



DWI Appeal Procedures: Fowler and Palmer

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Two statutes enacted as part of the Motor Vehicle Driver Protection Act of 2006, G.S. 20-38.6 and 20-38.7, significantly altered district court procedures for implied consent offenses committed on or after December 1, 2006. G.S. 20-38.6(a) requires that motions to suppress evidence or dismiss charges in such cases be made pre-trial, except for motions to suppress based upon facts newly discovered during trial and motions to dismiss for insufficient evidence. G.S. 20-38.6(f) prevents a district court judge from immediately entering a final judgment granting a defendant's motion to suppress or dismiss. Instead, a district court judge who determines that such a motion should be granted must issue a written preliminary determination which the state may, pursuant to G.S. 20-38.7(a), appeal to superior court. If the findings of fact are disputed, the superior court determines the matter *de novo*. The superior court then enters an order remanding the case to district court for entry of a final judgment granting or denying the motion.

These procedures were enacted to create a mechanism by which the state could seek review of a district court's decision to suppress evidence or dismiss a case without running afoul of the Double Jeopardy Clause. *State v. Morgan*, 660 S.E.2d 545 (2008), demonstrates nicely the application of the bar against double jeopardy to prevent the state from appealing the dismissal of implied-consent charges if the basis for the decision was insufficiency of the evidence, even where the lack of evidence results from erroneous findings. By requiring pre-trial motions, the new procedures require determinations of most motions to suppress before jeopardy attaches. Because, however, such motions may also be raised during trial - after jeopardy has attached - based upon newly discovered evidence, there remain situations in which a district court judge's granting of a motion to suppress or dismiss may resolve factual elements of the offense charged, thereby constituting an acquittal for Double Jeopardy purposes.

Yesterday, the Court of Appeals issued two opinions ruling on the constitutionality and logistics of the new procedures: *State v. Fowler*, [here](#), and *State v. Palmer*, [here](#).

Fowler analyzes and ultimately rejects challenges to the procedures on due process, equal protection, and other constitutional grounds. It also answers several questions about the scope of the procedures. For example, the opinion is particularly notable for interpreting G.S. 20-38.6 and G.S. 20-38.7 in a matter that limits the state's right to appeal from district court rulings on motions to suppress or dismiss made *during* trial. The court upheld the constitutionality of the procedures as applied in *Fowler's* case, which involved a *pre-trial* motion to suppress evidence based upon a lack of probable cause. Significantly, however, it held that the state could appeal only from a district court's preliminary determination that is (1) made at a time before jeopardy has attached (that is, before the district court sits as the trier of fact to adjudicate the defendant's guilt), and (2) is "entirely unrelated to the sufficiency of the evidence as to any element of the offense or to defendant's guilt or innocence." The court held that G.S. 20-38.6 and G.S. 20-38.7 should *not* be construed to grant the State the right to appeal to superior court upon the district court's granting of a motion to suppress evidence or to dismiss charges during trial. The court concluded that the General Assembly intended pretrial motions to suppress evidence or dismiss charges under G.S. 20-38.6(a) "to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations imposed on a defendant's access to witnesses, and challenges to the results of a breathalyzer."

Given the court's ruling, the requirement that judges issue preliminary determinations seems to complicate the procedures in implied consent cases without having any real impact. If only pre-trial motions are subject to review by

the superior court, the General Assembly could have permitted district court judges to enter final rulings on such motions that could be appealed to superior court for review before jeopardy attached, in much the same way that G.S. 15A-979(c) permits the state to appeal superior court orders granting motions to suppress.

The court also devotes a fair bit of analysis to the state's right of appeal at various other junctures in implied consent cases, concluding that in *Fowler*, the state will have no right to appeal from the district court's entry of an order upon remand suppressing the challenged evidence.

For its part, *State v. Palmer* considers the proper method for appealing a district court's preliminary determination. In approving the method used by the state in *Palmer*, the court provides direction that is difficult to glean from the Spartan appeal provisions in G.S. 20-38.7(a). Perhaps most significantly, Palmer declines to engraft onto G.S. 20-38.7(a) the ten-day time limit for appeals in G.S. 15A-1432, though the court considered other provisions of G.S. 15A-1432 as analogous to the implied consent provisions.

As always, I'd love to know what you think.