

# DWI Law Update

## 2008 Fall Superior Court Judges Conference



**SHEA RIGGSBEE DENNING**

**(919) 843-5120**

**[denning@sog.unc.edu](mailto:denning@sog.unc.edu)**

**SCHOOL OF GOVERNMENT  
UNC-CHAPEL HILL**

# Elements of Impaired Driving: G.S. 20-138.1



1. Drives
2. A vehicle
  - a) Including a lawnmower or bicycle
3. On a street, highway, or public vehicular area (new def'n of PVA)
  - a) Area used by the public for vehicular traffic at any time
  - b) Parking lots for businesses even if business is closed
  - c) Residential subdivision road included even if not public roads
4. while
  - a) Under the influence of an impairing substance, or
  - b) After consuming a sufficient quantity of alcohol that he has an alcohol concentration of .08 or more at any relevant time after the driving, or
  - c) With **any** amount of a Schedule I controlled substance or its metabolites in his blood or urine (New)
    1. Heroin, LSD, Ecstasy, MDMA, PCP, Morphine

# Impaired Driving in a Commercial Vehicle: G.S. 20-138.2



1. Drives
2. A commercial motor vehicle -- defined in G.S. 20-4.01(3d)
3. On a street, highway, or public vehicular area
4. while
  - a) Under the influence of an impairing substance, or
  - b) After consuming a sufficient quantity of alcohol that he has an alcohol concentration of .04 or more at any relevant time after the driving, or
  - c) **With *any* amount of a Schedule I controlled substance or its metabolites in his blood or urine**

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- \* CVR for .04 BAC or refusal (revokes privilege to drive any vehicle – commercial or passenger vehicle for at least 30 days)
  - \* DMV revocation of regular passenger license of a commercial driver for BAC of .06
  - \* First conviction of 20-138.1 or 20-138.2 disqualifies person from driving commercial vehicle for 1 year

# Habitual Impaired Driving: G.S. 20-138.5



1. Driving while impaired under G.S. 20-138.1
2. After being convicted of 3 or more offenses involving impaired driving within 10 years of the date of the offense

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- Offenses involving impaired driving are:

- Impaired driving
- Habitual impaired driving
- Impaired driving in commercial vehicle
- Death by vehicle under G.S. 20-141.4 based on impaired driving
- 1st or 2nd degree murder under G.S. 14-17 based on impaired driving
- Involuntary manslaughter under G.S. 14-18 based on impaired driving
- Substantially similar offenses committed in another state or jurisdiction

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- Class F Felony
  - Minimum active term of 12 months, cannot suspend sentence
  - Sentence must be consecutive to any sentence being served

# Felony Death by Vehicle: G.S. 20-141.4(a1)



1. Unintentionally cause death of another person
2. While engaged in impaired driving under G.S. 20-138.1 or G.S. 20-138.2
3. And impaired driving is proximate cause of the death of another
  - DWI does not have to be sole or immediate cause of death
  - Need only be contributing cause if direct cause is a natural result of the criminal act
  - Contributory negligence not a defense
- Class E Felony (before December 1, 2006, was a Class G felony)

# Aggravated Felony Death By Vehicle: G.S. 20-141.4(a5)



1. Felony Death by Vehicle

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2. Conviction involving impaired driving within 7 years

- Impaired driving
- Habitual impaired driving
- Impaired driving in commercial vehicle
- Death by vehicle under G.S. 20-141.4 based on impaired driving
- 1st or 2nd degree murder under G.S. 14-17 based on impaired driving
- Involuntary manslaughter under G.S. 14-18 based on impaired driving
- Substantially similar offenses committed in another state or jurisdiction

• Class D Felony

# Repeat Felony Death By Vehicle: G.S. 20-141.4(a6)



1. Felony Death by Vehicle or Aggravated Felony Death by Vehicle  
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2. Prior Conviction (no time limit) for
  - Felony Death by Vehicle
  - Aggravated Felony Death by Vehicle
  - 1<sup>st</sup> or 2<sup>nd</sup> degree murder based on impaired driving
  - Manslaughter based on Impaired driving
- Sentenced as if convicted of second degree murder (Class B2 felony)

# Misdemeanor Death By Vehicle: G.S. 20-141.4(a6)



1. Unintentionally cause death of another person
  2. While engaged in violation of any traffic law other than impaired driving under G.S. 20-138.1
  3. And violation in (2) is proximate cause of the death of another
    - Not necessary to prove reckless or careless driving
- Class 1 misdemeanor



## Felony Serious Injury by Vehicle: G.S. 20-141.4(a3)



1. Unintentionally cause serious injury to another
  2. While engaged in impaired driving in violation of G.S. 20-138.1 or -138.2
  3. And offense is proximate cause of serious injury
    - Causing great pain and suffering or serious mental injury
    - Same standard as used in grossly aggravating factor
- Class F felony

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## Aggravated felony serious injury by vehicle: G.S. 20-141.4(a4)

1. Elements 1, 2, and 3 from above
    - +
  2. Prior conviction involving impaired driving within 7 years of offense
- Class E felony

# Implied Consent Offense Procedures: Ch. 20, Article 2D



- Apply to investigation & processing of an implied consent offense.
  - Trial procedures apply to any implied consent offense tried in district court
- What is an implied consent offense? Defined in G.S. 20-16.2(a1).
  - Impaired driving (G.S. 20-138.1)
  - Drinking and driving by person under 21 (G.S. 20-138.3)
  - Violating no-alcohol condition of limited privilege (G.S. 20-179.3)
  - Vehicular homicide (G.S. 20-141.4, G.S. 14-17, -18)
  - Impaired instruction (G.S. 20-12.1)
  - Impaired driving in commercial vehicle (G.S. 20-138.2)
  - Operating commercial vehicle after drinking (G.S. 20-138.2A)
  - Operating school bus, school activity bus, or child care vehicle after drinking (G.S. 20-138.2B)
  - Habitual impaired driving (G.S. 20-138.5)
  - Open container (G.S. 20-138.7)
  - Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f))

# Police Processing Duties in Implied Consent Cases: G.S. 20-38.3



- Upon arrest for an implied consent offense, a LEO
  - **Must** inform defendant of charges or cause for arrest
  - May take defendant to any place in state for one or more chemical analyses and for evaluation by LEO, medical professional, or other person to determine extent or cause of impairment
  - May take person to some other place in state for purpose of having person identified, to complete a crash report, or for any other lawful purpose
  - May take photographs and fingerprints in accordance with GS 15A-502
  - **Must** take person before a judicial official for an initial appearance after completing all investigatory procedures, crash reports, chemical analyses, and other procedures

# Procedures for performing a Chemical Analysis :

## G.S. 20-16.2



- Person charged with an implied consent offense must be taken before a chemical analyst authorized to administer a test of the person's breath or an LEO authorized to administer chemical analysis of breath, who must inform the person orally and in writing that:
  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 .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.

# Procedures for Testing Unconscious Person: G.S. 20-16.2(b)



- If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or incapable of refusal, the LEO may direct the taking of a blood sample or other analysis
  - Notification of rights not necessary in these circumstances

# Request and Refusal: G.S. 20-16.2(c)



- LEO must designate type of test(s) and request that person submit to test
- If person willfully refuses to submit to that test, none may be given “under the provisions of this section”
  - GS 20-139.1: If a person refuses to submit to any test under this section, LEO with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order would result in the dissipation of the percentage of alcohol in the person’s blood or urine.

# Procedures for Testing Unconscious Person: G.S. 20-16.2(b)



- If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or incapable of refusal, the LEO may direct the taking of a blood sample or other analysis
  - Notification of rights and request not necessary in these circumstances

# Procedures for Reporting Results and Refusals to DMV: G.S. 20-16.2(c1)



- **If person**
  - refuses
  - has BAC of 0.15 or more, or
  - Has BAC that exceeds alcohol concentration restriction on license
- **LEO & chemical analyst must execute affidavit stating:**
  - Person was charged with implied-consent offense or had an alcohol concentration restriction on the DL
  - LEO had reasonable grounds to believe that person committed implied consent offense or violated alcohol concentration restriction on DL
  - Whether implied-consent offense involved death or critical injury if person willfully refused test
  - Person was notified of implied consent rights
  - Results of test or that person willfully refused
  - Any other violation of restoration condition other than alcohol concentration
- **LEO must immediately mail affidavit to DMV**



# Procedures for Reporting Results and Refusals to DMV: G.S. 20-16.2(c1)



- DMV must notify person that license is revoked for 12 months, effective on the 10<sup>th</sup> day after the mailing of the revocation order unless
  - Person makes written request for hearing before effective date of order
  - If refusal was in case involving death or critical injury, no limited privilege may be issued.
- If DMV sustains revocation, person may petition for hearing on the record in superior court within 30 days. Superior court review limited to:
  - Whether there is sufficient evidence in record to support findings of fact
  - Whether conclusions of law are supported by the findings of fact; and
  - Whether the DMV committed an error of law in revoking the license

# Initial Appearance in an Implied Consent Case: Ch. 15A, Art. 24 and G.S. 20-38.4



- GS 15A-511(b) requires magistrate to inform the defendant of:
  - Charges against the defendant
  - Right to communicate with counsel and friends, and
  - General circumstances under which defendant may secure release
- In implied consent cases, magistrate must also comply with G.S. 20-38.4.
  - Magistrate may hold initial appearance anywhere in county
  - Magistrate **must**, to extent practicable, be available at locations other than courthouse
- In determining whether there is probable cause to believe that a person is impaired, magistrate may
  - review alcohol screening tests and chemical analyses
  - receive testimony from any LEO concerning impairment & the circumstances of the arrest, and
  - observe the person arrested
- If the magistrate finds probable cause, magistrate must consider whether the person is impaired such that the person should be detained under G.S. 15A-534.2

# Initial Appearance in an Implied Consent Case



- If person is not going to be released immediately upon completion of initial appearance, the magistrate must do the following & complete AOC-CR-271:
  1. Inform person in writing of the procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis
    - This means that magistrate must provide to the defendant – along with AOC-CR-271 – a copy of written local procedures explaining how the defendant may contact others and how others can observe the defendant at the jail and administer an additional chemical analysis
  2. Require the defendant to list all persons he wishes to contact and telephone numbers on AOC-CR-271, which sets forth procedures for contacting the persons listed.

# Access to Defendant Charged with an Implied Consent Offense: G.S. 20-38.5



- **Chief District Court Judge, DHHS, DA, and sheriff must:**
  - Establish written procedures for attorneys and witnesses to have access to chemical analysis room
  - Approve the location of written notice of implied-consent rights in the chemical analysis room in accordance with G.S. 20-16.2
  - Approve a procedure for access to a person arrested for an implied-consent offense by family and friends or a qualified person contacted by the arrested person to obtain blood or urine when the person is detained
- **Signs must be posted explaining procedure for access to**
  - breath testing room and
  - any person arrested for an implied consent offense

# Motions and District Court Procedure: G.S. 20-38.6



- Motions to suppress evidence must be made pre-trial with limited exceptions:
  - Defendant may move to dismiss charges for insufficient evidence at close of State's evidence and at close of all evidence without prior notice
  - Defendant may make motion to suppress during trial based on newly discovered facts
- State must be granted reasonable time to procure witnesses or evidence and to conduct research
- District court judge may summarily grant motion if State stipulates that evidence will not be introduced
- District court judge may summarily deny motion if not made pretrial and not based on newly discovered facts

# Motions and District Court Procedure: G.S. 20-38.6



- If motion is not determined summarily, district court judge must hold hearing and make findings of fact
- District court judge must set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether motion should be granted or denied
- If judge preliminarily indicates the motion should be granted, the judge shall not enter a final judgment on the motion until after the state has appealed to superior court or indicated that it does not intend to appeal

# Motions and District Court Procedure:

## G.S. 20-38.7



- State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss
- If facts are disputed, superior court determines matter de novo
  - Does superior court enter order on motion or remand to district court for entry of order?
- The defendant may not appeal a denial of a pretrial motion to suppress or dismiss, but may appeal conviction
- If defendant is convicted and appeals to superior court, the sentence imposed by the district court is vacated upon giving notice of appeal
  - Case can only be remanded back to district court with the consent of the prosecutor and the superior court
  - When an appeal is withdrawn or a case remanded back to district court, the district court must hold a new sentencing hearing and must consider any new convictions

# Motions and District Court Procedure: G.S. 20-38.7



- After new sentencing hearing in district court, defendant has right of appeal to superior court only if
  - Sentence is based on additional facts considered by district court that were not considered in the previously vacated judgment, and
  - The defendant would be entitled to a jury determination of those facts under GS 20-179
  - Prior impaired driving conviction for which appeal to superior court has been withdrawn or that has been remanded to district court for a sentencing hearing that has not yet been held is a grossly aggravating factor under GS 20-179(c)(1).
- If defendant appeals a re-sentencing by the district court and then withdraws the appeal, the district court must reinstate its sentence as a final judgment not subject to further appeal



# Admissibility of Chemical Analysis: G.S. 20-139.1



- Results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration
- A chemical analysis of the breath administered pursuant to the implied consent law is admissible if it meets both of the following requirements:
  - Test is performed in accordance with DHHS rules
  - Chemical analyst had current DHHS permit
    - ✦ Court must take judicial notice of DHHS permit records
    - ✦ Any person with current permit may perform chemical analysis
- Breath analysis:
  - Must have sequential tests, but no required waiting period between tests
  - Results of *all* breath tests are admissible if results from any two do not differ by more than .02
  - Only lower result can be used to establish a particular alcohol concentration

# Admissibility of Chemical Analysis: G.S. 20-139.1



- **Chemical analyst can testify by affidavit in district court**
  - Results of a chemical analysis of blood or urine by SBI Lab, Charlotte PD lab, or other approved lab are admissible w/o further authentication
- **Alcohol Screening Devices: G.S. 20-16.3**
  - Positive or negative result on an alcohol screening test “may be used by a law enforcement officer” and is admissible in court – but not the actual alcohol concentration result
    - ✦ Should magistrates hear result?
  - Results of alcohol screening test are admissible to determine violation of zero tolerance under G.S. 20-138.3

# HGN tests: G.S. 8C-1, Rule 702



- **State v. Helms, 348 N.C. 578 (1988)**
  - HGN test does not measure behavior a lay person would commonly associate with intoxication, but represents specialized knowledge that must be presented to a jury by a qualified expert
  - Until there is sufficient scientific ally reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results
- **Amended Rule 702(a1)(1)**
  - HGN test results admissible if offered by a person who has been trained in the test's administration and in interpretation of the test data
  - Witness may give expert testimony solely on issue of impairment and not on specific alcohol concentration level

# Other expert testimony: GS 8C-1, Rule 702



- A witness who has received training and is certified as a Drug Recognition Expert by DHHS may testify as to
  - Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances
  - Person may testify solely on issue of impairment and not on issue of specific alcohol concentration level
- A witness qualified as an expert in accident reconstruction who has reconstructed a crash or reviewed the report of investigation, with proper foundation, may give an opinion as to the speed of the vehicle even if the witness did not see the vehicle moving

# Sentencing for Impaired Driving: G.S. 20-179



<b>Level</b>	<b>Factors</b>	<b>Mandatory Minimum</b>	<b>Maximum Sentence</b>	<b>Maximum Fine</b>
1*	2 + GA Factors	30 days jail	24 months	\$4,000
2*	1 GA Factor	7 days jail	12 months	\$2,000
3	Agg. > Mitig.	72 hours jail or community service	6 months	\$1,000
4	Agg. = Mitig.	48 hours jail or community service	120 days	\$500
5	Mitig. > Agg.	24 hours jail or community service	60 days	\$200

\* May impose CAM as condition of probatoin

# Sentencing: G.S. 20-179



- Non-operation period does not meet mandatory special probation condition for levels 3-5.
  - Defendants must go to jail or perform community service.
- New mitigating factor: Defendant's completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption as proven by a continuous alcohol monitoring system
- Defendant must serve each jail hour ordered.
- If defendant comes to jail with alcohol in body, reported to court.
- If sentence is 48 hrs or more, it must be served in min. 48 hr increments

# Meaning of New Provisions



- Results of chemical analysis are “shall be deemed sufficient evidence to prove a person’s alcohol concentration.” G.S. 20-138.1(a)(2).\*
- State v. Narron, N.C. App. (7 October 2008): Statute requires that properly admitted result of chemical analysis be treated as prima facie evidence of a defendant’s alcohol concentration. Does not create mandatory presumption.

# Limited Privileges: S.L. 2006-253



- G.S. 20-179.3(c1), (g5)
- Threshold for High-Risk Drivers lowered from 0.16 to 0.15
- Limited privilege must include ignition interlock if defendant has AC of .15 or more
  - Results of chemical test presented at trial are conclusive and cannot be modified with or without court approval
- Limited privilege not effective until 45 days after final conviction
- Limited privilege may only allow
  - Driving to and from work or school,
  - Driving to court ordered substance abuse treatment or education, and
  - Driving to an ignition interlock service facility.



# Checkpoints: S.L. 2006-253



- If law enforcement agency conducts checking stations to determine compliance with Chapter 20, it must:
  1. Designate in advance pattern for stopping vehicles and for requesting drivers that are stopped to produce drivers license, registration, or insurance information
  2. Operate under a written policy that provides guidelines for the pattern, which need not be in writing
    - May operate under another agency's policy, but that must be stated in writing
  3. Mark checkpoint with at least one law enforcement vehicle with its blue light in operation