

## SEARCH AND SEIZURE CHECKLIST

November 30, 2007

1. Baseline question: did your client have a reasonable expectation of privacy in the area searched?
  - a. not whether your client *subjectively* expected privacy but whether society *objectively* says that he had a right to expect privacy; “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,” 149 N.C. App. 734, 739
  - b. Examples:
    - i. client has a reasonable expectation of privacy in his home
      1. “[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” 158 N.C. App. 606, 610
      2. includes the home itself and also the “curtilage” (“curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings,” 151 N.C. App. 208, 214)
    - ii. overnight guest in a home also has reasonable expectation of privacy, 495 U.S. 91, 98 (1990)
    - iii. but no privacy in trash left at the curb for pickup outside the curtilage, 486 U.S. 35, 36
2. If your client had a reasonable expectation of privacy, then see whether law enforcement had a search warrant
  - a. “searches conducted outside the judicial process, without prior approval by judge or magistrate [in the form of a search warrant], are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions,” 151 N.C. App. 208, 213
    - i. no “good faith” exception to warrant requirement in NC; 158 N.C. App. 117, 123
  - b. what goes in the search warrant:
    - i. probable cause: Must be based a statement from a law enforcement officer that establishes probable cause to believe that evidence of a crime is located in the place to be searched
      1. heightened scrutiny if the officer is presenting information from an unnamed confidential informant
      2. information must be fairly recent and not “stale” : “statements in the affidavit were so stale as to make it unlikely that illegal drugs would be found on the premises at the time of the issuance of the warrant (164 N.C. App. 56, 67 (dissent)) (reversed on other grounds)
    - ii. oath: the officer’s statement must be sworn – usually in the form of an affidavit
    - iii. particular Description: the warrant must specifically describe the place to be searched and the items to be seized
    - iv. if warrant found defective on any of the above: watch for State to argue that evidence can still be admitted because the search otherwise fell within one of the exceptions to the warrant requirement (see below)
  - c. Who can issue the warrant: a “neutral and detached” judicial official per 15A-243:
    - i. magistrate: can only issue warrants for their own county
    - ii. district court judge: warrants for their judicial district
    - iii. superior court judge: warrants for anywhere in the state
  - d. When and how the search warrant must be executed; see 15A-241 through 259; some highlights:
    - i. must be executed within 48 hours or less after the warrant is issued; “any warrant not executed within that time limit is void” per 15A-248
      1. but watch for State to argue that evidence can still be admitted because search otherwise fits within one of the exceptions to the warrant requirement
    - ii. knock and announce: requires an officer executing a search warrant, before entering the premises, to “give appropriate notice of his identity and purpose,” and “[i]f it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.”
      1. 15A-249; also 151 N.C. App. 420
      2. but watered down recently; see 126 SCt 2159, 646 SE2d 609
    - iii. before search is done: warrant must be read and copy given to person in charge of the premises, 15A-252
    - iv. After search is done: officer must leave itemized inventory of items taken, 15A-254

3. If the search was done without a warrant, it is invalid UNLESS it fits within one of the exceptions to the rule:
  - a. Search incident to arrest: an officer may “conduct a warrantless search of the arrestee’s person and the area within the arrestee’s immediate control,” 148 N.C. App. 135, 139
    - i. for arrest in home: officer may conduct limited “protective sweep” of the home incident to arrest “to ensure the security” of the officer; *but* “the protective sweep must be limited to a cursory inspection of places where a person may hide and last no longer than is necessary to dispel the reasonable suspicion of danger,” 150 N.C. App. 631, 640
  - b. Plain view search
    - i. but absent exigent circumstances, if officer is standing outside a house and looks in and sees contraband in plain view, he still must get warrant before going in, 149 N.C. App. 734, 743
  - c. Consent search
    - i. but if the consent is given only after the person is held too long by law enforcement, then the consent is invalid, and the fruits of the search must be suppressed
    - ii. consent to search does *not* include consent to destroy or damage personal property, 500 U.S. 248, 252, or to pull down the person’s pants, 179 N.C. App. 297, 304
    - iii. **“knock and talk”**: “a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant,” 346 N.C. 794, 800
      1. **note**: if the officers say they enough info to get a warrant if the person does not consent to the search, then argue that “knock and talk” does not apply and that the consent was unlawfully obtained
  - d. Stop and frisk reasonable suspicion search
  - e. Car searches
  - f. Exigent circumstances search
    - i. “must be strictly circumscribed by the exigencies that justify its initiation” and “a generalized interest in expedient law enforcement” is NOT enough, 547 U.S. 103, 116
    - ii. examples: hot pursuit of suspect who flees into a house, preventing imminent destruction of evidence, fighting a fire, responding to a cry for help from inside a house when someone inside is being attacked
  - g. Search by a private party: but only if the private party is not acting at the direction and under the control of law enforcement; 115 N.C. App. 431, 436-37 (several factors)
  - h. Search by a probation officer: within the terms and conditions of probation
    - i. but must be search by *probation* officer and not by “any” officer, 143 N.C. App. 461, 467
4. File a motion to suppress to challenge the search, 15A-971 through 15A-980
  - a. Grounds: see above list; and phrase in terms of constitutional or statutory violations: United States Constitution, North Carolina Constitution, and “substantial” violations of North Carolina statutes under 15A-974
  - b. If Superior Court: file written motion prior to trial
    - i. must be supported by affidavit, 15A-977; but affidavit can sometimes be signed by attorney rather than client, 130 N.C. App. 107, 110-11
  - c. Burden of proof at suppression hearing:
    - i. if the search was done without a warrant: burden is on the State “to demonstrate the admissibility of the challenged evidence” by preponderance standard, 307 N.C. 552, 556-57
    - ii. if the search was done with a warrant: State still has the burden of proof, 32 N.C. App. 584, 586, but search warrant is presumed to be valid and defense is obligated “to go forward with their evidence” that rebuts the presumption, 60 N.C. App. 595, 597
    - iii. and in either case: defense must at least start the ball rolling by filing a motion to suppress supported by an affidavit as required by 15A-977; if not, then motion denied summarily
  - d. Defendant can testify at suppression hearing; and if he loses, his testimony *cannot* be used by the State at trial as part of their case-in-chief, 390 U.S. 377, 393
    - i. but: if Defendant testifies at trial in his own defense: his suppression hearing testimony *can* be used to impeach him, 303 N.C. 112, 120
    - ii. can also likely be used against Defendant at sentencing
  - e. Judge must rule on the motion to suppress during the same term of court in which the motion is heard, 359 N.C. 583
  - f. If Defendant loses the suppression hearing and then pleads guilty: he can still get review of the suppression issue on appeal; 15A-979(b), 120 N.C. App. 623, 625