A Trap for the Unwary Prosecutor

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In recent years, courts have generally deemphasized formalistic compliance with procedural rules. But sometimes, procedural considerations can still make or break a case. Take, for example, *State v. Oates*, __ N.C. App. __ (2011), decided last week.

The case began in a seemingly routine manner. The police searched the defendant's house pursuant to a search warrant, found a gun, and charged the defendant with being a felon in possession of a firearm. The defendant moved to suppress, apparently arguing that the warrant was issued without probable cause. Then the following sequence of events took place:

- 12/14/09 -- motion heard, judge orally grants motion
- 12/22/09 -- state files written notice of appeal
- 3/22/10 -- judge files written order granting motion

The court of appeals *sua sponte* raised the issue of whether the state's notice of appeal was effective, and concluded that it was not. It began by citing G.S. 15A-1445(b), which provides that "[t]he State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979." Then, it noted that under N.C. R. App. P. 4(a), a party in a criminal case may appeal by "giving oral notice of appeal at trial, or. . . filing notice of appeal with the clerk . . . within fourteen days after entry of the judgment or order." The court of appeals stated that "entry" of an order granting a motion to suppress takes place when the order is reduced to writing and filed. Because the state's notice of appeal was not filed within fourteen days after the 3/22/10 written order, it was untimely and the appeal was dismissed.

There's nothing illogical about the opinion in *Oates*, but it creates some tricky practical problems for prosecutors. Remember that not all rulings on motions to suppress are reduced to writing. So if a judge orally grants a motion to suppress, and the state waits around for a written order but the judge elects not to file one, the state may inadvertently allow the time for appeal to expire. Alternatively, if a judge orally grants a motion to suppress, and the state files a notice of appeal but the judge later enters a written order, the state's notice of appeal will be rendered invalid. (The state could presumably file another one.) Asking the judge whether he or she plans to enter a written order may help to avoid this dilemma.

The court's opinion appears to suggest that it would have been proper for the state to give oral notice of appeal after the trial judge announced his ruling in court. If that were feasible, it would be another way to avoid the dilemma described above. But (1) Rule 4(a) refers to oral notice of appeal "at trial," while appealable suppression orders are generally issued at motions hearings, so I'm not sure about the propriety of an oral notice of appeal in this context. (I've never researched that issue; perhaps it isn't as doubtful as it seems.) In any event, (2) a prosecutor who loses a suppression hearing will normally want to consult with his or her supervisor -- and perhaps the Attorney General's office -- before deciding whether or not to appeal, making an immediate oral notice of appeal an unlikely event. Finally, (3) appeals by the state require a "certificate by the prosecutor" to the effect that the appeal is not for the purpose of delay. G.S. 15A-979. I'm not sure that an oral pronouncement regarding an appeal would satisfy that mandate.

Anyhow, prosecutors, be alert to *Oates* when it comes to notices of appeal. This isn't federal court, where premature

notices of appeal are generally deemed timely. If you file too early, your appeal may be dismissed by the court of appeals.