

# Chapter 15: Stops and Warrantless Searches

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This chapter outlines a five-step approach for analyzing typical “street encounters” with police. It covers situations involving both pedestrians and occupants of vehicles. For a fuller discussion of warrantless searches and seizures, *see* WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (4th ed. 2004) [hereinafter LAFAVE]; ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* (UNC School of Government, 3d ed. 2003) [hereinafter FARB]; ROBERT L. FARB, 2006 SUPPLEMENT TO *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA*, ADMINISTRATION OF JUSTICE BULLETIN No. 2007/01 (Jan. 2007) [hereinafter FARB SUPP.], at [www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0701.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0701.pdf).

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. *See generally* 6 LAFAVE § 11.4.

In many (although not all) of the situations described below, an officer may act without 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 (1994) (search and seizure of property unaccompanied by prior judicial approval in form of warrant is per se unreasonable unless search falls within 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 actions of officers”); *see also Flippo v. West Virginia*, 528 U.S. 11 (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); *U.S. 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 (1964) (arrest without warrant bypasses safeguards provided by objective predetermination of probable cause).

## 15.1 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 20. 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 U.S. 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).

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); *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*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law); *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. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked his car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if he 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. 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); *see also State v. Patterson*, 868 A.2d 188 (Me. 2005) (officer's tapping on window of parked car and directing driver to roll down window constituted seizure, and evidence discovered after rolling down of window, including odor of alcohol leading to additional incriminating evidence, was properly suppressed); *State ex rel. J.G.*, 726 A.2d 948 (N.J. Super. Ct. App. Div. 1999) (although initial exchange was consensual, officer's words to juvenile became authoritative and indicative of criminal suspicion, converting encounter into seizure that had to be supported by reasonable suspicion); *Popple v. State*, 626 So. 2d 185 (Fla. 1993) (officer approached defendant who was sitting in parked car and ordered him to exit car; defendant was seized); 4 LAFAVE § 9.4(a).

## B. 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); *State v. West*, 119 N.C. App. 562 (1995) (following *Hodari D.*); *compare State v. Clayton*, 45 P.3d 30 (Mont. 2002) (under state constitution, seizure occurs when a reasonable person would not feel free to leave even if suspect does not actually yield in response to police); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (court rejects *Hodari D.* rule and holds under state constitution that police pursuit of person may constitute seizure); *In re Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993) (court rejects *Hodari D.* rule and holds under state constitution that seizure occurs when police say "stop").

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 may occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See U.S. 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* § 15.2D

(flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

### 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. U.S.*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as race); *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997); *U.S. v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also U.S. 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 any non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.2L (discussing cases in which court found officer lacked grounds for stop).

In recognition of the potential for racial profiling, North Carolina law requires the Division of Criminal Statistics of the Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 114-10.01. This statute also requires the Division 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).

## 15.2 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); *but cf.* G.S. 15A-1113(b) (statute states that an officer who has probable cause may detain a person to issue and serve a citation for an infraction; however, numerous North Carolina opinions have upheld stops for criminal and noncriminal traffic violations without considering this statute); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (holding that although *Terry* authorizes stop based on reasonable suspicion of criminal offense and possibly of noncriminal traffic violation, it does not authorize stop based on reasonable suspicion of other noncriminal infractions); *see also infra* § 15.2E (standard for making traffic stop).

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

### **B. High Drug Areas**

Presence in a high-drug area, standing alone, does not constitute reasonable suspicion. *See Brown v. Texas*, 443 U.S. 47 (1979); *State v. Fleming*, 106 N.C. App. 165 (1992). The presence of other factors may or may not give rise to reasonable suspicion. *Compare 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), *with State v. Butler*, 331 N.C. 227 (1992) (finding stop valid); *State v. Cornelius*, 104 N.C. App. 583 (1991) (finding stop valid).

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

Proximity to a crime scene, without more, does not establish reasonable suspicion. *See State v. Murray*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 205 (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 all the circumstances).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 622 (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 Court held that the defendant's headlong flight upon 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); *Paff v. State*, 884 So. 2d 271 (Fla. Cist. Ct. App. 2004) (officer lacked reasonable suspicion to stop defendant's vehicle, which was idling alongside another car in gas station known for drug dealing and left quickly when driver saw officer; officer did not observe any type of transaction, defendant did not drive away in manner or at rate of speed that violated any traffic laws, and officer stopped vehicle as soon as it exited lot and did not observe any evasive conduct).

**Flight from consensual or illegal encounter.** 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 and would not itself give the officer grounds to stop the defendant. *State v. Sinclair*, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 866 (2008) (initial encounter between officer and defendant was consensual, and defendant's flight from consensual encounter was not evidence of RDO); *State v. Washington*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 622 (2008) (officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO); *see also supra* § 15.1A (discussing difference between consensual encounters and seizures).

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 Sinclair* (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *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* 137–38 (1996) (person has limited right to resist illegal stop); *but cf. State v. Branch*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 18 (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); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (juvenile could be adjudicated delinquent of obstructing officer for giving false name to officer during course of illegal stop).

## 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* § 15.2I.

The North Carolina Court of Appeals held in several opinions that when an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, the stop had to be supported by probable cause. In contrast, according to these decisions, reasonable suspicion was sufficient if the suspected violation was one that could be verified only by stopping the vehicle, such as impaired driving or driving with a revoked license. *See State v. Baublitz*, 172 N.C. App. 801 (2005) and cases cited therein; *see also State v. Ivey*, 360 N.C. 562 (2006) (suggesting under U.S. and North Carolina constitutions that probable cause may be required to stop for any traffic violation). The North Carolina Supreme Court has since 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); *but cf. 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); *State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (to same effect).

**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 for Fourth Amendment purposes when the police make a traffic stop and that the passenger may challenge the stop's constitutionality. Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence. This ruling overrules any contrary authority in North Carolina. *See State v. Smith*, 117 N.C. App. 671 (1995) (suggesting that a passenger did not have standing to move to suppress). The North Carolina Court of Appeals has recognized under *Brendlin* that a passenger also has standing to challenge the duration of a stop. *See State v. Jackson*, \_\_\_ N.C. App. \_\_\_ (Aug. 18, 2009).

If a stop is valid, a passenger's standing to challenge actions taken during the stop will depend on whether the officer's actions infringe on the passenger's rights.

**Delay at light.** *See, 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); *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.** *See, e.g., 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); *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).

**Speeding, weaving, line straddling, and other driving.** *See, e.g., State v. Peele*, 675 S.E.2d 682 (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*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 675 (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); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer’s estimate of defendant’s speed justified stop); *State v. Jacobs*, 162 N.C. App. 251 (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 lane 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 U.S. v. Valadez-Valadez*, 525 F.3d 987 (10th Cir. 2008) (driving moderately slowly below speed limit does not constitute impeding traffic and does not justify stop); *U.S. v. Colin*, 314 F.3d 439 (9th Cir. 2002) (touching dividing lane twice and veering slightly in own lane did not justify stop; defendant did not violate California statute prohibiting lane straddling); *Barrientos v. State*, 39 S.W.3d 17 (Ark. Ct. App. 2001) (weaving in own lane, without more, did not justify traffic stop); *Hernandez v. State*, 983 S.W.2d 867 (Tex. App. 1998) (drifting once into adjacent lane on five-lane road did not justify stop); *State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998) (trial court granted motion to suppress, observing that driving a car, in and of itself, is “controlled weaving”; appellate court upholds suppression of stop).

**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* § 15.2F.

**Ownership and registration.** *See, e.g., 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); *State v.*

*Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that temporary registration had expired and that vehicle was improperly registered); *see also U.S. 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); *People v. Johnson*, 885 N.E.2d 358 (Ill. App. Ct. 2008) (an officer's knowledge that a driver who had a restricted driving permit was driving on a Sunday did not, in the absence of knowledge about the terms of the particular driver's permit, provide reasonable suspicion to make a stop for violating the terms of the permit). For a discussion of limitations on an officer's actions after discovering that a car was not improperly registered, *see infra* § 15.2K (mistake of fact).

**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 courts often consider whether independent police work corroborates significant details of the tip. *See State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Peele*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (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 along with 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); *U.S. v. Reaves*, 512 F.3d 123 (4th Cir. 2008) (anonymous tip did not provide reasonable suspicion; among other things, caller was adamant about remaining anonymous); *U.S. v. Roch*, 5 F.3d 894 (5th Cir. 1993) (informant said blond white man, who drove white and orange pickup and was staying at local motel, was planning to pass forged checks; merely seeing such a person in such a vehicle at that motel was not sufficient corroboration given the absence of significant details and prediction of future behavior); *compare Salt Lake City v. Bench*, 177 P.3d 655 (Utah App. 2008) (although identified citizen-informants are generally considered reliable, their veracity may be subject to question in some circumstances, making it more important to examine the tip's details and the officer's corroboration of the details; although ex-wife could be considered identified citizen-informant, her tip that husband was driving while impaired was not sufficiently detailed or corroborated to establish reasonable suspicion).

A tip from a person who 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. Allen*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 519 (2009) (tip was not anonymous; victim had face-to-face encounter with police when reporting alleged assault); *State v. Hudgins*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 717 (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).

**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).

There have been several cases around the country involving anonymous tips of impaired driving, with differing results. *See, e.g., Commonwealth v. Lubiejewski*, 729 N.E.2d 288 (Mass. App. Ct. 2000) (trooper's corroboration of innocent details in tip about dangerous driving did not provide adequate basis for concluding that anonymous informant was reliable); *McChesney v. State*, 988 P.2d 1071 (Wyo. 1999) (unknown motorist's tip that defendant was driving while impaired, without more, was insufficient to support stop of car that matched tip); *State v. Rewis*, 722 So. 2d 863 (Fla. Dist. Ct. App. 1998) (to same effect); *compare, e.g., U.S. v. Wheat*, 278 F.3d 722 (8th Cir. 2001) (finding that when certain factors are present anonymous tip may be sufficient to support stop for impaired driving); *State v. Golotta*, 837 A.2d 359 (N.J. 2003) (police may conduct investigatory stop based on information furnished by anonymous 911 caller without having level of corroboration traditionally necessary to uphold such action, but information must convey unmistakable sense that caller has witnessed ongoing offense that presents risk of imminent death or serious injury).

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*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip should not necessarily be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See* General Test, above.

**Drug cases.** An anonymous tip to police that a vehicle was involved in illegal drug sales was not sufficient, without more, to justify an investigatory stop of the defendant, who was the driver of the vehicle. *See State v. McArn*, 159 N.C. App. 209 (2003); *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 stopping officer has reasonable suspicion for the stop;
- the requesting officer has reasonable suspicion for the stop; or
- the observations of the requesting officer were relayed to the stopping officer before the stop *and* the collective knowledge of both officers amounted to reasonable suspicion.

*See State v. Battle*, 109 N.C. App. 367 (1993) (discussing general standard); *State v. Bowman*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 831 (2008) (officers' collective knowledge was imputed to officer who searched vehicle); *see also State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to the stopping officer may not be used to show reasonable suspicion, even if the stopping officer did not know that the information was fabricated).

**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*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (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); 4 LAFAVE § 9.5(i); *McSwain v. State*, 522 S.E.2d 553 (Ga. Ct. App. 1999) (police broadcast to be on lookout for particular car did not give officer grounds for stop; state presented no evidence of facts on which lookout was based); *see also F.*, above (discussing anonymous tips).

### **H. Pretext**

In some 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 cut back significantly on 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); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution); *compare State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting *Whren* under state constitution). Previously, the test in many jurisdictions, including North Carolina, was what a reasonable officer “would have” done in a similar circumstance, not what an officer lawfully “could have” done. *See State v. Hunter*, 107 N.C. App. 402 (1992) (stating former standard); *State v. Morocco*, 99 N.C. App. 421 (1990) (to same effect).

*Whren* did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also State v. Hamilton*, 125 N.C. App. 396 (1997) (dissent notes that *Whren* left this question open). It seems unlikely, however, that the courts would hold that *Whren* does 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* 1 LAFAVE § 1.4(f), at 152–53.

**Exceptions.** There are a number of 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. *Accord Bartruff v. State*, 706 N.E.2d 225 (Ind. Ct. App. 1999) (recognizing that *Whren* continues to prohibit inventory search if it is ruse for general rummaging).
- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* § 15.2I.
- 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 detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. This limitation has proved significant in several cases. *See infra* § 15.3E.
- Some courts have held that a stop for a traffic violation cannot be upheld on a basis other than that articulated by the officer. *See Dennis v. State*, 693 A.2d 1150 (Md. 1997); *compare 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 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); *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).

- If an officer stops a defendant because of his or her race, the stop may violate Equal Protection regardless of whether probable cause exists. *See supra* § 15.1C. Or, the racial motivation may undermine the credibility of the officer’s stated reason for the stop. *See infra* § 15.2L.

**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 found irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine); *State v. Parker*, 183 N.C. App. 1 (2007) (similar principle).

Nevertheless, a stop would be unlawful if the circumstances indicate the officer did not have grounds for the stop—for example, the officer could not have observed the alleged traffic or other violation. *See State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have probable cause 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).

## I. License and DWI Checkpoints

**License and registration checkpoints.** In *Delaware v. Prouse*, 440 U.S. 648 (1979), the 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); *State v. Veazey*, 191 N.C. App. 181 (2008) (questioning whether it is constitutionally permissible to set up a checkpoint to check for all motor vehicle violations; case remanded for trial court to make findings of fact and conclusions of law).

In *State v. Rose*, 170 N.C. App. 284 (2005), the court held that a license checkpoint must satisfy two basic requirements: (1) the primary purpose of the checkpoint must be constitutionally permissible—for example, a checkpoint for general criminal investigation is not constitutional, and (2) the setting up and operation of the checkpoint must be constitutionally reasonable. In *Rose*, the court questioned whether the checkpoint at issue satisfied either requirement, as there was no plan, no time frame, no supervision, and no direction—oral or written—about how to conduct the checkpoint. The court remanded the case to the trial court for further findings.

Elaborating on *Rose*, the court in *State v. Burroughs*, 185 N.C. App. 496 (2007), held that the trial court must inquire into the actual purpose of the checkpoint, the first requirement in *Rose*, only if the evidence brought forward is at odds with the stated purpose of the checkpoint. If the purpose of the checkpoint is permissible, the trial court still must determine that the checkpoint was set up and operated in a constitutionally reasonable

manner. *See also State v. Veazey*, 191 N.C. App. 181 (2008) (trooper testified that purpose of checkpoint was to check for motor vehicle violations, but trooper's testimony also indicated that purpose was to check for other criminal law violations; court remands to trial court for further inquiry into primary purpose of checkpoint and for findings on reasonableness of setting up and operation of checkpoint); *State v. Gabriel*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 581 (2008) (finding evidence in conflict on purpose of checkpoint and remanding for further findings on both purpose and reasonableness of checkpoint).

The North Carolina Court of Appeals has held that a defendant stopped pursuant to a checkpoint has standing to challenge the constitutionality of the checkpoint. *See State v. Haislip*, 186 N.C. App. 275 (2007) (defendant has standing to challenge constitutionality of checkpoint plan), *vacated and remanded*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

G.S. 20-16.3A establishes several statutory requirements for checking stations and roadblocks, including license checkpoints. Checkpoints are subject to any additional requirements under the U.S. and North Carolina constitutions. *See also State v. Mitchell*, 358 N.C. 63 (2004) (court found license checkpoint constitutional based on following: (1) although there were no written guidelines, there were oral guidelines, which the officers implemented, (2) the officer received supervisory approval to set up the checkpoint in that he had standing permission from his superior to set up checkpoints and on this occasion communicated with his staff sergeant before proceeding, and (3) the guidelines required, among other things, that the officers stop all incoming traffic; court found, in any event, that the officers had reasonable suspicion to stop defendant because he sped up at the checkpoint and nearly struck one of the officers); *State v. Tarlton*, 146 N.C. App. 417 (2001) (evidence indicated that officers had obtained supervisors' approval to set up license checkpoint; court states in dicta that supervisor's permission is not constitutional requirement); *see generally* 5 LAFAVE § 10.8(a); FARB at 30–31.

**DWI checkpoints.** The 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); *compare Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183 (Minn. 1994) (impaired-driving checkpoints violate state constitution); *Sitz v. Dept. of State Police*, 506 N.W.2d 209 (Mich. 1993) (on remand from U.S. Supreme Court, court holds that impaired-driving checkpoints violate state constitution). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A on 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); *U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (pretext analysis applies when officer lacks individualized suspicion for stop; court reviews conflicting

decisions of circuit courts and finds that checkpoint is constitutional only if primary motive is lawful, not merely if one of motives is lawful).

**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, including the defendant's turning away from or avoidance of a checkpoint, to determine whether the officer had reasonable suspicion to stop. See *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); see also *Commonwealth v. Scavello*, 734 A.2d 386 (Pa. 1999) (investigatory stop of defendant who made legal U-turn to avoid police roadblock not justified; avoidance or attempt to avoid roadblock must be coupled with other articulable facts to support reasonable suspicion of criminal activity); *Murphy v. Commonwealth*, 384 S.E.2d 125 (Va. Ct. App. 1989) (making a lawful right turn before roadblock does not give rise to reasonable suspicion of criminal activity unless driver's turn is coupled with other articulable facts).

The Court of Appeals has held that turning away from an unconstitutional checkpoint, without more, is not grounds for a stop. *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*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law); see also *U.S. v. Yousif*, 308 F.3d 820 (8th Cir. 2002) (officers who set up drug checkpoint as ruse, and who erected signs suggesting that drivers could avoid checkpoint by getting off highway at previous exit, did not have reasonable suspicion to stop all drivers who got off at that exit).

**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); *State v. Colbert*, 146 N.C. App. 506 (2001) (ordering driver stopped at DWI checkpoint to take alcohol screening test was permissible because officer had developed reasonable suspicion that driver was impaired); G.S. 20-16.3A(b) (allowing additional investigation if reasonable suspicion exists, and alcohol screening test if officer determines that driver has consumed alcohol or has open container of alcohol in vehicle); see also 5 LAFAVE § 10.8(d), at 378–79; FARB at 31.

## J. Drug and Other Checkpoints

**Drug checkpoints.** The U.S. Supreme Court has refused to uphold drug checkpoints. To stop a person to investigate for drugs, officers must have reasonable suspicion. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *see also U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (drug checkpoint unconstitutional); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional); *Commonwealth v. Rodriguez*, 722 N.E.2d 429 (Mass. 2000) (drug checkpoint violated state constitution).

**Information-seeking checkpoints.** Distinguishing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), 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).

## K. Mistaken Belief by Officer

**Mistake of law.** A stop based on an officer's incorrect assessment of the law governing a person's actions—that is, 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 mph in what the officer thought was a 20 mph zone; speed limit was actually 55 mph, and stop violated Fourth Amendment); *State v. Schiffer*, 132 N.C. App. 22 (1999) (officer was mistaken in believing that out-of-state vehicle was subject to North Carolina's window-tinting restrictions; however, officer had reasonable suspicion to stop vehicle for violation of North Carolina's windshield-tinting restrictions, which do apply to out-of-state vehicles); *U.S. v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003) (officer's mistaken belief that city code required vehicles to have inside rear-view mirrors did not justify traffic stop of defendant's van; officer's mistake of law does not provide reasonable suspicion).

**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*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 191 (2008) (so holding); *U.S. v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003) (so holding). Once the officer realizes his or her mistake, the officer must terminate the encounter unless he or she has developed additional reasonable suspicion for the stop. *See State v. Diaz*, 850 So. 2d 435 (Fla. 2003) (once officer determined that temporary license tag on defendant's automobile was valid, any further detention violated defendant's Fourth Amendment rights); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001) (although initial stop

of truck was permissible based on officer's belief that truck's taillights were not working, officer could not continue to detain truck once officer saw that both taillights were working); *State v. Lopez*, 631 N.W.2d 810 (Minn. Ct. App. 2001) (officer, who stopped car for having no license plates but then discovered upon approaching car that car had lawful temporary sticker, could continue stop long enough to explain to driver that he was free to go; when officer approached driver, odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue detention and investigate).

## **L. 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* § 15.2H, discussing pretextual stops), our 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 (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 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); *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, 599 S.E.2d 62 (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 Ivey, supra*; *see also supra* § 15.1C (discussing applicability of Equal Protection to race-based encounters).

## **M. 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 14–16, 248–49 and FARB SUPP. 2–3 (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"); *State v. Pipkin*, 927 So. 2d 901 (Fla. Dist. Ct. App. 2005) (conduct observed by city officer outside city limits did not support stop within city limits); *see also Parker v. Hyatt*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 109 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

## N. 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 in car as public safety measure; *State v. Maddox*, 54 P.3d 464 (Idaho Ct. App. 2002) (stop of motorist not justified by community caretaking function; evidence did not show that motorist needed assistance); *see also* G.S. 15A-285 (authorizing non-law-enforcement actions when urgently necessary); *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).

## O. Vessels

*Compare State v. Pike*, 139 N.C. App. 96 (2000) (wildlife officers could stop boat for safety inspection without individualized suspicion because of interest in water safety) *with Klutz v. Beam*, 374 F. Supp. 1129 (W.D.N.C. 1973) (boarding and search of boat without individualized suspicion violated Fourth Amendment). *See also* FARB at 31 (discussing authority of wildlife and marine fisheries officers to make stop of person engaged in regulated activities).

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

This part concentrates 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*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009) ("most traffic stops resemble in duration and atmosphere, the kind of brief detention authorized in *Terry*") (citations omitted); 4 LAFAVE § 9.3.

### 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. Morton*, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 437 (2009) (encounter was initially consensual and not a seizure, but officers did not have grounds to frisk for weapons based on information provided by confidential informants); *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. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed); *State v. Artis*, 123 N.C. App. 114 (1996) (suppressing evidence for same reason); *see also U.S. v. Burton*, 228 F.3d 524 (4th Cir. 2000) (in absence of reasonable suspicion, officer may not frisk person merely because officer feels uneasy for his or her safety); *State v. Setterstrom*, 183 P.3d 1075 (Wash. 2008) (officer did not have grounds to conduct protective search of defendant where he believed defendant was under the influence, probably from methamphetamine; defendant did not do or say anything that would indicate he was armed and dangerous).

**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
- the person's prior criminal record and history of dangerousness

*See* 4 LAFAVE § 9.6(a), at 624–32.

**Other protective measures.** Whether officers may take other protective measures in connection with a weapons frisk depends on the circumstances of the case. *See State v. Smith*, 150 N.C. App. 317 (lifting of long shirt to expose pants pocket during frisk was reasonable under circumstances), *aff'd per curiam*, 356 N.C. 605 (2002); *State v. Sanchez*, 147 N.C. App. 619 (2001) (multiple occupants of vehicle were briefly handcuffed while officers frisked for weapons and then handcuffs were removed; handcuffing did not exceed scope of stop and convert stop into arrest); *State v. Campbell*, 188 N.C. App. 701 (2008) (handcuffing reasonable in light of prior occasions in which defendant had fled from law enforcement); *U.S. v. Melendez-Garcia*, 28 F.3d 1046 (10th Cir. 1994) (circumstances did not justify officers drawing of guns and handcuffing of defendants as part of stop); *State v. Gay*, 748 N.W.2d 408 (N.D. 2008) (although officer had reasonable grounds to handcuff defendant initially, officer acted unreasonably by failing to remove handcuffs once frisk revealed no weapons and the officer's concerns were dissipated; evidence discovered thereafter was subject to suppression); *People v. Delaware*, 731 N.E.2d 904 (Ill. App. Ct. 2000) (stop was converted into arrest, requiring probable cause, when officers kept defendant handcuffed after patdown search revealed no weapons); *Longshore v. State*, 924 A.2d 1129 (Md. 2007) (handcuffing of defendant was de facto arrest where suspect posed no danger or flight risk); *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007) (“frisk and sit” violated Fourth Amendment; although officer had grounds initially for frisk, placing defendant in back seat of patrol car thereafter was more akin to full-scale arrest than brief detention generally incident to ordinary traffic stop).

## 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); *see also* 5 LAFAVE § 10.8(d), at 378 (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).

**Ordering passengers to exit or remain in vehicle; frisking passengers.** Previously, officers could require passengers to exit the vehicle only if the officers had grounds to do so. *See State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable belief that passenger might be armed); *State v. Adkerson*, 90 N.C. App. 333 (1988) (officer arrested defendant for driving while impaired and had right to require passenger to exit vehicle so officer could search vehicle incident to arrest of driver). 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. *Compare Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (based on state constitution, court rejects rule that officer may automatically order driver or passenger to exit vehicle).

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*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (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 788. The decision did not resolve, however, 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); *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle; concurring judge disagrees with majority opinion to extent it suggests that officer may require passenger to remain in vehicle during traffic stop without any reason to believe that passenger poses threat to safety or is engaged in criminal activity); *Wilson v. State*, 734 So. 2d 1107 (Fla. Dist. Ct. App. 1999); *Walls v. State*, 714 N.E.2d 1266 (Ind. Ct. App. 1999); *State v. Mendez*, 970 P.2d 722 (Wash. 1999) (so holding on state constitutional grounds); *but see Tawdul v. State*, 720 N.E.2d 1211 (Ind. Ct. App. 1999) (disagreeing with panel of Indiana court of appeals that issued *Walls*).

A passenger may still 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* § 15.2E (standing of passenger to challenge stop). Officers also must have grounds in order to frisk occupants; a valid stop and order to exit the vehicle does not

automatically give the officer the right to frisk. *See supra* § 15.3A; *see also Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009) (officers may frisk passengers if they have reasonable suspicion that passengers are armed and dangerous; officers do not need to have reasonable suspicion of criminal activity by passengers).

**Other actions involving passengers.** *See Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009) (questioning of passengers during traffic stop that did not relate to justification for stop did not measurably lengthen stop and was constitutionally permissible); *Illinois v. Harris*, 543 U.S. 1135 (2005) (court summarily vacates Illinois Supreme Court decision finding that officers could not run warrant check on passenger that did not prolong otherwise valid traffic stop); *but see State v. Affsprung*, 87 P.3d 1088 (N.M. Ct. App. 2004) (officer’s request during traffic stop for passenger’s identifying information was not justifiable based on generalized concerns about officer safety); *State v. Rankin*, 92 P.3d 202 (Wash. 2004) (state constitution forbids officers from requesting passenger’s identification without independent reason justifying request).

**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); *State v. Green*, 103 N.C. App. 38 (1991) (officer could not look in glove compartment of defendant’s car as part of protective weapons search; officer had already placed defendant in patrol car and defendant could not obtain any weapon or other item from car); *State v. Braxton*, 90 N.C. App. 204 (1988) (facts did not warrant belief that suspect was dangerous and could gain control of weapon); *see also infra* § 15.5A (discussing *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (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).

### C. Plain View

Generally, observations by officers of things in “plain view” do not constitute a search. *See* 1 LAFAVE § 2.2; FARB at 74–76. 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 § 2.2(b), at 463 (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 (discussed *supra* § 15.2) or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop (for example, the officer searched the car for weapons without adequate justification, discussed *supra* § 15.3B, or the detention lasted longer than necessary to effectuate the purpose of the stop, discussed *infra* § 15.3E). See also *Bond v. United States*, 529 U.S. 334 (2000) (officer’s physical manipulation of defendant’s carry-on bag was unlawful search).

#### 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); *State v. Williams*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 394 (2009) (under “plain feel” doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient); *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 wads 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, he or she may need a search warrant before inspecting the interior of the object. See *infra* § 15.5C on searches of containers.

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

**Generally.** 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); *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998) (once purpose of traffic stop is completed, officer must have reasonable suspicion to continue to detain defendant); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001) (police officer's continued detention of truck after initial traffic stop violated Fourth Amendment; officer stopped truck based on perception that its taillights were not working, but once officer saw that both taillights were working, purpose of stop was satisfied, and officer's subsequent actions of asking driver to exit truck, requesting his driver's license, checking truck's inspection sticker, and briefly surveying truck's interior were all illegal and exceeded scope of stop's initial justification).

**Requests for consent and questioning.** Numerous cases have addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. In arguing that a request for consent or questioning was beyond the scope of the stop, and therefore that 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 feel 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 unduly 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 State v. Jackson*, \_\_\_ N.C. App. \_\_\_ (Aug. 18, 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. Parker*, 183 N.C. App. 1 (2007) (“[w]ithout additional reasonable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment”; in this case officer had reasonable suspicion to request that passenger consent to search of her purse after discovering what appeared to be a controlled substance in the door of the car next to where passenger was sitting); *State v. Hernandez*, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop); *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); *State v. Castellon*, 151 N.C. App. 675 (2002) (during traffic stop officer developed reasonable suspicion that defendant was engaged in illegal drug activity and was justified in asking for permission to search vehicle); *State v. Beveridge*, 112 N.C. App. 688 (1993) (once officer had frisked defendant for weapons, officer could not continue to search or question defendant), *aff'd per curiam*, 336 N.C. 601 (1994); *see also U.S. v. Mesa*, 62 F.3d 159 (6th Cir. 1995) (officer may stop person for traffic violation even if real purpose is to uncover narcotics; however, once purpose of traffic stop is completed, officer may not detain person further and request consent to search); *State v. Smith*, 184 P.3d 890 (Kan. 2008) (during *Terry* stop, officer's actions must be reasonably related to justification for initiating stop; request for consent to search unrelated to reason for stop is unconstitutional under U.S. and state constitutions); *State v. Carty*, 790 A.2d 903 (N.J. 2002) (for consent to search of motor vehicle and its occupants to be valid under state constitution, law enforcement personnel must have reasonable suspicion of criminal wrongdoing, beyond initial reason for traffic stop, before seeking consent to search), *modified on other grounds*, 806 A.2d 798 (N.J. 2002).

Whether questioning unduly prolongs the detention is particularly important. In *Muehler v. Mena*, 544 U.S. 93 (2005), the Court held that it was not unconstitutional during the execution of a search warrant for officers to question a lawfully detained person about her immigration status. The Court reasoned that the officers did not require reasonable suspicion to ask the person for identifying information because the questioning did not prolong the detention. *See U.S. v. Alcaraz-Arellano*, 441 F.3d 1252 (10th Cir. 2006) (relying on *Mena*, court holds that officer's questions to motorist during traffic stop did not unreasonably prolong stop and were permissible). In *Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009), the court held that an officer's questioning of passengers on matters unrelated to the justification for the traffic stop was constitutionally permissible because it did not measurably extend the duration of the stop..

**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. 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); *but cf. O'Boyle v. State*, 117 P.3d 401 (Wyo. 2005) (violation of state constitution for trooper, during traffic stop for speeding, to spend approximately seven minutes asking driver over thirty questions about purpose of trip and other matters; although trooper told defendant he was free to go before trooper asked for consent to search, defendant's consent was not sufficiently attenuated from preceding unconstitutional detention).

In *Ohio v. Robinette*, 519 U.S. 33 (1996), the state court held that officers must clearly inform a motorist that a traffic stop has ended and that the motorist is free to go before requesting consent to search on an unrelated matter. Without this warning, the state court held, the motorist's consent is involuntary. The U.S. Supreme Court rejected such a requirement, holding that the voluntariness of a motorist's consent is evaluated under the

totality of circumstances. *Robinette* does not affect the law discussed above. 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 State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (on remand from U.S. Supreme Court, state supreme court found that officer exceeded scope of stop and that consent was therefore invalid). Any consent given must also be voluntary. *See infra* § 15.4B (voluntariness of consent).

## F. Drug Dogs

**Generally.** The U.S. Supreme Court has held that use of a drug dog to sniff luggage in a public place does not constitute a search under the Fourth Amendment. *See U.S. v. Place*, 462 U.S. 696 (1983). Walking a dog around a vehicle (although not a person) likewise is not considered a search. *See State v. Fisher*, 141 N.C. App. 448 (2000) (sniff of vehicle's perimeter by drug dog is not search under Fourth Amendment). An "alert" by the dog may constitute probable cause if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Matheson v. State*, 870 So. 2d 8 (Fla. Dist. Ct. App. 2003) (drug dog's alert to defendant's vehicle was insufficient to establish probable cause to search defendant's car; state did not present any evidence of dog's track record for reliably detecting presence of contraband); *State v. England*, 19 S.W.3d 762 (Tenn. 2000) (dog and handler were sufficiently trained and reliable to support finding that once dog alerted for presence of drugs, handler had probable cause to conduct search of inside of vehicle); *State v. Wallace*, 812 A.2d 291 (Md. 2002) (drug dog alert to car did not establish probable cause to search all passengers of car); 1 LAFAVE § 2.2(g); FARB at 76; LeAnn Melton, *Drug Dogs—Reliability Issues and Case Law* (Nov. 29, 2007) (2007 North Carolina Fall Public Defender Seminar), online at [www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf](http://www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf).

**During traffic stop.** In *Illinois v. Caballes*, 543 U.S. 405 (2005), the U.S. Supreme Court held that using a trained drug dog to sniff around the exterior of a vehicle for controlled substances during the progress of a lawful stop for a traffic violation does not infringe on a protected interest under the Fourth Amendment and does not require reasonable suspicion. In light of *Caballes*, the U.S. Supreme Court vacated a North Carolina Court of Appeals decision finding that officers needed reasonable suspicion to conduct a drug dog sniff of a defendant's vehicle that was being lawfully detained at a license checkpoint. *See North Carolina v. Branch*, 546 U.S. 931 (2005); *see also Florida v. Rabb*, 544 U.S. 1028 (2005) (court summarily vacates Florida state court decision that canine sniff outside door of house was unconstitutional search). On remand, the North Carolina Court of Appeals followed the rule established in *Caballes*. *See State v. Monica Branch*, 177 N.C. App. 104 (2006); *compare State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002) (under state constitution, officer must have reasonable, articulable suspicion of drug-related criminal activity before drug dog sniff of exterior of motor vehicle, even if sniff does not extend duration of stop).

A drug dog sniff is still impermissible if it unduly prolongs the stop and the officer does not have reasonable suspicion to justify the delay. *See State v. McClendon*, 350 N.C. 630

(1999) (canine unit did not arrive until 15 to 20 minutes after conclusion of traffic stop, but officer had reasonable suspicion beyond basis for traffic stop); *State v. James Branch*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 18 (2008) (officer did not have grounds to detain defendant for canine unit to arrive after officer finished checking defendant's license and registration); *State v. Euceda-Valle*, 182 N.C. App. 268 (2007) (relying on *McClendon*, court finds that officer had reasonable suspicion to detain defendant for canine sniff of exterior of vehicle after officer handed defendant warning ticket and traffic stop ended); *State v. Monica Branch*, 177 N.C. App. 104, 107 n.1 (2006) (suggesting that if drug dog sniff extends duration of stop, it may be unconstitutional); *State v. Fisher*, 141 N.C. App. 448 (2000) (detaining defendant after traffic stop for drug dog sniff exceed scope of stop); *State v. Falana*, 129 N.C. App. 813 (1998) (officer exceeded scope of traffic stop by detaining defendant even briefly for dog to do drug sniff); *see also U.S. v. Davis*, 430 F.3d 345 (6th Cir. 2005) (officers could not extend traffic stop to allow sniff by second drug dog after first drug dog failed to alert; failure to alert dissipated any reasonable suspicion that would have justified prolonging detention). Based on the U.S. Supreme Court's decision in *Caballes*, the North Carolina Court of Appeals held that a ninety-second delay for a dog sniff was a *de minimus* extension of a traffic stop and did not require additional reasonable suspicion. *See State v. Brimmer*, 187 N.C. App. 451 (2007); *but see State v. Louthan*, 744 N.W.2d 454 (Neb. 2008) (rejecting *de minimus* rule and holding that officer must have additional reasonable suspicion to detain defendant after investigative procedures incident to traffic stop have been completed). For a discussion of other actions that may unduly prolong a traffic stop, *see supra* § 15.3E.

A drug dog sniff also is impermissible if it intrudes into protected areas—for example, the sniff is of the interior of the vehicle or 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* § 15.2I and J.

### **G. Does *Miranda* Apply?**

A person generally is not entitled to *Miranda* warnings on a stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984). Once taken into custody, a person is entitled to *Miranda* warnings prior to 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. Johnston*, 154 N.C. App. 500 (2002) (defendant who was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives was in custody for *Miranda* purposes); *see also People v. Rivera*, 709 N.E.2d

710 (Ill. App. Ct. 1999) (stop became custodial interrogation, requiring *Miranda* warnings).

## **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); *see also State v. Worwood*, 164 P.3d 397 (Utah 2007) (off-duty officer had reasonable suspicion to stop driver for impaired driving, but stop became de facto arrest and violated Fourth Amendment when off-duty officer transported driver more than a mile away from the scene for on-duty officer to conduct field sobriety tests). Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.3G.

## **I. Defendant's Name**

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the 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 during a *Terry* stop . . . , it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." 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. *Cf.* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). Therefore, a person's mere refusal to disclose his or her name (where 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).

## **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) (check of vehicle identification number valid); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on

facts of case); *see also* *U.S. v. Caro*, 248 F.3d 1240 (10th Cir. 2001) (trooper's request to search for VIN inside automobile during traffic stop, after having viewed VIN on dashboard, was not reasonable under Fourth Amendment and exceeded permissible scope of detention).

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

### A. Probable Cause

**Required for arrest or search.** Although reasonable suspicion may be sufficient to support an officer's initial stop and investigative actions, an officer must have probable cause to make an arrest or to search for evidence (absent consent to search, discussed below). *See, e.g., 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). *See also Maryland v. Pringle*, 540 U.S. 366 (2003) (police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle; defendant was one of three men riding in the vehicle at 3:16 a.m., \$763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and the three men failed to offer any information with respect to the ownership of the cocaine or money); *compare State v. Grande*, 187 P.3d 248 (Wash. 2008) (odor of marijuana emanating from car gave officer probable cause to search car but not probable cause to arrest all car passengers and search them incident to arrest).

**Requirement of arrest warrant.** Although officers may have probable cause to arrest for a criminal offense, they may not make a warrantless arrest except in one of 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).

**State law limits on authority 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*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1598 (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); *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 a seat belt violation, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 46 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore, supra* (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.

**Scope of search without warrant.** The permissible scope of a search without a warrant depends on whether the officers have probable cause to arrest or probable cause to search. *See infra* § 15.5.

## **B. Consent**

For several reasons a purported consent to search may be invalid.

**Effect of illegal detention.** If a person is detained illegally—for example, a stop is unduly prolonged—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. U.S.*, 371 U.S. 471 (1963). Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention. The consent also may be flawed for other reasons, discussed below, such as being beyond the authority of the person who purported to consent.

**Length of detention.** Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.3E (nature, length, and purpose of detention).

**Voluntariness of consent.** Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *U.S. 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); *U.S. 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); *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000) (consent to search

involuntary when defendant was surrounded by officers, backed against hood of car, and told to assume position).

*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); *compare State v. McLees*, 994 P.2d 683 (Mont. 2000) (rejecting apparent authority doctrine under state constitution; for consent to be valid against defendant, third party must have actual authority to give consent to search). Whether the 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 U.S. 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); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver lacked authority to consent to search of defendant's suitcase in trunk of driver's car; officer has obligation to ascertain ownership of items not owned by or within control of the person purportedly giving consent when circumstances do not clearly indicate that the person is the owner or controls item to be searched); *People v. James*, 645 N.E.2d 195 (Ill. 1994) (driver consented to search outside of hearing of defendant-passenger; consent did not authorize police to search purse on passenger's seat).

*See also infra* § 15.5B and D (discussing searches of passenger belongings incident to arrest of driver or based on 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); *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 frisk of his person); *State v. Neal*, 190 N.C. App. 453 (2008) (female defendant knowingly and voluntarily consented to strip search by female officer); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search 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 *U.S. v. Osage*, 235 F.3d 518 (10th Cir. 2000) (defendant's consent to search did not permit officer to destroy container or render it useless for intended function); *U.S. v. Elliott*, 107 F.3d 810 (10th Cir. 1997) (officer's statement that he did not intend to look through each item limited consent-search to visual observation); *State v. Arroyo-Sotelo*, 884 P.2d 901 (Or. Ct. App. 1994) (general consent to search car did not extend to prying open of panels within car).

**Withdrawal of consent.** A person may withdraw consent at any time prior to completion of the search. See 4 LAFAVE § 8.1(c), at 44–49. Prior to withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

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

### A. Search Incident to Arrest

**Of person.** Officers may search a person incident to a lawful arrest of that person. See *U.S. v. Robinson*, 414 U.S. 218 (1973); compare *State v. Neil*, 958 A.2d 1173 (Vt. 2008) (state constitution requires warrant for search of container seized from person of arrestee); *State v. Hardaway*, 36 P.3d 900 (Mont. 2001) (holding under state constitution that search incident to arrest of person is permissible only to prevent arrestee from escaping, using weapons, or destroying incriminating evidence in arrestee's possession).

**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 the establishment of 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; state constitution not raised); *State v. Cooper*, 304 N.C. 701 (1982) (to same effect).

In *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search incident to the arrest of an occupant of a 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. The *Gant* decision is based in part on Justice Scalia's dissent in *Thornton v. United States*, 541 U.S. 615 (2004). *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*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2158 (2009) (vacated and remanded for reconsideration in light of *Gant*), *on remand*, \_\_\_ N.C. App. \_\_\_ (Sept. 15, 2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search). The practical impact is that once officers have secured an arrestee—by, for example, handcuffing the arrestee—they may not search the vehicle based on the first ground in *Gant*. The second ground for searching is also unavailable in many instances because it will not be reasonable to believe that evidence relevant to the crime of arrest may be found. *See Meister v. Indiana*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2155 (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*). For a further discussion of *Gant*’s impact, *see* Robert L. Farb, *The United States Supreme Court’s Ruling in Arizona v. Gant* (April 26, 2009), online at <http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf>.

## B. Limits on Searches Incident to Arrest

*Gant*, discussed in A., 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 both persons and vehicles incident to arrest are discussed below, based on previous case law and the potential impact of *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 (1968) (“It is axiomatic that an incident search may not precede an arrest and serve as part of its justification”); FARB at 90 (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 persons.** 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. *See* FARB at 91 (arrest of occupant of vehicle does not automatically authorize officers to search trunk of vehicle *or* to frisk or search other occupants based on search-incident-to-arrest justification); 3 LAFAVE § 7.1(c), at 519. *Gant* does not appear to modify these limitations. *See United States v. Bell*, 2009 WL 2526161 (6th Cir., Aug. 20, 2009) (unpublished) (*Gant* authorizes search of passenger compartment of vehicle if either of *Gant* grounds exists; in this case, officers had reason to believe container in passenger compartment contained evidence related to offense of arrest and were authorized to search it); *Owens v. Kentucky*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2155 (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*).

**Containers.** There has been conflicting authority on whether officers may search locked containers incident to arrest. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); 3 LAFAVE § 5.5(a), at 217–20 (discussing potential limits on search of containers in arrestee’s possession), § 7.1(c), at 519–21 (suggesting that *Belton* does not necessarily authorize dismantling of vehicle or search of locked containers within vehicle); *but see* FARB at 90 (arguing that prevailing federal case law allows search of locked containers in arrestee’s possession as search incident to arrest); *State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest). *Gant* may limit searches of containers, whether locked or unlocked. If officers cannot satisfy either ground for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there is not a reasonable basis to believe that the container contains evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. *See* Jeff Welty, *I Gant Believe I’m Posting about this Case Again* (April 29, 2009), online at <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=315>.

**Non-contemporaneous search of vehicle.** Before *Gant*, some courts precluded a non-contemporaneous search of a vehicle following arrest of an occupant. *See Preston v. United States*, 376 U.S. 364 (1964) (where vehicle had been towed to garage, search of vehicle was not contemporaneous with arrest and was disallowed); *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search of vehicle was not contemporaneous with arrest where search took place 30 to 45 minutes after occupant had been arrested, handcuffed, and placed in back of patrol car). This limitation is implicit in the first ground for a search permitted by *Gant* because in virtually all instances the arrestee will not be within reaching distance of the vehicle at the time of a non-contemporaneous search. It also seems unlikely that the courts will allow vehicle searches, conducted long after arrest, based on the lower “reasonable to believe” standard described in *Gant*. It seems more likely that the courts will require that officers have full probable cause to search for non-contemporaneous searches. *See infra* § 15.5D (discussing probable cause to search vehicle). Officers also may have other grounds to inspect a vehicle after arrest. *See infra* § 15.5E (describing circumstances in which officers may inventory contents of seized vehicle).

**Inspections of and intrusions into body.** *See generally State v. Smith* 118 N.C. App. 106 (1995) (although officers had grounds to conduct warrantless search, it was unreasonable to require defendant to pull down his pants on public street), *rev’d in pertinent part*, 342 N.C. 407 (1995) (court adopts dissenting opinion, which found that search was not unreasonable under circumstances); 3 LAFAVE § 5.3(c).

**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, one question in cases in which a person is outside a vehicle when approached by officers

is whether the person qualifies as a “recent occupant.” *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). Even if a person is a recent occupant, officers still need to meet one of the two grounds identified in *Gant* authorizing a search incident to arrest. *See also State v. Robb*, 605 N.W.2d 96 (Minn. 2000) (in case predating *Gant*, court recognized that when person was arrested by officer, he was so far removed from vehicle that he did not have opportunity to conceal weapons or evidence; officers therefore could not search vehicle incident to arrest).

**Passenger belongings.** *See State v. Jones*, 45 P.3d 1062 (Wash. 2002) (officers could not search passenger’s purse incident to arrest of driver when officers ordered passenger to leave purse in vehicle); *see also State v. Parker*, 987 P.2d 73 (Wash. 1999) (en banc) (under state constitution, if officers know or should know that articles belong to passenger, they do not have automatic right to search the articles incident to arrest of driver).

**Pretext.** Before *Whren* (discussed *supra* § 15.2H), it could be argued that a search incident to arrest violates the Fourth Amendment if the officers arrest the person, rather than issue a citation, as a pretext to search the person incident to arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court extended the rule in *Whren* to arrests, holding that an officer’s decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).) There do not appear to be any reported decisions in North Carolina on this specific question.

### C. Probable Cause to Search Person

**Person.** Officers may conduct a warrantless search of a person who they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g., 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, and exigent circumstances justified immediate warrantless search); *State v. Smith*, 118 N.C. App. 106, *rev’d on other grounds*, 342 N.C. 407 (1995); *State v. Watson*, 119 N.C. App. 395 (1995).

**Containers.** The same rule applies to containers found on a person. Officers may conduct a warrantless search of a container found on a person who 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* FARB at 88; *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App. 2001) (officers could seize chapstick container found during frisk but could not open it without a warrant).

#### D. 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 items 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); *State v. Corpening*, 109 N.C. App. 586 (1993) (to same effect); *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).

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Smith*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 191 (2008) (officers could search defendant's truck); *compare Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008) (odor of burnt marijuana on clothes of vehicle's occupant gave officer probable cause to search passenger compartment of vehicle; officer did not have probable cause, however, to search vehicle's trunk because officer could not reasonably believe that source of smell of burnt marijuana would be found in trunk); *State v. Grande*, 187 P.3d 248 (Wash. 2008) (odor of marijuana emanating from car gave officer probable cause to search car but not probable cause to arrest all car passengers and search them incident to arrest).

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*; *but see State v. Miller*, 630 A.2d 1315 (Conn. 1993) (finding under state constitution that warrantless automobile search at police station was invalid even though supported by probable cause). *Compare supra* § 15.5A (delay in search of car may undermine grounds for search of vehicle incident to arrest of occupant).

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. *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 was forfeitable contraband).

**Passengers' 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. *Compare State v. Boyd*, 64 P.3d 419 (Kan. 2003) (distinguishing *Houghton*, the court held that officers could not search a passenger's purse as part of their search of a car when they had ordered her to leave her purse in the car and they did not have probable cause to search the car or passenger at the time they gave the order).

This ruling does not 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* § 15.4B on consent searches.

**Seizure of object.** Before seizing an object found in 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).

### **E. Inventory Search**

**Arrestees.** Officers may search and inventory possessions of arrestee. *See* FARB at 92.

**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 93–94.

**Pretext.** Inventory searches may be challenged as pretextual. *See supra* § 15.2H (discussing exceptions to *Whren*).