

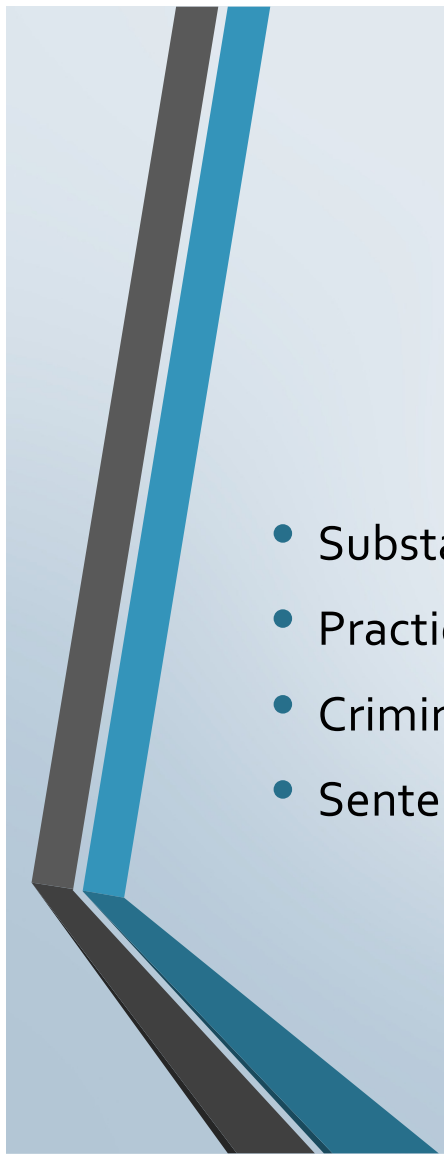


Driving While Impaired

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Roadmap

- Substantive Law
- Practical Exercises
- Criminal Procedure
- Sentencing



The Law of Impaired Driving

Implied Consent Offenses

- “Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense.”
- Not defined in G.S. 20-4.01
- Not even fully defined in G.S. 20-16.2
 - “Under this section, an "implied-consent offense" is an offense involving impaired driving, a violation of G.S. 20-141.4(a2), or an alcohol-related offense made subject to the procedures of this section.”
- These offenses do not necessarily require impairment – but most do.
 - Examples include violating no-alcohol restriction on a limited driving privilege and transporting an open container of alcohol.

Offenses Involving Impaired Driving

- A smaller subset of implied consent offenses, plus some extra offenses
- Defined in G.S. 20-4.01
 - Includes any offense where impairment is an element or an underlying theory of conviction (such as murder or involuntary manslaughter based on impaired driving).
- What consequences follow from offenses involving impaired driving?
 - Possible seizure and forfeiture
 - Impaired driver holds

Offenses Involving Impaired Driving

- Impaired driving under G.S. 20-138.1
- Habitual impaired driving under G.S. 20-138.5
- Impaired driving in commercial vehicle under G.S. 20-138.2
- Any offense under G.S. 20-141.4 (felony and misdemeanor death by vehicle and serious injury by vehicle) based on impaired driving
- First- or second-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

Driving after consuming

- N.C.G.S. 20-138.3 "Driving by person less than 21 years old after consuming alcohol or drugs"
 - Person less than 21 years old, drives a motor vehicle on street, highway, or public vehicular area
 - While consuming alcohol or at any time while he has remaining in his body any alcohol or controlled substance previously consumed
 - Exception: controlled substance lawfully obtained and taken in therapeutically appropriate amounts
- No impairment required

Driving after consuming

- Driving After Consuming is not a lesser included offense of Driving While Impaired.
- The first requires a person to be less than 21, and the second requires that they be impaired. Because each offense has a unique element, one is not considered a “lesser” of the other, and Double Jeopardy concerns are not triggered.
- Both offenses can be charged and sentenced if all the elements are met.



The Offense Timeline

Reasonable Suspicion + Seizure

Probable Cause + Arrest

Testing + Processing

Reasonable Suspicion

- Particularized, articulable, and objective observations that raise a suspicion of any wrongdoing.
- DWI offenses often begin with RS or PC for a Chapter 20 violation
- Example: your client is pulled over for changing lanes without giving a signal

Probable Cause

- “The probable-cause standard is *incapable of precise definition or quantification* into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that “[t]he substance of all the definitions of probable cause is a *reasonable ground* for belief of guilt.” *Maryland v. Pringle*, 540 U.S. 366 (2003).
- Law enforcement must have PC of every element of the offense for a valid arrest.

Probable Cause

Generally speaking:

- Evidence of substance use plus indicators of impairment from field sobriety tests, OR
- Evidence of substance use plus unexplained “bad driving,”

And remaining elements and identity will suffice for probable cause.

Implied Consent Testing

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
2. The test results, or the fact of your refusal, will be admissible in evidence at trial.
3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
4. After you are released, you may seek your own test in addition to this test.
5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Implied Consent Testing



Advice of Rights



Test

Implied Consent Testing

- For intox to be suppressed where law enforcement didn't wait the full thirty minutes, the defense must show that witnesses would have gotten there in time, were turned away, or were not otherwise granted access.
- Waiting less than thirty minutes was permissible as there was no evidence "that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes."
 - *State v. Buckner*, 34 N.C. App. 447 (1977)
- Witnesses turned away or not granted access, leading to suppression:
 - *State v. Myers*, 118 N.C. App. 452 (1995)
 - *State v. Hatley*, 190 N.C. App. 639 (2008)
 - *State v. Buckheit*, 223 N.C. App. 269 (2012)

Processing

- If the state violates your client's statutory right to pretrial release, and your client is denied access to witnesses during the time following your client's arrest, your client may be entitled to dismissal of the charges.
- *State v. Knoll*, 322 N.C. 535 (1988)

Processing

- Implied Consent Offense Notice

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Before The Magistrate
STATE VERSUS	IMPLIED CONSENT OFFENSE NOTICE G.S. 20-38.4	
Name Of Defendant	OBSERVATION PROCEDURE	
TO THE DEFENDANT: The established local procedure to contact other persons and have other persons appear at the jail to observe your condition or administer an additional chemical analysis to you is provided in writing with this form and incorporated into this form by reference. You are hereby notified of this procedure.		
CONTACT PERSONS		
TO THE DEFENDANT: Pursuant to G.S. 20-38.4(a)(4), you are required to list all persons you wish to contact and their telephone numbers. (attach additional sheets, if necessary)		
Name		Telephone Number
1. _____		_____
2. _____		_____
3. _____		_____
☐ I do not wish to contact anyone.		
SIGNATURE		
By signing below, the defendant indicates that he/she has received notice of the contact and observation procedure and has listed all persons that he/she wishes to contact.		
Date	Signature Of Defendant	
_____	_____	
MAGISTRATE'S CERTIFICATION		
The undersigned magistrate certifies that pursuant to Article 24 of Chap. 15A and G.S. 20-38.4 that		
1. An initial appearance was held and the undersigned found probable cause to believe the defendant committed an implied consent offense.		
2. The undersigned reviewed all alcohol screening tests, chemical analyses and testimony from law enforcement officers concerning impairment and the circumstances of the arrest, and observed the defendant.		
3. The undersigned considered whether the defendant was impaired to the extent that the provisions of G.S. 15A-534.2 should have been imposed.		
4. The undersigned informed the defendant in writing of the established procedure to have others appear at the jail to observe the defendant's condition or to administer an additional chemical analysis.		
5. The undersigned required the defendant to list all persons the defendant wishes to contact and telephone numbers on a copy of this form.		
☐ The defendant returned this form to the undersigned at the initial appearance.		
☐ The defendant failed to return this form at the initial appearance.		
Date	Time ☐ AM ☐ PM	Signature Of Magistrate
_____	_____	_____
The defendant returned this form to the undersigned after the initial appearance.		
Date	Time ☐ AM ☐ PM	Signature
_____	_____	_____
☐ Magistrate ☐ Resident CSC ☐ Deputy CSC ☐ Clerk Of Superior Court		
NOTE: If a defendant charged with an implied consent offense is unable to make bond, the magistrate must (1) inform the defendant in writing of the established procedure to have others appear at the jail to observe the defendant's condition or administer an additional chemical analysis and (2) require the defendant to list all persons the defendant wishes to contact and their telephone numbers. A copy of this form must be placed in the case file. G.S. 20-38.4(a)(4).		
AOC-CR-271, Nov 1/2006 © 2006 Administrative Office of the Courts		

Knoll

- Checking the “I do not wish to contact anyone” box does not end your Knoll motion.
 - I do not wish to contact anyone for the purposes of observing me ***at the jail*** or administering an additional chemical analysis.
- “Even if defendant waived his right to have someone observe him at the jail, he did not waive his right to have friends or family observe his condition outside the jail, which is what would have occurred had he been permitted to call a taxi and return home to his wife.”
 - *State v. C.K.D.*, 291 N.C.App. 693 (2023) (unpublished)
- *C.K.D.* relied on *Knoll*, and defendant Hicks in particular, who also could have been observed by a witness outside of the jail, had he been properly advised and lawfully held.

Knoll

- What does your local jurisdiction require for setting a secured bond?
 - G.S. 15A-534(b)
- What does the law require for imposing an impaired driver hold?
 - G.S. 15A-534.2
 - *State v. Labinski*, 188 N.C.App. 120 (2008)

Knoll

- What if you can't find a statutory violation but your client was denied access to witnesses after their DWI arrest?
- *State v. Hill*, 277 N.C. 547 (1971)
 - Led to G.S. 15A-954(a)(4) "The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."
 - Official Commentary: The provisions of subdivision (a)(4) are intended to embody the holding of the Supreme Court of North Carolina in *State v. Hill*, 277 N.C. 547 (1971). It is assumed that the drastic relief called for under this motion would be granted most sparingly.

DWI Elements

- Operating
- Vehicle
- Street, highway, or public vehicular area
- While:
 - Appreciably impaired,
 - Having consumed enough alcohol such that they have .08 or more BAC within a relevant time after driving
 - With any amount of a Schedule I controlled substance in their system.

Operation

Operator. – A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous. (G.S. 20-4.01(25))



What about self-driving vehicles?

A close-up photograph of a bicycle's rear suspension system, showing a metal spring and a brown leather seat post. The image is positioned on the left side of the slide, partially overlapping a blue and grey geometric design element.

Vehicle

- Vehicle: Any device that will take people or property down the road other than devices moved by human power. But, bicycles are vehicles, even though human-powered. Segways are not vehicles. And certain devices used by a person who has a mobility impairment are not vehicles. (G.S. 20-4.01(49))

Street, highway, or public vehicular area



Streets, highways, roads, roadways, all are synonymous.



Public Vehicular Area is both defined and not defined

Public Vehicular Area

Public Vehicular Area: Any area within the State of North Carolina that meets one or more of the following requirements:

- a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
 1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.
 3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina.
- b. The area is a beach area used by the public for vehicular traffic.
- c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.
- d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

Read *State v. Ricks*, 237 N.C. App. 359 (2014)

Impairment

- “The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration.”
 - G.S. 20-138.1(a)(2); G.S. 20-139.1(b)
- This clause in G.S. 20-138.1(a)(2) “does **not create an evidentiary or factual presumption**, but simply states the standard for *prima facie* evidence of a defendant's alcohol concentration.”
 - *State v. Narron*, 193 N.C. App. 76, 83 (2008)

Blood Draws

- May only occur via consent, search warrant, or exigent circumstances.
- Search Warrants
 - Must establish PC for driving while impaired and PC that the evidence sought is in the place to be searched.
 - Do not require compliance with implied consent rights because refusal is not an option.
- Exigent Circumstances
 - The natural dissipation of alcohol is not an exigent circumstance on its own
 - Increased technology and audio/visual capabilities are greatly reducing the likelihood of an officer's inability to obtain a search warrant.

Blood Draws

- Unconscious Defendants
 - “[If] the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample” G.S. 20-16.2(b)
 - Blood draws must still satisfy constitutional requirements: either a search warrant or exigent circumstances.
- Hospital Records may also be obtained after treatment
 - State accomplishes this via a search warrant for records
 - Hearsay concerns must still be resolved before records may be admitted into evidence
 - They are non testimonial and do not implicate the confrontation clause



Appreciable Impairment

- N.C.G.S. 20-4.01 (Definitions)
 - (48b) Under the influence of an impairing substance
 - The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance
 - (14a) Impairing Substance
 - Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.

Drug Impairment



**No different than a refusal – or a
BAC below .08**

Vehicle in Motion

Personal Contact

Field Sobriety Tests



**No requirement to identify the
substance itself**

State v. Lindley, 286 N.C. 255 (1974)

Defenses

- Necessity
 - Evidence must permit the reasonable inference that the defendant:
 - Took reasonable action,
 - To protect the life, limb, or health of a person, and
 - No other acceptable choice was available

Defenses

- Involuntary Intoxication/Automatism
 - Absence of consciousness precludes the existence of any specific mental state and the possibility of a voluntary act without which there can be no criminal liability
 - This is not a defense in cases of voluntary intoxication, even with undesired or unpredicted consequences

Defenses

- No defense of automatism as no evidence demonstrated that the defendant's consumption of alcohol, resulting in an alcohol concentration of 0.25, was involuntary. Despite possible side effect of Alprazolam, the defendant testified that his ingestion of the anxiety drug also was voluntary.
 - *State v. Clowers*, 217 N.C. App. 520 (2011)
- No involuntary intoxication where defendant drove after voluntarily consuming prescription medication that he knew or should have known could impair him.
 - *State v. Highsmith*, 173 N.C. App. 600 (2005)



Practical Exercises

Exercise 1

- Your client is driving in their neighborhood when they are blue-lighted by a police officer. They drive to their house and pull into their driveway and stop. The officer pulls in behind them, not perfectly blocking them in, and stops with their lights flashing. Has your client been seized?
- Your client is already sitting in their car, stopped in their driveway. The officer pulls in behind them, not perfectly blocking them in, and stops with their lights flashing. Has your client been seized?

Exercise 2

- Your client has been arrested for DWI and taken to the magistrate. The magistrate imposed an impaired driver hold on the finding that their impairment makes them dangerous. Your client checked the box on AOC-CR-271 “Implied Consent Offense Notice” stating “I do not wish to contact anyone for the purposes of observing me at the jail or administering an additional chemical analysis.” So, the jail does not provide your client with the local procedures for contacting witnesses. Your client is released once they sober up. Do you have a Knoll motion?

Exercise 3

- At approximately 11:45 PM on a Saturday night, Officer Smith was patrolling a quiet residential neighborhood. He noticed a sedan traveling at what he described as a “slightly slower than normal” speed. The vehicle did not violate any posted speed limits, nor did it commit any traffic infractions.
- Officer Smith followed the vehicle for about two blocks and observed it briefly touch the fog line. He initiated a traffic stop, stating that he was “concerned the driver might be impaired due to the time of night and the vehicle’s slow speed.”
- Upon approaching the vehicle, Officer Smith noted that the driver appeared “nervous” and had “slightly bloodshot eyes.” He provided his license and registration without issue. Officer Smith asked if he had been drinking, and he replied, “I had a beer with dinner a few hours ago.”
- Officer Smith then asked him to step out of the vehicle and perform field sobriety tests. Officer Smith administered the Horizontal Gaze Nystagmus (HGN), Walk and Turn, and One-Leg Stand tests. Jordan showed four clues on the HGN, but completed the other tests without issue.
- Officer Smith arrested him for DWI. A subsequent breath test at the station showed BAC of 0.07



Criminal Procedure

Continuances

- State's Motions to Continue
 - When denied, the State may voluntarily dismiss the charge and re-charge your client within the statute of limitations.
 - Re-charging (particularly re-arresting) may violate your client's constitutional speedy trial rights, apply the test laid out in *Barker v. Wingo*, 407 U.S. 514 (1972).
- Vehicle Seizure Cases
 - G.S. 20-28.3(m) establishes trial priority and restricts continuances in cases where a vehicle has been seized.
 - While it may be an effective tool to oppose continuances, violations of subsection (m) do not necessarily result in dismissal or suppression.

Pretrial Motions

- G.S. 20-38.6: Motions to Suppress or Dismiss in implied consent cases must be made pretrial
- Exceptions
 - Motion to Dismiss for Insufficiency of the Evidence
 - Motions based on facts not previously known to the defense
- The statute entitles the State to reasonable time to procure witnesses, obtain evidence, or conduct research

Motion to Suppress

- Based on a violation of the defendant's constitutional rights
 - Violations against unreasonable seizures (no reasonable suspicion)
 - Violations against unreasonable arrests (no probable cause)
 - Violations against unreasonable searches (invalid search warrant)
- The State has the burden of establishing the constitutionality of the seizure/arrest/search warrant
- The rules of evidence do not apply during pretrial motions, often immediately preceding trial

Search Warrants

- Most often arise when law enforcement obtained a blood sample against your client's objection or while they were unconscious
- May also be used to obtain medical records from the hospital that contain evidence of impairment
- Review of the search warrant is limited to the "four corners" of the search warrant application
 - There must be probable cause that (1) a crime was committed, and (2) that the evidence to be obtained is in the place to be searched
- Implied consent procedures do not apply to chemical testing obtained by search warrant

Motion to Dismiss

- Violation of the defendant's ability to prepare a defense (Knoll).
 - Check your local rules for requirements regarding timing and whether these must be made in writing.
- The defendant has the burden of establishing a violation of the defendant's statutory rights and that this violation prejudiced the defendant.
 - In cases without a BAC, prejudice is presumed
 - In cases with a BAC, the defendant must prove prejudice

Evidence Admissibility

- If your client's implied consent rights are violated, the test results are inadmissible.
 - Do you raise this pretrial? Object during the State's case in chief?
 - In Superior Court this would be addressed by motion in limine

Pretrial Motions

- Two circumstances permit a summary ruling
 - May grant the motion summarily if the State stipulates to suppression
 - May deny the motion summarily if the defendant failed to properly move pretrial
- Otherwise Court may only enter a Preliminary Determination
 - After a hearing and finding of facts, the Court preliminarily indicates if it will grant or deny the motion to suppress/dismiss
 - If it is denying, it may enter the order and proceed with trial
 - If it is granting, it may not enter the order until the State has the opportunity to appeal to Superior Court

"Appeals"

- Appeal of a Preliminary Determination of a Pretrial Motion to Suppress
 - Review is whether the conclusions of law are supported by the findings of fact unless there is a factual dispute, then a de novo hearing in Superior Court
 - Superior Court either affirms or reverses the District Court preliminary indication and remands case to proceed accordingly
- This does not impact the defendant's right to de novo appeal of the entire case in Superior Court
 - No case yet regarding whether the same motion to suppress may be made and heard again in Superior Court

Trial

- The State may always attempt to proceed without the excluded evidence, be prepared for the theory of appreciable impairment.
- Remote Testimony: Laboratory analyst may testify remotely if:
 - State has provided copy of report to defendant; and
 - State has notified defendant at least 15 business days before the proceeding of intent to offer remote testimony.

Appeals

- Upon disposition and sentencing in District Court, the defendant may appeal de novo to Superior Court.
- The District Court may set an appeal bond while the case is pending.
 - “A person who is detained or objects to the conditions required for his release which were imposed or allowed to stand by order of a district court judge may apply in writing to a superior court judge to modify the order.” G.S. 15A-538
- No new substantive or discovery rights attach in Superior Court.

Remand

- G.S. 20-38.7(c) [requires a new sentencing hearing](#) after the case is remanded unless:
 - The appeal is withdrawn and remanded within 10 days of the original judgment, and the prosecutor certifies in writing that there are no new sentencing factors to consider,
 - The appeal is withdrawn and remanded after 10 days from the original judgement, but before the case is calendared for trial and the prosecutor certifies in writing that there are no new sentencing factors to consider, or
 - The appeal is withdrawn and remanded after it has been calendared for trial, the prosecutor certifies in writing that there are no new sentencing factors to consider, and the prosecutor did not object to the remand occurring.
- If any of these three circumstances occur, there is no new sentencing hearing, and the original judgment from the district court disposition is executed.
- Entering a plea and being sentenced in Superior Court is also a considerable option.



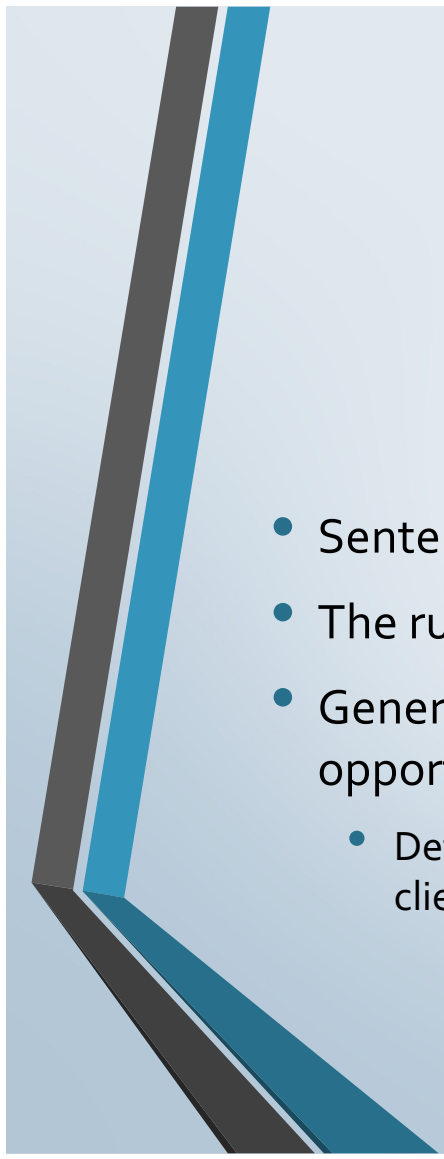
Sentencing

Overview

- DWI sentencing is governed by G.S. 20-179
- No prayers for judgment continued
- Cannot be consolidated with other DWI convictions – may run concurrently
- All suspended sentences require:
 - Some form of special probation
 - Substance Abuse Assessment and recommended treatment

Applicability

- G.S. 20-138.1 (impaired driving)
- G.S. 20-138.2 (impaired driving in a commercial vehicle)
- Second or subsequent conviction of
 - G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol)
 - G.S. 20-138.2B (operating a school bus, child care vehicle, emergency or law enforcement vehicle after consuming)
- A person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level 5 punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.



Sentencing Process

- Sentencing hearings usually immediately follow entry of the verdict
- The rules of evidence do not apply
- Generally the State makes its required showing, then the defense has an opportunity to be heard
 - Detailed and zealous representation during sentencing are essential to affording your client the best representation possible

Duties of the Prosecutor

- Imposed by G.S. 20-179(a)(2)
 - Obtain and present full record of traffic convictions
 - Present all appropriate grossly aggravating factors and aggravating factors of which they are aware
 - Present evidence of alcohol concentration from valid chemical analysis

Grossly Aggravating Factors

- G.S. 20-179(c)
 - (1) a qualifying prior conviction for an offense involving impaired driving;
 - (2) driving while license revoked for an impaired driving revocation pursuant to G.S. 20-28(a1);
 - (3) serious injury to another person caused by the defendant's impaired driving; and
 - (4) driving with one of the following types of individuals in the vehicle:
 - (i) a child under the age of 18,
 - (ii) a person with the mental development of a child under 18, or
 - (iii) a person with a physical disability preventing unaided exit from the vehicle.
- The state must prove any contested grossly aggravating factor beyond a reasonable doubt.

Aggravating Factors

- G.S. 20-179(d)
 - (1) gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or higher;
 - (2) especially reckless or dangerous driving;
 - (3) negligent driving that led to a reportable accident;
 - (4) driving by the defendant while his or her driver's license was revoked;
 - (5) two or more prior convictions of certain motor vehicle offenses within five years of the instant offense or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the instant offense;
 - (6) conviction under G.S. 20-141.5 of speeding to elude;
 - (7) conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit;
 - (8) passing a stopped school bus in violation of G.S. 20-217; and
 - (9) any other factor that aggravates the seriousness of the instant offense.
- The state must prove any contested aggravating factor beyond a reasonable doubt.

Mitigating Factors

- G.S. 20-179(e)
 - (1) slight impairment of the defendant's faculties, resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving;
 - (2) slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant;
 - (3) driving that was safe and lawful except for the defendant's impairment;
 - (4) a safe driving record;
 - (5) impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of drug taken was within the prescribed dosage;
 - (6) voluntary submission to a substance abuse assessment and to treatment;
 - (6a) completion of a substance abuse assessment, compliance with its recommendations, and sixty days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system;
 - (6b) voluntary installation and use of an ignition interlock system for a minimum of six months [*effective for offenses committed on or after December 1, 2025*]; and
 - (7) any other factor that mitigates the seriousness of the offense.
- The defendant must prove any contested mitigating factor by a preponderance of the evidence.

Determining the Sentence Level

- If there are any grossly aggravating factors, the sentence must be a Level A1, 1, or 2.
 - If there are three or more grossly aggravating factors, the sentence level must be an A1.
 - If the grossly aggravating factor in G.S. 20-179(c)(4) (driving with certain individuals in the vehicle) exists or if two other grossly aggravating factors exist, the sentence level must be a 1.
 - If only one grossly aggravating factor exists, other than the factor in G.S. 20-179(c)(4), the sentence level must be 2.

Determining the Sentence Level

- If there are no grossly aggravating factors, the sentence level must be a 3, 4, or 5.
 - If aggravating factors substantially outweigh any mitigating factors, or if there are only aggravating factors, the sentence level must be a 3.
 - If there are no aggravating or mitigating factors, or if aggravating factors are counterbalanced by mitigating factors, the sentence level must be a 4.
 - If the mitigating factors substantially outweigh any aggravating factors, or if there are only mitigating factors, the sentence level must be a 5.
 - The weight assigned to any aggravating or mitigating factor is within your discretion. As a result, when both types of factors are present, the sentencing level is not strictly determined by counting the number of aggravating factors against the number of mitigating factors.

Punishment for Covered Driving While Impaired (DWI) Offenses Committed on or after October 1, 2013

Grossly Aggravating Factors (G.S. 20-179(c))

- (1) A qualifying prior conviction for an offense involving impaired driving
- (2) Driving while license revoked for an impaired driving revocation
- (3) Serious injury to another person caused by the defendant's impaired driving
- (4) Driving with one of the following types of individuals in the vehicle:
 - (i) a child under the age of 18,
 - (ii) a person with the mental development of a child under 18, or
 - (iii) a person with a physical disability preventing unaided exit from the vehicle

After finding grossly aggravating factors and determining the sentence level, the judge may elect to consider aggravating and mitigating factors in imposing the appropriate sentence with the applicable level of punishment.

When there are no grossly aggravating factors, the court must impose a Level Three, Four, or Five punishment based on the weight, presence, and absence of aggravating and mitigating factors.

Aggravating Factors (G.S. 20-179(d))

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more
- (2) Especially reckless or dangerous driving
- (3) Negligent driving that led to a reportable accident
- (4) Driving by the defendant while his or her driver's license was revoked
- (5) Two or more prior convictions of certain motor vehicle offenses within five years of the instant offense or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the instant offense
- (6) Conviction under G.S. 20-141.5 of speeding to elude
- (7) Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit
- (8) Passing a stopped school bus in violation of G.S. 20-217
- (9) Any other factor that aggravates the seriousness of the offense

Mitigating Factors (G.S. 20-179(e))

- (1) Slight impairment of the defendant's faculties, resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving
- (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant
- (3) Driving that was safe and lawful except for the defendant's impairment
- (4) A safe driving record
- (5) Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of drug taken was within the prescribed dosage
- (6) Voluntary submission to a substance abuse assessment and to treatment
- (6a) Completion of a substance abuse assessment, compliance with its recommendations, and 60 days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system
- (6b) Voluntary installation and use of an Ignition Interlock system for a minimum of six months [effective for offenses committed on or after December 1, 2025]
- (7) Any other factor that mitigates the seriousness of the offense

One or more grossly aggravating factors

No grossly aggravating factors

Punishment Level Controlling Statute Factors	Imprisonment and Mandatory Probation Conditions
Aggravated Level One G.S. 20-179(f3) <i>Three or more grossly aggravating factors</i>	• 12 months minimum to 36 months maximum • If suspended ◦ Imprisonment of at least 120 days as a condition of special probation ◦ Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$10,000
Level One G.S. 20-179(g) <i>Grossly aggravating factor in G.S. 20-179(c)(4) or two other grossly aggravating factors</i>	• 30 days minimum to 24 months maximum • If suspended ◦ Special probation requiring (1) Imprisonment of at least 30 days or (2) Imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$4,000
Level Two G.S. 20-179(h) <i>One grossly aggravating factor, other than the grossly aggravating factor in G.S. 20-179(c)(4)</i>	• 7 days minimum to 12 months maximum • If suspended ◦ Special probation requiring (1) Imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days – If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$2,000
Level Three G.S. 20-179(i) <i>Aggravating factors substantially outweigh any mitigating factors, or only aggravating factors are present</i>	• 72 hours minimum to 6 months maximum • If suspended ◦ Must require one or both of the following – Imprisonment for at least 72 hours as a condition of special probation – Community service for a term of at least 72 hours ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$1,000
Level Four G.S. 20-179(j) <i>No aggravating and mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors</i>	• 48 hours minimum to 120 days maximum • If suspended ◦ Must require one or both of the following – Imprisonment for 48 hours as a condition of special probation – Community service for a term of 48 hours ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$500
Level Five G.S. 20-179(k) <i>Mitigating factors substantially outweigh aggravating factors, or only mitigating factors are present</i>	• 24 hours minimum to 60 days maximum • If suspended ◦ Must require one or both of the following – Imprisonment for 24 hours as a condition of special probation – Community service for a term of 24 hours ◦ Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-176. • Fine (optional) up to \$200

Determining the Punishment Conditions

- Within each sentencing level, there is a range of permissible conditions and multiple options available.

Level Two

G.S. 20-179(h)

*One grossly
aggravating factor,
other than the grossly
aggravating factor in
G.S. 20-179(c)(4)*

- 7 days minimum to 12 months maximum
- If suspended
 - Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days
 - If Level Two based on prior conviction or DWLR for an Impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed
 - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6
- Fine (optional) up to \$2,000

- Although the level is determined by the presence of a grossly aggravating factor, aggravating and mitigating may also be considered in determining sentence length, whether to suspend the imprisonment, and whether to impose a fine.

Residential Programs

- DART Center and Black Mountain
- 90 day voluntary substance abuse addiction facilities
 - Treat addictions to any substance
 - No medically assisted treatment at this time
 - Are equipped to work with dual diagnoses and most (but not all) physical needs
- Both are currently actively seeking participants – no waitlist
- Accomplished by ordering as a condition of supervised probation (not a split sentence or active time as it is not a confinement program).

Practice

Your client has been convicted of DWI. They were stopped in a private subdivision and had a BAC of .14. They have a "safe driving record."

What sentence level is the judge likely to impose?

Practice

Your client has been convicted of DWI. They were stopped in a private subdivision and had a BAC of .14. Their only prior convictions are felony serious injury by vehicle from 5 years ago and speeding last year. They obtained a substance abuse assessment and have already completed 24 hours of community service.

What sentence level is the judge likely to impose?

Practice

Your client has been convicted of DWI. They were stopped in a private subdivision and had a BAC of .14. Their license was revoked for an impaired driving revocation. They have a obtained a substance abuse assessment and completed the recommended treatment.

What sentence level is the judge likely to impose?

DWLR Impaired

- Speeding to elude arrest is defined as operating “a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.”
- This offense is a felony if any two of the eight aggravating factors listed in the statute are present; one of those factors is “[d]riving when the person's drivers license is revoked.”
- The defendant argued this aggravating factor required proof that the offense occurred on a street or highway, as otherwise required for DWLR.

State v. Dewalt, 209 N.C.App. 187 (2011)

DWLR Impaired

- We draw his attention to another well-known canon of statutory construction, *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another. See *Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 890–91 (1991). The speeding to elude arrest statute cites several other criminal statutes when defining aggravating factors which support the felony level of this offense.
- However, the statute does not cite § 20–28 when listing the aggravating factor “[d]riving when the person's drivers license is revoked.” Thus, the plain language of § 20–141.5 reveals that, while the General Assembly chose to cross-reference criminal statutes in defining the scope of certain aggravating factors, it chose not to do so in defining aggravating factor (b)(5).

State v. Dewalt, 209 N.C.App. 187 (2011)

§ 20-141.5. Speeding to elude arrest; seizure and sale of vehicles.

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

- (1) Speeding in excess of 15 miles per hour over the legal speed limit.
- (2) Gross impairment of the person's faculties while driving due to:
 - a. Consumption of an impairing substance; or
 - b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.
- (3) Reckless driving as proscribed by G.S. 20-140.
- (4) Negligent driving leading to an accident causing:
 - a. Property damage in excess of one thousand dollars (\$1,000); or
 - b. Personal injury.
- (5) Driving when the person's drivers license is revoked.
- (6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).
- (7) Passing a stopped school bus as proscribed by G.S. 20-217.
- (8) Driving with a child under 12 years of age in the vehicle.

one of the other grossly aggravating factors applies. The grossly aggravating factors are:

- (1) A prior conviction for an offense involving impaired driving if:
 - a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
 - b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
 - c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn, or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

Each prior conviction is a separate grossly aggravating factor.

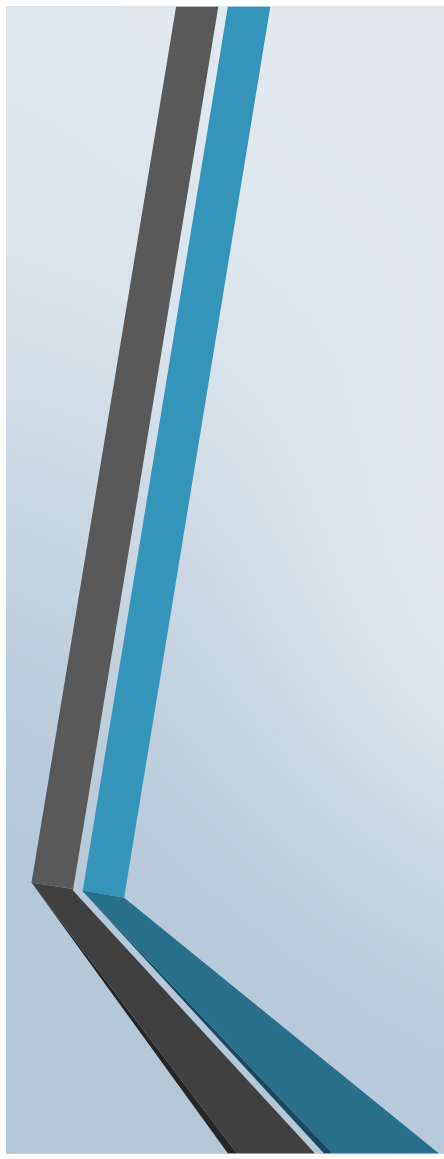
- (2) Driving by the defendant at the time of the offense while the defendant's driver's license was revoked pursuant to G.S. 20-28(a1).
- (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (4) Driving by the defendant while (i) a child under the age of 18 years, (ii) a person with the mental development of a child under the age of 18 years, or (iii) a person with a physical disability preventing unaided exit from the vehicle was in the vehicle at the time of the offense.

(d) Aggravating Factors to Be Weighed. – The judge, or the jury in superior court, shall determine before sentencing under subsection (f) of this section whether any of the aggravating factors listed below apply to the defendant. The judge shall weigh the seriousness of each aggravating factor in the light of the particular circumstances of the case. The factors are:

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving. For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.
- (2) Especially reckless or dangerous driving.
- ~~(3) Negligent driving that led to a reportable accident.~~
- (4) Driving by the defendant while the defendant's driver's license was revoked.
- ~~(5) Two or more prior convictions or a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced.~~
- (6) Conviction under G.S. 20-141.5 of speeding by the defendant while fleeing or attempting to elude apprehension.
- (7) Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit.
- (8) Passing a stopped school bus in violation of G.S. 20-217.
- (9) Any other factor that aggravates the seriousness of the offense.

DWLR Impaired

- Yes, this also likely means that driving *any vehicle* (bicycle, electric scooter, etc.) on a street, highway, or a *public vehicular area* while a person's license is revoked—either for an impaired or nonimpaired driving revocation—would subject a person to the aggravating factor.
- Unlike grossly aggravating factors, aggravating factors can be counterweighed by mitigating factors, including the catch-all.
 - 6,000 lb vehicle going 55mph vs. fixie bicycle in a neighborhood
 - Impaired driving revocation vs. non impaired driving revocation
 - Driving down a busy road vs. sleeping in a running car in the parking lot



Questions?

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