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PLAN

- Overview
 - Elements
 - Special Rules and Duties
 - Sentencing
- Probable Cause and Implied Consent Testing Rules
- Motions to Suppress and Dismiss
- Admissibility of Chemical Analysis Results
- Pretrial Release and Motions to Dismiss
- Sufficiency of the Evidence

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ELEMENTS OF DWI

- Drive
- Vehicle
- Street, highway or public vehicular area
- While impaired
 - Appreciable impairment;
 - BAC of 0.08 or more at any a relevant time after driving; or
 - Any Schedule I controlled substance or its metabolites in his/her blood or urine

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PROBABLE CAUSE FOR DWI?

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SCENARIO ONE

An officer pulls behind a vehicle at a stoplight around 3 a.m. and sees that its registration is expired.

He activates his blue lights, and the defendant turns into a nearby parking lot.

The officer smells a medium odor of alcohol coming from the defendant's breath and sees that the defendant's eyes are red and glassy.

The officer performs an HGN test, noting 5 of 6 indicators of impairment.

The defendant tells the officer that he had three beers at 6 p.m. the previous evening.

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STATE V. LINDSEY, 249 N.C. APP. 516 (2016)

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SCENARIO TWO

Officer responds to a report of a traffic accident in a restaurant parking lot.

The defendant backed his SUV into a motorcycle that was parked (not in a parking space) directly behind the defendant's vehicle.

The motorcycle was lower than the rear window of the defendant's car.

The defendant smelled faintly of alcohol and admitted to consuming drinks at the restaurant just before the accident.


The defendant registered a positive result on the portable breath test. He performed well on field sobriety tests, though he put his foot down 15 seconds into the one-leg stand test and asked what to do next.

After the officer told him to complete the test, he raised his foot for an additional 15 seconds.

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STATE V. OVEROCKER, 236 N.C. APP. 423 (2014)

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SCENARIO 3

Two highway patrol troopers discover the driver's car in a ditch on the side of the interstate.

The driver said she ran off the road. No other vehicles were involved in the crash. The car rolled several times before coming to rest.

One of the troopers smells alcohol on the driver. He tells his fellow officer what he smelled.

Does the remaining trooper have probable cause to arrest the driver for DWI?

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STEINKRAUSE V. TATUM,
 201 N.C. APP. 289
 (2009),
AFF'D PER CURIAM,
 364 N.C. 419 (2010).

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THE UPSHOT?

Evidence of drinking
 +
 Indicators of impairment from field sobriety tests
 or
 Unexplained faulty driving consistent with impairment
 =
 Probable cause

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Rules for implied consent testing

Probable cause for implied consent offense

Charged with implied consent offense

Chemical analyst with a permit

Designates type of test

Advises of rights orally and in writing

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1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

2. The test results, or the fact of your refusal, will be admissible in evidence at trial.

3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

4. After you are released, you may seek your own test in addition to this test.

5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

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REMEDY


See *State v. Shadding*, 17 N.C. App. 279 (1973).

See *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 735 S.E.2d 345 (N.C. App. 2012)

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WHAT IF TEST IS NOT DELAYED 30 MINUTES?

- Is it per se inadmissible?
- See *State v. Buckner*, 34 N.C. App. 447, 451 (1977).



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G.S. 20-38.6

- Motions to suppress evidence or dismiss charges in an implied consent case must be made before trial
- Exceptions:
 - *Motions to dismiss for insufficient evidence*
 - *Motion based on facts not previously known*
- State must be given reasonable time to procure witnesses or evidence and conduct research

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Summary Rulings

- State stipulation
- Failure to move pretrial

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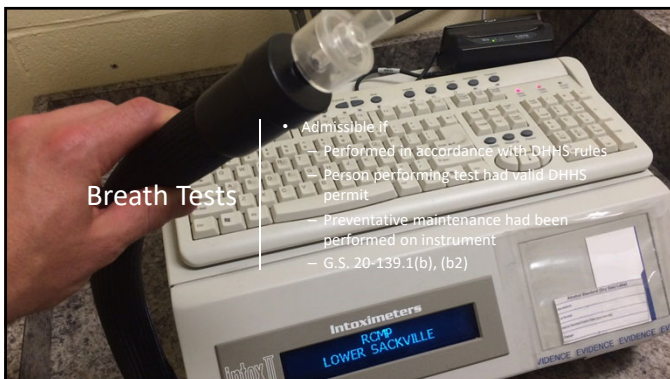
Preliminary Determination:
G.S. 20-38.6(e), (f)

- Hearing and findings of fact
- Written order
- Findings of fact
- Conclusions of law
- Preliminary indication of granted or denied
- If indication is to DENY, judge may enter final order
- If indication is to GRANT, judge may not enter final ruling until State has opportunity to appeal

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RULES FOR BREATH TESTING

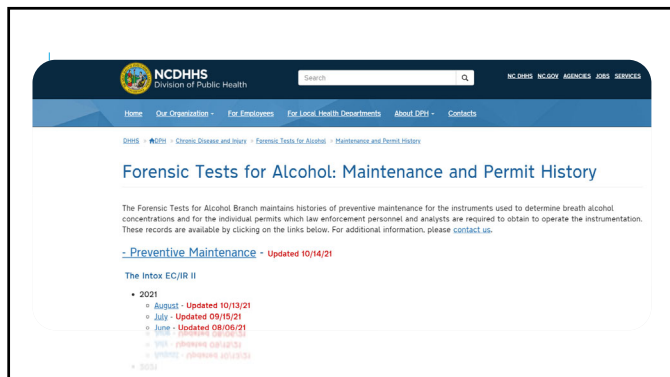
1. Observation period. Chemical analyst must observe the person to be tested to determine that the person has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. 10A NCAC 41B .0101(6), .0322.

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RULES FOR BREATH TESTING

2. Preventative maintenance. Intoximeter EC/IR II must undergo preventative maintenance every 4 months. The ethanol gas canister must be changed before its expiration date. 10 NCAC 41B .0323.

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RULES FOR BREATH TESTING

3. Duplicate, sequential breath samples. Results are admissible if test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. G.S. 20-139.1(b3).

See 10A NCAC 41B .0322 ("If the alcohol concentrations differ by more than 0.02, a third or fourth breath sample shall be collected when 'PLEASE BLOW' appears.")

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Duplicate sequential breath samples?

Lot Number: AG011703
Exp Date: 04/27/2012

Test g/210L Time
DIAG Pass 11:24pm
AIR BLK .00 11:25pm
ACCTY CHK .08 11:26pm
AIR BLK .00 11:27pm
SUB TEST .10 11:27pm
AIR BLK .00 11:29pm
SUB TEST *** 11:32pm

.10
11:27 p.m.

TEST TIME OUT
Signature: *[Signature]*
Chemical Analyst
Insuff. sample
11:32 p.m.
CVR

Lot Number: AG011703
Exp Date: 04/27/2012

Test g/210L Time
DIAG Pass 11:37pm
AIR BLK .00 11:38pm
ACCTY CHK .08 11:39pm
AIR BLK .00 11:39pm
SUB TEST .09 11:39pm
AIR BLK .00 11:39pm
SUB TEST *** 11:41pm
AIR BLK .00 11:41pm

.09
11:38 p.m.

NO TEST
Signature: *[Signature]*
Chemical Analyst
Court CVR

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CHEMICAL ANALYSIS OF BLOOD/URINE

"In any implied-consent offense . . . a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence." G.S. 20-139.1(a).

"A chemical analysis is a test or tests of the breath, blood, or other bodily fluid of substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses." G.S. 20-4.01(3a).

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CHEMICAL ANALYSIS OF BLOOD OR URINE

If the defendant is asked to consent to the withdrawal of blood after being asked to provide breath sample, the defendant must first be readvised of his/her implied consent rights. G.S. 20-139.1(b5).

Person conducting analysis must have DHHS permit.

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CONFRONTATION CLAUSE

A defendant has a Sixth Amendment right to be confronted with the witnesses against him.

In *Crawford v. Washington*, 541 U.S. 36 (2014), the Court held that testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross examination.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that sworn forensic reports prepared by laboratory analysts for purposes of prosecution are testimonial statements.

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CHEMICAL ANALYSIS OF BLOOD OR URINE

Results of a chemical analysis of blood or urine reported by State Crime Lab or any DHHS-approved laboratory are admissible without further authentication and without testimony from the analyst if notice and demand procedures are followed. G.S. 20-139.1(c1).

Note: There also is notice and demand procedure for use of chemical analyst's affidavit in district court. G.S. 20-139.1(e1).

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Statute	Evidence	Proceedings	Time for State's Notice	Time for D's Objection or Demand	AOC Form
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1), (e2)	Chemical analyst affidavit	Hearing or trial in district court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344

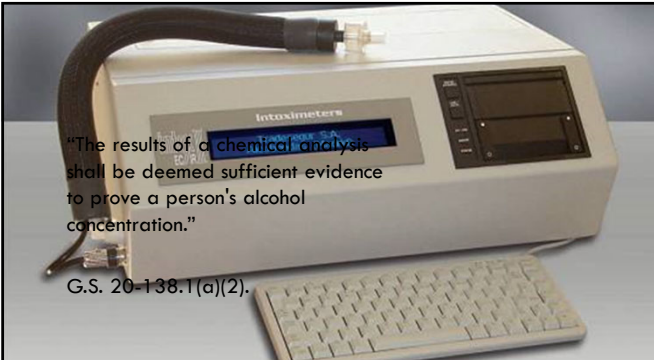
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REMOTE TESTIMONY IN DISTRICT COURT

G.S. 20-139.5(c6): Laboratory analyst may testimony remotely if:

- State has provided copy of report to defendant
- State has notified defendant at least 15 business days before the proceeding of intent to offer remote testimony

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"The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."

G.S. 20-138.1(a)(2).

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“[T]he challenged provision does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration.”

State v. Narron, 193 N.C. App. 76 (2008)

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PRETRIAL RELEASE

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**G.S. 15A-534:
CONDITIONS OF PRETRIAL RELEASE**

1. Written promise
2. Unsecured bond
3. Custody release
4. Secured bond
5. House arrest with electronic monitoring

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Impaired Driving Holds

Offense involving impaired driving

Clear and convincing evidence that the impairment presents a danger

§ 15A-542. Detention of impaired drivers.

(a) A judicial official conducting an initial appearance for an offense involving impaired driving, as defined in G.S. 20-411.2(a), must follow the procedure in G.S. 15A-511 except as modified by this section. This section may not be interpreted to impede a defendant's right to communicate with counsel and friends.

(b) If at the time of the initial appearance the judicial official finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until one of the requirements of subsection (c) is met; provided, however, that the judicial official must at the time determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.

(c) A defendant subject to detention under this section has the right to pretrial release under G.S. 15A-534 when the judicial official determines either that:

- (1) The defendant's physical and mental faculties are no longer impaired to the extent that he presents a danger of physical injury to himself or others or of damage to property if he is released; or
- (2) A sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired. If the defendant is released to the custody of another, the judicial official may impose any other condition of pretrial release authorized by G.S. 15A-534, including a requirement that the defendant execute a secured appearance bond.

The defendant may be denied pretrial release under this section for a period no longer than 24 hours, and after such detention may be released only upon meeting the conditions of pretrial release set in accordance with G.S. 15A-534. If the defendant is detained for 24 hours, a judicial official must immediately determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.

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No longer impaired to extent that he presents danger

Sober, responsible adult willing and able to assume responsibility for defendant until no longer impaired

(c) A defendant subject to detention under this section has the right to pretrial release under G.S. 15A-534 when the judicial official determines either that:

- (1) The defendant's physical and mental faculties are no longer impaired to the extent that he presents a danger of physical injury to himself or others or of damage to property if he is released; or
- (2) A sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired. If the defendant is released to the custody of another, the judicial official may impose any other condition of pretrial release authorized by G.S. 15A-534, including a requirement that the defendant execute a secured appearance bond.

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No longer than 24 hours

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**STATE V. HILL,
277 N.C. 547 (1971)**

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G.S. 15A-954

1. The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.
2. The statute of limitations has run.
3. The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.
4. **The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.**
5. The defendant has previously been placed in jeopardy of the same offense.
6. The defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid.
7. An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.
8. The court has no jurisdiction of the offense charged.
9. The defendant has been granted immunity by law from prosecution.
10. The pleading fails to charge an offense as provided in G.S. 15A-924(e).

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STATE V. KNOLL,
 322 N.C. 535
 (1988)

If the State violates a defendant's statutory right to pretrial release by impermissibly holding the defendant; **and**
 The defendant is—during the crucial time period following his or her arrest—denied access to witnesses;
 The defendant may be entitled to *dismissal* of the charges.

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STATE V. HILL,
 277 N.C. 547
 (1971)

If a defendant charged with an impaired driving offense is denied access to witnesses
 He may be entitled to dismissal of the charges based on a flagrant violation of his constitutional rights
Even if he is lawfully detained

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SUFFICIENT EVIDENCE? SCENARIO ONE

Officer sees car crashed car on side of road. Car registered to Don Defendant.

LEO finds Don walking on roadway two miles from crash. Don has mark on forehead, is twitchy, and unsteady on feet. Don tells officer, "I am smoked up on meth."

EMS takes Don to hospital.

At hospital, Don says he was in a wreck a couple of hours ago. He says he is on meth. He does not know the date, the day of week, or the time.

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SUFFICIENT EVIDENCE? SCENARIO 2

Officer hears crash. Goes to scene. Car is in ditch. No one is in car.

Driver's side door is jammed closed. There is blood between driver's seat and passenger seat, on the steering wheel, and on the back of the passenger's seat.

Officer finds David Defendant walking on road near accident 30 minutes later. He has an injury on the left side of his cheek and blood on his hands.

David is noticeably impaired and admits to driving the car.

David's BAC is 0.18.

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<i>State v. Eldred</i> , 259 N.C. App. 345 (2018)	<i>State v. Foye</i> , 200 N.C. App. 37 (2012)
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