

DWI Fundamentals

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UNC SCHOOL OF GOVERNMENT

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Roadmap

Pretrial Motions

Elements of DWI

Evidentiary Issues

Sentencing

Pretrial Motions

G.S. 20-38.6

The Offense Timeline

Reasonable Suspicion + Seizure

Probable Cause + Arrest

Testing + Processing

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

Motion to Suppress Evidence

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

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: the defendant 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).

There must be probable cause for every element of the offense.

Probable Cause for DWI

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 for DWI.

Search Warrants

Most often arise when law enforcement obtained a blood sample against the defendant'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

State v. Rogers (NCSC Oct. 2025) adopted the good-faith exception. It applies to reasonable reliance in good faith on warrants/court orders later found to be unlawful.

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

Processing

If the state violates the defendant's statutory right to pretrial release, and they are denied access to witnesses during the time following their arrest, they may be entitled to dismissal of the charges.

State v. Knoll, 322 N.C. 535 (1988)

STATE OF NORTH CAROLINA		File No. _____
County _____		In The General Court Of Justice Before The Magistrate
STATE VERSUS Name Of Defendant _____	IMPLIED CONSENT OFFENSE NOTICE G.S. 20-38.4	
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 ☐ Assistant 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		

Processing

IMPLIED CONSENT OFFENSE NOTICE

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)

Ruling on 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 you are denying, you may enter the order and proceed with trial
- If you are granting, you 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

Motor Vehicle Seizures

Pursuant to G.S. 20-28.2, 20-28.3. Applies when:

- Defendant has no valid license and no insurance, or
- Their license was revoked “as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2(a)”

G.S. 20-28.3(m) establishes trial priority in seizure cases.

- Must be scheduled on the arresting officer’s next court date or within 30 days, whichever comes first.
- Shall not be continued unless a written motion is filed with notice to the opposing party, the judge finds a “compelling reason” for the continuance, and the motion and finding are included in the case file.

Motor Vehicle Seizures

G.S. 20-28.3(m) trial priority:

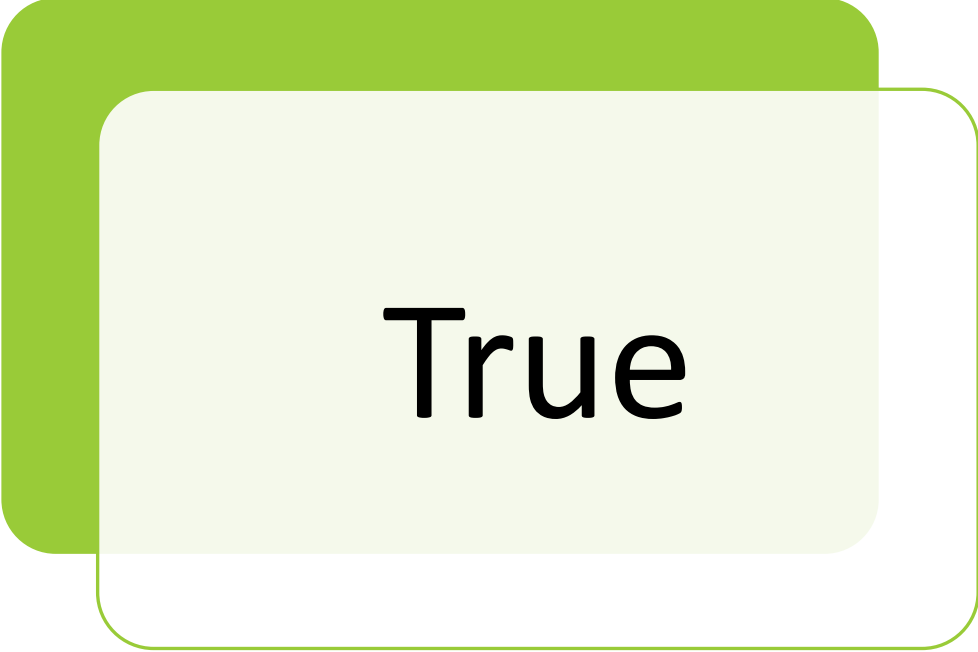
- Preserves the vehicle's value from attrition due to storage fees. Forfeiture to the school board is required after a finding of guilt.
- Failure to comply situates the defendant like all other defendants charged with DWI.
- Unlawful seizure of vehicle from the outset did not warrant dismissal without showing prejudice to constitutional right.
 - *State v. Liskew*, 711 S.E.2d 876 (2011) (unpublished)

Don't forget the forfeiture hearing!

- Requires proper notice to be sent
- Can occur alongside sentencing, after sentencing, or after the D's FTA.

Elements of DWI

A person asleep behind the wheel of a running vehicle is operating that vehicle

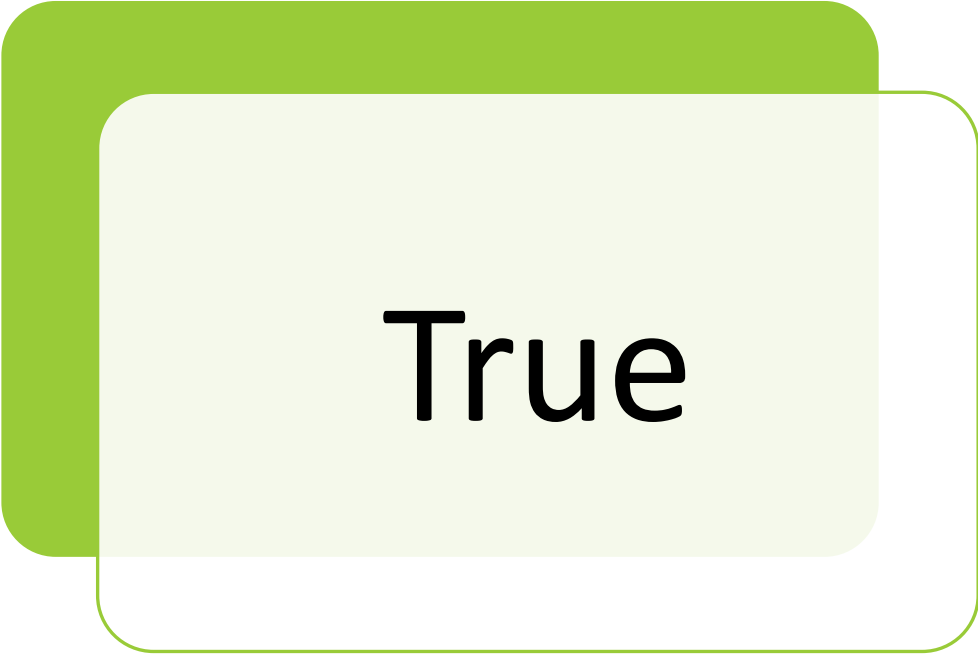


True

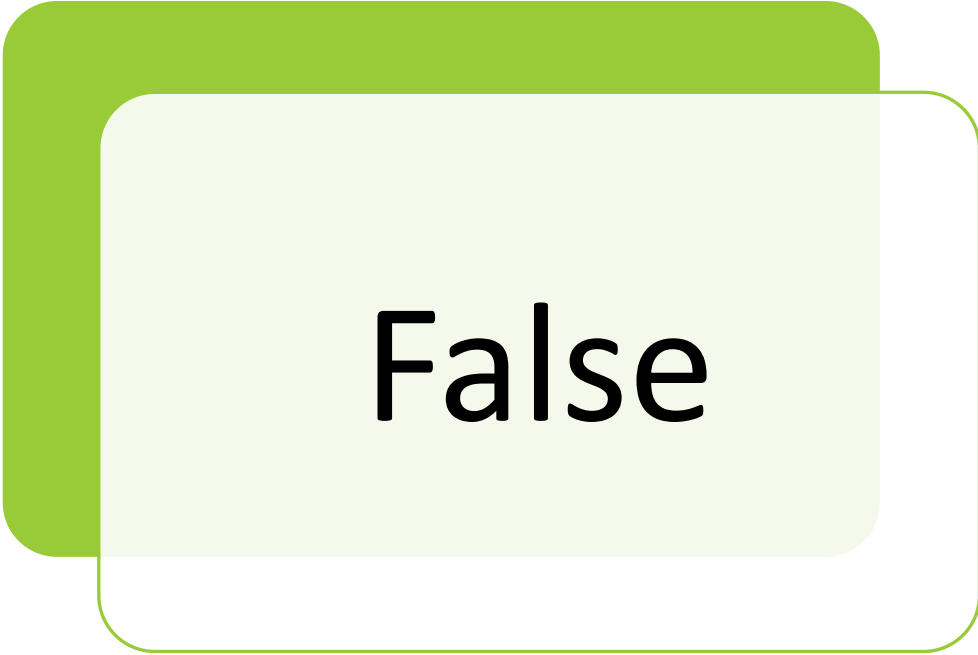


False

A person steering a car that is being towed is operating that vehicle

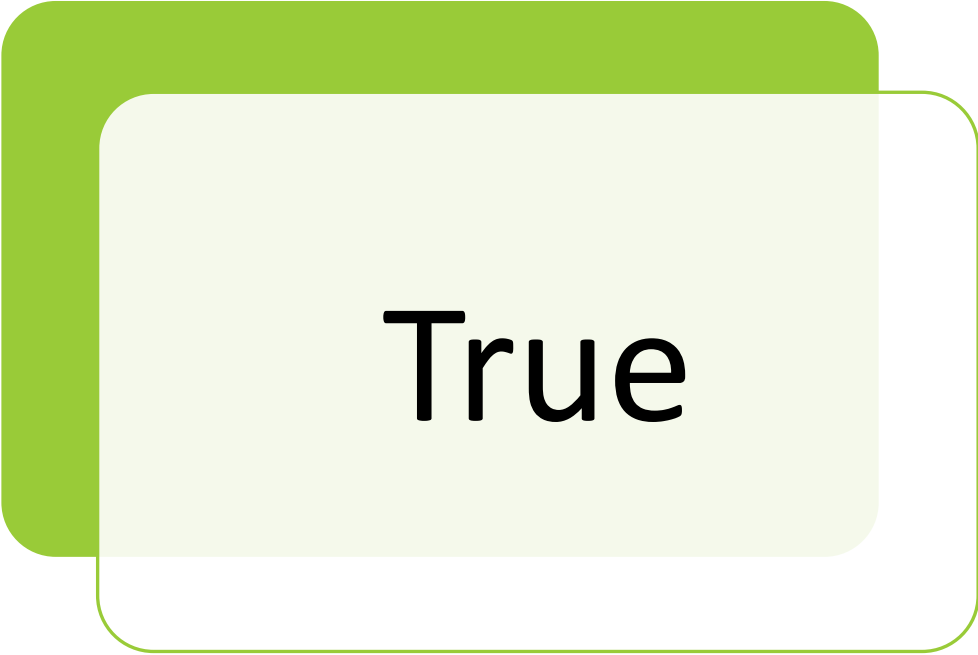


True

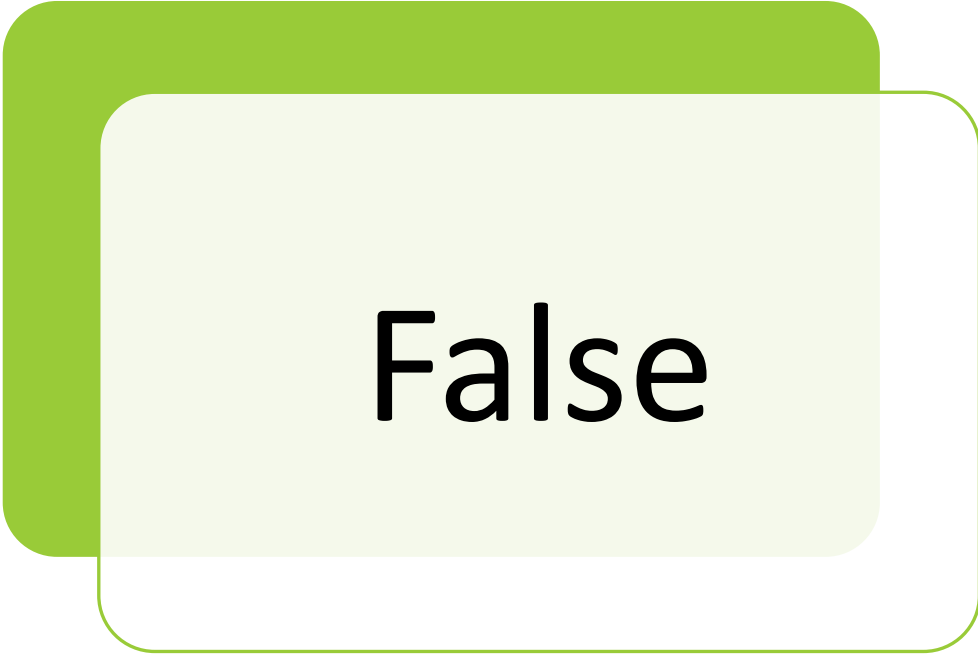


False

A person using “self driving mode” in their vehicle is operating that vehicle



True



False

Operation

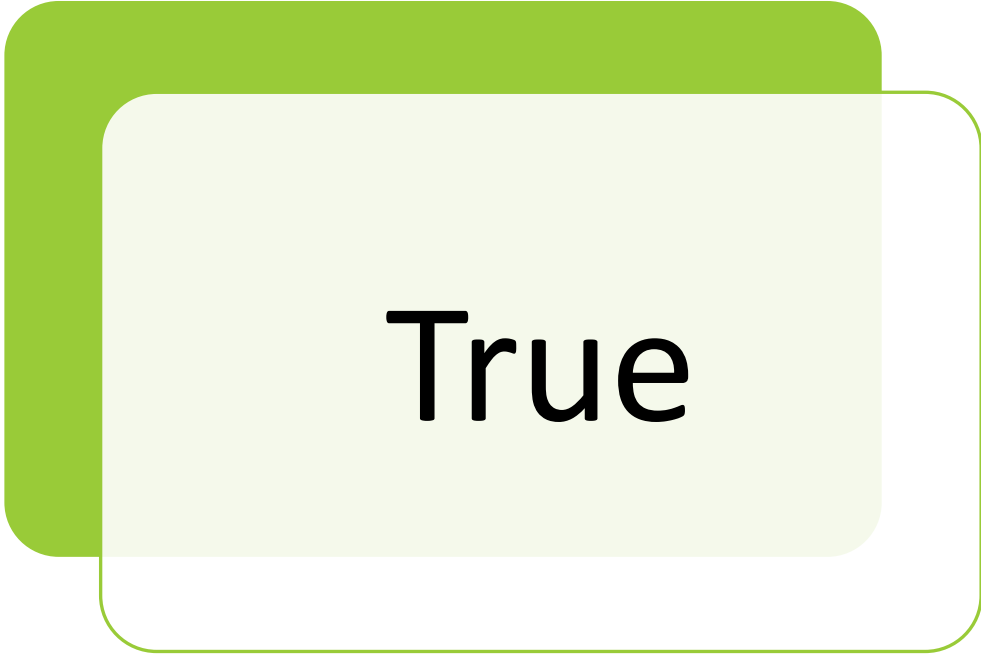
N.C.G.S. 20-4.01(25) Operator. – A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

Autonomous Vehicles

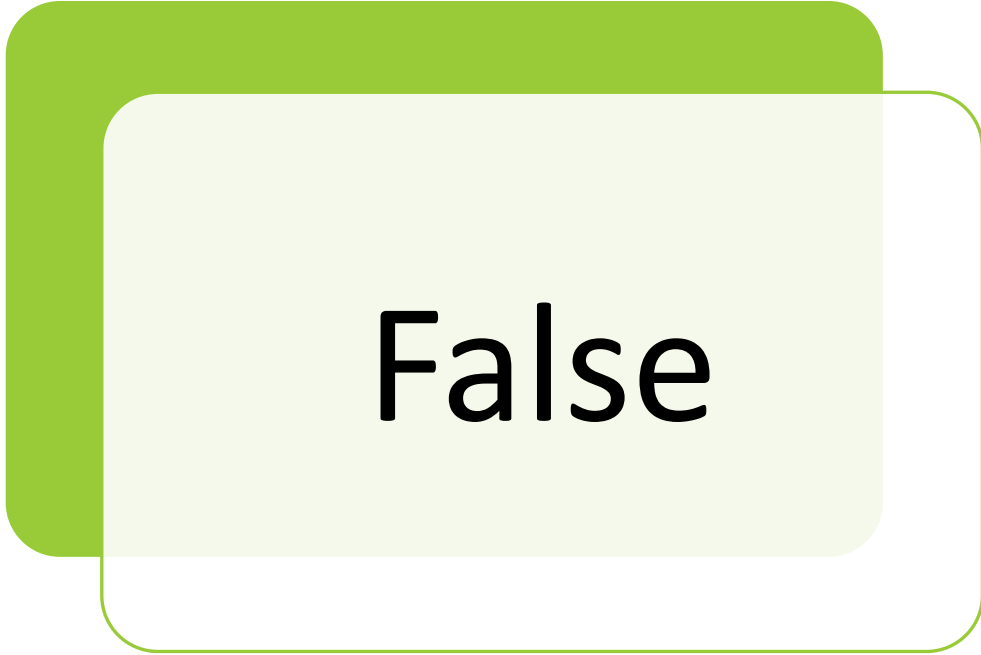
- Level 0 – No automation
- Level 1 – Assists either speed or direction
- Level 2 – Assists both speed and direction
- Level 3 – “Conditional” driving automation
- Level 4 – High driving automation
- Level 5 – Full driving automation

G.S. 20-400(3) Fully autonomous vehicle. – A motor vehicle equipped with an automated driving system that will not at any time require an occupant to perform any portion of the dynamic driving task when the automated driving system is engaged. If equipment that allows an occupant to perform any portion of the dynamic driving task is installed, it must be stowed or made unusable in such a manner that an occupant cannot assume control of the vehicle when the automated driving system is engaged.

A person may commit the offense of
DWI while on a motorcycle

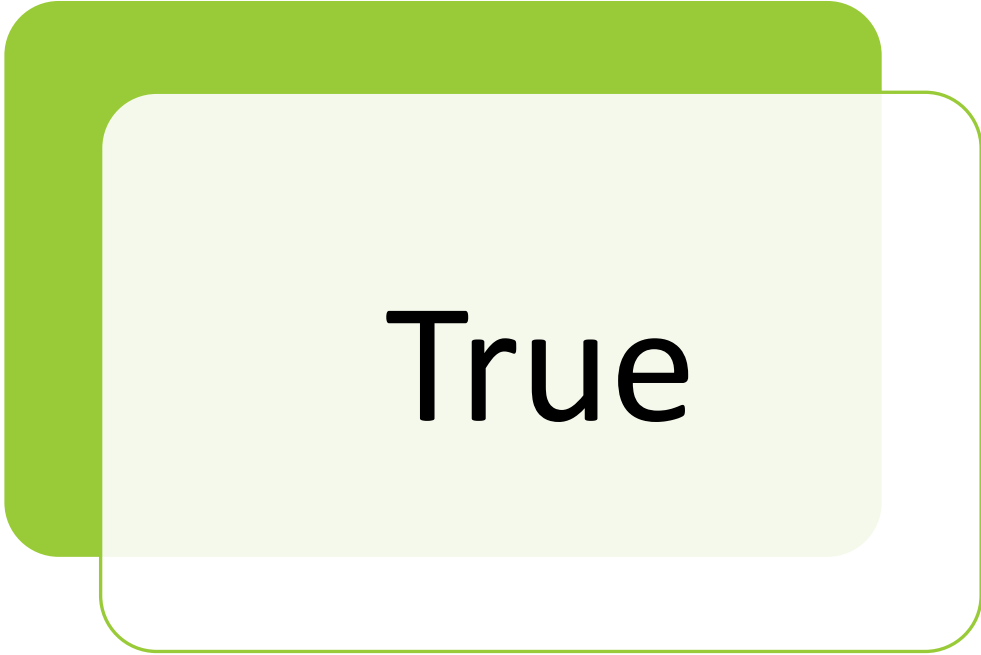
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True

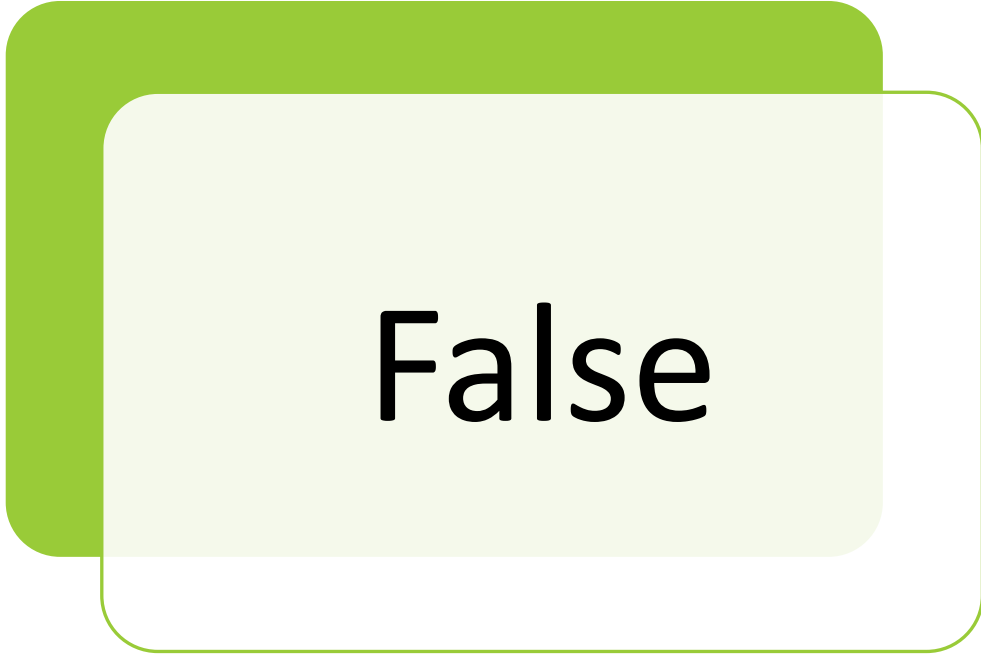
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False

A person may commit the offense of
DWI while on a moped

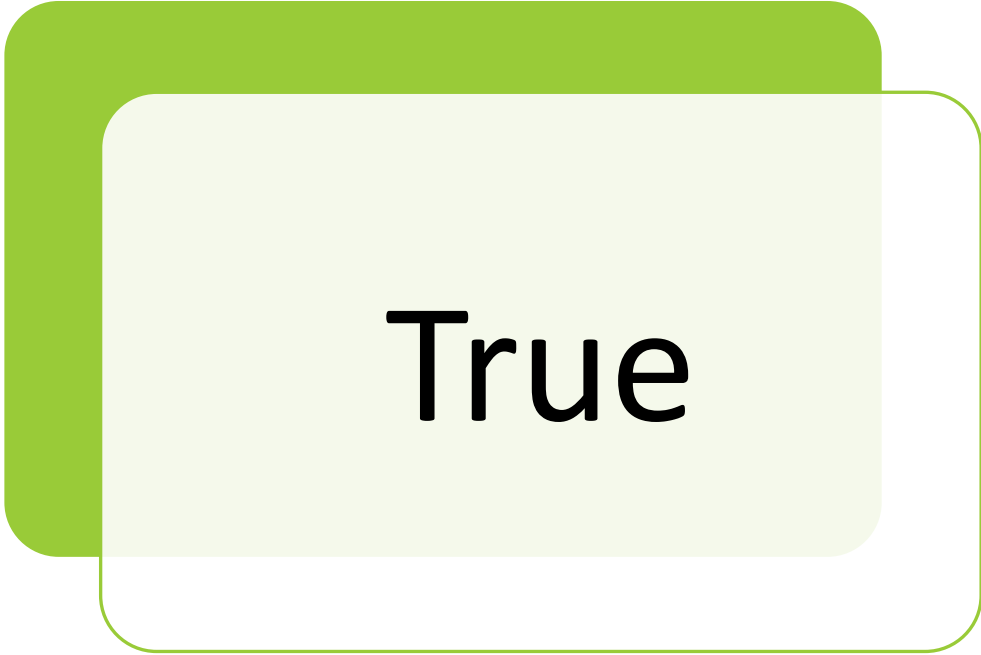
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True

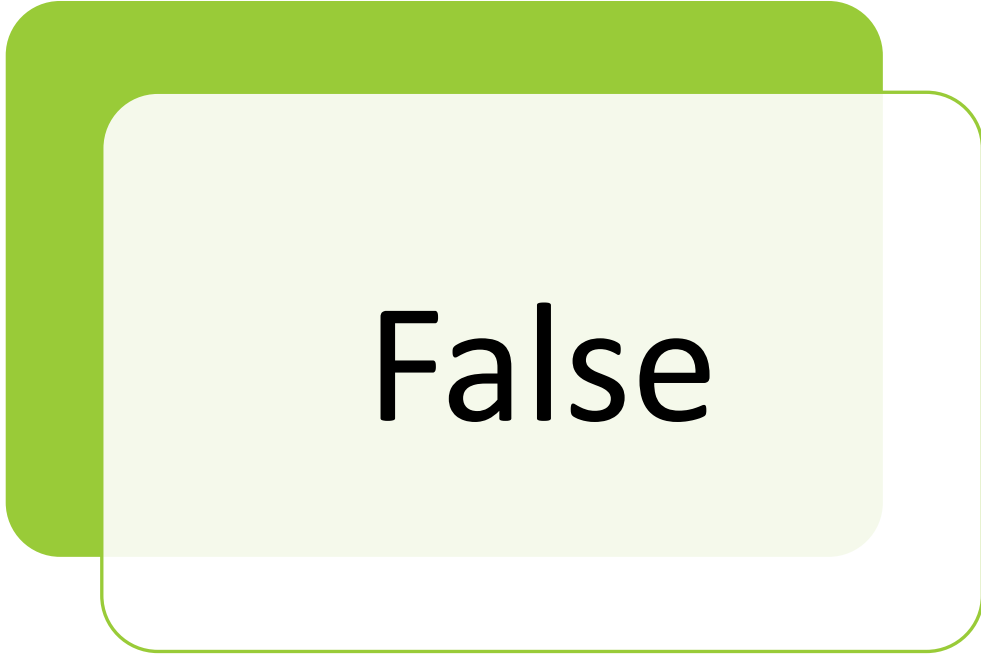
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False

A person may commit the offense
of DWI while on a bicycle

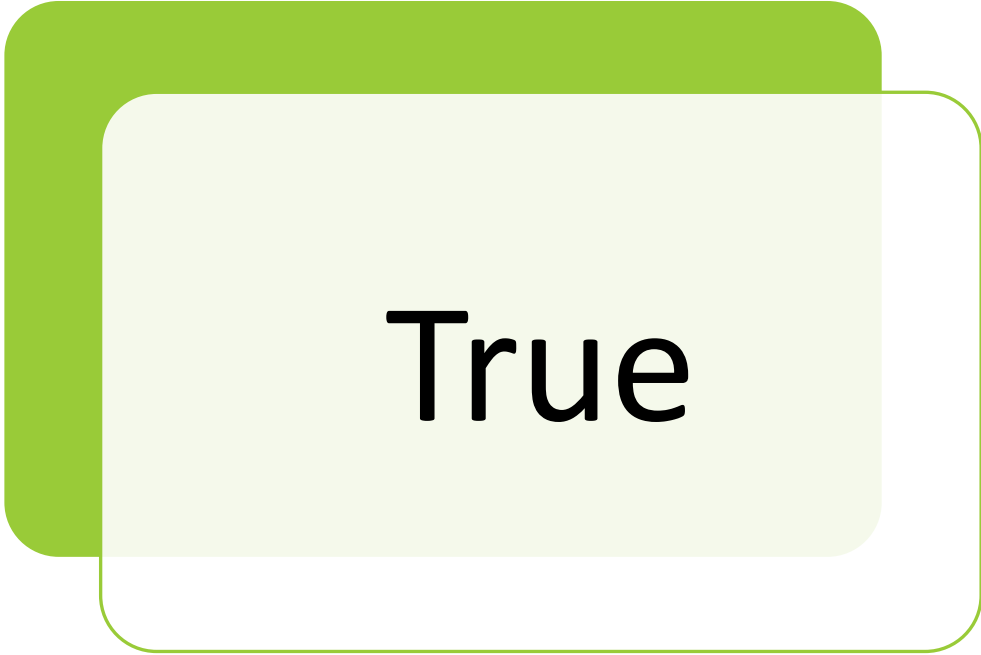
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True

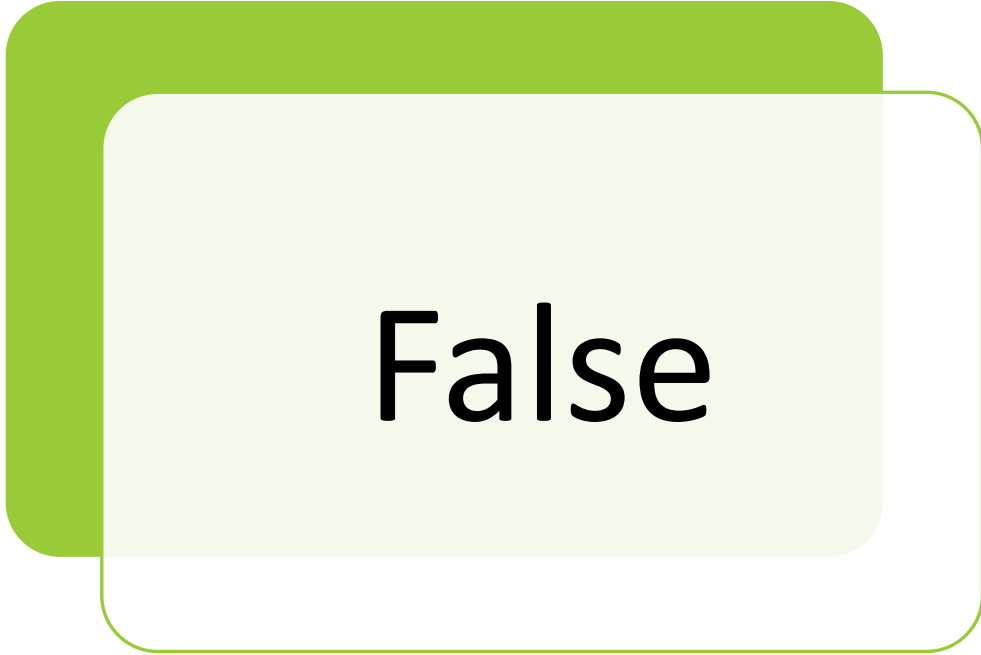
A button with a green border and a light green background, containing the word "False".

False

A person may commit the offense of DWI while on a skateboard

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True

A button with a green background and a white rounded rectangle in the center containing the word "False".

False

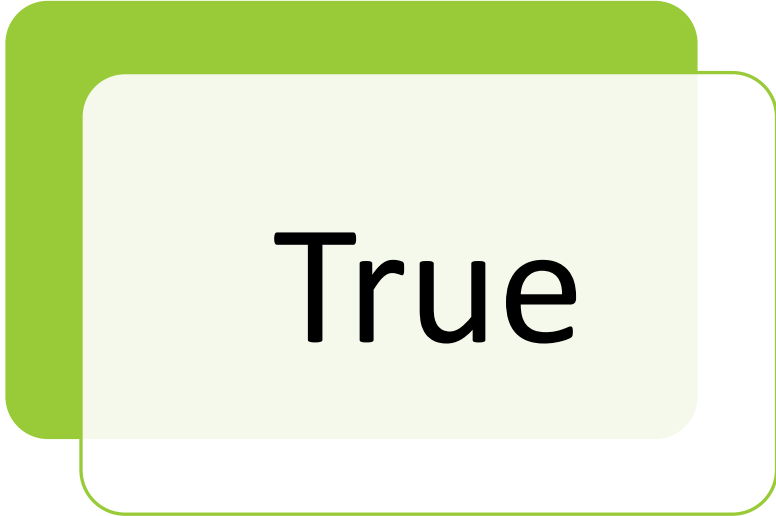
DWI and Vehicles

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).

This is contrast with *motor vehicles*, which is the element required for driving while license revoked. Where does this distinction come up most often?

A person may commit the offense of DWI
at a gas station

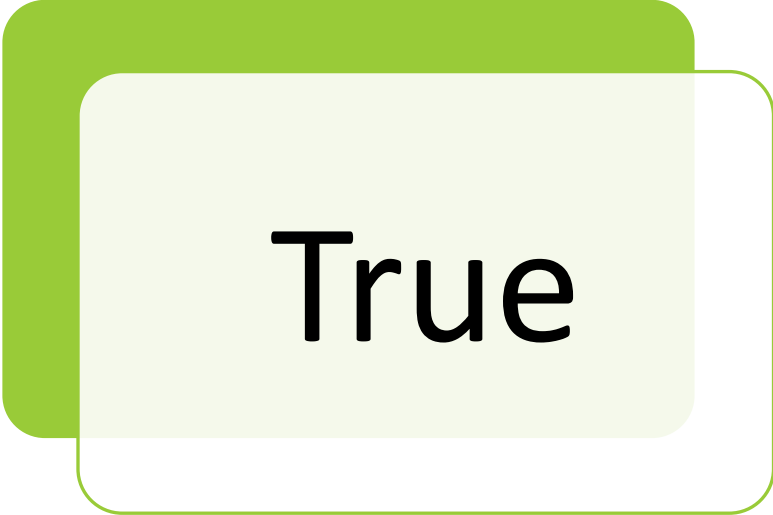
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True

A button with a green background and a white border, containing the word "False" in black text.

False

A person may commit the offense of DWI in the parking lot of a closed business

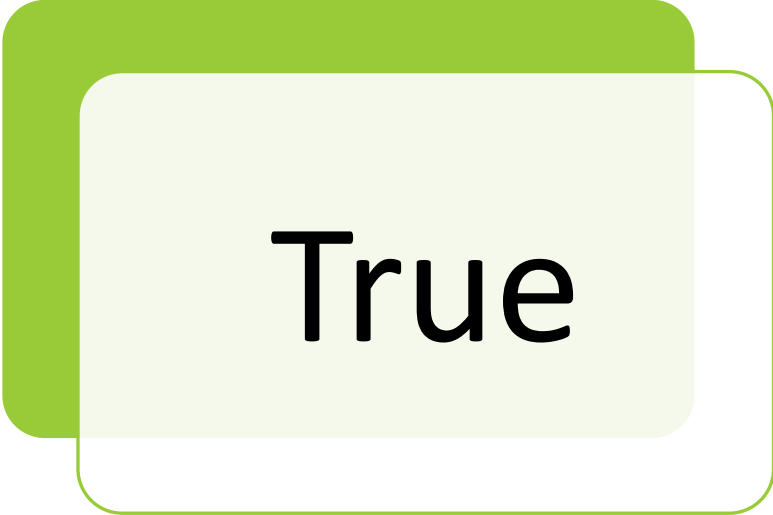
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True

A button with a green background and a white border, containing the word "False" in black text.

False

A person may commit the offense of DWI on private property regularly used for traffic

A button with a green background and a white border, containing the word "True" in black text.

True

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False

Public vehicular area

Street, Highway: The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. G.S. 20-4.01(13), (46).

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.

G.S. 20-4.01(32).

Public vehicular area

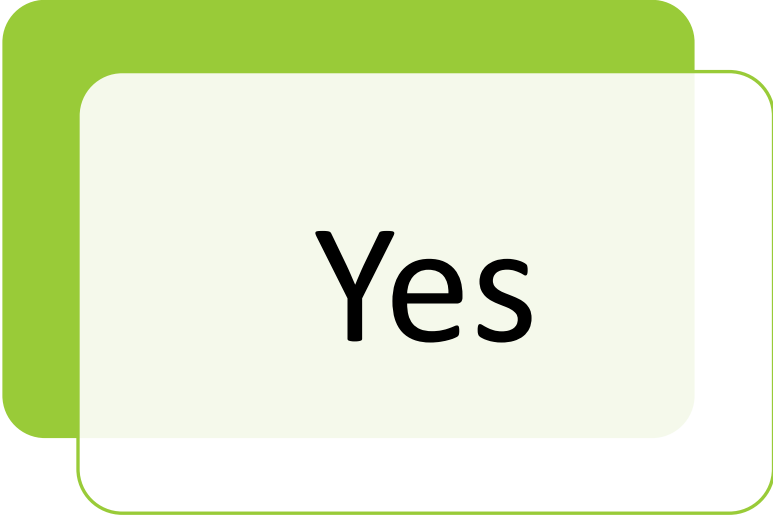
Based on State v. Ricks, if the area is a portion of private property used by vehicular traffic,
AND

It is NOT any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of

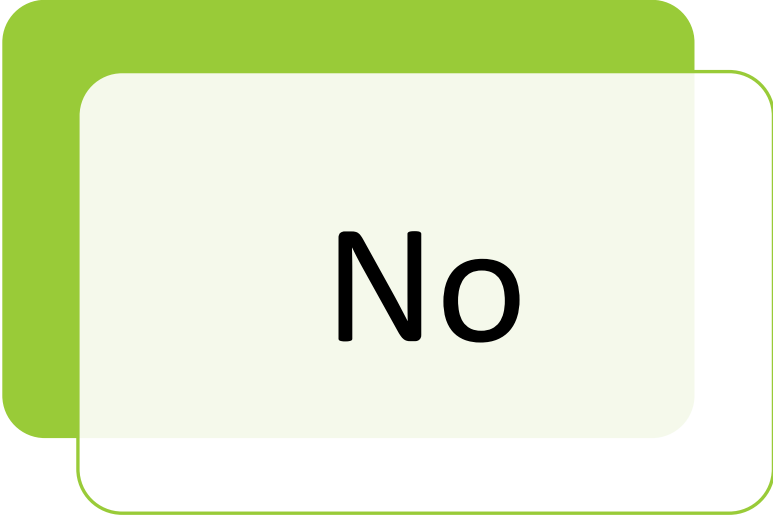
- Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions, or
- Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed, or
- Any property owned by the United States and subject to the jurisdiction of the State of North Carolina

Then it is NOT a PVA (like the dirt drive in Ricks) and DWI would not apply.

After a person was arrested for DWI due to alcohol and blew a .06, the officer is seeking a DWI charge. May they be charged? May they be convicted?

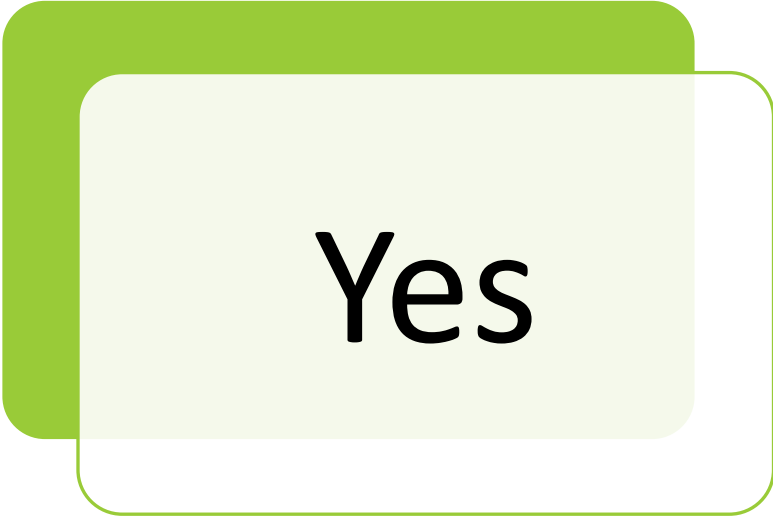


Yes

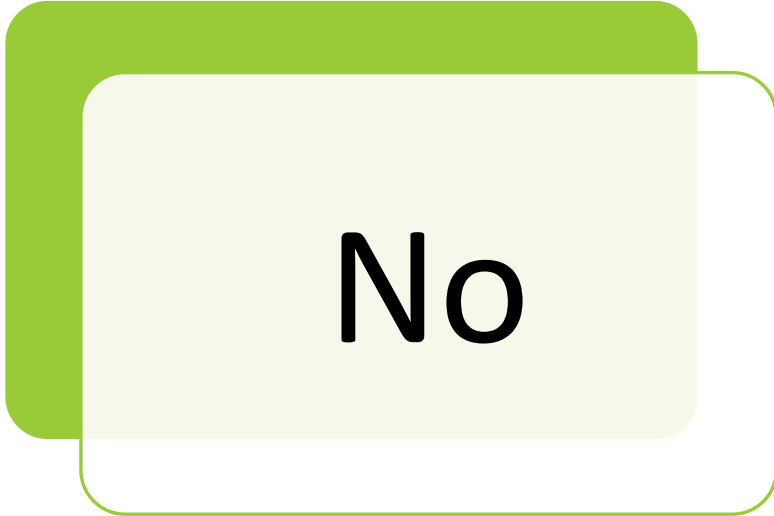


No

An officer suspects drug impairment based on the suspect's behavior and finding unknown pills. Without identifying the substance, may the person be charged? Convicted?



Yes



No

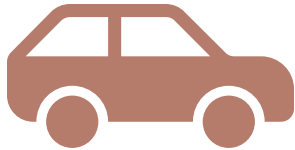
Impairment

§ 20-138.1. Impaired driving.

(a) Offense. – A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

Impairment – Drugged Driving



No different than considering 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)

Cannabis

What is cannabis?

- G.S. 90-87(16) "Marijuana"
- G.S. 90-87(13a) "Hemp"

What are cannabinoids?

- Chemical compounds that interact with our body's natural endocannabinoid system
- For example, CBD, **THC-9**, THC-8, THC-A, THC-O....

Schedule VI (G.S. 90-94)

(b) The following controlled substances are included in this schedule:

- (1) Marijuana
- (2) Tetrahydrocannabinols, except for tetrahydrocannabinols found in a product with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis.

Why doesn't this matter in DWI cases?

In what similar case does this matter a lot?

Evidentiary Issues

In-trial Objections

Not all evidence admissibility is the result of a motion to suppress for lack of reasonable suspicion or probable cause.

If the defendant's implied consent rights are violated, the test results may be inadmissible. The State may also fail to lay a proper foundation.

This may properly be argued when the evidence is being offered, if there is an objection to its admissibility and does not have to be made pretrial.

Implied Consent Generally

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 inadmissible 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 inadmissibility:

- *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)

Breath Test Administration

Trooper Cruz testified that the Intoxilyzer EC/IR II is “the instrument that we use ... when we arrest somebody for DWI[,] we take them to the ... Pitt County Detention Center and then we have them provide two [] breath samples ... to give a reading of alcohol concentration.”

When the State moved to admit its exhibit displaying Defendant's breath test result, Defendant objected to the foundation. The trial court judge overruled Defendant's objection and accepted the breath test exhibit into evidence.

Next, the State asked for the trooper's testimony of the breath result, and Defendant objected a second time to foundation. Again, the trial court judge overruled Defendant's objection, and the result was stated before the jury.

Breath Test Administration

Must state compliance with both N.C.G.S. 20-139.1 and the DHHS Regulations

Failure to offer evidence of compliance with the statutorily prescribed methods of administering the test renders the result inadmissible. *State v. Vaughn*, 296 N.C. App. 752 (2024).

“Testimony simply noting the test is performed in accordance with the rules of DHHS could have met this requirement; yet the record is completely devoid of such evidence.”

See also *State v. Gray*, 28 N.C. App. 506, 506, 221 S.E.2d 765, 765 (1976) (holding that the defendant was entitled to a new trial when the trial court committed prejudicial error by admitting breath test results over the defendant's objection after the State failed to establish compliance with the procedures outlined in N.C. Gen. Stat. § 20-139.1)

The State may “prove compliance with these two requirements in any proper and acceptable manner.” *State v. Powell*, 10 N.C. App. 726, 728, 179 S.E.2d 785, 786 (1971).

Blood Testing

May only occur via consent, search warrant, or exigent circumstances.

If the basis for suppressing the blood results is the Fourth Amendment (lack of consent, search warrant lacks PC, no exigent circumstances), then:

- Proper avenue is a Motion to Suppress
- Must (mostly) be made pre-trial, unless the defense learns of facts not previously known in trial.

If the basis for suppressing the blood results is a rule of evidence (hearsay, lack of expert foundation, confrontation), then:

- Proper avenue is objection when the testimony is offered
- Cannot be made pre-trial, as the testimony has not been offered yet.

Blood Testing

Hospital Records of blood contents

- State accomplishes this via a search warrant or court order 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

Analyst Testimony

- May testify remotely if State properly serves a copy of the report and notifies the defense at least fifteen business days before the proceeding.
- May not use the testimony of a substitute or supervising analyst, must be the analyst the performed the testing (State v. Holt, COA25-560 (May 20, 2026)).

Drug Recognition Experts

Police Officers and other public safety officials who have successfully completed the NC Drug Evaluation and Classification Program.

- Three Phases, 120 combined hours of instruction, followed by the Certification Phase.
- Generally experienced law enforcement officers with additional training beyond requirements.

After a 12 Step Drug Evaluation Process, DRE officers may form an expert opinion as to whether or not a person is:

- Impaired, and if so, is the impairment due to an injury, illness, or other medical complication, or is it drug-related, and if it is drug-related, what is the category or combination of drug(s) that are the most likely source of the impairment.

Drug Recognition Experts

N.C.G.S. 8C-1, Rule 702(a1)(2) governs DRE testimony as expert testimony.

- Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following: Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances, if the witness holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services.

Similar to, but not the same as, Rule 702 (a1)(1) for HGN.

Drug Recognition Experts

State v. Moore, No. COA24-899 (N.C. Ct. App. July 16, 2025)

In *Moore*, the DRE reviewed reports, BWC, and testimony to form their opinion.

The Court concluded “[i]t is beyond reason . . . to construe ‘notwithstanding any other provision of law’ to mean the legislature intended to allow testimony outside of the witness’ qualification or area of expertise” Slip op. at 12.

The holding in *Moore* aligns the requirements for DRE testimony with the requirements for HGN testimony. *Moore* now similarly requires a DRE officer to administer the evaluation in accordance with their training for the expert testimony to be admissible.

Sentencing

DWI Sentencing Overview

Driving While Impaired sentencing is governed by G.S. 20-179

No indefinite Prayers for Judgment Continued

Mandatory minimum sentences

Substance Abuse Assessment and Recommended Treatment required for all suspended sentences

Limits on consolidating with other offenses

There are six sentence levels: A1, 1, 2, 3, 4, and 5

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.

Duties of the Prosecutor

Imposed by G.S. 20-179(a)(2)

- Obtain and present full record of traffic convictions
- Present all other appropriate grossly aggravating factors and aggravating factors of which they are aware
- Present evidence of alcohol concentration from valid chemical analysis

Sentencing Factors

DWI Sentencing is governed by statutory factors:

- Grossly aggravating factors (G.S. 20-179(c)) **Beyond a reasonable doubt**
- Aggravating factors (G.S. 20-179(d)) **Beyond a reasonable doubt**
- Mitigating factors (G.S. 20-179(e)) **Preponderance of evidence**

Aggravating factors and mitigating factors also contain a catch all “any other factor that aggravates/mitigates the seriousness of the offense.”

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(f)(3)
Three or more grossly aggravating factors

- 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. 20-17.6
- Fine (optional) up to \$10,000

Level One

G.S. 20-179(g)
Grossly aggravating factor in G.S. 20-179(c)(4) or two other grossly aggravating factors

- 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. 20-17.6
- Fine (optional) up to \$4,000

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

Level Three

G.S. 20-179(i)
Aggravating factors substantially outweigh any mitigating factors, or only aggravating factors are present

- 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. 20-17.6
- Fine (optional) up to \$1,000

Level Four

G.S. 20-179(j)
No aggravating and mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors

- 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. 20-17.6
- Fine (optional) up to \$500

Level Five

G.S. 20-179(k)
Mitigating factors substantially outweigh aggravating factors, or only mitigating factors are present

- 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. 20-17.6
- 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.

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

DWLR Impaired

Where an aggravating factor includes a statutory reference, that statutory reference defines the scope of the factor.

G.S. 20-179(c)(2): “driving by the defendant at the time of offense while the defendant’s driver’s license was revoked pursuant to G.S. 20-28(a1).”

G.S. 20-179(d)(4): “driving by the defendant while the defendant’s driver’s license was revoked.”

“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)

Delegated Authority

Included by default in all impaired driving suspended sentences (since December 1, 2023)

- Perform up to 20 hours of community service and pay the fee prescribed by law for this supervision.
- Report to the offender's probation officer on a frequency to be determined by the officer.
- Submit to substance abuse assessment, monitoring, or treatment.
- Submit to house arrest with electronic monitoring.
- Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month, imposed in 2-day or 3-day consecutive periods, during any three separate months during the period of probation.
- Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits electronic monitoring of the offender's compliance with the condition.
- Participate in an educational or vocational skills development program, including an evidence-based program.

May be withheld from probation's authority by checking the box in the "Suspension of Sentence" section of AOC-CR-310E.

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).

Confinement

Other than imprisonment required as special probation (split sentence), imprisonment is served in the Statewide Misdemeanant Confinement Program. Special probation must be served in a designated local confinement (or treatment facility).

By DAC Regulation, DWI inmates receive 1 day Good Time credit for every day of confinement without a conviction through the Disciplinary Process of a violation of inmate conduct rules.

Sentences may not be reduced below the mandatory minimum for that level of DWI.

Aggravated Level One DWI sentences are not eligible for any Good Time credit.

Resentencing after Remand

In misdemeanors sentenced pursuant to Structured Sentencing, the district court sentence is stayed on appeal, and if the defendant remands the case, the case is calendared for execution of the judgment.

In impaired driving cases, 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.

Questions?

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