DWI Overview for Superior Court Judges

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Contents

I. Probable Cause.

Probable cause is defined as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343 (1985). Whether probable cause exists depends on the totality of the circumstances present in each case. *State v. Sanders*, 327 N.C. 319, 339 (1990). Whether an officer has probable cause to arrest a defendant for impaired driving depends upon whether a prudent officer in that officer's position "would reasonably have believed defendant's mental or physical faculties to have been appreciably impaired as the result of the consumption of an intoxicant." *State v. Parisi*, ___ N.C. ___, 831 S.E.2d 236, 244 (August 16, 2019).

A. Cases finding probable cause.

- *State v. Parisi*, __ N.C. ___, 831 S.E.2d 236 (August 16, 2019). The state supreme court determined that findings of fact made by the district and superior court below failed to support those courts' legal conclusion that the investigating officer lacked the probable cause needed to place defendant under arrest for impaired driving. Those findings included that the defendant, who was stopped at a checkpoint, had been driving, that he admitted having consumed three beers, that his eyes were red and glassy, that a moderate odor of alcohol emanated from his person, and that he exhibited multiple clues indicating impairment while performing various field sobriety tests. Findings that the defendant did not slur his speech, drive unlawfully or badly, or appear unsteady on his feet did not support a legal conclusion that no probable cause existed.

- *State v. Clapp*, __ N.C. App. ___, 817 S.E.2d 222 (June 5, 2018). The court of appeals reversed the trial court's determination that the facts and circumstances known to the officer were insufficient to establish probable cause.

  The officer first arrested the defendant for driving while impaired at 9:30 p.m. He submitted to a breath test at 10:25 p.m. that revealed a breath alcohol concentration of 0.16. He was released from jail at 11:35 p.m. Thirty minutes later, the officer saw the defendant seated in the driver's seat of his car with the engine running. The officer stopped the defendant. He noted that he smelled of alcohol, had slurred speech and was unsteady on his feet. He did not ask the defendant to perform any field sobriety tests.

  The court of appeals concluded that the following facts, taken as a whole, provided the officer with probable cause:

  - defendant's admission to driving;
  - defendant's red-glassy eyes, moderate odor of alcohol, slurred speech, and unsteadiness on his feet; and

- defendant's 0.16 BAC result one hour and forty minutes earlier combined with the officer's knowledge of the standard blood-alcohol elimination rate for an average individual.

- *State v. Lindsey*, ___ N.C. App. ___, 791 S.E.2d 496 (September 20, 2016). The following findings supported the trial court's conclusion that there was probable cause to arrest the defendant for driving while impaired: the officer smelled a moderate odor of alcohol coming from defendant and observed defendant's eyes to be red and glassy; the officer observed five of six indicators of impairment upon administering an HGN test to defendant; and defendant admitted to the officer that he had consumed three beers hours before the stop.

- *State v. Townsend*, 236 N.C. App. 456 (2014). An officer had probable cause to arrest the defendant, who was stopped at a checkpoint, for impaired driving. The defendant "had bloodshot eyes and a moderate odor of alcohol about his breath," registered results positive for alcohol on two portable breath tests, and exhibited multiple clues indicating impairment during the performance of field sobriety tests. The absence of other signs of intoxication such as slurred speech, glassy eyes or physical instability did not undermine the existence of probable cause.

- *Steinkrause v. Tatum*, 201 N.C. App. 289 (2009), *aff'd per curiam*, 364 N.C. 419 (2010). Probable cause to believe that a driver was guilty of impaired driving existed based on the odor of alcohol detected from the driver's person and her involvement in a one-car accident that extensively damaged her car. The officer could have concluded that the accident resulted from the driver's inability to prevent her car from swerving off the road at a high speed. The nature of the accident could indicate an impairment of coordination on the part of the driver.

B. Case finding no probable cause.

- *State v. Overocker*, 236 N.C. App. 423 (2014). A light odor of alcohol about the defendant's person, the defendant's consumption of three alcoholic drinks in a four-hour period, and his involvement in a car accident that was *not* his fault did not provide probable cause to believe the defendant was driving while impaired.

II. Preliminary Determinations.

G.S. 20-38.6 requires that motions to suppress evidence or dismiss charges in an implied consent case be made prior to trial in district court. Exceptions apply to a motion to dismiss based on the insufficiency of the evidence and motions to suppress or dismiss that are based on the defendant's discovery of facts not previously known.

A district court judge may not rule on a pretrial motion to suppress evidence or dismiss charges in an implied consent case in the same manner he or she might in any other criminal case. Instead, after

holding a hearing on the motion, the district court judge must set forth in writing his or her findings of facts and conclusions of law and "preliminarily indicate" whether the motion should be granted or denied. *See* G.S. 20-38.6(f). If the judge preliminarily indicates that the motion should be granted, the judge may not enter a final judgment on the motion until after the State has appealed to superior court or indicates that it does not intend to appeal. If the judge preliminarily indicates that the motion should be denied, he or she may proceed to enter a final judgment denying the motion. The defendant may not appeal the district court's denial of a pretrial motion to suppress or dismiss, see G.S. 20-38.7(b), though upon conviction, the defendant may appeal to superior court for trial de novo as provided in G.S. 15A-1431.

A. Time for appeal.

G.S. 20-38.7 does not set forth a time limit for filing a notice of appeal. The court of appeals has determined that, given the absence of a specific statutory rule, the State must appeal from a preliminary determination within a reasonable time. *State v. Fowler*, 197 N.C. App. 1 (2009).

B. Procedure for appeal.

G.S. 20-38.7 does not prescribe rules for appealing from a preliminary determination. The court of appeals in *State v. Palmer*, 197 N.C. App. 201 (2007), looked to the procedures in G.S. 15A-1432(b) to determine whether the State properly appealed pursuant to G.S. 20-38.7(a).

Assuming without deciding that the State was required to file written notice of appeal, the *Palmer* examined whether the State's written notice in that case sufficiently conformed to the requirements of G.S. 15A-1432(b), which requires appeal by written motion specifying the basis of the appeal. Motions for appeal under this provision must be filed with the clerk and served upon the defendant. The *Palmer* court found the State's appeal proper. The State filed a document captioned "State's Appeal to Superior Court," including in the caption the defendant's name and address and the case file number. The document stated that the State "appeals to the superior court the district court preliminary determination granting a motion to suppress or dismiss," enumerated the issues raised in the defendant's motion, and "recited almost verbatim all of the district court's findings of fact." The appellate court rejected the superior court's conclusion that the State's failure to provide the date of the preliminary determination rendered its notice of appeal insufficient. The court likewise rejected the defendant's contention that the State's failure to include the month on its certificate of service rendered the State's appeal insufficient as a matter of law, noting that the defendant was not misled or prejudiced by the error.

C. Standard of review.

If the State appeals a district court preliminary determination granting a motion to suppress or dismiss to superior court, and there is a dispute about the findings of fact, the superior court must determine the matter de novo. *See* G.S. 20-38.7(a). If there is no dispute about the findings of fact, the superior court reviews for error the district court's conclusions of law. The State may obtain a de novo hearing without setting forth the specific findings of fact to which it objects unless there is an administrative order requiring specific objections. *State v. Miller*, 247 N.C. App. 628 (2016).

D. Action by superior court.

The superior court does not itself suppress evidence or dismiss the charges. Instead, the superior court must enter an order remanding the matter to district court with instructions to enter a final judgment granting or denying the motion. *See State v. Fowler*, 197 N.C. App. 1 (2009) (interpreting G.S. 20-38.6(f) to require remand for entry of final order).

III. Appeal for trial de novo.

A defendant convicted in district court may appeal to superior court for trial de novo. G.S. 15A-1431(b). Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. G.S. 15A-1431(c).

A. Withdrawal of appeal.

Within 10 days. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. After 10 days, if an appeal has been entered and not withdrawn, the clerk must transfer the case to superior court. G.S. 15A-1431(c).

Before calendaring. The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal is taken, for execution of the judgment. G.S. 15A-1431(g).

After calendaring. The defendant may withdraw his appeal after the calendaring of the case for trial de novo only by consent of the court, and with the attachment of the costs of that court, unless the costs are remitted by the court. The case may then be remanded by order of the superior court to the district court. G.S. 15A-1431(h).

Status of district court judgment. Appeal for trial de novo in superior court stays the execution of all portions of the district court judgment. G.S. 15A-1431(f1). In most cases, when an appeal is withdrawn, the case is remanded for execution of the original judgment imposed in district court.

Special rule in implied consent cases. A different rule applies in implied consent cases when a defendant appeals to superior court for trial de novo and subsequently withdraws or her his appeal. In such a circumstance, when an appeal is withdrawn or a case is remanded, the sentence imposed by the district court is vacated and the district court must hold a new sentencing hearing and consider any new convictions. G.S. 20-38.7(c).

The district court sentence is *not* vacated, however, if one of the following conditions is met:

- The appeal is withdrawn within 10 days of entry of judgment and the prosecutor has certified to the clerk that he or she has no new sentencing factors to offer to the court.

- The appeal is withdrawn before calendaring and remanded and the prosecutor has certified to the clerk that he or she has no new sentencing factors to offer to the court.

- The appeal is withdrawn and remanded after the calendaring of the case and the prosecutor has certified to the clerk in writing that the prosecutor consents to the withdrawal and remand and has no new sentencing factors to offer the court.

G.S. 20-38.7(c).

B. Appeal from resentencing in district court.

A defendant may appeal to the superior court from a resentencing in district court pursuant to G.S. 20-38.7(c) if:

- The sentence is based on additional factors considered by the district court that were not considered in the previously vacated sentence; and

- The defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

G.S. 20-38.7(d).

IV. Sentencing.

Convictions for the following offenses are sentenced pursuant to G.S. 20-179:

- G.S. 20-138.1 (impaired driving),
- G.S. 20-138.2 (impaired driving in a commercial vehicle),
- Second or subsequent conviction under G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol), and
- Second or subsequent conviction under G.S. 20-138.2B (operating a school bus, child care vehicle, emergency or law enforcement vehicle after consuming alcohol).

G.S. 20-179 requires the court to hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed. G.S. 20-179(a). Those findings are entered on the Impaired Driving Determination of Sentencing Factors form, AOC-CR-311.

A. Burden of proof.

The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the defendant bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

B. Duties of prosecutor.

Before the hearing the prosecutor must make all feasible efforts to secure the defendant's full record of traffic convictions. The prosecutor must present that record to the judge at the hearing. In addition, the prosecutor must present all other appropriate grossly aggravating and aggravating factors of which he or she is aware. The prosecutor also must present evidence of the alcohol concentration resulting from a valid chemical analysis of the defendant.

C. Notice of aggravating factors.

When a misdemeanor impaired driving conviction entered in district court is appealed for trial de novo in superior court, the State must notify the defendant no later than ten days before trial that it intends to prove one or more aggravating factors. G.S. 20-179(a1)(1). If the State fails to provide that notice, the factors may not be used by the superior court to determine the defendant's sentence.

- *State v. Hughes*, ___ N.C. App. ___, 827 S.E.2d 318 (April 16, 2019). The State's failure to provide notice of aggravating factors as required by G.S. 20-179(a1)(1) precludes the trial court from considering those factors at sentencing – even if evidence supporting those factors was presented in district court. The court reasoned that while using sentencing factors in district court "may notify a defendant of the existence of evidence supporting those factors, it does not give adequate notice of the State's intent to use those factors in a subsequent *de novo* proceeding, in a separate forum, potentially tried by a different prosecutor." *Id.* at ___; 827 S.E.2d at 321.

  The *Hughes* court rejected the State's argument that the defendant was not prejudiced by the error because the existence of the aggravating factors was not disputed and providing notice would not have changed the result at sentencing. The court concluded that the defendant ***was*** prejudiced: The court erroneously relied upon factors for which no notice had been provided. And the court's reliance on those factors resulted in a harsher sentence.

- *State v. Williams*, ___ N.C. App. ___, 786 S.E.2d 419 (June 21, 2016). The court construed G.S. 20-179(a1)(1) as written and rejected the defendant's argument that the superior court erred by relying on aggravating factors that the State served notice of seven days before trial in an impaired driving case within the court's original jurisdiction.

  The defendant in *Williams* also argued that the State's failure to provide notice violated his Sixth Amendment right to be afforded notice of the charges against him. The court of appeals rejected that argument on the basis that the defendant's sentence had been enhanced solely by prior convictions – factors for which he was not constitutionally entitled to notice. Moreover, the court noted that the State had provided the defendant with notice of its intent to prove these aggravating factors seven days before trial, which arguably satisfied the Sixth Amendment's requirement for "reasonable notice."

D. Procedure for determining aggravating factors.

If the defendant does not admit to the existence of an aggravating factor (other than the fact of a prior conviction) only the jury may determine if it is present.

- **Defendant admits to aggravating factor.** The defendant may admit to the existence of an aggravating factor. If he or she does so, the factor must be treated as though it were found by a jury. If the defendant does not so admit, only a jury may determine if an aggravating factor is present.

If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying charge, a jury must be impaneled to dispose of the charge only. In that case, evidence that relates solely to the establishment of an aggravating factor may not be admitted.

- **Defendant admits guilt, but not aggravating factor.** If the defendant pleads guilty to the charge, but contests the existence of one or more aggravating factors, a jury must be impaneled to determine if the aggravating factor or factors exist.

- **Defendant pleads not guilty and does not admit aggravating factor.** The jury impaneled for the trial may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination.

  If the court determines that a separate proceeding is required, the proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue.

E. Concurrent, consolidated, and consecutive sentences.

Separate judgments. There generally should be a separate judgment imposed for each impaired driving conviction sentenced under G.S. 20-179. For each such conviction, save for two exceptions, a judge must determine whether any of the statutory aggravating or mitigating factors that dictate the applicable level of punishment exist. G.S. 20-179(f2). No such finding of factors is required if the defendant's conviction of impaired driving is premised upon the common law concept of aiding and abetting or if the impaired driving charge is consolidated with a charge carrying a greater punishment. *Id.*

Concurrent sentences permissible. Sentences imposed under G.S. 20-179 for impaired driving may run concurrently with each other and with other sentences. G.S. 15A-1354(a), which applies to sentences imposed pursuant to G.S. 20-179 as well as to Structured Sentencing Act sentences, provides that in the absence of a statutory provision requiring a consecutive sentence or specification in the judgment that the sentences are to run consecutively, sentences imposed at the same time or upon a person already subject to an undischarged term of imprisonment run concurrently.

Sentences imposed for the offense of habitual impaired driving under G.S. 20-138.5 must run consecutively with and must commence at the expiration of any sentence being served. G.S. 20-138.5(b).

Limits on consolidation. Two or more impaired driving charges sentenced under G.S. 20-179 ***may not be*** consolidated for judgment. G.S. 20-179(f2).

An impaired driving charge sentenced under G.S. 20-179 ***may be*** consolidated with a conviction subject to greater punishment under the Structured Sentencing Act. G.S. 20-179(f2). In that circumstance, the judgment must contain a sentence appropriate for the most serious offense. *See* G.S. 15A-1340.15(b). It also appears to be permissible to consolidate a lesser misdemeanor that is not subject to sentencing under G.S. 20-179 with an impaired driving offense sentenced under G.S. 20-179.

Special rules for related convictions. A separate statutory sentencing rule provides that if convictions for G.S. 20-138.2 (driving while impaired in a commercial vehicle) and G.S. 20-138.1 (driving while impaired) arise from the same driving incident, the aggregate punishment may not exceed the maximum punishment applicable to the offense of impaired driving under G.S. 20-138.1. G.S. 20-138.2(e). The same rule applies to sentencing for convictions of G.S. 20-138.3 (driving by a person under 21 after consuming) and G.S. 20-138.1 that are based on the same driving incident. G.S. 20-138.3(c).

V. Limited Driving Privileges.

A. Revocation for conviction of DWI.

G.S. 20-17(a)(2) requires DMV to revoke the license of any driver convicted of impaired driving under G.S. 20-138.1. The revocation may be for one or four years or may be permanent, depending upon whether the person previously has been convicted of an offense involving impaired driving, when that offense occurred, and the level at which a person is sentenced.

B. Application for limited driving privilege.

A person convicted of impaired driving may apply for a limited driving privilege at the time judgment is entered or at a later time during the revocation period. If the person applies after sentencing, he or she must file the application with the clerk in duplicate. The clerk may not schedule a hearing until a reasonable time after the clerk files a copy of the application with the district attorney's office.

The hearing must be scheduled before the presiding judge at the applicant's trial if that judge is assigned to a court in the district court district or superior court district in which the conviction for impaired driving was imposed. If the presiding judge is not available within the district at the conviction was imposed in superior court, the hearing must be scheduled before the senior resident superior court judge.

C. Eligibility.

A person whose license is revoked for impaired driving under G.S. 20-138.1 is eligible for a limited driving privilege only if he or she is sentenced at Level Three, Four, or Five. The person also must satisfy each of the following additional conditions.

- The person must be revoked solely under G.S. 20-17(a)(2).
- At the time of the offense, the person must have been validly licensed or have had a license that had been expired for less than a year.
- The person must not have been convicted of an offense involving impaired driving within the seven years preceding the offense.
- Subsequent to the offense, the person must not have been convicted of or have an unresolved charge of an offense involving impaired driving.
- The person must have obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6.
- Finally, the person must furnish proof of financial responsibility, or establish that he or she is exempt from this requirement, and must, upon issuance of the privilege, pay a processing fee of $100.

D. Authorized Driving

A limited driving privilege issued to a person pursuant to G.S. 20-179.3 may authorize driving of a non-commercial motor vehicle for essential purposes related to

- the person's employment,
- maintenance of the person's household,
- the person's education,
- the person's court-ordered treatment or assessment,
- community service ordered as a condition of the person's probation,
- emergency medical care, and
- religious worship.

Driving that is not related to these purposes is unlawful even if done at times and on routes authorized by the privilege. Driving for essential medical care is authorized at any time and without restriction as to routes.

Driving for work-related purposes during standard working hours. A limited driving privilege may authorize driving for work-related purposes during standard working hours—6:00 a.m. to 8:00 p.m. on Monday through Friday—without specifying the times and routes during/on which the driving must occur. The limited driving privilege must state the name and address of the applicant's place of work or employer, and it may include other information and restrictions applicable to work-related driving in the discretion of the court.

Driving generally during nonstandard hours. If the applicant is not required to drive for essential work-related purposes except during standard working hours, the limited driving privilege must prohibit driving during nonstandard working hours unless the driving is authorized as essential to the completion of any

- community work assignments,
- course of instruction at an Alcohol and Drug Education Traffic School, or
- substance abuse assessment or treatment that is ordered by the court as a condition of probation for the impaired driving conviction.

If driving for these purposes is to occur during nonstandard working hours, additional information must be included. G.S. 20-179.3(g2).

Driving to and from the applicant's place of religious worship also may be authorized during nonstandard working hours if additional documentation is provided. G.S. 20-179.3(g2).

Driving for work during nonstandard hours. If the person is required to drive for an essential work-related purpose outside of standard working hours, he or she must present documentation of that fact before the judge may authorize driving for this purpose during those hours. If the person is self-employed, the documentation must be attached to or made a part of the limited driving privilege. If the judge determines that it is necessary for the applicant to drive during nonstandard hours for a work-related purpose, he or she may authorize such driving subject to the following limitations:

- If the person is required to drive to and from **a specific place of work at regular times**, the limited driving privilege must specify the general times and routes during/on which the person will be driving to and from work and restrict driving to those times and routes.
- If the person is required to drive to and from **work at a specific place but is unable to specify the times** at which that driving will occur, the limited driving privilege must specify the general routes on which the person will be driving to and from work and restrict the driving to those general routes.
- If the person is required to drive to and from **work at regular times but is unable to specify the places** at which work is to be performed, the limited driving privilege must specify the general times and geographic boundaries during/in which the applicant will be driving and restrict driving to those times and within those boundaries.
- If the person **can specify neither the times nor places during/to which he or she will be driving for work**, or if the person is **required to drive during nonstandard working hours as a condition of employment**, the limited driving privilege must specify the geographic boundaries in which the person will drive and restrict driving to within those boundaries.

E. Alcohol Restriction

The limited driving privilege also must prohibit the driver from consuming alcohol while driving and from driving at any time while he or she has remaining in his or her body any alcohol or controlled substance previously consumed, unless the controlled substance was lawfully obtained and taken in therapeutically appropriate amounts.

F. Form Petition and Order

The form order for a limited driving privilege for a person convicted of impaired driving under G.S. 20-138.1 is AOC-CR-312.

G. High-Risk Drivers

As is the case for any person convicted of impaired driving in violation of G.S. 20-138.1, a person so convicted based on an alcohol concentration of 0.15 is subject to a license revocation of at least one year. And if evidence that the person had an alcohol concentration of 0.15 or more was presented at trial or sentencing, the limited privilege must contain additional restrictions that reflect the person's status as a "high-risk driver."

Limited driving privilege requirements for high-risk drivers. A limited privilege issued to a person whose license is revoked upon conviction of impaired driving in violation of G.S. 20-138.1 and who had an alcohol concentration of 0.15 is subject to the following restrictions:

1. The limited driving privilege may not become effective until at least 45 days after the final conviction under G.S. 20-138.1.
2. The limited driving privilege must restrict the driver to operating only a designated motor vehicle.
3. The limited driving privilege must require that the designated motor vehicle be equipped with a functioning ignition interlock system of a type approved by NC DMV, which is set to prohibit driving with an alcohol concentration greater than 0.00.
4. The limited driving privilege must require that the driver personally activate the ignition interlock system before driving the motor vehicle.
5. Finally, the limited driving privilege must restrict the applicant to driving only to and from the applicant's place of employment, the place the applicant is enrolled in school, any court-ordered treatment or substance abuse education, and any ignition interlock service facility.

Form order. AOC-CR-340 is the form for such privileges.

Exception for employer-owned vehicles. The ignition interlock restrictions for a limited driving privilege that are set forth as requirements (2), (3), and (4) above do not apply to a motor vehicle that is owned by the driver's employer and that the driver operates solely for work-related purposes. For this exception to apply, the owner of the vehicle must file with the court a written document authorizing the driver to drive the motor vehicle for work-related purposes under the authority of the limited driving privilege.