IV. Other Pretrial Motions and Notices with Deadlines

A. Motion to Suppress
B. Motion to Recuse Trial Judge
C. Notice of Defenses
D. Chapter 90 Notice and Demand
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G. Notice of Intent to Use Residual Hearsay
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A. Motion to Suppress

Authority

G.S. 15A-971 through G.S. 15A-979; Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19, 20, and 23 of the N.C. Constitution; substantial statutory violations of G.S. Chapter 15A.

Deadlines

Timing rules for a suppression motions in felony cases depend on the type of evidence to be suppressed and whether the State gives notice of intent to use certain evidence. Generally, motions to suppress must be made before trial. "Before trial" means before jeopardy attaches. *State v. Tate*, 300 N.C. 180 (1980). If the State provides timely notice of its intent to use "certain evidence", this triggers an earlier deadline for suppression motions addressing that evidence (discussed in more detail below). If the grounds for suppression could not have been identified before trial through the exercise of reasonable diligence, or if there was no opportunity to make the motion before trial, the motion may be made during trial.

If the State provides notice to the defendant of the State's intent to use "certain evidence" at least twenty business days before trial, any motion to suppress addressing that evidence is due ten business days after receipt of the State's notice. "Certain evidence" includes statements by the defendant, evidence obtained by warrantless search, or evidence obtained by a search warrant when the defendant was not present at the time of the search. *See* G.S. 15A-975. If the State fails to give formal notice of intent to use that evidence, a suppression motion addressing that evidence may be made at trial. This deadline applies only to motions to suppress under G.S. 15A-974 (state or federal constitutional grounds and substantial violations of the Criminal Procedure Act, G.S. Chapter 15A); it does not apply, for example, to a motion to exclude inadmissible evidence under the N.C. Rules of Evidence.

The deadline for suppression motions for certain evidence applies only to cases originating in superior court and does not apply to misdemeanor appeals. Motions to suppress in misdemeanor appeals cases must nonetheless be filed before trial if the grounds for the motion are known. *State v. Simmons*, 59 N.C. App. 287 (1982), *overruled on other grounds by State v. Roper*, 328 N.C. 337 (1991).

Local rules may impose other deadlines as well, and counsel should be familiar with them.

Key Principles

The scope of these motions is wide and may include stop, arrest, or search issues (lack of reasonable suspicion, lack of probable cause, improperly obtained test results, etc.); *Miranda* or other issues concerning statements by the defendant; pretrial identification issues; and any other evidence obtained in violation of a defendant's constitutional or statutory rights.

In certain instances (identified above), suppression motions may be made during the course of trial, although the better practice is usually to file the motions pretrial. Pretrial hearings on motions to suppress may give defense counsel a preview of testimony not otherwise available, may resolve the case without the need for a trial, and will generally be favored by trial courts in the interest of judicial economy.

Motions to suppress require (1) a detailed affidavit from counsel that provides specific factual support of the motion and (2) a statement of the specific legal grounds that would support an order of suppression.

Failure to attach a sufficiently detailed affidavit or to state specific legal grounds supporting suppression can result in summary denial of the motion. *State v. Phillips*, 132 N.C. App. 765 (1999) (affidavit without facts, merely reciting that discovery was reviewed by counsel and that grounds exist to grant motion, was insufficient; summary dismissal affirmed); *State v. Davis*, 210 N.C. App. 491 (2011) (unpublished) (affidavit incorporating motion by reference and attesting to truth of motion on information and belief was insufficient; summary denial appropriate); *State v. Hall*, 73 N.C. App. 101 (1985) (summary denial appropriate where motion failed to state specific legal grounds on which suppression could be ordered).

It is the defendant's burden to challenge the evidence in a timely manner and in proper form. Generally, the State has the burden of proof on the merits of the motion by a preponderance of the evidence standard. *State v. Williams*, 225 N.C. App. 636 (2013).

The procedure for a statutory "*Franks*" challenge (for false or misleading information in a search warrant) is found in G.S. 15A-978. This is a specific type of suppression motion with different standards than a typical motion to suppress. For instance, the defendant has the burden to make a substantial showing that material representations in the warrant application were falsely made by law enforcement intentionally or recklessly. *See Franks v. Delaware*, 438 U.S. 154 (1978).

Practice Tips

- These motions are often dispositive, and counsel should take great care to investigate all possible grounds for suppression and to file timely motions to suppress.
- The State typically gives notice of its intent to use certain evidence as a part of its response to the defense discovery request, which triggers the timeline of ten business days for the defense to move to suppress the "certain evidence" subject to that deadline (discussed in more detail above).
- If the State provides notice of its intent to use the "certain evidence" covered by G.S. 15A-975, the deadline is relatively short for defense counsel to file a suppression motion addressing such evidence. Consider requesting that the court extend the deadline for suppression motions where necessary and appropriate. Motions to extend deadlines are discussed *supra* in Section V. H.

- If the defendant pleads guilty after the denial of a motion to suppress, the defendant must clearly and explicitly state in the plea transcript and on the record before entering the plea that he or she is reserving the right to appeal the denial of the motion in order to preserve the suppression issue for appeal. *See State v. Pimental*, 153 N.C. App. 69 (2002) (plea transcript reading "Defendant preserves his right to appeal any and all issues which are so appealable pursuant to . . . law" was found insufficient to preserve motion to suppress for appellate review). Language such as "The defendant hereby pleads guilty on the express condition that the right to appeal the trial court's denial of the defendant's motion to suppress is preserved" should suffice. In other words, defense counsel must give the court and the State notice of the intent to appeal the denial of the suppression motion in the plea transcript in order to preserve the right to appeal the denial of the motion.
- Any appeal following the denial of a suppression motion is from the final judgment in the case, and any written notice of appeal must reference the final judgment of the case (not the order denying the suppression motion). Failure to properly give notice of appeal can result in dismissal of the appeal, even if the suppression issue was otherwise properly preserved. For more on notices of appeal, see *infra* Section VIII. A.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 14 (Suppression Motions).

B. Motion to Recuse Trial Judge

Authority

G.S. 15A-1223; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 of the N.C. Constitution; N.C. Code of Judicial Conduct canon 3.

Deadlines

This motion must be filed at least five days before trial, unless the grounds for recusal are not reasonably known at the time or for other good cause.

Key Principles

These motions must be in writing and accompanied by an affidavit factually supporting the motion.

The judge should recuse himself or herself if the judge is biased against either party, closely related by blood or marriage to either party, a witness in the case, or for any other reason that impairs the ability of the judge to be fair and impartial.

The defendant has the burden to demonstrate by reasonable grounds that there is cause to question the judge's impartiality. *State v. Poole*, 305 N.C. 308 (1982).

Practice Tips

- Counsel may request that the judge refer this motion to another judge for hearing.
- Documentary evidence in support of the motion should be attached and referenced in the motion.
- Present evidence at the hearing on the motion if appropriate.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.4C (Miscellaneous Motions—Motion to Recuse Trial Judge).

C. Notice of Defenses

Authority

G.S. 15A-905(c).

Deadlines

The defendant must give notice of defenses within twenty business days of the case being set for trial if the defendant requests any discovery, the State provides discovery or is ordered to do so, and the State requests discovery from the defendant, unless the court sets a different deadline.

Key Principles

Generally, defendants are required by statute to give written notice of an intent to rely on the defenses of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, or involuntary or voluntary intoxication. To avoid any challenges, defendants should consider giving notice of defenses not enumerated in the statute, such as necessity, defense of others or property, mistake, etc.

For the defense of alibi, on motion of the State, the court may order disclosure of alibi witnesses no later than two weeks before trial.

For other enumerated defenses (duress, entrapment, insanity, automatism, or involuntary intoxication), the notice of defense must contain specific information about the nature and extent of the defense.

For insanity, the defense has special rules per G.S. 15A-959.

Practice Tips

- Failure to give proper notice of defenses may result in a sanction by the court, up to and including prohibiting presentation of the defense. Err on the side of giving notice; the notice may be withdrawn later.
- Provide timely, written notice for each potential defense and, if required for that defense, provide specific details.
- If the deadline is missed, argue that the defendant should not be punished for the error of counsel and that a lesser sanction is appropriate. The sanction of prohibiting presentation of a defense should be met with constitutional objections.
- Consider requesting that the judge refrain from mentioning defenses to the jury until it is clear that evidence on the defenses will be presented. Pursuant to G.S. 15A-905(c)(1), notice of defenses is not admissible against the defendant. However, G.S. 15A-1213 directs the trial judge to inform prospective jurors of any affirmative defenses for which the defendant has given notice. If the defendant does not want the jury to be informed of a defense and the judge will not defer informing the jurors of the defense, defense counsel may have to withdraw the defense or allow the jury to be so informed.

References

N.C. DEFENDER MANUAL Vol. 1, §§ 4.8E (Prosecution's Discovery Rights—Defenses), 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

D. Chapter 90 Notice and Demand

Authority

G.S. 90-95(g).

Deadlines

If the State gives notice to the defendant at least fifteen business days before trial of its intent to introduce at trial the evidence described below and provides a copy of the evidence, then the defendant must file a written objection or "demand" at least five days before trial.

Key Principles

This statute allows the admission into evidence of a lab report, analyst affidavit, and chain of custody statement without authentication and without the testimony of the analyst if the State meets the above requirements and no timely demand for the witness is made by the defendant.

Failure to object and demand the live witness is a waiver of the right to confront such witnesses. This statutory procedure satisfies the Confrontation Clause under the Sixth Amendment. *State v. Steele*, 201 N.C. App. 689 (2010).

Practice Tips

- Look carefully at the form and substance of any notice by the State, as well as at its timing. The State has the burden to prove its compliance with these requirements and that the defendant waived the right to confront by failing to object to the State's proper notice. Arguably, if the State's notice is ineffective, the evidence should not be admissible without the live testimony of the analyst, even in the absence of a timely demand by the defendant.
- To preserve the issue at trial, an objection that the State failed to comply with the requirements of the Chapter 90 notice and demand statute should state specifically how the State failed to comply, as well as assert more general Confrontation Clause and hearsay arguments. In addition to any pretrial objections, counsel must object to the admission of this evidence when it is introduced during trial to preserve appellate review.
- If the analyst attends the trial and the defendant is convicted, the defendant must pay a $600 expert witness fee unless waived by the court. This fee is in addition to the lab analysis fee of $600. *See generally* G.S. 7A-304.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

E. Chapter 20 Notice and Demand

Authority
G.S. 20-139.1(c1), (c3)(3), and (e2).

Deadlines
If the State gives notice to the defendant at least fifteen business days before trial of its intent to introduce at trial the evidence described below and provides the defendant a copy of the evidence within fifteen business days of the State receiving it, then the defendant must file a written objection or "demand" at least five business days before trial. Unlike the G.S. Chapter 90 notice and demand procedure discussed in the section immediately above, "trial" here is defined as the next court setting. Thus, the defense has five business days before the next court date in which to file a demand after timely receipt of the State's proper notice, regardless of when trial is or may actually be scheduled. Failure to file a demand within that window constitutes waiver of the right to demand the presence of the witness.

Key Principles
This statute allows the admission into evidence of the results of any chemical analysis (breath, blood, or urine), chain of custody statement, and analyst affidavit without authentication and without the testimony of the analyst if the State meets the above requirements and no timely demand for the witness is made by the defendant.

Failure to file a timely, written objection or demand at the time of the receipt of the State's notice is binding at all subsequent court settings. Conversely, once the defendant has filed a timely objection, the objection remains effective at any subsequent court settings and need not be renewed.

Practice Tips
- Look carefully at the form and substance of any notice by the State, as well as at its timing. The State has the burden to prove its compliance with these requirements and that the defendant waived the right to confront by failing to object to the State's proper notice. Arguably, if the State's notice is ineffective, the evidence should not be admissible without the live testimony of the analyst, even in the absence of a timely demand by the defendant.
- To preserve the issue at trial, an objection that the State failed to comply with the requirements of the Chapter 20 notice and demand statute should state specifically how the State failed to comply, as well as assert any more general Confrontation Clause and hearsay objections. In addition to any pretrial objections, counsel must object to the admission of this evidence when it is introduced during trial to preserve appellate review.
- If the analyst attends the trial and the defendant is convicted, the defendant must pay a $600 expert witness fee unless waived by the court. This fee is in addition to any laboratory analysis fee. *See generally* G.S. 7A-304.

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also Shea Denning, *Amendments to Notice and Demand Provisions for DWI Cases*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 22, 2016).

F. Notice of Expert Testimony

Authority
G.S. 15A-905(c)(2).

Deadlines
The defendant must give notice of expert witnesses within a reasonable time before trial if the defendant requests any discovery, the State provides discovery or is ordered to do so, and the State requests discovery from the defendant, unless the court sets a different deadline.

Key Principles
The defendant must provide notice of any experts expected to testify at trial, along with their expert opinions, a report of their tests or examinations, the underlying basis for their opinion, and the experts' resumes or curricula vitae. The State is required to disclose all of the same information pursuant to its discovery obligations and upon the request of the defendant.

The obligation of defense counsel to disclose expert witnesses applies only if the defendant intends to call the expert as a witness at trial. The defendant is not obligated to disclose non-testifying experts to the State.

Practice Tips
- The notice provision protects both parties from unfair surprise and may be used to exclude expert evidence where notice was not provided or was insufficient. A reasonable time before trial" means enough time for the opposing party to adequately prepare to meet and object to the expert testimony.
- If notice is untimely, the expert may be excluded from trial. However, cases indicate that the sanction of evidence exclusion against the defendant is harsh and should be used only if other sanctions are insufficient.
- On receipt of a notice of expert witnesses from the State, consider the need for your own expert if you have not already done so, both to affirmatively counter the State's evidence and to assist the defense in effective cross-examination of the State's expert.
- Consider the possibility of requesting a pretrial *voir dire* of the State's experts to challenge their expert qualifications under N.C. Rule of Evidence 702 or under any other grounds. (See *infra* Section VII. B).

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also John Rubin, *What Are Permissible Discovery Sanctions Against the Defendant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 12, 2013).

G. Notice of Intent to Use Residual Hearsay

Authority
N.C. R. EVID. 804(b)(5).

Deadlines
Written notice of an intent to rely on residual hearsay must be provided sufficiently in advance of its use so that the opposing party has a fair opportunity to prepare for and contest the use of the evidence.

Key Principles
A notice under this rule must state the proponent's intention to use the statement at issue, provide the particulars of the statement, and include the name and address of the declarant, in addition to meeting the "fair opportunity to contest" timing rule noted above.

In addition to the notice requirement, residual hearsay must also meet the requirements of Evidence Rule 804(b)(5) to be admissible at trial. Those requirements include that the witness is unavailable, the statement is offered as evidence of a material fact, the statement is more probative on the point for which it was offered than any other evidence which the proponent can reasonably obtain, and the general purposes of the Rules of Evidence and the interest of justice will be best served by admission of the statement.

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also Jessica Smith, *Hearsay Exceptions: The Residual Exceptions*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 4, 2014).

H. Notice of Intent to Use Convictions Older than Ten Years

Authority
N.C. R. EVID. 609(b).

Deadlines
Written notice of intent to use older convictions must be provided to opposing counsel sufficiently in advance of their use for the opposing party to have a fair opportunity to contest the use of the older convictions.

Key Principles
The notice should identify the older convictions by offense, date, and location. It should further explain the specific facts and circumstances that support a finding that the use of such convictions is more probative than prejudicial for the case at hand.

Practice Tips
- Defense lawyers should always request criminal records for all witnesses in discovery and should verify such information with independent research. Impeachment of State witnesses

with criminal convictions is a powerful trial tool, and use of this notice ensures that the fact finder will hear as many prior convictions as possible.

- Consider attaching a certified criminal record to the notice, and list the convictions desired to be used with specificity in the body of the motion, along with the reasons their use should be allowed under the facts of the case.

References

KENNETH S. BROWN, BRANDIS & BROWN ON NORTH CAROLINA EVIDENCE 339 (7th ed. 2011).