



# Motor Vehicle Checkpoints

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## Introduction

The purpose of this bulletin is to summarize and clarify the rules regarding checkpoints used to enforce the state's motor vehicle laws. It is intended for use by judges, lawyers, and law enforcement officers. Except incidentally, it does not address other types of checkpoints, such as immigration checkpoints<sup>1</sup> or checkpoints designed to gather information about a recently committed crime.<sup>2</sup>

The United States Supreme Court upheld sobriety checkpoints against a Fourth Amendment challenge in *Michigan Department of State Police v. Sitz*.<sup>3</sup> Motor vehicle checkpoints have been widely employed by law enforcement agencies since that time. In North Carolina, they are expressly authorized and regulated by Section 20-16.3A of the North Carolina General Statutes (hereinafter G.S.). But questions remain regarding when, where, and how checkpoints may be conducted. This bulletin employs a question-and-answer format to address some of these issues.

## Establishing a Checkpoint

### 1. Are motor vehicle checkpoints permitted?

Yes, in appropriate circumstances. As noted above, the United States Supreme Court has held that sobriety checkpoints do not violate the Fourth Amendment. The General Statutes go further and allow checkpoints to be used "to determine compliance with the provisions of" Chapter 20.<sup>4</sup> In other words, the statute allows checkpoints to be used to detect violations of any

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1. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 453 (1976) (authorizing permanent immigration checkpoints near national borders).

2. See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004) (authorizing such checkpoints under certain circumstances).

3. 496 U.S. 444 (1990). The Court had previously suggested in *dicta* that motor vehicle checkpoints were permissible. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

4. G.S. 20-16.3A(a).

motor vehicle law, not just the impaired driving laws. By contrast, checkpoints may not be used for general crime control.<sup>5</sup>

The court of appeals initially expressed some doubt about whether the broad checkpoint authority contained in G.S. 20-16.3A passes constitutional muster. In *Veazey I*,<sup>6</sup> the court stated that

it is unclear whether a primary purpose of finding any and all *motor vehicle* violations is . . . lawful. . . . One reason that a checkpoint is an appropriate tool for helping police discover certain types of motor vehicle violations is that police cannot discover such violations simply by observing a vehicle during normal road travel. . . . However . . . [m]any violations of North Carolina's motor vehicle laws are readily observable and can be adequately addressed by roving patrols when officers develop individualized suspicion of a certain vehicle.<sup>7</sup>

In *Veazey II*,<sup>8</sup> however, the court seems to have concluded that “enforcement of the State’s Motor Vehicle laws” is a lawful purpose for a checkpoint. As a practical matter, many checkpoints are conducted either for the purpose of detecting impaired drivers—a purpose expressly approved by *Sitz*—or for the purpose of detecting license and registration violations, which are not readily observable. Therefore, whether a checkpoint established for the purpose of detecting any violation of the motor vehicle laws is constitutional may be academic.

## 2. Must officers obtain a warrant before establishing a checkpoint?

No. Although one leading commentator has argued that officers “would be well advised” to obtain a warrant before establishing certain checkpoints,<sup>9</sup> that view has generally been rejected by courts across the country,<sup>10</sup> and no North Carolina case supports it.

## 3. Must officers establish a checkpoint pursuant to a checkpoint policy?

Yes. Under G.S. 20-16.3A(a), a law enforcement agency conducting a checkpoint “must . . . [o]perate under a written policy.” As a constitutional matter, it may not be essential that the policy be in writing, but it is essential that the checkpoint be conducted pursuant to a policy that limits individual officers’ discretion regarding which vehicles to stop.<sup>11</sup> An agency that does not have its own checkpoint policy may adopt, in writing, the policy of another agency.<sup>12</sup>

5. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *Edmond* casts grave doubt on *State v. Grooms*, 126 N.C. App. 88 (1997), which had approved a checkpoint designed in part to detect “individuals who have arrest warrants outstanding.”

6. *State v. Veazey*, 191 N.C. App. 181 (2008) (*Veazey I*).

7. *Id.* at 189–90.

8. *State v. Veazey*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 530, 533–34 (2009) (*Veazey II*).

9. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.8(d) (4th ed. 2004) (stating that “a rather good argument may be made in favor” of requiring a warrant for impaired driving checkpoints). *But see id.* § 10.8(a) (arguing otherwise for license and registration checkpoints).

10. *Id.* § 10.8(d) n.149 and accompanying text.

11. The Supreme Court of North Carolina held in *State v. Mitchell*, 358 N.C. 63 (2004), that “neither *Sitz* nor the Fourth Amendment requires police departments to have written guidelines before conducting driver’s license checkpoints, nor do we find any such requirement under our state constitution.” However, *Mitchell* was a 4–3 decision, and changes in the court’s composition since it was decided raise the possibility that the issue might be resolved otherwise if it arose again today.

12. G.S. 20-16.3A(2a). *See also State v. Colbert*, 146 N.C. App. 506, 515 (2001) (concluding that “nothing in the . . . checkpoint statute or case law” supports the argument that the officers who operate a

Some agencies have a blanket checkpoint policy that applies to all checkpoints, perhaps with a supplemental written plan for each specific checkpoint,<sup>13</sup> while other agencies effectively create a unique checkpoint policy for each checkpoint that is conducted.<sup>14</sup> Either approach appears to be permissible.

#### 4. What must the policy contain?

The only thing that the statute requires is that the policy provide “guidelines for the pattern,” i.e., the pattern “both for stopping vehicles and for requesting drivers that are stopped to produce drivers license, registration, or insurance information.”<sup>15</sup> However, the pattern itself need not be in writing.<sup>16</sup> It is not clear what “guidelines for the pattern” means, short of actually specifying the pattern. As a result, most checkpoint policies simply dictate the pattern. Typically, the pattern is to stop every vehicle, though a pattern of stopping every vehicle approaching the checkpoint in a certain numerical sequence—such as every tenth vehicle—also would be permitted.<sup>17</sup>

The policy *may* include “contingency provisions for altering either pattern” based on traffic conditions, so long as no individual officer is thereby given authority to determine which vehicles are stopped or which drivers are questioned.<sup>18</sup> Other issues that checkpoint policies sometimes address include who may authorize a checkpoint, permitted locations for a checkpoint, how drivers are to be given notice of a checkpoint, and how a checkpoint is to be staffed and operated.

#### 5. Must officers obtain prior authorization from a supervisor before establishing a checkpoint?

Not necessarily. Neither the statute nor the case law requires such prior authorization.<sup>19</sup> Of course, prior authorization may be required under the checkpoint policy or as a matter of a law enforcement agency’s general regulations and procedures. And, as discussed later in this bulletin, the absence of supervisory approval may be considered by a court in assessing the reasonableness of a checkpoint.<sup>20</sup>

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checkpoint must be members of the agency that drafted the checkpoint policy).

13. The Governor’s Highway Safety Program, part of the Department of Transportation, follows this model. The program’s model checkpoint policy and individual checkpoint plan are available at [www.ncdot.gov/programs/GHSP/lawenforcement/default.html](http://www.ncdot.gov/programs/GHSP/lawenforcement/default.html) (last visited August 4, 2010).

14. The checkpoint plans at issue in *State v. Burroughs*, 185 N.C. App. 496 (2007), and *State v. Colbert*, 146 N.C. App. 506 (2001), both of which were submitted as part of the record on appeal and so are publicly available, are of this type.

15. G.S. 20-16.3A(2a), (2).

16. G.S. 20-16.3A(2a).

17. Some checkpoint policies state that there shall be a pattern and that it shall consist *either* of stopping every vehicle *or* of stopping every third—or fifth or tenth—vehicle. Perhaps this constitutes “provide[ing] guidelines for the pattern.”

18. G.S. 20-16.3A(2a).

19. *State v. Mitchell*, 358 N.C. 63, 67–68 (2004) (upholding checkpoint conducted pursuant to “standing permission” from a supervisor); *State v. Tarlton*, 146 N.C. App. 417, 422 (2001) (“There is no constitutional mandate requiring officers to obtain permission from a supervisory officer before conducting a . . . checkpoint.”).

20. *See infra* pp. 11–12.

## 6. Where may a checkpoint be located?

Under G.S. 20-16.3A(d), the “placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity.” Presumably a location is “statistically indicated” if there is reason to believe it has more problems than other locations “with unlicensed or unregistered drivers,” impaired drivers, or motor vehicle violations in general.<sup>21</sup> However, there has been little litigation about this issue, perhaps because the statute provides that a violation of its provisions regarding the location of checkpoints “shall not be grounds for a motion to suppress.”<sup>22</sup>

## Operating a Checkpoint

### 7. Which officers may operate a checkpoint?

Any officer with territorial and subject-matter jurisdiction may participate in the operation of a checkpoint.<sup>23</sup> So may any officer acting pursuant to a mutual aid agreement.<sup>24</sup> Thus officers from several agencies may participate in a single checkpoint.<sup>25</sup> All the officers need not come from the agency that established or adopted the checkpoint policy.<sup>26</sup>

However, for both legal and practical reasons, it is advisable to have a single agency in charge of the checkpoint. The checkpoint should operate under that agency’s checkpoint policy, and a supervisory officer from that agency should be responsible for determining whether, e.g., traffic is backed up so far that it is necessary to deviate from the pattern for stopping vehicles. Furthermore, if many of the officers involved in a checkpoint have primary responsibilities other than the enforcement of the motor vehicle laws, a court may consider that fact when determining the primary programmatic purpose of the checkpoint, as discussed below.<sup>27</sup>

Sometimes, a magistrate also will be present at a checkpoint, typically in a mobile unit that includes an instrument for conducting chemical analyses of drivers’ breath and office space for a magistrate.<sup>28</sup> Such arrangements are permitted by statute,<sup>29</sup> though of course the magistrate must remain neutral and independent.

21. *State v. Rose*, 170 N.C. App. 284, 291–92 (2005). For example, an area with a large concentration of bars may be “statistically indicated.”

22. G.S. 20-16.3A(d). This subsection is discussed *infra* p. 13.

23. For a discussion of territorial and subject-matter jurisdiction, see ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 14–17 (3d ed. 2003). If an officer participates in the operation of a checkpoint outside his or her territorial jurisdiction, the defendant may argue that evidence obtained at the checkpoint should be suppressed. There is little support for this position in the case law. *Id.* at 248–49 (collecting and summarizing cases).

24. Mutual aid agreements are authorized by G.S. 160A-288 *et seq.* See also FARB, *supra* note 23, at 18.

25. Thus in *White v. Tippet*, 187 N.C. App. 496 (2007), a state trooper “saw several [Charlotte] police officers conducting a checkpoint, so he pulled over to assist them.”

26. *State v. Colbert*, 146 N.C. App. 506, 515 (2001) (upholding checkpoint involving “eight organizations” and stating that “nothing in the . . . statute or case law” precludes the involvement of officers from agencies other than the one that established or adopted the checkpoint policy).

27. See *State v. Rose*, 170 N.C. App. 284, 290 (2005) (noting that four of the five officers involved in a checkpoint were narcotics officers and treating that as a relevant factor in determining the purpose of the checkpoint).

28. Such mobile units are commonly called “BATmobiles,” a partial acronym for Breath Alcohol Testing Mobile Units.

29. G.S. 20-38.4(a)(1) (directing magistrates to conduct initial appearances in impaired driving cases “at locations other than the courthouse when it will expedite the initial appearance” and is practicable).

### 8. Must officers notify the public of a checkpoint?

Yes, to an extent. By statute, officers must “[a]dvertise the public that an authorized checking station is being operated by having, at a minimum, one law enforcement vehicle with its blue light in operation during the conducting of the checking station.”<sup>30</sup> No further notification, such as “checkpoint ahead” signs, is required.<sup>31</sup>

Some type of readily observable show of authority is likely a constitutional requirement as well. The Supreme Court has stated that checkpoint stops are less intrusive and frightening than roving-patrol stops in part because “[a]t traffic checkpoints, the motorist can see that other vehicles are being stopped [and] can see visible signs of the officers’ authority.”<sup>32</sup> The blue light requirement in the statute appears to satisfy this constitutional command.

Whether advance publicity of a checkpoint is required is a different question. Some have argued that such publicity both helps to diminish the apprehension that drivers might otherwise feel upon encountering a checkpoint and serves to deter motor vehicle violations and that such publicity may therefore be desirable or even constitutionally required.<sup>33</sup> There are no North Carolina cases on point.<sup>34</sup> Out-of-state cases generally conclude that advance notice is helpful but not mandatory.<sup>35</sup> The checkpoint statute, of course, imposes no such requirement.

### 9. How long may a driver be stopped at a checkpoint?

Checkpoint stops must be “brief[.]”<sup>36</sup> Unless an officer develops reasonable suspicion justifying further detention, as soon as the officer completes the license and registration check, sobriety screening, or other actions necessitated by the purpose of the checkpoint, the driver should be permitted to depart.<sup>37</sup> Nor should the officer in charge of a checkpoint permit traffic to back up

30. G.S. 20-16.3A(a)(3).

31. *State v. Sanders*, 112 N.C. App. 477 (1993) (finding “no Fourth Amendment violation” in the operation of a checkpoint, despite the fact that the officers “posted no signs warning the public that a license check was being conducted”).

32. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 453 (1990) (internal quotation marks and citations omitted).

33. *See generally* LAFAVE, *supra* note 9, § 10.8(d) (arguing that this issue “has been given insufficient attention in the cases”).

34. However, the presence or absence of advance publicity could be a factor in the balancing test discussed *infra* pp. 11–12.

35. *See, e.g.*, *Brouhard v. Lee*, 125 F.3d 656 (8th Cir. 1997) (“The Motorists further argue that the lack of . . . advance publication of checkpoint locations[] renders the checkpoints unreasonable. We disagree.”); *United States v. Dillon*, 983 F. Supp. 1037 (D. Kan. 1997) (“While advance publicity may be one effective measure to protect the rights of the individual, it is not an absolute requirement.”); *People v. Banks*, 863 P.2d 769 (Cal. 1993) (advance publicity, while desirable, is not a constitutional prerequisite); *State v. Bates*, 902 P.2d 1060 (N.M. Ct. App. 1995) (“Whether or not there is advance publicity is not dispositive of the reasonableness of a DWI roadblock.”); *State v. Williams*, 909 N.E.2d 667 (Ohio Ct. App. 1 Dist. 2009) (“Although advance publicity is not absolutely required in planning checkpoints . . . [it] serves to give even greater notice of the checkpoint and results in a lesser intrusion of privacy.”); *State v. Hicks*, 55 S.W.3d 515 (Tenn. 2001) (“Although the absence of publicity will not invariably render a checkpoint invalid if other measures satisfy [concerns regarding deterrence and the minimization of surprise and fear], the advanced publicity requirement . . . must nevertheless be regarded as a minimally intrusive roadblock.”).

36. *Sitz*, 496 U.S. at 451 (“[T]he measure of the intrusion on motorists stopped briefly at sobriety checkpoints [] is slight.”).

37. LAFAVE, *supra* note 9, § 10.8(a).

extensively. In several out-of-state cases, a lengthy traffic delay resulting from a checkpoint was held to result in an unreasonable seizure.<sup>38</sup>

#### 10. What steps may an officer take to detect motor vehicle violations at a checkpoint?

There is no single laundry list of permitted investigative techniques. Generally, an officer's actions must be "reasonably related . . . to the circumstances which justified" the checkpoint.<sup>39</sup> Therefore, an officer may certainly ask to see a driver's license and registration at a license and registration checkpoint, although it is unclear whether an officer may conduct a computer check regarding an apparently valid driver's license.<sup>40</sup> Likewise, at a sobriety checkpoint, an officer may attempt to detect impaired drivers using nonintrusive techniques like those described in *State v. Colbert*, where officers "observe[d] the driver's eyes for signs of impairment[, e]ngage[d] the driver in conversation to determine if the driver ha[d] an odor of alcohol on his or her breath or if his or her speech pattern indicate[d] the possibility of impairment, [and o]bserve[d] the driver's clothing."<sup>41</sup>

Absent reasonable suspicion, it is not appropriate for an officer to order a driver out of his or her vehicle,<sup>42</sup> order the driver to undergo field sobriety testing, or require the driver to submit to an Alcosensor test.<sup>43</sup> Once reasonable suspicion is established, however, a checkpoint stop effectively becomes a standard traffic stop, with all the investigative authority that accompanies such suspicion-based seizures.<sup>44</sup>

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38. *State v. Barcia*, 562 A.2d 246 (N.J. Super. Ct. App. Div. 1989) (roadblock that caused a "traffic morass of monumental proportions," leading over a million vehicles to come to a complete stop, some for several hours, unreasonably inconvenienced motorists); *Merrett v. Dempsey*, 1993 WL 774466 (N.D. Fla. Apr. 2, 1993) (unpublished) (although a roadblock was generally legal, an "unlawful seizure occurred when traffic was heavy, when officers failed to waive enough vehicles through the roadblock to avoid the formation of a long line, when an officer refused to permit a motorist to leave the line that formed, and when—as a result—the motorist was forced to endure an unreasonable delay in his travels").

39. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

40. The North Carolina case that bears most closely on this issue suggests that the answer is no. *State v. Branch*, 162 N.C. App. 707 (2004) (apparently requiring, and finding on the specific facts of the case, "reasonable suspicion to justify investigation of the validity of the license" presented by a driver at a checkpoint), *vacated and remanded on other grounds*, 546 U.S. 931 (2005). However, *Branch* does not discuss the issue in detail, and there is contrary authority from other jurisdictions. *See, e.g.*, *Price v. Commonwealth*, 483 S.E.2d 496 (Va. Ct. App. 1997) (appearing to allow a computer license *and warrant* check of every driver); *Mullinax v. State*, 920 S.W.2d 503 (Ark. Ct. App. 1996) (approving checkpoint where, for every fifth vehicle, "officers would call in the driver's license number and the radio operator would inform them if the license was valid"). Certainly a computer check would be reasonable when a driver is unable to produce a facially valid license.

41. 146 N.C. App. 506, 510 (2001).

42. *LAFAVE*, *supra* note 9, § 10.8(a).

43. *State v. Colbert*, 146 N.C. App. 506, 514 (2001) (requiring every driver to take an Alcosensor test "would violate the third prong of the balancing test as set forth in *Sitz*" because it would be unduly intrusive). If an officer develops reasonable suspicion, however, the officer may require a driver to submit to an approved alcohol screening test, subject to certain limitations. G.S. 20-16.3.

44. For a discussion of the law of traffic stops, see my October 27, 2009, post "Traffic Stops" on the North Carolina Criminal Law Blog, <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=806>.

An interesting issue is whether several individually permitted investigative actions can together become so intrusive that the combination is prohibited. There is some out-of-state authority supporting that idea,<sup>45</sup> but the issue has not been conclusively resolved in North Carolina.<sup>46</sup>

### 11. May an officer look for evidence of non-motor vehicle crimes?

Generally, no. Unless the driver consents,<sup>47</sup> an officer at a checkpoint may not engage in investigative activity designed to discover evidence of non-motor vehicle crimes rather than to discover motor vehicle violations. Thus, the court of appeals has questioned the constitutionality of a checkpoint where “one officer would . . . ask for the license and registration, while a second officer would scan the inside of the vehicle and walk around it,” in an apparent effort to look for “possible criminal activity.”<sup>48</sup> However, an officer is not required to ignore evidence of non-motor vehicle crimes that he or she happens to observe in plain view during a checkpoint stop.<sup>49</sup>

### 12. May an officer stop a driver who legally avoids a checkpoint?

Yes. In *State v. Foreman*,<sup>50</sup> the defendant made a legal left turn away from a checkpoint, just prior to a sign giving notice of the checkpoint. An officer followed the defendant, ultimately arresting her for DWI and other offenses. The court of appeals opined that “a legal left turn at the intersection immediately preceding a posted DWI checkpoint, without more, does not

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45. LAFAVE, *supra* note 9, § 10.8(a) n.67 and accompanying text (citing *State v. DeBooy*, 996 P.2d 546 (Utah 2000) (checkpoint for licenses, registration, insurance, license plates, impaired driving, etc., became a “pretext to stop all vehicles to search for any and all violations of the law that might be apparent” and was too intrusive); *State v. Abell*, 70 P.3d 98 (Utah 2003) (checkpoint allowing for eleven different inquiries was unconstitutional under *DeBooy*, notwithstanding thirty-second limit on stops: “we doubt that it is possible to conduct all of the inquiries authorized at this checkpoint in just thirty seconds without investing officers with significant discretion to include or omit items authorized by the checkpoint plan”).

46. As noted *supra* p. 2, *Veazey II* appears to have concluded that “enforcement of the State’s Motor Vehicle laws” is a permitted purpose for checkpoints, but even if that is so, it does not necessarily follow that an officer may comprehensively assess a single driver’s or vehicle’s compliance with every imaginable motor vehicle regulation during a single checkpoint stop.

47. If the driver consents, of course, an officer’s investigative activity is constrained only by the limits of the consent. *Cf. State v. Pulliam*, 139 N.C. App. 437, 441 (2000) (“[T]he initial check point stop and the driver’s consent to the search of his vehicle provided sufficient constitutional justification for [the passenger’s] removal from the car.”).

48. *State v. Rose*, 170 N.C. App. 284, 292 (2005). The court’s apparent disapproval of conduct that does not alone amount to a Fourth Amendment search suggests that similar activity, such as having a drug dog sniff a vehicle at a checkpoint, also would be improper because it, too, would suggest that the purpose of the checkpoint was not related to motor vehicle offenses. However, if a driver is legally detained at a checkpoint beyond the initial screening—for example, for further investigation of a possible motor vehicle offense—having a drug dog sniff the driver’s vehicle appears to be permitted under *State v. Branch*, 177 N.C. App. 104 (2006). *But see, e.g., United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990) (use of a drug dog at a license checkpoint was permitted where the duration of the stop was not extended by the use of the dog).

49. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (“[P]olice officers [may] act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose.”)

50. 351 N.C. 627 (2000).

justify an investigatory stop,” suggesting instead that an officer should follow a driver who legally avoids a checkpoint and watch for other evidence of illegal activity.<sup>51</sup> The supreme court disagreed:

[T]he purpose of any checkpoint . . . would be defeated if drivers had the option to “legally avoid,” ignore or circumvent the checkpoint . . . by turning away upon entering the checkpoint’s perimeters. Further, it is clear that the perimeters of the checkpoint or “the area in which checks are conducted” would include the area within which drivers may become aware of its presence by observation of any sign marking or giving notice of the checkpoint. Therefore, we hold that it is reasonable and permissible for an officer to monitor a checkpoint’s entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.<sup>52</sup>

The inclusion of the phrase “in light of and pursuant to the totality of the circumstances” in the *Foreman* opinion has resulted in some doubt about whether a legal turn away from a checkpoint alone justifies a stop, or whether there must be other “circumstances” in addition to the turn. In *State v. Bowden*,<sup>53</sup> the court of appeals appeared to suggest the latter, identifying several factors “[i]n addition to the fact of defendant’s legal turn immediately prior to the checkpoint” that “combined to allow [an officer] to make a reasonable inquiry to determine whether defendant was trying to evade the checkpoint,” including the late hour, the abruptness of the defendant’s turn, and the defendant’s strange driving after he turned. However, while some of the same factors were present in *Foreman*, the supreme court did not appear to rely on them. The most natural reading of the holding in *Foreman* is that a legal turn away from a checkpoint, from within the checkpoint’s perimeters, is alone sufficient justification for a stop.<sup>54</sup>

### 13. May an officer deviate from the patterns contained in the checkpoint policy?

Yes, pursuant to the policy’s “contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated.”<sup>55</sup> Typically, such contingency provisions address traffic backups caused by the checkpoint. The contingency provisions may not give any

51. *State v. Foreman*, 133 N.C. App. 292, 296 (1999), *affirmed as modified*, 351 N.C. 627 (2000).

52. *Foreman*, 351 N.C. at 632–33.

53. 177 N.C. App. 718, 724 (2006).

54. A good argument can be made for the view that whether a legal turn away from a checkpoint is sufficient to provide reasonable suspicion depends on the circumstances. For example, if officers establish a checkpoint so that the perimeters of the checkpoint include several major intersections, the fact that a driver turns at one of the intersections may not, by itself, provide reasonable suspicion. But if officers establish a checkpoint on a rural highway, the fact that a driver makes a U-turn may suffice for reasonable suspicion. *Cf., e.g., State v. Anaya*, 217 P.3d 586 (N.M. 2009) (“The conclusion that a driver is attempting to avoid a checkpoint may be unreasonable in light of the circumstances of the stop—the time of day, the proximity of the turn to the checkpoint, or whether the driver’s actions were typical considering the layout of the area and the normal flow of traffic.”); *Taylor v. State*, 549 S.E.2d 536 (Ga. Ct. App. 2001) (“[A]bnormal or unusual actions taken to avoid a roadblock may give an officer a reasonable suspicion of criminal activity even when the evasive action is not illegal. By contrast, completely normal driving, even if it incidentally evades the roadblock, does not justify a *Terry*-type . . . stop.”).

55. G.S. 20-16.3A(a)(2a).



individual officer discretion regarding which vehicles will be stopped or which drivers will be required to produce license and registration information.<sup>56</sup> It is not clear how detailed the policy must be in order adequately to restrain officers' discretion. For example, consider a provision that states: "The officer in charge of the checkpoint may let vehicles through without stopping if traffic is backed up extensively." Does that give the officer in charge too much discretion? Must the policy instead provide, for example: "Once twenty or more vehicles are backed up at the checkpoint, officers will let vehicles through without stopping until there is no backup"? No cases shed light on this issue, but the more detailed the provisions, and the less they leave to an officer's judgment, the less vulnerable they are to attack.<sup>57</sup>

Presumably circumstances other than traffic flow also may justify deviations from the patterns. For example, at a checkpoint operated by a small number of officers it may be permissible to let traffic flow freely when an officer is busy writing a citation and therefore unavailable to screen vehicles at the checkpoint.<sup>58</sup> Again, this should be done systematically and consistently to minimize the discretion given to individual officers. If officers deviate from the pattern arbitrarily, the checkpoint may violate the Fourth Amendment.

## Litigating a Checkpoint

### 14. How may a defendant challenge the legality of a checkpoint?

A defendant in a criminal case may challenge the legality of a checkpoint through a motion to suppress evidence obtained as a result of the checkpoint. In district court, such motions are typically made during trial,<sup>59</sup> except in impaired driving cases when the special timing rules of G.S. 20-38.6 apply.<sup>60</sup> In superior court, such motions usually are, and often must be, made before trial.<sup>61</sup>

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56. *Id.*

57. For an interesting discussion of this issue and an illustration of how reasonable minds may differ about how much discretion is constitutionally permissible, see *Commonwealth v. Worthy*, 957 A.2d 720 (Pa. 2008) (reversing lower courts and upholding the constitutionality of a checkpoint despite the discretion given to officers regarding when traffic was excessively congested).

58. *Cf. State v. Tarlton*, 146 N.C. App. 417, 421 (2001) (describing a checkpoint where officers "checked every vehicle in both directions except when they were writing citations," though the propriety of this was not the issue in the case).

59. G.S. 15A-973.

60. G.S. 20-38.6(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."). See generally Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after State v. Fowler and State v. Palmer*, ADMIN. OF JUSTICE BULLETIN 2009/06 (Dec. 2009), available at [www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf).

61. G.S. 15A-975 (requiring motions to suppress to be made prior to trial except in specified circumstances).

Occasionally, the constitutionality of a checkpoint is raised in civil contexts, such as in connection with the suspension of a driver's license<sup>62</sup> or in a suit brought for the purpose of testing the legality of checkpoints.<sup>63</sup>

#### 15. How should a court determine the constitutionality of a checkpoint?

It is a two-step process. "In evaluating the constitutionality of a checkpoint, a reviewing court must first determine the primary programmatic purpose of the checkpoint, and if the purpose is valid, must consider whether the checkpoint was reasonable under the balancing test articulated in *Brown v. Texas*."<sup>64</sup> These two steps are discussed immediately below.

#### 16. How should a court determine the purpose of a checkpoint?

As discussed above, officers may establish a checkpoint for the purpose of detecting motor vehicle violations but not, for example, for the purpose of general crime control.<sup>65</sup> Normally the state may establish the purpose of the checkpoint simply by having an officer who participated in planning or operating the checkpoint testify about it. The officer need not be a supervisor.<sup>66</sup> If there is no evidence to contradict the officer's testimony, that alone is sufficient to show the checkpoint's purpose.

However, "where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose" but instead must carry out a close review of that purpose.<sup>67</sup> In such a case, the court must also make findings regarding the purpose of the checkpoint.<sup>68</sup> Evidence sufficient to trigger a searching review may consist, for example, of an officer's conflicting testimony about

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62. See, e.g., *White v. Tippett*, 187 N.C. App. 285 (2007). However, it is questionable whether the legality of a checkpoint may properly be raised in civil revocation proceedings. By statute, hearings regarding such revocations are limited to five enumerated issues, none of which concern the constitutionality of a checkpoint at which a driver may have been stopped. G.S. 20-16.2(d).

63. See, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

64. *State v. Veazey*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 530, 533 (2009) (*Veazey II*).

65. Technically, a court must determine the *primary programmatic purpose* of a contested checkpoint. The focus on the primary purpose is important because "a checkpoint with an unlawful primary purpose will not become constitutional when coupled with a lawful secondary purpose." *State v. Gabriel*, 192 N.C. App. 517, 520 (2008).

66. *State v. Burroughs*, 185 N.C. App. 496, 498–503 (2007).

67. *State v. Veazey*, 191 N.C. App. 181, 187 (2008) (*Veazey I*).

68. *State v. Jarrett*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 692 S.E.2d 420, 424 (2010) ("Because variations existed in [the officer's] testimony regarding the primary purpose of the checkpoint, the trial court was required to make findings regarding the actual primary purpose."); *Veazey I*, 191 N.C. App. at 190 (given the conflicting evidence regarding the purpose of the checkpoint, "the trial court was required to make findings regarding the actual primary purpose of the checkpoint and it was required to reach a conclusion regarding whether this purpose was lawful"); *Gabriel*, 192 N.C. App. at 521; *State v. Rose*, 170 N.C. App. 284, 289–90 (2005).

the purpose of a checkpoint<sup>69</sup> or of evidence that the checkpoint was conducted in a manner suggestive of an improper purpose.<sup>70</sup>

### 17. How should a court determine whether a checkpoint passes the balancing test?

If a checkpoint has a proper purpose, the next step is to determine whether it appropriately balances “the public’s interest and an individual’s privacy interest.”<sup>71</sup> This balancing requires the consideration of three factors: “(1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.”<sup>72</sup>

The first factor is straightforward. Binding precedent establishes that detecting motor vehicle violations, including impaired driving, is a matter of substantial public concern.<sup>73</sup>

The second factor asks whether “the checkpoint [is] appropriately tailored to meet” the public purpose the checkpoint is intended to serve.<sup>74</sup> The court of appeals has explained the application of this factor as follows:

Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.<sup>75</sup>

The third factor requires the court to consider both the intrusiveness of the checkpoint and the extent to which the checkpoint empowers officers to act in an arbitrary, unconstrained, and discretionary manner. Factors the court of appeals has held are relevant in this analysis are

the checkpoint’s potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by

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69. *Jarrett*, \_\_\_ N.C. App. at \_\_\_, 692 S.E.2d at 424 (determination of purpose required “[b]ecause variations existed in [the officer’s] testimony regarding the primary purpose of the checkpoint”); *Veazey I*, 191 N.C. App. at 189 (officer testified both that the checkpoint was for the purpose of detecting motor vehicle violations and that it was for the purpose of detecting all criminal violations); *Gabriel*, 192 N.C. App. at 521 (officer testified both that the checkpoint was established because of several recent robberies in the area and in order to detect motor vehicle violations).

70. *Rose*, 170 N.C. App. at 290–93 (questioning the purpose of a checkpoint because most of the officers operating the checkpoint were narcotics officers, and when a vehicle was stopped, one of the officers would walk around the vehicle and scan its interior).

71. *Id.* at 293.

72. *Id.* at 293–94 (quoting *Illinois v. Lidster*, 540 U.S. 419 (2004)).

73. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (“No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.”); *State v. Veazey*, 191 N.C. App. 181, 191 (2008) (*Veazey I*) (noting that “[b]oth the United States Supreme Court as well as our Courts” have found that license and registration checks and other efforts to ensure compliance with the motor vehicle laws serve an important public interest).

74. *State v. Rose*, 170 N.C. App. 284, 294 (2005).

75. *Veazey I*, 191 N.C. App. at 191.

officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint.<sup>76</sup>

A trial judge need not address every listed factor in rendering a decision regarding the legality of a checkpoint.<sup>77</sup> It seems that a motor vehicle checkpoint conducted in a professional manner and in compliance with G.S. 20-16.3A will usually pass the balancing test. In fact, our appellate courts have never invalidated a checkpoint under the balancing test in a published opinion.<sup>78</sup>

### 18. Must the state introduce a copy of the checkpoint policy?

No. This question generally arises when a defendant has filed a motion to suppress, questioning the legality of a checkpoint.<sup>79</sup> In order to establish compliance with G.S. 20-16.3A, the state must show that the checkpoint was conducted pursuant to a written policy<sup>80</sup> and that the policy provided guidelines for the patterns for stopping vehicles and for requesting license and registration information from drivers. But an officer with knowledge can testify to these facts without ever introducing the policy. At trial, perhaps testimony about the contents of the policy would violate the best evidence rule, but the rules of evidence do not apply at suppression hearings.<sup>81</sup>

Although not required, it may be advisable for the state to introduce a copy of the checkpoint policy. Some judges may be put off by the state's failure to do so, or may question the credibility of an officer who testifies about a policy that the officer cannot produce.<sup>82</sup>

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76. *Id.* at 193. The court emphasized that these are not the only possible relevant factors. Further, it is clear that no single factor is dispositive. For example, as discussed *supra* p. 3, the lack of supervisory approval does not necessarily render a checkpoint unreasonable.

77. *State v. Jarrett*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 692 S.E.2d 420, 425–26 (2010).

78. Nor have they invalidated a checkpoint for any other reason. The court of appeals was plainly skeptical of the checkpoint that gave rise to *Rose* but ultimately remanded the case for further findings.

79. Absent such a motion, it is obvious that the state need not introduce a copy of the policy, as it is not essential to establish the elements of any crime.

80. In *State v. Tarlton*, 146 N.C. App. 417, 422 (2001), the court of appeals wrote that it “disagree[d] with the contention that the State’s failure to introduce the [policy] into evidence required the court to find the stop unconstitutional.” But that holding was based on the premise that a no written policy was required at all, a premise that is not correct—at least as a statutory matter—under the current version of G.S. 20-16.3A. Thus, while the conclusion reached in *Tarlton* remains correct, the reasoning is suspect.

81. The best evidence rule is N.C. R. Evid. 1002 (“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”). Under N.C. R. Evid. 1101(b)(1), however, the rules of evidence do not apply when determining “questions of fact preliminary to admissibility of evidence.”

82. When offered at trial, the checkpoint policy is not hearsay because it is not admitted for the truth of the matter asserted. This also obviates any Confrontation Clause issue.

### 19. Can a driver who is stopped for evading a checkpoint challenge the checkpoint's legality?

Probably not, under *White v. Tippett*.<sup>83</sup> In that case, a driver stopped briefly at a checkpoint, then drove off without permission and was later apprehended. The driver argued that the checkpoint was unconstitutional because it had an impermissible purpose. The court of appeals rejected this argument, stating that challenges to a checkpoint's purpose are appropriate "only where the petitioner or defendant has in fact been stopped at a checkpoint. Here, [the driver] was not stopped at the checkpoint, and as such her argument . . . is irrelevant. . . . [T]he validity of the checkpoint is not at issue here."<sup>84</sup>

It may be worth noting that a different panel of the court of appeals reached a different conclusion in *State v. Haislip*,<sup>85</sup> but the case was vacated by the supreme court based on the inadequacy of the record. Thus, *White* is the only authority on point, though the vacated result in *Haislip* suggests that the issue may not be completely settled.<sup>86</sup>

### 20. When is suppression of evidence an appropriate remedy?

When the police violate the Fourth Amendment, evidence obtained as a result of the violation is generally suppressed. Thus if a checkpoint is operated in an unconstitutional manner, evidence obtained at the checkpoint will normally be subject to suppression. But what if a checkpoint is operated in compliance with the Fourth Amendment yet in violation of G.S. 20-16.3A? Is suppression then required?

Clearly not, if the violation in question concerns the location of the checkpoint. Subsection (d) of the statute, which constrains the placement of checkpoints, includes a provision that it "shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station."

As to other statutory violations, however, the answer is not clear. There is no statutory exclusionary rule in Chapter 20, in contrast to Chapter 15A.<sup>87</sup> But perhaps a court under its inherent authority could suppress evidence obtained in violation of G.S. 20-16.3A. There is no case law on point, possibly because judges tend to find statutory and constitutional violations in tandem.<sup>88</sup>

The applicability of the exclusionary rule when an officer participates in the operation of a checkpoint outside his or her territorial jurisdiction is discussed above.<sup>89</sup>

83. 187 N.C. App. 285 (2007).

84. *Id.* at 288.

85. 186 N.C. App. 275 (2007), *vacated and remanded*, 362 N.C. 499 (2008). The court of appeals ruled that a defendant stopped "pursuant to a checkpoint plan" for turning away from a checkpoint, rather than under the totality of the circumstances, "has standing to challenge the constitutionality of the plan by which she was 'snared.'" *Id.* at 280.

86. There are a number of out-of-state cases on point, a majority of which seem to be in accordance with the holding in *White*. See, e.g., *United States v. Scheetz*, 293 F.3d 175 (4th Cir. 2002) (driver who made an illegal U-turn in an attempt to avoid a checkpoint "was not seized for Fourth Amendment purposes by the show of police authority by virtue of the checkpoint signs or the checkpoint itself"); *Gary v. State*, 603 S.E.2d 304 (Ga. Ct. App. 2004) ("Although [the defendant] challenges the legality of the roadblock, we need not consider this contention because the evidence shows that he was not stopped at the roadblock" but, rather, was stopped for evading it); *State v. Skiles*, 938 S.W.2d 447, 454 (Tex. Ct. Crim. App. 1997) (citing cases from several states, all of which reach the same conclusion as *White*).

87. G.S. 15A-974(2).

88. For a detailed discussion of this issue, see Shea Denning's May 4, 2009, post "Stick to the Plan (er, Policy)," on the North Carolina Criminal Law Blog, <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=326>.

89. *Supra* note 23.

**Conclusion**

Checkpoints are controversial. Hopefully this bulletin will help to clarify which controversies remain and which have been resolved.

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