



DWI Law – Issues and Updates

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May 2025

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Audience Survey


Option 1


Option 2

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Reasonable Suspicion

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Reasonable Suspicion

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?

Yes

No

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Reasonable Suspicion

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?

Yes

No

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Reasonable Suspicion

- Where the defendant's movement was impeded by a physical and "psychological barrier," they were seized since "most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only end in trouble and/or danger." The defendant would "have had to narrowly skirt around . . . the police cruiser while backing up in order to avoid either hitting the cruiser or running off the road."

* State v. Eagle, 286 N.C.App. 80 (2022)

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Reasonable Suspicion

- "[W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away."
 - *Brendlin v. California*, 551 U.S. 249 (2007)
- It all comes back to the test for whether a seizure occurs: the controlling inquiry is whether a reasonable person would feel free to ignore the officer and go about their business.
 - *Florida v. Bostick*, 501 U.S. 429, 434 (1991)

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Reasonable Suspicion

- Language from *Eagle* about getting in trouble for leaving
 - "most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only *end in trouble and/or danger*."
- G.S. 20-166?
- Prepare to argue the equities...

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Witness Access

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Witness Access

Your client has been arrested for DWI and taken to the law enforcement center for Intox testing. The officer waits 25 minutes instead of 30. Must the results be suppressed?

Yes

No

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Witness Access

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?

Yes

No

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Witness Access

- 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)

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Witness Access

- Checking the "I do not wish to contact anyone" box does not kill 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.

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Witness Access

- 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)

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Witness Access

- 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.

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Sentencing

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Sentencing

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?

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Sentencing

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?

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Sentencing

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?

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Sentencing

- 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)

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Sentencing

- 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)

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Sentencing

- § 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 I 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 II 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 prescribed 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 driver's 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(g).
 - (7) Placing a stopped school bus as prescribed by G.S. 20-217.
 - (8) Driving with a child under 17 years of age in the vehicle.

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Sentencing

- 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 sentence 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. 20-38(a).
- (3) ~~Violence against a minor 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 is in the vehicle at the time of the offense.

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Sentencing

100. Aggravating factors to the sentence - see page 100 for the list of aggravating factors 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 subsection, 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.

Especially relevant in dangerous driving.
 - (2) ~~Driving by the defendant while the defendant's driver's license was revoked.~~
 - (3) ~~Violence against a minor person caused by the defendant's impaired driving at the time of the offense.~~
 - (4) ~~Driving by the defendant while the defendant's driver's license was revoked.~~
 - (5) ~~Violence against a minor person caused by the defendant's impaired driving at the time of the offense.~~
 - (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) Placing a stopped school bus in violation of G.S. 20-217.
 - (9) Any other factor that increases the seriousness of the offense.

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Sentencing

- 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

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Questions?

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