# Selected Impaired Driving Cases
# 2000-2008

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**October 10, 2008**

## Substantive Offense

**State v. Cornett, 177 N.C. App. 452, 629 S.E.2d 857 (2006).** Dead end dirt road with six homes on it, with driveways leading off of the road to each house is a public vehicular area; it is road within or leading to a subdivision. There were no gates or signs indicating it was a private road. No right to discovery in criminal district court, apart from constitutional interests such as those implicated in Brady v. Maryland and its progeny.

**State v. Crow, 175 N.C. App. 119, 623 S.E.2d 68 (2005).** "Stand-up scooter" is a vehicle; it is not excepted from the impaired driving statute (as bicycles and lawnmowers were until 12/1/06), it is not an electric personal assistive mobility device, and is not intended to aid those with mobility impairments (such as a motorized wheelchair). Legislature's specific exemptions suggest legislative intent to include all other devices covered by statutory definition of vehicle.

**State v. Highsmith*,* 173 N.C. App. 600, 619 S.E.2d 586 (2005).** Defendant's admission that he took Floricet, a pain medication was admissible and not in violation of *corpus delicti* rule where expert testified about effects of the drug and officer testified about defendant's impaired faculties. Involuntary intoxication instruction not required in this case, and is only involuntary when "alcohol is introduced into a person's system without his knowledge or by force majeure." Knowing ingestion of drug is not involuntary.

**State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443 (2005).** Defense of necessity applicable to DWI cases; defense applicable when a person "acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice." Defense is limited to situations where "a human being was thereby saved from death or peril, or relieved from severe suffering." Defense assertion that defendant steered runaway truck to avoid its running into a house were questions for the jury.

**State v. Gregory, 154 N.C. App. 718, 572 S.E.2d 838 (2002).** Neither intoxilyzer test nor field sobriety tests are required to establish that a person's faculties are appreciably impaired. Officer's opinion, as a lay witness, is competent to establish that defendant's faculties are impaired.

**State v. Mark, 154 N.C. App. 341, 571 S.E.2d 867 (2002).** The following evidence was sufficient to withstand a motion to dismiss, based on a failure to prove that the driving occurred on a street: it took place on "Florida Street", which was near US Hwy 29 and twice the normal width of a "normal street 'out in the county'".

**State v. Scott, 146 N.C. App. 283, 551 S.E.2d 916 (2001).** Following evidence found to be insufficient to support conviction of impaired driving. (1) Defendant brought vehicle to rest in an intersection upon being told to stop; (2) Defendant left vehicle, approached officer, and reenter vehicle at officer's request; (3) Officer smelled alcohol coming from vehicle; (4) Open beer bottle on the car seat, half full; (5) Officer noticed odor of alcohol from defendant's person; (6) Defendant had slurred speech. No evidence of difficulty in controlling the vehicle, no weaving in or out of lane while driving, did not stumble or have any trouble walking. Defendant was compliant, courteous and non-combative. Defendant was not asked to submit to field sobriety tests.

**State v. Streckfuss*, *171 N.C. App. 81, 614 S.E.2d 323 (2005).** Law enforcement officer who is not qualified by specific training to administer field sobriety tests may testify as to the specific actions he takes and a defendant's response, and may base his opinion about impairment on the specific conduct of the defendant, but not because the "failed the tests."

**State v. Jones*, *140 N.C. App. 691, 538 S.E.2d 228 (2000).** A truck tractor, designed to pull a commercial trailer weighing more than 10.000 lbs., is a commercial vehicle even when driven without the trailer. Evidence from an officer that the vehicle was a "transfer truck, tractor trailer truck" and admission from driver that the vehicle weighed 78,000 lbs, when loaded with a load of produce was sufficient to establish that the trailer have a vehicle weight of more than 10,000 lbs.

**State v. Fuller*, *176 N.C. App. 104, 626 S.E.2d 655 (2006).** Officer's testimony that he relied on Alco-sensor to form his opinion that the defendant was impaired was not error where officer did not reveal results and jury was instructed to disregard the testimony.

**State v. Speight*, *___ N.C. App. ____ , 650 S.E. 2d 452 (18 September 2007).** Failure to submit aggravating factors to jury in DWI sentencing ruled harmless error, under facts of the case, finding evidence that aggravating factor present was overwhelming and uncontroverted. Defendant failed to bring forth facts contesting the omitted element and failed to raise evidence sufficient to support a contrary finding. Factors were use of weapon or device that posed great risk of death to more than one person and killing another person in course of the conduct that led to the conviction. (These two factors related to two separate manslaughter convictions arising out of an impaired driving incident).

**State v. Morgan, ___ N.C. App.___ , 660 S.E.2d 545 (15 April 2008).** Defendant alleged at district court trial that officer's affidavit used to establish probable cause for arrest was notarized by person who was not authorized to do because the document did not contain the expiration date of the person's commission as a notary. The district court judge dismissed the case due to lack of evidence because there was no probable cause for the arrest without the affidavit, and the affidavit was ruled to be deficient by the district court. Since the dismissal was based on lack of evidence, jeopardy had attached and the case could not be reopened. That is true even though the appellate court stated the court was incorrect as a matter of law to exclude evidence based on the technical violation, since there was other evidence to indicate when the notary's commission would expire.

**State v. Wilson, ___ N.C. App. ___ , 661 S.E.2d 327 (6 May 2008) (unpublished op.).**
Defendant failed to file motion to suppress prior to trial in superior court, and failed to meet his

burden of establishing that he did not have a reasonable opportunity to make motion before trial. (Note: case arouse before 2006 amendments, which impose similar rule in district court motions in impaired driving cases.)

**State v. Corbett, ___ N.C. App ___, 661 S.E.2d 759 (17 June 2008).** Defendant was charged with misdemeanor DWI by citation on January 7, 2006. Meanwhile, a grand jury indicted defendant in superior court on September 5, 2006 for misdemeanor DWI and felony habitual DWI. Both charges were based on defendant's operation of a vehicle on January 7, 2006. The grand jury issued a superseding indictment for the same two offenses on September 25, 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on December 11, 2006.

Defendant's misdemeanor DWI citation was not dismissed from district court after he was indicted in superior court. While his case was pending in superior court, he pled guilty in district court on November 27, 2006 to the misdemeanor DWI offense. The district court continued sentencing until December 27, 2006. After the defendant pled guilty in district court, the state dismissed the felony habitual DWI charge in superior court because of the defendant's plea of guilty in district court to misdemeanor DWI for the January 7 offense.

At defendant's December 27, 2006 sentencing in district court, the state moved to strike defendant's guilty plea. The district court entered an order on December 29, 2006 concluding that because defendant had been indicted for the misdemeanor and felony DWI offenses in superior court on September 5, 2006, the district court lacked jurisdiction to accept defendant's guilty plea on November 27, 2006. Therefore, the district court struck defendant's November 27, 2006 guilty plea to the misdemeanor DWI charge as void ab initio. Defendant was never sentenced for the DWI in district court.
After defendant's guilty plea in district court was stricken, a grand jury on January 2, 2007, issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI. Defendant moved to dismiss the new charges in superior court on grounds of Double Jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the state from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charge in superior court as a predicate offense for the felony habitual DWI charge. The superior court denied defendant's motion to dismiss. Defendant appealed to the court of appeals on the basis that the superior court erroneously failed to dismiss the charges against him based on double jeopardy. The state filed a motion to dismiss the defendant's appeal on the basis that he had no statutory right to appeal his conviction and waived appellate review of his double jeopardy argument.

The court of appeals concluded that the defendant waived review of double jeopardy issues by pleading guilty, relying on State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971). The defendant argued that Menna v. New York, 423 U.S. 61 (1975), controlled – rather than Hopkins. In *Menna*, the U.S. Supreme Court held that the defendant's guilty plea did not waive his claim that his conviction amounted to double jeopardy. The court of appeals concluded that even though *Menna* and *Hopkins* conflicted, it was bound by Hopkins, the Supreme Court of North Carolina's interpretation, until otherwise instructed. Judge Elmore dissented, concluding that the Court was bound by *Menna*, and that defendant's felony habitual DWI conviction should be vacated.

**State v. Hernandez, ___ N.C. App. ___, 655 S.E.2d 426 (15 January 2008).** Hernandez and Pedro were involved in an automobile accident in Pender County. The car hit a ditch and landed thirty to forty feet away in a bean field. Two Highway Patrol Troopers, Dezso and Henline, arrived after the accident. No one was in the car when they arrived. Trooper Dezso saw the steering wheel air bag had deployed and there was blood on the airbag. He also noticed Hernandez had blood near his nose and on his shirt. Trooper Henline saw that Pedro had a fabric burn extending from her right shoulder to her collarbone, Hernandez's nose was bleeding, and bloodstains were on his shirt. Trooper Henline asked Hernandez to produce a driver's license. He did not have an NC license in his possession. Later, Pedro told Trooper Henline that she had been driving.

Trooper Henline smelled a strong odor of alcohol from Hernandez. Trooper Henline took Hernandez to a law enforcement center and an Intoxilyzer test was administered, resulting in a BAC of .26. Hernandez was charged with driving while impaired and operating a motor vehicle without a license. Pedro was charged with giving false information for a motor vehicle crash report in violation of G.S. 20-279.31(b).

At trial, Hernandez and Pedro moved to dismiss the charges at the close of all the evidence. The trial court reserved its ruling on those motions. The jury returned guilty verdicts, and defendants moved for judgments notwithstanding the verdicts. The trial court granted the defendants' motions and vacated the jury's verdicts. The State appealed, contending the trial court erred in vacating the jury's verdicts because the evidence was sufficient to submit the case to the jury. Hernandez and Pedro appealed on the basis that the trial court's decision to reserve its ruling on the defendants' motions to dismiss at the close of all the evidence violated G.S. 15A-1227(c) and the defendant's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The court agreed with the state that a reasonable jury could infer from the physical evidence that Hernandez was the driver based upon Pedro's right shoulder burn, the lack of blood on the passenger side of the vehicle, the blood on the driver's side air bag, and blood on Hernandez. This circumstantial evidence of driving also supported the conclusion that Hernandez was the driver of the car also supported the conviction for driving with no operator's license. The court further concluded that the state presented substantial evidence that Pedro gave false information in violation of G.S. 20-279.31(b).

As to the trial court's decision to reserve ruling on the motions to dismiss at the close of all the evidence, the court recognized that G.S. 15A-1227(a) requires that a judge rule on a motion to dismiss for insufficiency of the evidence before the trial can proceed. However, to establish reversible error, the court held that a defendant must show a reasonable probability that had the error not been committed, a different result would have been reached at trial. Defendants argued that had the court ruled on their motions to dismiss before the jury's verdict, the court's decision would not have been appealable because reversal on appeal would have subjected the defendants to a new trial in violation of the Double Jeopardy Clause. The court stated that defendants' argument presumed that their motions would have been granted if the court had entered its decision before the jury reached its verdicts, but noted that the judge's comments indicated otherwise. The court concluded there was no reasonable probability that the pre-verdict motions would be granted and thus no prejudice to the defendants. Furthermore, the court concluded that there was sufficient evidence in the record to withstand a motion to dismiss.

**State v. Coffey, __ N.C. App. __, 658 S.E.2d 73 (18 March 2008).** Coffey was charged with DWI, DWLR, speeding 92 in a 45 mph zone, and reckless driving to endanger. At 12:05 a.m. on September 8, 2005, Corporal Anderson of the Caldwell County Sheriff's Department saw defendant's Ford Contour speeding down Connelly Springs Road, a two-lane road. Using a radar gun, Corporal Anderson determined that the vehicle was traveling 92 mph in a 45 mph zone. After passing Corporal Anderson, defendant's vehicle ran off the shoulder of the road, slinging rocks and gravel on to the patrol car. Corporal Anderson turned around and began to follow the defendant. Defendant slowed down, pulled into a driveway and stopped. Corporal Anderson walked up to the vehicle, where defendant was seated in the driver's seat, with his seatbelt on. Corporal Anderson smelled a strong odor of alcohol coming from the car and saw that defendant's eyes were red and glassy. Corporal Anderson asked the defendant to get out of the car. When he did, he had trouble maintaining his balance and used the side of the car to support himself.

Defendant refused to perform field sobriety tests. Corporal Anderson arrested him. When Corporal Anderson asked defendant to submit to an Intoxilyzer test, defendant responded: "I'm not doing a f------ thing or signing sh--." After reviewing defendant's vehicle registration and license information, Corporal Anderson determined that defendant was driving with a suspended license.

The jury found the defendant guilty of driving while impaired, speeding in excess of 80 mph in a 45 mph and reckless driving. The trial court sentenced defendant to a Level 1 term of imprisonment of 24 months, finding two grossly aggravating factors: (1) that defendant had been convicted of a prior offense of driving while impaired within the last seven years; and (2) at the time of the current offense, defendant was driving while his license was revoked due to an impaired driving revocation.

Defendant argued that the trial court's imposition of a sentence in the aggravated range violated Blakely v. Washington, 542 U.S. 296 (2004), and his Sixth Amendment right to trial by jury. He argued that the trial court should have submitted to the jury the issue of whether he was driving while his license was revoked for a prior impaired driving license revocation. The court found that the trial court should have submitted this issue to the jury but that its failure to do so was harmless beyond a reasonable doubt.

**State v. Corbett, ___ N.C. App ___, 661 S.E.2d 759 (17 June 2008).** Defendant was charged with misdemeanor DWI by citation on January 7, 2006. Meanwhile, a grand jury indicted defendant in superior court on September 5, 2006 for misdemeanor DWI and felony habitual DWI. Both charges were based on defendant's operation of a vehicle on January 7, 2006, for which he was cited. The grand jury issued a superseding indictment for the same two offenses on September 25, 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on December 11, 2006.

While defendant's case was pending in superior court, he pled guilty in district court on November 27, 2006 to the misdemeanor DWI offense. The district court continued sentencing until December 27, 2006. After the defendant pled guilty in district court, the state dismissed the felony habitual DWI charge in superior court because of the defendant's plea of guilty in district court to misdemeanor DWI for the January 7 offense. At defendant's December 27, 2006

sentencing in district court, the state moved to strike defendant's guilty plea. The district court entered an order on December 29, 2006 concluding that because defendant had been indicted for the misdemeanor and felony DWI offenses in superior court on September 5, 2006, the district court lacked jurisdiction to accept defendant's guilty plea on November 27, 2006. Therefore, the district court struck defendant's November 27, 2006 guilty plea to the misdemeanor DWI charge as void ab initio. Defendant was never sentenced for the DWI offense in district court.

After defendant's guilty plea in district court was stricken, a grand jury on January 2, 2007, issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI. Defendant moved to dismiss the new charges in superior court on grounds of Double Jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the state from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charge in superior court as a predicate offense for the felony habitual DWI charge. The superior court denied defendant's motion to dismiss. Defendant appealed.

The court of appeals majority relied upon State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971), in concluding that the defendant waived his right to raise a Double Jeopardy claim by pleading guilty. Defendant Corbett argued that Menna v. New York, 423 U.S. 61 (1975), controlled – rather than Hopkins. In *Menna*, the U.S. Supreme Court held that a guilty plea did not waive a claim of double jeopardy. The state court of appeals concluded that even though *Menna* and *Hopkins* conflicted, it was bound by *Hopkins*. Judge Elmore dissented, concluding that the court was bound by *Menna*, and that defendant's felony habitual DWI conviction should be vacated.

**State v. Narron, ___ N.C. App. ___, ___ S.E.2d. ___ (7 October 2008).** Defendant appealed his impaired driving conviction, alleging that G.S. 20-138.1(a)(2), which provides that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" creates a mandatory presumption that violates due process. The court concluded that this phrase codified a longstanding common law rule that once the trial court determined that the chemical analysis was valid, the reading was reliable evidence sufficient to satisfy the state's burden of proof as to this element of the offense of impaired driving. The court concluded that G.S. 20-138.1(a)(2) requires that properly admitted results of a chemical analysis be treated as prima facie evidence of a defendant's alcohol concentration. The court rejected the defendant's argument that the language created an unconstitutional presumption. Instead, the court reasoned that the statute authorizes the jury to find that the report is what it purports to be – the results of a chemical analysis showing the defendant's alcohol concentration. The court also found no prejudice to the defendant in the court's statement to the jury that the results of a chemical analysis are deemed sufficient evidence of a person's alcohol concentration.

## License Revocations

**State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2002).** Increase in length of pretrial revocation under CVR statute (GS 20-16.5) does not reflect legislative purpose to make it a "punishment" for double jeopardy purposes (notwithstanding some public statements by governmental leaders that could be read as reflecting that purpose); nor is the effect punitive, nor is the fact that limited privileges require economic resources not available to everyone.

**Cooke v. Faulkner, 137 N.C. App. 755, 529 S.E.2d 512 (2000).** Courts have no jurisdiction to review permanent revocations entered pursuant to GS 20-138.5 (habitual DWI).

**State v. Bowes, 360 N.C. 55, 619 S.E.2d 502 (2005)**, vacated court of appeals decision reported at 159 N.C. App. 18, 583 S.E.2d 294 (2003) and dismissed appeal to supreme court as moot. Vacated court of appeals opinion had held that trial court was authorized to grant limited driving privilege, such that judgment was binding on DMV, even if entered contrary to law; statute authorizing DMV to determine if limited driving privilege would be recognized as valid violated separation of powers doctrine; and DMV's invalidation of defendant's limited driving privilege violated defendant's right to due process.

**State v. Reid, 148 N.C. App. 548, 559 S.E.2d 561 (2002).** Revocation under CVR statute (GS 20-16.5) without the availability of a limited privilege to operate a commercial vehicle is not "punishment" and thus it was not double jeopardy to also try and convict the defendant for the conduct that led to the license revocation.

**State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (2005).** Revocation under CVR statute (GS 20-16.5) of license of an out-of-state resident was not "punishment" and thus it was not double jeopardy to also try and convict the defendant for the conduct that led to the license revocation; the fact that the driver might have been unable to drive in his home state during the period was not sufficient to convert the license revocation to one that constituted "punishment" for double jeopardy purposes.

**State v. Benbow, 169 N.C. App. 297, 610 S.E.2d 297 (2005).** Trial court has no jurisdiction to exempt motorist from requirement that he or she use an ignition interlock as a condition of getting a restored license, even if medical testimony suggests that is an appropriate thing to do. (*Note: 2006 legislation addressed this issue, for offenses committed on or after 12.1.06.)*

**State v. Hinchman, __ N.C. App ___, ___S.E.2d ___ (16 September 2008).** On June 23, 2004, defendant (who was then under 21) and some of his friends were drinking alcohol at defendant's parents' house. They then left the house in defendant's car. Defendant lost control of the car and hit a guard rail. The car turned over. State Highway Patrol Trooper William Brown arrived on the scene minutes after the crash. Defendant said that he was driving and that he was not hurt. Trooper Brown smelled alcohol on defendant's breath and saw that his eyes were red and glassy. Trooper Brown arrested the defendant and charged him with impaired driving [G.S. 20-138.1], driving after consuming by a person under 21 [G.S. 20-138.3], and reckless driving [G.S. 20-140]. Trooper Brown took the defendant to Pitt County Memorial Hospital where an employee of the blood laboratory at the hospital drew the defendant's blood. The SBI lab report revealing a BAC of .10 was completed on August 30, 2004.

The district court entered a revocation order pursuant to G.S. 20-16.5 on November 5, 2004, ordering defendant to surrender his driver's license and revoking his license for a minimum of thirty days. Defendant moved to dismiss the impaired driving charge on the basis that revocation of his license was criminal punishment and that further prosecution would subject him to double jeopardy.

The court of appeals rejected the defendant's contention that the license revocation was criminal rather than civil because the 135 day delay between his arrest and license revocation did not serve the intended purpose of the statute. The court cited Hudson v. United States, 522 U.S. 93 (1997), as establishing the principle that the criminal or civil nature of a sanction is "determined on the face of the statute" rather than on "an individual basis." Accordingly, the court relied upon State v. Evans, 145 N.C. App. 324, 334, 550 S.E.2d 853, 860 (2001), in concluding that the defendant's license revocation was a civil remedy. Thus, the court held that the defendant's right to be free from double jeopardy was not violated by his trial and conviction for impaired driving after the civil revocation.

## Chemical Testing

**State v. Hatley, ___ N.C. App. __, 661 S.E.2d 43 (20 May 2008)**. Defendant moved to suppress Intoxilyzer results based upon the denial of her statutory right to have a witness observe the test. Defendant was arrested for DWI and transported to the sheriff's office for an Intoxilyzer test. At 3:01 a.m., she was advised of her right to have a witness view the test. She called her daughter and spoke to her at 3:04 a.m. Defendant told the officer that her daughter was on her way. While the arresting officer normally informed the front duty officer that a witness was expected, the officer could not specifically remember doing so in this case. The test was delayed 34 minutes to give defendant's daughter time to arrive. Defendant submitted to the test without a witness after 34 minutes. The test concluded at 3:37 a.m. with a result of .11. Defendant was then taken to a magistrate. She ran into her daughter on the way.

Amy Hatley, defendant's daughter, testified at the suppression hearing that her mother called at 3:05 a.m. She immediately left her house and arrived at the sheriff's office 15 minutes later. When she arrived, she told the desk duty officer that she was "there for Debra Hatley" who was there for "a DUI." Amy Hatley waited 15 minutes. She then saw her mother and the arresting officer, who directed her to the magistrate's office.

The trial court denied Hatley's motion to suppress "[b]ecause Amy Hatley did not tell the officer she was there to be a witness." The court of appeals reversed, finding that the officer knew that the defendant had contacted a witness and that she was on her way to the sheriff's office. The court concluded that Amy Hatley timely arrived and made reasonable efforts to gain access to the defendant; therefore, defendant's statutory right to have a witness view the testing procedure was violated. The court rejected the state's argument that a potential witness to an Intoxilyzer test must state unequivocally and specifically that he or she has been called to view such a test.

**State v. Corriher, N.C. App. , 645 S.E.2d 413 (2007).** State forensic scientist allowed to offer expert testimony on the effect of leaving a blood sample in an unrefrigerated place (patrol car) for 12 days. (Effect is to lower the blood alcohol concentration from what it would have been

had the sample been properly preserved.) Any evidence of lack of supporting data in this particular study goes to weight of evidence, but is not sufficient to establish that the study used was not sufficiently reliable to justify excluding the evidence.

**State v. Teate, N.C. App. , 638 S.E.2d 29 (2006).** Alco-Sensor results admissible to determine probable cause to arrest. Officer was not certified to conduct field sobriety tests or roadside breath test, but defendant failed to object, so no error for court to consider the results. Retrograde extrapolation of breath test result was admissible; expert was qualified, method was reliable, evidence was relevant and probative value outweighed any prejudice.

**State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586 (2005).** Failure of state to request chemical analysis does not raise an inference of a defendant's sobriety.

**State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483 (2004).** Retrograde extrapolation expert testimony admissible when based on average elimination rate and on only one test of defendant's BAC.

**State v. McDonald, 151 N.C. App. 236, 565 S.E.2d 273 (2002).** Results of test on blood sample left in patrol car for three days admissible where state demonstrates compliance with provisions of GS 20-139.1, even though State Highway Patrol requires that sample be left in vehicle for no more than one hour. Error, if any, goes to weight and not to admissibility of evidence.

**State v. Roach, 145 N.C. App. 159, 548 S.E.2d 841 (2001).** Failure of chemical analyst to testify that he or she has a valid permit to administer a breath test is error and test result must be suppressed; unless jury verdict is clearly based on impairment of faculties prong of GS 20-138.1, must be retried.

**State v. Davis, 142 N.C. App. 81, 542 S.E.2d 236 (2001).** Blood test results from sample taken pursuant to search warrant admissible, even though in giving implied consent warnings, defendant told he had right to refuse to be tested. Evidence of refusal admissible, even though defendant not told that if he refused implied consent test, he could still be tested pursuant to other authority. Extrapolation from blood test results admissible.

**State v.Thompson, 154 N.C. App. 194, 571 S.E.2d 673 (2002).** There is no requirement that a chemical analyst actually hand a defendant a copy of the implied consent rights before the analyst reads the rights to the defendant if there is a copy in front of the defendant and the defendant is given a copy after the test is completed.

**State v. Tappe, 139 N.C. App., 533 S.E.2d 262 (2000).** Chemical analyst's testimony that he was in habit of performing simulator test was sufficient to establish compliance with regulations governing chemical testing, in a case in which there was ten years between the arrest and the trial.

**State v. Fuller, 176 N.C. App. 104, 626 S.E.2d 655 (2006).** Expert in retrograde extrapolation may give opinion as to alcohol concentration at the time officer made contact with defendant; that time is a relevant time after the driving even though there was a time gap between the accident and the officer's arriving at the scene (There was no evidence of intervening drinking). It was permissible to show expert's calculations to the jury. (Extrapolation resulted in opinion

that reading of 0.07 would have been 0.08 at time of contact with officer). Expert's testimony alone was sufficient to survive motion to dismiss, if other elements proved.

**State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (12 June 2008)**, *reversing in part*, 184 N.C. App. 401 (3 July 2007). Defendant was playing poker and drinking alcoholic beverages with friends. He drove away from the poker game in his own car. Witnesses testified that they saw defendant's car speeding and moving erratically moments before it crashed, swerving around other vehicles and on to the shoulder of the road. Defendant crashed his car into a car parked on the shoulder of I-40/I-85. Three men were sitting inside the parked car. One of the men was killed, and the other two men were seriously injured.

Defendant was indicted for second-degree murder and two counts of assault with a deadly weapon inflicting serious injury. On March 23, 2005, defendant filed a "Request for Voluntary Disclosure" of each expert witness the state intended to call, a summary of each expert opinion the State intended to present, and the results of all reports of scientific tests or studies made in connection with the case. Defendant filed a second discovery request on January 18, 2006.

The state retained Paul Glover, a research scientist and training specialist with the Forensic Test for Alcohol Branch at the NC Department of Health and Human Services, as an expert witness in blood analysis and the effects of alcohol and drugs on human performance and behavior. In a January 13, 2006 report, Glover prepared a retrograde extrapolation of defendant's blood alcohol concentration at the time of the crash. This analysis resulted in an estimated BAC of .08 at the time of the crash.

Defendant's trial was set for Monday February 20, 2006. On Wednesday, February 15, 2006, the state notified defendant that Glover would testify as an expert witness and provided Glover's curriculum vitae. On the afternoon of Friday, February 17, 2006, the state sent to defendant Glover's retrograde extrapolation report, which the prosecutor testified he received that day. Defendant filed a motion to continue the trial upon receiving the report, citing G.S. 15A-903(a)(2) and arguing that the State had failed to notify him of Glover's expert opinion within a reasonable time before trial. Defendant's counsel said that because of the late notice, he did not have sufficient time to find and consult an expert to rebut Glover's testimony.

The trial court denied defendant's motion to continue. Glover testified, and the jury found defendant guilty of second-degree murder and both counts of assault with a deadly weapon inflicting serious injury. Defendant appealed.

In a divided opinion the court of appeals found no error in part and remanded in part. The state appealed to the Supreme Court on the basis of the dissent.

The state supreme court concluded that the state violated G.S. 15A-903(a)(2) when it failed to furnish the defendant with sufficient notice of its intent to use blood alcohol concentration retrograde extrapolation evidence within a reasonable time before trial. The court distinguished State v. Fuller, 176 N.C. App. 104, 626 S.E.2d 655 (2006), noting that Fuller was a misdemeanor impaired driving case that originated in district court, while Cook's case originated in superior court, rendering statutory discovery requirements applicable. In addition, the defendant in *Fuller* moved to dismiss the case rather than simply for a continuance.

The supreme court concluded that the trial court's denial of the defendant's motion for a continuance was an abuse of discretion, though it cautioned that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. The court then applied harmless error analysis and found the error harmless beyond a reasonable doubt.

## Checkpoints

**State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005).** Defendant appealed drug and firearm convictions, alleging that evidence uncovered during an unlawful checkpoint stop should have been suppressed. Five police officers in Onslow County decided to "spontaneously throw a checkpoint up" for the stated purpose of checking licenses and registrations. The officers noted that passengers in Rose's car"seemed nervous" and, after questioning, discovered they had marijuana and a gun. The officers' statements regarding purpose of checkpoint were belied by other facts. No plan was created for the checkpoint or approved before-hand. The state offered no evidence as to why there was a particular need for checkpoint in this area of the county. Four of five officers were narcotics detectives, and the arrest was for drugs, not a license violation. A second officer was positioned to scan cars during the stop. Thus, evidence showed that actual purpose of checkpoint was to check for possible criminal activity – specifically narcotics possession.

The court of appeals held that the trial court was required to make findings of fact as to the checkpoint's purpose and that it could not simply accept State's invocation of a proper purpose, but had to closely review the scheme at issue. Moreover, even if court determines the primary programmatic purpose was lawful, it must determine the reasonableness of stop. This requires balancing the public's interest the with the individual's privacy interest under the test set forth in Brown v. Texas, 443 U.S. 47 (1979), which considers the (1) gravity of the public concern, (2) the degree to which the seizure advances public interest; and (3) the severity of the interference with individual liberty. The court noted that the tailoring of the checkpoint was in question given that the checkpoint was spontaneous and no evidence was presented regarding why the location was chosen. The severity of the interference, specifically the amount of discretion afforded field officers, also appeared to be an issue since the evidence suggested a lack of any limitation on the officers' discretion in the field other than the requirement that they stop every car.

**State v. Burroughs, 185 N.C. App. 498, 648 S.E.2d 561 (21 August 2007).** Charlotte-Meck PD set up a checkpoint on Park Road in Charlotte, where the defendant was stopped. Officer testified that this was a DWI checkpoint. The court noted that only certain purposes for checkpoints are constitutionally allowed and that where the stated purpose is at odds with the evidence, the trial court must inquire as to the actual purpose. But neither State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005), nor City of Indianapolis v. Edmond, 531 U.S. 32 (2000), requires that every trial court make extensive inquiries into the purpose behind every checkpoint. No evidence suggested that the stated purpose of the checkpoint (sobriety) was a mask for an unconstitutional purpose. Thus, the trial court erred in holding that the lack of evidence as to the *actual* -- versus the *stated* -- purpose required it to exclude the evidence obtained by the stop.

**State v. Veazey, ___ N.C. App. ___, 662 S.E.2d 683 (1 July 2008).** Defendant was charged with impaired driving after being stopped at a SHP checkpoint. Defendant alleged the checkpoint was unconstitutional. The trooper who set up the checkpoint was the sole witness at the the suppression hearing.

The trial court denied the motion to suppress in open court, stating as a finding that the trooper "Said the purpose of the checkpoint was to-for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina." In its written order denying the defendant's motion to suppress, the trial court stated that the trooper admitted the checkpoint was a "generalized checking station" and that he had significant discretion in operating it. Nonetheless, the trial court concluded that the checkpoint was proper and lawful.

The court of appeals noted that it had previously held that where there is no evidence to contradict the State's proffered purpose for the checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. However, where there is evidence that could support a finding of an unlawful purpose, the trial court cannot rely solely on the officer's statements regarding the checkpoint's purpose but instead must closely review the scheme at issue. The court of appeals concluded that the evidence was conflicting regarding the State's primary purpose. The court cited the trooper's testimony that the purpose was '"[t]o enforce any kinds of motor vehicle law violations," and as well as his testimony that he was "looking for all violations," including criminal violations that were not motor vehicle violations. The trooper also testified that the primary purpose of the checkpoint was to check for to check for driver's license, registration and insurance violations, as contrasted from all motor vehicle violations.

The court of appeals held that the trial court was required to make findings regarding the actual primary purpose of the checkpoint and was required to reach a conclusion reading whether this purpose was lawful. Merely reciting the trooper's testimony, as the court did in its oral findings and later in its written order, did not constitute a finding of fact resolving the conflicting evidence. Therefore, the court remanded the case to the trial court to issue new findings and conclusions regarding the primary programmatic purpose of the checkpoint. The court further held that even if the trial court had determined that the primary programmatic purpose of the checkpoint was lawful, it was then required to apply the three prong balancing inquiry set out in Brown v. Texas, 443 U.S. 47 (1979), to determine whether the checkpoint itself was reasonable.

**State v. Gabriel, ___ N.C. App. ___, ___ S.E.2d ___ (2 September 2008).** State Highway Patrol troopers set up driver's license checkpoint in an area in Charlotte where there had been several armed robberies the week before and where robbery suspects had been seen driving a stolen sports utility vehicle. The defendant was stopped by the checkpoint and ultimately charged with impaired driving. At trial, the defendant filed a motion to suppress the evidence obtained at the checkpoint on the basis that the checkpoint was unconstitutional.

During the hearing on the motion to suppress, Trooper White first testified that the checkpoint was set up because of the armed robberies. He later testified that the purpose was to "issue citations for anything that came through." Citing State v. Veazey, ___ N.C. App. ___, ___, 662 S.E.2d 683, 686 (2008) and State v. Rose, 170 N.C. App. 284, 288, 612 S.E.2d 336 (2005), the court of appeals held that because Trooper White's testimony varied regarding the primary

programmatic purpose of the checkpoint, the trial court could not simply accept the State's assertion of a proper purpose, but instead had to closely review the checkpoint scheme. The court explained that this "searching inquiry is required to ensure an illegal multi-purpose checkpoint is not made legal by the simple device of assigning the primary purpose to one objective instead of the other." The court of appeals determined that the trial court failed to make the requisite fact-findings and that, without those findings, the trial court could not determine whether the checkpoint was lawful. The court of appeals remanded the case to the trial court to take additional evidence and enter the required findings of fact and conclusions of law regarding the primary programmatic purpose (and, if the purpose was lawful, the reasonableness) of the checkpoint.

**Note: Cases dealing with other issues such as probable cause, reasonable suspicion to stop, pretrial release and jail access issues and *Crawford v. Washington* issues are contained in other School of Government materials available at [www.sog.unc.edu](http://www.sog.unc.edu).**