

## Traffic Stops

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### Introduction

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.<sup>1</sup>

### Before the Stop

**"Running Tags."** Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. *See, e.g., State v. Chambers*, 2010 WL 1287068 (N.C. Ct. App. April 6, 2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); *Jones v. Town of Woodworth*, \_\_\_ So.3d \_\_\_, 2013 WL 6834783 (La. Ct. App. 3<sup>rd</sup> Cir. Dec. 26, 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); *State v. Setinich*, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); *State v. Davis*, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"); *State v. Donis*, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). *Cf. New York v. Class*, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). *See also infra* p. 7 (discussion under heading "Driver's Identity" and cases cited therein).

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<sup>1</sup> The organization of this paper was inspired in part by Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843 (2004).

## Making the Stop

**Legal Standard.** “Reasonable suspicion [is] the necessary standard for stops based on traffic violations.” State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968).

**Pretextual Stops.** If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver’s vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the “[s]ubjective intentions” of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).<sup>2</sup> However, if an officer makes a pretextual traffic stop and then engages in extensive investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer’s subjective intentions regarding the purpose of the stop are immaterial, whether “an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop.” State v. Parker, 183 N.C. App. 1 (2007).

**When Reasonable Suspicion Must Exist.** Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a person to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the suspect’s compliance with the officer’s instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer’s show of authority, but before a driver’s submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver’s weaving in addition to his slow rate of speed. State v. Atwater, 2012 WL 1333416 (N.C. Ct. App. Apr. 17, 2012) (unpublished) (adopting the foregoing analysis and concluding that “[r]egardless of whether [the officer]

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<sup>2</sup> Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer’s incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) (“[A]n arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. . . . That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.”); State v. Osterhoudt, \_\_\_ N.C. App. \_\_\_, 731 S.E.2d 454 (2012) (an officer stopped the defendant based on the officer’s mistaken belief that the defendant’s driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant’s driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant’s driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6<sup>th</sup> Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1212 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFare, Search and Seizure § 9.4(d) n. 170 (4<sup>th</sup> ed. 2004) (collecting cases) (hereinafter, LaFare, Search and Seizure).

### **Common Issues.**

**Speeding.** Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed is generally also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer without any special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2851 (2013).

**Driving Slowly.** Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 mph on I-95 and weaved within his lane supported reasonable suspicion of

DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, “his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer’s] mind”).

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) (“For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit.”), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 2010 WL 3860440 (N.C. Ct. App. Oct. 5, 2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 1 Dist. 2007) (holding that “slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion,” and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, \_\_\_ N.C. App. \_\_\_, 736 S.E.2d 532 (2012) (fact that vehicle slowed to 59/65 upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. State v. Brown, *supra* (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 2009 WL 2369281 (N.C. Ct. App. Aug. 4, 2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

**Weaving.** G.S. 20-146 requires that “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

*Across Lanes.* Weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, \_\_\_ N.C. App. \_\_\_, 731 S.E.2d 454 (2012) (where the “defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated” G.S. 20-146); State v. Simmons, 205 N.C. App. 509 (2010) (finding that a stop was supported by reasonable suspicion where the defendant “was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road”). But see State v. Kochuk, 366 N.C. 549 (2013) (analyzing the existence of reasonable suspicion under the weaving plus framework discussed below, even though the defendant “crossed over the dotted white line [separating freeway lanes], causing both wheels on the passenger side of the vehicle to cross into the right lane for [several] seconds, and then move[d] back into the middle lane”); State v. Derbyshire, \_\_\_ N.C. App. \_\_\_, 745 S.E.2d 886 (2013), temporary stay allowed, \_\_\_ N.C. \_\_\_, 747 S.E.2d 524 (2013) (holding that a stop was not supported by

reasonable suspicion because it was based on only “one instance of weaving,” even though “the right side of Defendant’s tires crossed into the right-hand lane” during the weaving).

*Within a Lane.* Weaving within a single lane, by contrast, does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving Within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver “swerve[d] to the white line on the right side of the traffic lane” three times over a mile and a half. However, the court stated that weaving, “coupled with additional . . . facts,” may provide reasonable suspicion. The court cited cases involving additional facts such as driving “significantly below the speed limit,” driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that ‘weaving plus’ may do so. Fields has been applied in cases such as State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, \_\_\_ N.C. App. \_\_\_, 745 S.E.2d 886 (2013), temporary stay allowed, \_\_\_ N.C. \_\_\_, 747 S.E.2d 524 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is “utterly ordinary” and insufficient to render weaving suspicious, and that having “very bright” headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was “possibl[y]” driving while impaired, then saw the defendant “weave within his lane once”).
- *Severe Weaving Within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, \_\_\_ N.C. App. \_\_\_, 723 S.E.2d 777 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him “weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from other drivers.” The officer compared the defendant’s vehicle to a “ball bouncing in a small room.” The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant’s “constant and continual” weaving at 11:00 p.m. on a Friday night).

**Sitting at a Stoplight.** Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired. An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer’s decision to stop the defendant where the defendant was waiting at a traffic light in a high-

crime area, near several bars, at 12:15 a.m., and “[w]hen the light turned green, defendant remained stopped for approximately thirty seconds” before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that “[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop”).

**Unsafe Movement/Lack of Turn Signal.** Under G.S. 20-154(a), “before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required.” Litigation under this statute has focused on the phrase “the operation of any other vehicle may be affected.” Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the “only legal movement he could make,” and the vehicle behind him was likewise required to stop, then turn right, so the defendant’s turn did not affect the trailing vehicle), and State v. Watkins, \_\_ N.C. App. \_\_, 725 S.E.2d 400 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes “immediately in front of” an officer, he violated the statute; “changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle”), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

**Late Hour, High-Crime Area.** The United States Supreme Court has held that presence in a high-crime area, “standing alone, is not a basis for concluding that [a suspect is] engaged in criminal conduct.” Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 561 (2009), aff’d per curiam, 364 N.C. 421 (2010) (holding that the defendant’s presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

**Tips.** Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Information from an anonymous tipster is usually insufficient unless (1) the tip itself contains strong indicia of reliability, such as very detailed information, or (2) the police are able to corroborate the tip in a meaningful way. State v. Johnson, 204 N.C. App. 259 (2010) (stating that “[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own” unless such a tip “itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer’s investigation or observations”); State v. Peele, 96 N.C.

App. 668 (2009) (an anonymous tip that defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion).

On the other hand, where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, the information is much more likely to provide reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").<sup>3</sup>

It should be noted that the case of Navarette v. California, No. 12-9490, is currently pending before the United States Supreme Court. The questions presented in that case include whether "the Fourth Amendment require[s] an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle." A decision is expected this spring and could reshape the law in this area.

**Driver's Identity.** "[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.<sup>4</sup>

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<sup>3</sup> The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, \_\_\_ N.C. App. \_\_\_, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

<sup>4</sup> In State v. Watkins, \_\_\_ N.C. App. \_\_\_, 725 S.E.2d 400 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

## Investigation During the Stop

**Ordering Occupants Out of the Vehicle.** In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4<sup>th</sup> ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=811> (October 28, 2009).

**Frisking Occupants.** A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

**"Car Frisks."** In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a routine traffic stop, the two types of stops are similar if not identical,<sup>5</sup> and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, supra, (defendant

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<sup>5</sup> Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest."); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'").

suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently “close proximity to the interior of the vehicle” to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; “these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon”), with State v. Braxton, 90 N.C. App. 204 (1988) (it was “uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car” where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, *supra*, the court held that an officer properly searched “a drawstring bag located underneath a piece of newspaper that fell to the ground” as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and “was at least large enough to contain methamphetamine and a ‘smoking device,’” perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

**License, Warrant, and Record Checks.** Officers will often check the validity of a driver’s license during a traffic stop, and may also check the driver’s criminal record, including a check for outstanding arrest warrants. The courts have generally viewed these checks, and the associated brief delays, as permissible. State v. Hernandez, 170 N.C. App. 299 (2005) (holding that “running checks on Defendant’s license and registration” was “reasonably related to the stop based on the seat belt infraction”); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute “detention for the purpose of determining the validity of defendant’s license was not unreasonable” when officer’s computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10<sup>th</sup> Cir. 2009) (“It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation.”); See generally Wayne R. LaFave, The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) (hereinafter LaFave, “Routine”).

**Questions about Unrelated Matters.** The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) (“An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8<sup>th</sup> Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10<sup>th</sup> Cir. 2007). It should be emphasized that the questioning in Muehler did not extend the subject’s detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

**Use of Drug-Sniffing Dogs.** Having a dog sniff a car is not a search and so requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. (Again, whether a traffic stop may be prolonged for a dog sniff is discussed below.)

**Asking for Consent to Search.** Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, most courts find such requests to be permissible if they do not significantly extend the duration of the stop. 4 LaFave, Search and Seizure 391. See also United States v. Turvin, 517 F.3d 1097 (9<sup>th</sup> Cir. 2008) (because “officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop,” a request for consent to search that did not substantially prolong a traffic stop was permissible). However, at least one North Carolina Court of Appeals case has stated that “[i]f the officer’s request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity.” State v. Parker, 183 N.C. App. 1 (2007). The court’s reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.<sup>6</sup> But cf. State v. Jacobs, 162 N.C. App. 251 (2004) (“Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant’s consent for the search [during an investigative stop]. No such showing is required.”).

**Prolonging the Stop for Questions about Unrelated Matters, Use of Drug-Sniffing Dogs, or Asking for Consent to Search.** A lengthy extension of a traffic stop in order to engage in the investigative activities described above plainly would violate the Fourth Amendment unless the officer had developed reasonable suspicion to support the continued detention. Whether an officer may briefly extend a stop in order to deploy the described investigative techniques, however, is less clear. The case law in North Carolina is inconsistent, with brief delays in order to conduct dog sniffs permitted under State v. Sellars, \_\_\_ N.C. App. \_\_\_, 730 S.E.2d 208 (2012) (delay of four minutes and 37 seconds was de minimis and did not violate the Fourth Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis), but brief delays associated with requests for consent to search arguably prohibited by Parker, and brief delays for questions unrelated to the stop perhaps barred by State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions). It should be noted that Sellars describes Jackson and the similar case of State v. Myles, 188 N.C. 42 (2008), as being part of a line of cases that predated and/or failed to consider the de minimis analysis of Brimmer. The implication, of course, is that a brief extension of a traffic stop for any reason is de minimis and does not run afoul of the Fourth Amendment.<sup>7</sup> If followed, that analysis by the Sellars

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<sup>6</sup> This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

<sup>7</sup> As to how long a delay is de minimis, consider State v. Branch, 194 N.C. App. 173 (2008) (ten-minute delay “beyond the time it took to check [the driver’s] license and registration was unlawful”), and United States v. Blair, 524 F.3d 740 (6<sup>th</sup> Cir. 2008) (unreasonable to extend traffic stop by thirteen minutes to allow drug dog to arrive and sniff).

court would bring some consistency to this area of the law. However, that portion of Sellars is dicta, leaving its ultimate effect opaque.

Most post-Muehler federal cases have allowed short delays for any of the investigative techniques under consideration. Compare United States v. Mason, 628 F.3d 123 (4<sup>th</sup> Cir. 2010) (“The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern.”), United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop “did not prolong the stop so as to render it unconstitutional”), and Turvin, *supra*, (asking a “few questions” unrelated to the stop that prolonged the stop by a “few moments” was not unreasonable, and collecting cases), with United States v. Digiovanni, 650 F.3d 498 (4<sup>th</sup> Cir. 2011) (unreasonable to spend ten minutes of a fifteen minute traffic stop asking drug-related questions); United States v. Peralez, 526 F.3d 1115 (8th Cir.2008) (extending traffic stop by ten minutes to ask drug-related questions was unreasonable). See generally United States v. Everett, 601 F.3d 484 (6<sup>th</sup> Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

**Total Duration.** There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, “routine” stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4<sup>th</sup> ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., Castellon, *supra* (twenty-five minutes); United States v. Rivera, 570 F.3d 1009 (8<sup>th</sup> Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10<sup>th</sup> Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7<sup>th</sup> Cir. 2005) (thirteen minutes).

### **Termination of the Stop**

**When Termination Takes Place.** “Generally, an initial stop concludes . . . after an officer returns the detainee’s license and registration.” Jackson, *supra*; State v. Heien, \_\_ N.C. App. \_\_, 741 S.E.2d 1 (2013) (“Generally, the return of the driver’s license or other documents to those who have been detained indicates the investigatory detention has ended.”), *aff’d per curiam*, \_\_ N.C. \_\_, 749 S.E.2d 278 (2013). As the Fourth Circuit explains, when an officer returns a driver’s documents, it “indicate[s] that all business with [the driver is] completed and that he [is] free to leave.” United States v. Lattimore, 87 F.3d 647 (4<sup>th</sup> Cir. 1996). The United States Supreme Court has rejected the idea that drivers must be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach). However, while returning the driver’s paperwork is a strong signal that a stop has terminated, it is not always dispositive. Some commentators have argued that many motorists will not, in fact, feel free to depart until they are expressly permitted to do so. LaFave, Routine at 1899-1902. And the North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver’s paperwork, in part because the officer “never told [the driver] he was free to leave.” State v. Myles, 188 N.C. App. 42 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a

driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

**Effect of Termination.** Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine Traffic Stop," *supra*.