

You've got to know when to hold 'em

Posted By [Shea Denning](#) On February 4, 2013 @ 12:48 PM In [Motor Vehicles, Procedure](#) | [No Comments](#)

Magistrates walk a tight rope of sorts in setting conditions of pretrial release for defendants charged with impaired driving offenses. In addition to taking into account all of the factors they must consider when setting conditions of pretrial release in any criminal case and setting conditions accordingly, see [G.S. 15A-534](#)^[1], magistrates who set conditions of release for a person charged with an impaired driving offense must consider whether the person is impaired to the extent that an impaired driving hold must be imposed, see [G.S. 20-38.4](#)^[2](a)(3). A hold is required if the magistrate finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he or she is released, of physical injury to the defendant or others or damage to property.

If an impaired driving hold is imposed, the defendant may not be released even if he or she satisfies other conditions of release by, for example, posting the amount of any secured bond. Instead, the defendant must be held until he or she is no longer impaired to the extent he or she poses a danger, or until a sober, responsible, adult appears who is willing and able to assume responsibility for the defendant until he or she is no longer impaired. [G.S. 15A-534.2](#)^[1].

Many magistrates want to impose such a hold in every case in which a defendant is charged with impaired driving. They worry that defendants allowed to leave without supervision may return to their cars and drive away, again endangering themselves and the public. Yet the law does not authorize an impaired driving hold to be imposed in every case in which a defendant is charged with impaired driving without additional findings. While magistrates determine whether impaired driving charges are supported by probable cause, the determination regarding the defendant's impairment for purposes of imposing a hold must be made by clear and convincing evidence. And the question is not whether the defendant was impaired at the time he or she drove. It is, instead, whether the defendant's current state of impairment presents a danger if he or she is released.

The matter is rendered more complicated by a countervailing concern that causes some magistrates to shy away from imposing a hold even when the statutory standard is satisfied. A defendant charged with an impaired driving offense is entitled to dismissal of the charges if he or she can demonstrate a substantial violation of the right to pre-trial release and irreparable prejudice resulting from the violation. See *State v. Knoll*, 322 N.C. 535 (1988). Thus, when a defendant is held pursuant to G.S. 15A-534.2 following an impaired driving charge, the magistrate later may be required to testify at a hearing on the defendant's motion to dismiss regarding the reasons for imposing the hold. If a court determines the hold was not warranted, the charges may be dismissed.

It isn't always easy to make the right call. There are few bright-line rules, other than that finding probable cause for impaired driving, without more, does not warrant the imposition of a hold. See *State v. Labinski*, 188 N.C. App. 120 (2008) (finding, in a case in which the defendant's alcohol concentration measured 0.08, that the magistrate substantially violated defendant's right to pretrial release by imposing an impaired driving hold without any evidence or finding that the defendant's impairment presented a danger). Our courts have not established a per se level at which a hold must be ordered. Cf. *State v. Bumgarner*, 97 N.C. App. 567 (1990) (finding that impaired driving hold was warranted based on magistrate's consideration of trooper's testimony, the magistrate's personal observations, and the results of the sobriety test, which revealed a 0.14 alcohol concentration). That said, alcohol concentrations that are sufficiently high likely do, without more, support the imposition of a hold at an initial appearance that is held within a reasonably short time after the alcohol concentration is gathered. I'm not sure exactly where our appellate courts might set that threshold, but an alcohol concentration of 0.15 may well be enough, particularly given that that level of alcohol concentration renders a person a "[h]igh-[r]isk" driver for purposes of the limited driving privilege law, see [G.S. 20-179.3](#)^[3](c1), and is treated, for sentencing purposes, the same as "gross impairment of the defendant's faculties." See [G.S. 20-179](#)^[3](d)(1). At the other end of the alcohol-concentration spectrum, there doubtless are cases in which evidence supports a finding that a defendant with an alcohol concentration of 0.08 or lower presents a danger if released.

When magistrates impose an impaired driving hold, they must complete form [AOC-CR-270](#)^[4], which contains a space for magistrates to list the reasons for the hold. When I talk to magistrates about filling out that form, I encourage them to list all of the evidence they relied upon in determining that a hold was required, including any such evidence related to the defendant's alcohol concentration, the manner in which the defendant drove, and the defendant's conduct and physical bearing before and during the initial appearance. Not only does this exercise provide the findings necessary to support the hold, but it can serve to jog a magistrate's memory about why it was imposed in the event he or she later is called upon to testify.

What's the practice in your district? Are impaired driving holds routinely or rarely imposed? When they are, are they based upon certain threshold alcohol concentrations or other common case characteristics?

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[1] G.S. 15A-534: <http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=15A-534.2>

[2] G.S. 20-38.4: <http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=20-38.4>

[3] G.S. 20-179.3: <http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=20-179.3>

[4] AOC-CR-270: <http://www.nccourts.org/Forms/Documents/842.pdf>