

Motions Procedures in Implied Consent Cases Post *State v. Fowler* and *State v. Palmer*

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The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-53 (H 1048) enacted significant changes to procedures governing the adjudication in district court of implied consent offenses committed on or after December 1, 2006. The genesis of the legislation was a 2005 report issued by the Governor's Task Force on Driving While Impaired, which made numerous recommendations for improving "North Carolina's DWI system."¹ One recommendation was that "District Court trial procedure . . . be formalized for DWI and related offenses" through the enactment of legislation requiring that motions to suppress and motions to dismiss evidence in implied consent cases litigated in district court be filed before trial.² The report further recommended the enactment of statutory provisions permitting the state to appeal to superior court any pretrial district court order suppressing evidence or dismissing charges. These recommendations were based upon the following observations noted in the report:

- Currently in Superior Court, motions to suppress are accompanied by an affidavit and are required before the trial. There is no such law in District Court, which is where the majority of DWI cases are tried. Also, the State is not allowed to appeal orders of suppressions to the Superior Court.
- Defense attorneys are allowed to argue to any motion without prior notice to the District Attorney (DA), and the DA does not have an opportunity to prepare a response to the motion as allowed in Superior Court.
- Many DWI cases are resolved when the court rules on these motions to dismiss or suppress.
- The proceedings of District Court should be modified to require:
 - [a.] Motions to suppress and dismiss evidence (such as Intoxilyzer results) must be made in writing and filed seven days prior to the trial.
 - b. There are no statutes defining when evidence can be suppressed or dismissed as there is in Superior Court. District Court procedure should be modeled to more closely resemble Superior Court.
 - c. District Court judges make written findings of fact and conclusions of law when evidence is suppressed or cases are dismissed.

- d. The State is allowed to appeal District Court orders dismissing a case or suppressing evidence to Superior Court.

Two statutes enacted as part of the Motor Vehicle Driver Protection Act of 2006, G.S. 20-38.6³ and 20-38.7,⁴ prescribe procedures governing motions to suppress and motions to dismiss in implied consent offenses in district court and granting the state certain rights of appeal, though the procedures differ somewhat from those recommended in the 2005 task force report.

The first of the statutes, G.S. 20-38.6, requires that motions to suppress evidence or dismiss charges in such cases be raised before trial, with the exception of (1) motions based upon newly discovered facts, which may be raised during trial, and (2) motions to dismiss for insufficient evidence, which may be raised at the close of the state's evidence and at the close of all the evidence. There is no requirement that motions raised under the new procedures be filed in writing. A district court judge must summarily grant a motion to suppress evidence if the state stipulates that the evidence will not be offered in evidence in any criminal action or proceeding against the defendant. A district court judge may summarily deny a motion to suppress evidence if the defendant failed to make the motion pretrial when all material facts were known to the defendant. If the motion is not determined summarily, the judge must conduct a hearing on the motion and must make findings of fact. The judge must then issue a written order, termed a *preliminary determination*, which contains findings of fact and conclusions of law and preliminarily indicates whether the motion should be granted or denied. If the preliminary determination indicates the motion should be granted, the judge may not enter a final judgment on the motion until after the state has appealed to superior court, pursuant to G.S. 20-38.7(a), or has indicated it does not intend to appeal.⁵ If the preliminary determination indicates the motion should be denied, the district court judge may enter a final judgment denying the motion. A defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.⁶ If the state appeals a preliminary determination in the defendant's favor and the findings of fact are disputed, the superior court determines the matter *de novo*. If there is no dispute, the district court's findings of fact are binding on the superior court and should be presumed to be supported by competent evidence.⁷ After considering the matter according to the appropriate standard of review, the superior court must enter an order remanding the matter to district court with instructions to enter a final judgment granting or denying the motion.⁸

By requiring that motions to suppress and motions to dismiss charges be filed before trial begins (with some exceptions), the implied consent offense procedures enacted in 2006 require determinations of such pre-trial motions before jeopardy attaches, thereby removing double jeopardy as a potential bar to the state's ability to challenge on appeal a district court's order suppressing evidence or dismissing charges. Yet the 2006 legislation went beyond the task force recommendation for creation of a pre-trial motions and appeals process for implied consent cases heard in district court that mirrored procedures applicable in superior court. Indeed, the General Assembly created a new *type* of ruling for such motions – the preliminary determination.

Given that pretrial rulings eviscerate any double jeopardy concerns, one might question why the legislature also required that district courts rule on such motions by preliminary determination rather than final orders. One potential explanation, (which was rejected by the North Carolina Court of Appeals in *State v. Fowler*, discussed *infra*⁹), is that the legislature required the entry of preliminary determinations rather than final judgments in order to preserve the state's right to file an interlocutory appeal from a district court ruling granting a motion to suppress during trial.¹⁰ Before the court held otherwise in *State v. Fowler*,¹¹ one might have interpreted G.S. 20-38.7(a) as allowing the state to appeal to superior court a district court's mid-trial preliminary determination granting a motion to suppress, thereby allowing the superior court to review the determination before it could result in the suppression of critical evidence that might later lead to entry of a dismissal resolving factual elements of the offense. The North Carolina Court of Appeals read the provisions differently in *State v. Fowler*, leaving unanswered, and perhaps rendering rhetorical, the query regarding the necessity of a preliminary determination of motions in implied consent cases.

*State v. Fowler*¹² resolved several significant challenges to the new provisions, upholding them as constitutional and explaining the circumstances and manner in which the procedures apply. *State v. Palmer*,¹³ decided the same day, clarified the mechanism by which a state may appeal a district court's preliminary determination. A detailed review of both decisions follows.

A. *State v. Fowler*, ___ N.C. App. ___, 676 S.E.2d 523 (2009)

Fowler was charged with impaired driving. He made a pretrial motion in district court to dismiss the charges on the basis that the officer lacked probable cause to arrest him for impaired driving. The record is unclear regarding whether Fowler also moved to suppress the evidence resulting from the alleged violation of his Fourth Amendment rights, which would have been the appropriate remedy for such a violation pursuant to the exclusionary rule codified in G.S. 15A-974. The district court entered a preliminary determination granting the motion to dismiss, which the state appealed to superior court. The superior court agreed with the district court on the merits and further held G.S. 20-38.6 and G.S. 20-38.7 unconstitutional on several grounds. The superior court remanded the case to district court for entry of an order dismissing the charges. The state gave notice of appeal to the court of appeals and subsequently filed a petition for writ of certiorari. The defendant moved to dismiss the state's appeal.

1. Appeal by the State

The court of appeals began its analysis by considering the state's right to appeal the superior court's interlocutory order. The court interpreted G.S. 20-38.6(f) and G.S. 20-38.7(a) to require that the superior court, rather than entering a final ruling on the pre-trial motion, remand the matter to district court with instructions to finally grant or deny a motion to suppress or to dismiss, which was the procedure employed by the superior court in *Fowler*. The court of appeals concluded that G.S. 15A-1445(a)(1), which allows the state to appeal to the appellate division from a superior court's entry of a judgment dismissing criminal charges, did not confer upon the state the right to appeal from the superior court's interlocutory order remanding the case for entry of a dismissal by the district court. The court rejected the state's argument that because the superior court's order remanding the case was to result in

dismissal of the charges by the district court, it could appeal pursuant to G.S. 15A-1445(a)(1).¹⁴ The court further held that G.S. 20-38.7(a) did not confer upon the state the right to appeal the superior court's remand order to the appellate division. While G.S. 20-38.7(a) authorizes the state to appeal a district court's preliminary determination to superior court and provides that any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes, no provisions of Chapter 15A allow the state to appeal from the superior court's order remanding the case for entry of dismissal by the district court.

Nevertheless, the court granted the state's petition for writ of certiorari in light of the substantial questions at issue and proceeded to consider the constitutionality of the new procedural provisions.

2. Constitutional Analysis

The *Fowler* court prefaced its constitutional analysis by stating: "Because the Constitution 'is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.'"¹⁵ Thus, the court noted that it presumes the constitutionality of any act promulgated by the General Assembly and resolves all doubts in favor of constitutionality.

a. Separation of Powers

The superior court considering the state's appeal in *Fowler* held the challenged provisions unconstitutional on several grounds, including that their enactment violated the state supreme court's exclusive authority to make rules of procedure and practice and unconstitutionally altered the jurisdiction of the district court. The court of appeals rejected those arguments, explaining that while the state constitution gives the state supreme court exclusive authority to make rules of procedure and practice for the appellate division, the General Assembly is empowered to "prescribe the jurisdiction and powers of the District Courts,"¹⁶ and, within constitutional limitations, to circumscribe the jurisdiction of the superior courts.¹⁷ Given that the challenged provisions of G.S. 20-38.6 and 20-38.7 affect procedure and practice in district and superior court only, the court concluded that the General Assembly acted within its constitutional authority in enacting those rules.

The court did not consider the defendant's argument that the statutory provisions violated the separation of powers clause of the North Carolina Constitution, Article 1, § 6, because the defendant failed to properly raise the issue on appeal, but stated that even if the issue had been before it, it "discern[ed] no usurpation of the judicial power of the state by the Legislature in the enactment of these statutory provisions."¹⁸

b. Double Jeopardy

The court then addressed the superior court's conclusion that the challenged provisions violated the Double Jeopardy Clause of the U.S. Constitution and the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, which similarly guarantees the common law doctrine of former jeopardy.¹⁹

The Double Jeopardy Clause of the Fifth Amendment of the federal Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The United States Supreme Court in *Benton v. Maryland*, 395 U.S. 784 (1969), held that the protections of the Clause were applicable to states through the Fourteenth Amendment. Courts have recognized three separate guarantees embodied in the Clause: “It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.”²⁰ Prosecution after acquittal, the guarantee at issue in *Fowler*, is barred “to prevent the State from mounting successive prosecutions and thereby wearing down the defendant.”²¹

The Double Jeopardy Clause is not an absolute bar to successive trials and generally does not bar reprosecution of a defendant whose conviction is overturned on appeal.²² The rule permitting retrial of a defendant after reversal of a conviction hinges on the concept of “‘continuing jeopardy,’” which exists “‘where criminal proceedings against an accused have not run their full course.’”²³ Acquittals, unlike convictions, however, terminate the initial jeopardy.²⁴ A ruling that as a matter of law the state’s evidence is insufficient to establish the defendant’s factual guilt is an acquittal under the Double Jeopardy Clause.²⁵

The principle that “[t]he protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy,”²⁶ the time at which jeopardy is said to “attach,” was significant to the *Fowler* court’s evaluation of the defendant’s double jeopardy challenge. The court noted that the rule regarding attachment of jeopardy “‘reflects an attempt to connect the consequences of jeopardy (that is, the risk of conviction) with the element that could result in conviction (that is, the introduction of evidence).’”²⁷ In a bench trial, jeopardy attaches when the judge begins to hear evidence or testimony,²⁸ which occurs when the first witness is sworn.²⁹ Before that time, there can be no double jeopardy bar to successive prosecutions of the defendant as the defendant has not yet been placed in jeopardy.

The court of appeals in *State v. Ward*, 127 N.C. App. 115, 487 S.E.2d 798 (1997), determined that jeopardy did not attach upon the district court’s consideration of defendants’ pretrial motions to dismiss based upon prosecutorial misconduct as “evidence was never accepted by the district court for an adjudication of defendants’ guilt.”³⁰ The *Fowler* court explained that when a district court presiding as both trier of fact and judge is “‘presented’ with evidence or testimony for its consideration of a pretrial motion on a question of law, jeopardy has not yet attached to the proceeding.”³¹ Therefore, the *Fowler* court held that the state’s right to appeal a district court’s pretrial preliminary determination indicating that it would grant a defendant’s motion to suppress or dismiss does not deprive defendants charged with implied-consent offenses of their guaranteed freedom from double jeopardy.

Recognizing that such motions will not always be raised pretrial, the *Fowler* court considered whether the state’s appeal from a district court’s preliminary determination granting a motion to suppress or dismiss made *after jeopardy has attached* is appealable under G.S. 20-38.7.

The court first addressed rulings on motions to dismiss for insufficient evidence made at the close of evidence, holding that the state may not appeal the granting of any such motion.³² Noting that G.S. 20-

38.6(a) excepted from its pretrial requirements motions to dismiss for insufficient evidence, the court explained that a determination by the district court that the state presented insufficient evidence to establish the defendant's guilt constitutes an acquittal for purposes of the Double Jeopardy Clause. Accordingly, when a court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution that might result in a second trial or in further proceedings devoted to resolving the factual issues related to the elements of the offense charged.

The court then addressed the more difficult question – whether the state is statutorily and constitutionally authorized to appeal a district court's rulings on other types of motions to dismiss or suppress that are raised during trial. Characterizing G.S. 20-38.6(a), (f), and 20-38.7(a) as “not expressly preclud[ing] the State from appealing motions to suppress or dismiss made by defendants *during* trial based on newly discovered facts,” and noting that statutes authorizing an appeal by the state in a criminal case must be strictly construed, the court of appeals concluded that the state may appeal a district court's preliminary determination in favor of the defendant to superior court only when it is: (1) made and decided in district court at a time before jeopardy has attached; and (2) entirely unrelated to the sufficiency of the evidence as to any element of the offense or to defendant's guilt or innocence.³³ “In other words,” the court explained: “G.S. §§ 20-38.6(a),(f), and 20-38.7(a) should not be construed to grant the state a right of appeal to superior court when the district court grants a defendant's motion to suppress evidence or dismiss charges during trial based on ‘facts not previously known’ which are only discovered by defendant ‘during the course of the trial.’”³⁴ Though the court relied in part upon the task force report as support for its conclusion,³⁵ the task force report made no recommendations regarding the issuance of preliminary determinations or mid-trial appeals.

The test articulated by the court is stricter than that required by the Double Jeopardy Clause, which does not bar the state's appeal from an order suppressing evidence, given that such orders are founded on a legal determination that a defendant's statutory or constitutional rights have been violated rather than upon a defendant's factual guilt or innocence. Moreover, principles of double jeopardy do not prohibit an appeal by the state from an order dismissing charges on grounds unrelated to a defendant's factual guilt or innocence or the retrying of a defendant if such an order is reversed on appeal -- even if the order dismissing the charges is entered after jeopardy has attached.³⁶ For example, the North Carolina Court of Appeals held in *State v. Priddy*³⁷ that the state's appeal from a superior court's order dismissing an habitual impaired driving charge on jurisdictional grounds after trial began was not barred by double jeopardy and that the defendant could be retried on the charge. Accordingly, G.S. 15A-1432(a)(1) grants the state a right to appeal from district court to superior court when there has been a decision or judgment dismissing criminal charges as to one or more counts unless the rule against double jeopardy prohibits further prosecution. Thus, the state may appeal to superior court a district court's order dismissing charges on grounds unrelated to the defendant's factual guilt or innocence, even when such an order is entered after trial begins. However, as the implied consent offense procedures are interpreted in *Fowler*, the state has no such right to appeal a district court's mid-trial granting of a motion to suppress.

With respect to the requirement that preliminary determinations subject to appeal by the state be entirely unrelated to the sufficiency of the evidence, the court opined that that the General Assembly

intended pretrial motions under G.S. 20-38.6(a) to address only procedural matters such as “delays in the processing of a defendant, limitations imposed on a defendant’s access to witnesses, and challenges to the results of a [chemical analysis of the defendant’s breath].”³⁸ Presumably the court considers a Fourth Amendment challenge such as the one raised by Fowler among motions addressing procedural matters rather than the sufficiency of the evidence, as the court did not indicate that the superior court lacked authority to consider the state’s appeal from the preliminary determination.

Based upon this interpretation of the statutory appeal provisions, the court of appeals concluded that the challenged provisions do not violate the Double Jeopardy Clause of the U.S. Constitution. Given the *Fowler* court’s holding that the provisions do not permit the state to appeal from motions granted mid-trial, the requirement that a district court rule by “preliminary determination” affords the state no right of appeal additional to what would be constitutionally permissible were the district court to issue such pretrial rulings by final order.

c. Due Process

Next, the *Fowler* court considered whether the provisions violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution or the Law of the Land clause of the Article I, § 19 of the North Carolina Constitution (which affords the same protection as the Due Process Clause) by giving the state the advantage of immediate appeal before a final judgment is entered.

The court rejected the defendant’s argument that G.S. 20-38.6(a) infringes upon a defendant’s fundamental right to a fair trial by requiring a defendant charged with an implied consent offense in district court to move to suppress evidence or dismiss charges pretrial without the benefit of any statutory right to pretrial discovery. Recognizing that G.S. 20-38.6(a) expressly allows a defendant to make a motion to suppress or dismiss during trial if the motion is based on facts first discovered during the course of the trial, the court held that any unfair surprise that might arise from the discovery of new facts is tempered by allowing defendants to make motions to suppress or dismiss during the course of the trial on the basis of newly discovered facts.

The court likewise rejected defendant’s argument that because G.S. 20-38.6(f) and 20-38.7(a) do not specify a period of time by which the state must appeal from a district court’s preliminary determination, the provisions infringe upon defendants’ fundamental right to a speedy trial. The court explained that in the absence of a rule prescribing the time for perfecting an appeal, an appeal must be taken and perfected within a reasonable time, and that reasonableness depends on the circumstances of the case.

After determining that the provisions infringed no fundamental rights, the court evaluated the provisions to determine whether they were rationally related to a legitimate state interest. The court determined that the pretrial motions procedure was designed to improve the safety of the driving public (presumably by resulting in the dismissal of fewer implied consent cases), a legitimate state interest, and that the enactment of procedures governing motions practice in implied consent cases was reasonably related to that goal.

d. Equal Protection

The court then considered the defendant's argument that the challenged provisions violated the Equal Protection Clauses of the federal and state constitutions, which require that all persons similarly situated be treated alike. The court determined that for the Equal Protection Clause to apply, the statute had to create classifications between different groups of people – a threshold that it determined was not met since all defendants charged with implied consent offenses who appear in district court are subject to the same procedural requirements. The court rejected Fowler's assertion that the Equal Protection Clause is implicated by having pre-trial procedures in place for defendants charged with implied consent offenses that do not apply to defendants charged with other misdemeanor offenses in district court. The court further stated that even if the classification was subject to equal protection analysis, it would be subject to rational basis review, and the provisions would pass for the same reasons they survived due process scrutiny.

e. Merits

Finally, the court considered the merits of the superior court's determination that the case should be dismissed upon remand. The court noted that the basis for the district court's preliminary determination that Fowler's motion to dismiss should be granted was that the officer lacked probable cause to arrest the defendant. The court noted that both parties characterized the defendant's pretrial motion in district court as one to dismiss for lack of probable cause rather than as a motion to suppress. However, a hand-written notation in the "Court Use Only" section of the citation issued to Fowler stated: "Pretrial motion to Suppress Granted."³⁹ The court explained that the granting of a motion to suppress does not mandate a pre-trial dismissal of the underlying indictments because the district attorney may elect to dismiss or proceed to trial without the suppressed evidence. The court of appeals reasoned that the district court must have preliminarily determined first that the evidence resulting from the arrest should be suppressed and second that, without the suppressed evidence, the state had insufficient evidence to establish a *prima facie* case, thereby warranting dismissal of the case. Yet, the appellate court explained that a trial court may only consider a motion to dismiss for insufficient evidence *after* the state has had an opportunity to present all of its evidence to the trier of fact during trial. Because there was no indication in the record that the state had that opportunity before the district court's preliminary determination, the court of appeals held that the superior court erred in concluding that the district court's "Conclusions of Law granting the motion to dismiss are based on the Findings of Fact that are cited in [the court's] Order."⁴⁰ The appellate court accordingly remanded the case to superior court with instructions to remand the case to district court to enter a preliminary order indicating its ruling on defendant's motion to suppress. The court explained that if the district court's preliminary order allowed the defendant's motion, the state could appeal the preliminary determination to superior court pursuant to G.S. 20-38.7(a). The court held, however, that the state has no statutory right of appeal from a district court's final order granting a defendant's pretrial motion to suppress evidence. In contrast, as noted earlier in the examination of the court's double jeopardy analysis, the state may, pursuant to G.S. 15A-1432(a)(1), appeal a district court's final order dismissing of charges, so long as the appeal does not violate the rule against double jeopardy. The state may likewise appeal a superior court's order affirming a district court's dismissal, pursuant to G.S. 15A-1432(e).

Commenting that the incongruous provisions regarding appeals from a district court's entry of a final order suppressing evidence versus a final order dismissing charges could have been intentional or might have been "the inadvertent result of hasty draftsmanship," the court noted that the reason was of no import as the "wisdom of the General Assembly's legislative enactments is not a proper concern of the courts."⁴¹

B. *State v. Palmer*__ N.C. App. ____, 676 S.E.2d 559 (2009)

The court in *State v. Palmer*, decided the same day as *Fowler*, considered the proper method for the state to appeal a district court's preliminary determination. In approving the method used by the state in that case, *Palmer* provides direction that is difficult to glean from the Spartan appeal provisions set out in G.S. 20-38.7(a). Perhaps most significantly, *Palmer* declined to engraft onto G.S. 20-38.7(a) the 10-day time limit for appeals required by G.S. 15A-1432, which governs appeals by the state to superior court from a district court's dismissal of criminal charges. However, the court found other provisions of G.S. 15A-1432 to be analogous to the implied consent appeal provisions.

Palmer was charged with driving while impaired in violation of G.S. 20-138.1. Palmer filed a pretrial motion in district court to suppress evidence on the basis that the officer lacked reasonable suspicion to detain him at the time of the stop and subsequently lacked probable cause to arrest him. The district court issued a handwritten preliminary order pursuant to N.C.G.S. § 20-38.6(f) on September 26, 2007, making findings of fact and giving "the parties preliminary notice of its intention to grant [d]efendant's motion to suppress."⁴² The court further noted in its preliminary order that the state gave notice of appeal "in open court."⁴³ The next day, the state filed a written notice of appeal to superior court. The superior court dismissed the state's appeal on the basis that the state failed to demonstrate jurisdiction for its appeal in superior court. The superior court then remanded the case to the district court for the entry of an order on the motion to suppress. The state appealed to the court of appeals from the superior court's order dismissing its appeal and also filed a petition for writ of certiorari.

Following *Fowler*, the *Palmer* court held that the state had no statutory right of appeal from the superior court's interlocutory order remanding the matter to a district court for entry of a final order. Nevertheless, the court exercised its discretion to grant certiorari review.

Recognizing that the implied consent offense procedures do not set forth procedures governing the state's appeal to superior court from a district court's preliminary determination, the court looked to analogous provisions of G.S. 15A-1432, which governs appeals by the state to superior court from a district court's dismissal of criminal charges. In doing so, however, the court "decline[d] to engraft upon N.C.G.S. § 20-38.7(a) the ten-day time limit for making an appeal specified in N.C.G.S. § 15A-1432(b)."⁴⁴ Instead, assuming without deciding that the state was required to file a written notice of appeal, the court examined whether the state's written notice of appeal sufficiently conformed with the remaining requirements of G.S. 15A-1432(b).

The *Palmer* court found that the state's written notice of appeal met the remaining requirements of 15A-1432(b). The state filed a document captioned "State's Appeal to Superior Court," including in the

caption the defendant's name and address and the case file number.⁴⁵ The document stated that the state "appeals to the superior court the district court preliminary determination granting a motion to suppress or dismiss," enumerated the issues raised in the defendant's motion, and recited "almost verbatim all of the district court's findings of fact."⁴⁶ The court rejected the superior court's conclusion that the state's failure to state the date of the preliminary determination rendered its notice of appeal insufficient. The court likewise rejected the defendant's contention that the state's failure to include the month on its certificate of service rendered the state's appeal insufficient as a matter of law, noting that the defendant was not misled or prejudiced by the error.

C. Guiding Principles

Based upon the statutory provisions and the interpretations thereof in *Fowler* and *Palmer*, several general principles can be stated to apply to district court rulings on motions to suppress and dismiss in implied consent cases.

1. If the district court issues a preliminary determination concluding that a pretrial motion to suppress evidence or to dismiss charges should be denied, it may enter final judgment denying the motion.
 - a. The defendant may not appeal the denial of a pretrial motion to suppress or to dismiss, but a defendant who is convicted in district court may appeal to superior court for trial *de novo*. G.S. 7A-290; 20-38.7(b).
2. If the district court issues a preliminary determination concluding that a pretrial motion to suppress evidence or to dismiss charges should be granted, the state may appeal to superior court.
 - a. The *Palmer* court did not decide whether the state must file a notice of appeal in writing rather than simply announcing its appeal in open court. The court did, however, evaluate the sufficiency of the state's notice of appeal by referring to G.S. 15A-1432(b). Given that G.S. 15A-1432(b) requires that appeals filed under that subsection be made by written notice, it seems likely that a court confronting the issue would conclude that the state must file its appeal by written motion.
 - b. The state must appeal within a reasonable time.
3. If the state appeals from a district court's preliminary determination of a motion to suppress or dismiss, the appropriate action for a superior court is to determine the merits of the motion and remand for entry of a final judgment by the district court.
 - a. If the findings of fact are disputed, the superior court determines the matter *de novo*.
 - b. If there is no dispute, the district court's findings of fact are binding on the superior court and are presumed to be supported by competent evidence.
4. If the superior court affirms a district court's preliminary determination that a defendant's motion to suppress or dismiss should be granted and enters an order remanding the case to district court for entry of final judgment, the state may not appeal from the superior court's remand order.

5. The state may appeal to superior court a district court's final judgment dismissing charges if the appeal does not violate the Double Jeopardy Clause. G.S. 15A-1432(a).
6. If the superior court reverses a district court's dismissal of charges it must reinstate the charges and remand the matter to district court. The defendant may appeal this order to the appellate division. G.S. 15A-1432(d).
7. If the superior court affirms a district court's final judgment dismissing charges, the state may appeal to the appellate division. G.S. 15A-1432(e).
8. The state may not appeal a district court's entry of a final order suppressing evidence but pursuant to Rule 19 of the General Rules of Practice may file in superior court a petition for writ of certiorari.
9. If the superior court reverses a district court's preliminary determination granting a motion to suppress or motion to dismiss, the defendant may not appeal from that ruling.
 - a. A defendant who is convicted in district court may appeal to superior court for trial *de novo*. G.S. 7A-290.
10. A district court must enter a final judgment, rather than a preliminary determination, on a motion to suppress or to dismiss arose after jeopardy has attached in district court (which occurs when the first witness is sworn).
 - a. The State may not appeal from the district court's final judgment granting a motion to suppress but may appeal a final judgment granting a motion to dismiss pursuant to G.S. 15A-1432(a)(1) when the appeal is not barred by double jeopardy.
 - b. Thus, the state may have an incentive to voluntarily provide discovery to avoid mid-trial motion to suppress evidence or to dismiss charges based upon the defendant's discovery during trial "of facts not previously known."

¹ Governor's Task Force on Driving While Impaired, Final Report to Governor Michael F. Easley 7 (January 14, 2005).

² *Id.* at 24, 62-63.

³ **§ 20-38.6. Motions and district court procedure.**

(a) The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

(b) Upon a motion to suppress or dismiss the charges, other than at the close of the State's evidence or at the close of all the evidence, the State shall be granted reasonable time to procure witnesses or evidence and to conduct research required to defend against the motion.

(c) The judge shall summarily grant the motion to suppress evidence if the State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(d) The judge may summarily deny the motion to suppress evidence if the defendant failed to make the motion pretrial when all material facts were known to the defendant.

(e) If the motion is not determined summarily, the judge shall make the determination after a hearing and finding of facts. Testimony at the hearing shall be under oath.

(f) The judge shall set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal.

⁴ § 20-38.7. Appeal to superior court.

(a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

(b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

(c) Notwithstanding the provisions of G.S. 15A-1431, for any implied-consent offense that is first tried in district court and that is appealed to superior court by the defendant for a trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions.

(d) Following a new sentencing hearing in district court pursuant to subsection (c) of this section, a defendant has a right of appeal to the superior court only if:

- (1) The sentence is based upon additional facts considered by the district court that were not considered in the previously vacated sentence, and
- (2) The defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

A defendant who has a right of appeal under this subsection, gives notice of appeal, and subsequently withdraws the appeal shall have the sentence imposed by the district court reinstated by the district court as a final judgment that is not subject to further appeal.

⁵ Before enactment of these procedures, the state lacked statutory authority to appeal a district court judge's granting of a motion to suppress. The state could, pursuant to Rule 19 of the General Rules of Practice, file in the superior court a petition for writ of certiorari. *See, e.g., State v. Hamrick*, 110 N.C. App. 60, 428 S.E.2d 830 (1993) (upholding superior court's authority to issue a writ of certiorari to consider propriety of district court's order dismissing a criminal charge). And, while G.S. 15A-1432 authorizes the state to appeal from the district court's entry of an order dismissing criminal charges, that right of appeal is circumscribed by the Double Jeopardy Clause of the U.S. Constitution.

⁶ G.S. 20-38.7(b).

⁷ *State v. Fowler*, ___ N.C. App. ___, ___, 676 S.E.2d 523, 535 (2009).

⁸ G.S. 20-38.6(f) provides that "the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal. The court of appeals in *State v. Fowler*, ___ N.C. App. ___, 676 S.E.2d 523 (2009), construed this provision to require that the superior court remand the case to district court for entry of a final judgment on the motion.

⁹ ___ N.C. App. ___, 676 S.E.2d 523.

¹⁰ G.S. 15A-1432(a)(1) grants the state the ability to appeal to the superior court from a district court order dismissing charges so long as the appeal is not barred by double jeopardy.

¹¹ ___ N.C. App. ___, 676 S.E.2d 523.

¹² *Id.*

¹³ ___ N.C. App. ___, 676 S.E.2d 559.

¹⁴ G.S. 15A-1445(a)(1) provides that "[u]nless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts."

¹⁵ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 536.

¹⁶ *Id.* at ___, 676 S.E.2d at 537.

¹⁷ *See* N.C. Const. Art. IV, § 12, cl. 3, 4.

¹⁸ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 537.

¹⁹ *See State v. Ward*, 127 N.C. App. 115, 121, 487 S.E.2d 798, 802 (1997) (stating that the Law of the Land Clause in the state constitution provides "similar protections" to the Double Jeopardy Clause); *State v. Brunson*, 327 N.C.

244, 247-48, 393 S.E.2d 860, 864 (1990) (rejecting the defendant's contention that as the time jeopardy attaches the law of the land clause confers greater former jeopardy protection upon defendants than federal law).

²⁰ *Justices of Boston v. Lydon*, 466 U.S. 264, 306-07 (1984).

²¹ *Id.* at 307.

²² *Id.* at 308.

²³ *Id.* (quoting *Price v. Georgia*, 398 U.S. 323, 326, 329 (1970)).

²⁴ *Id.*

²⁵ *United States v. Smalis*, 476 U.S. 140, 144 (1986).

²⁶ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

²⁷ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 538; (quoting *State v. Brunson*, 327 N.C. 244, 250, 393 S.E.2d 860, 865 (1990)).

²⁸ *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 864 (1990).

²⁹ See, e.g., *Goolsby v. Hutto*, 691 F.2d 199 (4th Cir. 1982).

³⁰ *Ward*, 127 N.C. App. at 121, 487 S.E.2d at 802.

³¹ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 538.

³² *State v. Morgan*, 189 N.C. App. 716, 660 S.E.2d 545 (2008), a case involving the dismissal of implied consent charges that were not governed by the procedures enacted in 2006 demonstrates the application of the bar against double jeopardy to prevent the state from appealing the dismissal of such charges if the basis for the decision is insufficiency of the evidence, even where the lack of evidence results from erroneous findings. In *Morgan*, the district court dismissed charges of impaired driving because the notary's seal on the affidavits giving rise to probable cause seemed to be missing the date on which the notary's commission would expire. The state appealed the dismissal to superior court, which determined that although "the state had begun to present . . . evidence on the charge in the District court when that court dismissed the case," the district court "dismissed the charge on grounds unrelated to the Defendant's guilt or innocence." *Id.* at 718, 660 S.E.2d at 547. The superior court held that, accordingly, the state's appeal was not barred on Double Jeopardy grounds. The superior court further concluded that "the seals on the arrest affidavit and the revocation reports contain all of the necessary information, including the expiration date of the notary's commission." *Id.* Thus, the superior court granted the state's appeal and reinstated the impaired driving charges against the defendant, remanding the case to district court for trial. The court of appeals reversed, determining that while the affidavits were suppressed due to perceived "technical violations . . . not substantively related to Defendant's guilt or innocence," the dismissal of the charges "arose from the lack of evidence to support the charge of DWI once the District Court disallowed the affidavits based on what now appears to be the erroneous finding of a technical violation." *Id.* at 721, 660 S.E.2d at 549. The appellate court noted that suppression of the affidavits by itself did not warrant dismissal of the charge. Instead, the dismissal resulted from the lack of any other evidence to support the charge once the affidavits were suppressed, noting that the defendant declined a breath test and refused to submit to any field sobriety tests. The court characterized the officer's affidavits as the "only evidence that Defendant was driving while impaired." *Id.*

The court of appeals' conclusion that there was no evidence other than the affidavits is curious given that the arresting officer, whose affidavits were under attack, testified in district court regarding the notarization of the affidavits. The court of appeals did not explain why the officer could not have provided evidence in support of the state's case by testifying about the events he observed before arresting the defendant. It also is unclear from the court's description of the proceedings below whether the state was afforded an opportunity to present other evidence in support of its case after the district court suppressed the affidavits. Perhaps the court's conclusion may be attributed in part to the apparent agreement by the state and the defendant "that the basis for the decision was insufficiency of the evidence – even if for technical reasons." *Id.* at 722, 660 S.E.2d at 549. Regardless of the reasons underlying the court's conclusion that the dismissal was based on sufficiency of the evidence, *Morgan* clearly stands for the proposition that dismissal of charges on sufficiency of the evidence grounds after jeopardy has attached is not reviewable on appeal.

³³ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 539.

³⁴ *Id.* at ___, 676 S.E.2d at 539.

³⁵ *Id.* at ___, 676 S.E.2d at 539 (citing as support the report's recommendation that a procedure be developed to prevent dismissals related to delays in processing and by the defendant's lack of access to witnesses).

³⁶ See *United States v. Scott*, 437 U.S. 82 (1978) (holding that the Double Jeopardy Clause did not bar the government's appeal of trial court's mid-trial dismissal of charges upon defendant's motion on grounds of pre-indictment delay that were unrelated to the legal sufficiency of the evidence).

³⁷ 115 N.C. App. 547, 445 S.E.2d 610 (1994).

³⁸ *Fowler*, ___ N.C. App. at ___, 676 S.E.2d at 539-40.

³⁹ *Id.* at ___, 676 S.E.2d at 545.

⁴⁰ *Id.* at ___, 676 S.E.2d at 545.

⁴¹ *Id.* at ___, 676 S.E.2d. at 546.

⁴² *Palmer*, ___ N.C. App. at ___, 676 S.E.2d at 560.

⁴³ *Id.* at ___, 676 S.E.2d at 560.

⁴⁴ *Id.* at ___, 676 S.E.2d. at 562.

⁴⁵ *Id.* at ___, 676 S.E.2d at 562.

⁴⁶ *Id.* at ___, 676 S.E.2d at 563.