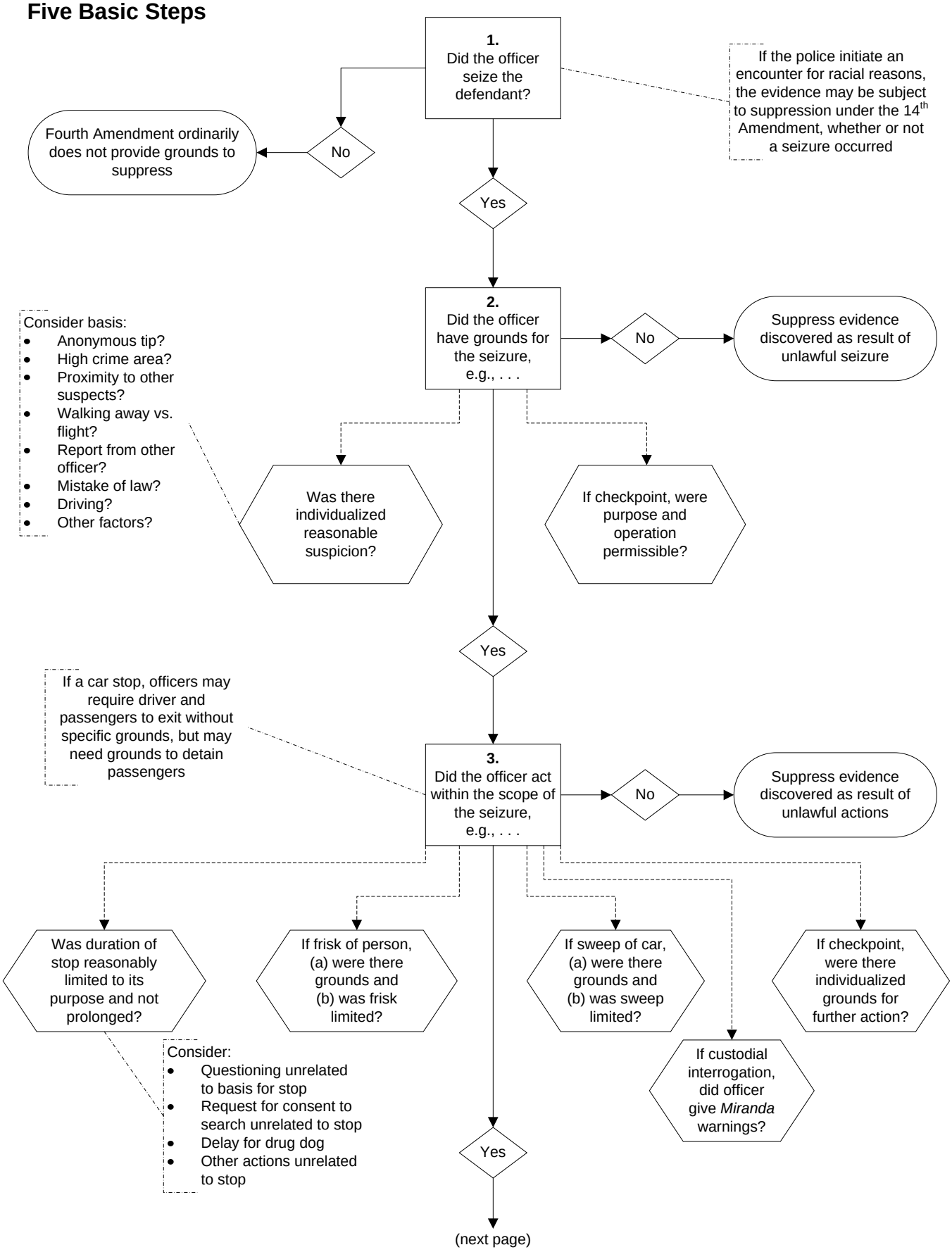
### F. Inventory Search

**Arrestees.** Officers may search and inventory possessions of arrestee. *See* FARB at 229.

**Vehicles.** Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 261–62 (discussing impoundment and inventory of vehicles).

**Pretext.** Inventory searches may be challenged as pretextual. *See supra* § 15.3H, Pretext.

# Appendix 15-1
# Stops and Warrantless Searches: Five Basic Steps



## Five Basic Steps (cont'd)