Prosecuting DWI Cases: The Law You Need to Know

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At the end of this session, you will be able to:

1. Define the term *implied consent offense*.
2. List the elements of DWI.
3. List statutory implied consent rights.
4. State the pleading requirements for DWI.
5. Identify the remedy for a violation of statutory implied consent rights.
6. State the rules governing the admissibility of tests of a defendant's breath, blood, or urine.
7. State the Fourth Amendment restrictions on the testing of a person's breath, blood or urine for evidence of alcohol or drugs.
8. Describe special pretrial release procedures that apply in cases involving impaired driving.
9. Identify the remedy for a violation of pretrial release procedures in impaired driving cases.
10. Describe the rules governing motions to suppress and dismiss in implied consent cases.
11. State the requirements for dismissing or reducing charges in an implied consent case.
12. State the duties of the prosecutor at sentencing.

1. **Define the term *implied consent offense*.**

What is an implied consent offense? An offense for which a person may be required to submit to testing of his or her breath, blood or urine. If the person refuses, his or her driving privileges are revoked.

The following are implied consent offenses:
1. Impaired driving (G.S. 20-138.1)
2. Impaired driving in a commercial vehicle (G.S. 20-138.2)
3. Habitual impaired driving (G.S. 20-138.5)
4. Death by vehicle or serious injury by vehicle (G.S. 20-141.4)
5. Murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving
6. Driving by a person under 21 after consuming alcohol or drugs (G.S. 20-138.3)
7. Violating no alcohol condition of a limited driving privilege (G.S. 20-179.3(j))
8. Impaired instruction (G.S. 20-12.1)
9. Operating a commercial motor vehicle after consuming alcohol (G.S. 20-138.2A)
10. Operating a school bus, school activity bus, child care vehicle, ambulance or other EMS vehicle, firefighting vehicle, or law-enforcement vehicle after consuming alcohol (G.S. 20-138.2B)
11. Transporting an open container of alcohol (G.S. 20-138.7(a))
12. Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f))

2. **List the elements of DWI.**

Driving while impaired (G.S. 20-138.1) is an implied consent offense. It consists of the following elements:
1. Drive (to be in actual physical control of a vehicle that is in motion or that has the engine running)
2. Vehicle
3. Street, highway or pva
4. While impaired
    a. Appreciable impairment;
    b. BAC of 0.08 or more at any a relevant time after driving; or
    c. Any Schedule I controlled substance or its metabolites in his/her blood or urine

3. **State the pleadings requirements for DWI.**

A pleading is sufficient if it "states the time and place of the alleged offenses in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance." G.S. 20-138.1(c). The State is not required to allege the specific hour and minute that the offense occurred. *State v. Friend*, 219 N.C. App. 338 (2012). Nor must the State allege the theory of impairment. *State v. Coker*, 312 N.C. 432 (1984).

If the State intends to prove one or more aggravating factors for misdemeanor DWI (or another offense sentenced under G.S. 20-179) that the defendant has appealed to superior court for trial de novo, the State must provide the defendant notice of its intent. G.S. 20-179(a1)(1). The notice must be provided no later than 10 days prior to trial and must contain a plain and concise factual statement indicating each factor the State plans to use.

4. List statutory implied consent rights.

Implied consent testing. The following requirements apply to implied consent testing (G.S. 20-16.2):

1. Law enforcement officer must have probable cause to believe defendant committed an implied consent offense.
2. Defendant must be charged with implied consent offense.
3. Defendant must be taken before chemical analyst with permit from DHHS.
4. Chemical analyst designates type of test and requests that person submit to it.
5. Chemical analyst must advise person orally and in writing of implied consent rights.
   a. You've been charged with an implied consent offense. If you refuse to be tested, your driver's license will be revoked for one year.
   b. The test results will be admissible at trial.
   c. If the result is .08 or more (.04 if CMV or .01 if you are under 21) your license will be revoked for 30 days.
   d. After you are released, you may seek your own test.
   e. You may call an attorney for advice and select a witness to view test. But test will not be delayed longer than 30 minutes for this purpose.
6. The chemical analyst may ask the person to submit to more than one type of testing. Before a new type of testing is carried out, the person must be readvised of his or her implied consent rights. G.S. 20-139.1(b5); *State v. Williams*, 234 N.C. App. 445 (2014); *but see State v. Sisk*, 238 N.C. App. 553 (2014) (concluding that because defendant volunteered to take blood test his right to be readvised of implied consent rights was not triggered).

5. Identify the remedy for violation of implied consent rights in impaired driving cases.

Failure to advise of rights or afford rights. If defendant was not advised of implied consent rights or afforded the rights, the test results may be suppressed. *See State v. Shadding*, 17 N.C. App. 279 (1973).

What if test is not delayed for 30 minutes? Is it per se inadmissible? No. Defendant must show that witness would have arrived within 30 minutes. *See State v. Buckner*, 34 N.C. App. 447, 451 (1977) (holding that a delay of 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.")

6. State the rules governing the admissibility of tests of a defendant's breath, blood, or urine.

Admissibility. In any implied consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substances in the person's body as shown by a chemical analysis is admissible in evidence. G.S. 20-139.1(a).

The results of a chemical analysis "shall be deemed sufficient evidence to prove a person's alcohol concentration," meaning they satisfy State's burden to introduce sufficient evidence from which finder of fact could find impairment based on BAC of .08 or more. G.S. 20-138.1(a)(2); 20-139.1(b); *State v. Narron*, 193 N.C. App. 76, 83 (2008) (holding that 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").

Breath test results. A chemical analysis of the breath administered pursuant to the implied consent law is admissible if (1) it is performed in accordance with the rules of the Department of Health and Human Services; and (2) the person performing the analysis had, at the time of the analysis, a current permit issued by DHHS authorizing the person to perform a breath test using the type of instrument employed.

Rules for breath testing.

1. **Observation period.** Chemical analyst must observe the person to be tested to determine that the person has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. May the chemical analyst observe while setting up the machine? Yes. 10 A NCAC 41B .0101(6), .0322.
2. **Preventative maintenance.** Intoximeter EC/IR II must undergo preventative maintenance every 4 months. The ethanol gas canister must be changed before its expiration date. 10 NCAC 41B .0323. A court must take judicial notice of the preventative maintenance records of DHHS. Breath test results are not admissible if a defendant objects and demonstrates that preventative maintenance was not performed within the time limits prescribed. G.S. 20-139.1(b2).
3. **Consecutive breath samples.** Results are admissible if test results from any two consecutive breath samples do not differ by more than 0.02. G.S. 20-139.1(b3).
4. **Are both results admissible?** Yes. But only the lower may prove a particular alcohol concentration. G.S. 20-139.1(b3).
5. **What if person provides one breath sample and then refuses?** That makes the result of the first breath sample or the one providing the lowest alcohol concentration admissible. G.S. 20-139.1(b3).
6. **Affidavit of chemical analyst.** In district court, the State may introduce an affidavit of a chemical analyst "without further authentication and without the testimony of the analyst" to prove the following matters:
    a. the defendant's alcohol concentration or the presence or absence of an impairing substance of a person
    b. the time blood, breath or urine was collected
    c. the type of chemical analysis administered and the procedures followed
    d. the type and status of the analyst's DHHS permit
    e. the date the most recent preventative maintenance was performed on the breath testing machine

    To use an affidavit in this way, the State must notify the defendant no later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding at which the affidavit will be introduced that it intends to introduce the affidavit. The State must provide a copy of the affidavit to the defendant. The State may introduce the affidavit without further authentication and without testimony from the analyst if the defendant, after receiving notice of the State's intent and a copy of the affidavit, fails to file a written objection with the court, at least 5 business days before the proceeding at which the affidavit will be used. If the case is continued, the notice and written objection (or lack thereof) remain effective at any subsequent calendaring of that proceeding. G.S. 20-139.1(e2).
7. **Continuance so that analyst may appear.** G.S. 20-139.1(e2), which sets for the rules for providing notice and demand for a chemical analyst's affidavit in district court, requires that the case be continued until the analyst can be present. It also states that the criminal case "shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."

Rules for blood or urine testing.

1. **Withdrawal of blood.** When a blood or urine test is specified as the type of chemical analysis by a law enforcement officer, a physician, nurse or other qualified person must withdraw the blood sample or obtain the urine sample unless the procedure cannot be performed without endangering the safety of the person collecting the sample or the person from whom the sample is being collected. G.S. 20-139.1(c).
2. **Notice and demand.** Chemical analysis results reported by the State Crime Lab or any other laboratory approved by DHHS are admissible "without further authentication and without the testimony of the analyst" if the defendant is provided notice and fails to file a written objection. G.S. 20-139.1(c1).
    a. The State must notify the defendant no later than 15 business days after receiving the report and at least 15 business days before the proceeding at which the evidence will be used that it intends to use the report. The State must provide a copy of the report to the defendant along with the notice. G.S. 20-139.1(c1)(1).
    b. The defendant must file a written objection with the court, with a copy to the State, at least five business days before the proceeding at which the report will be used that the defendant objects to the introduction of the report into evidence. If the defendant fails to file a written objection within this timeframe, the objection is waived and the report may be admitted without the testimony of the analyst. G.S. 20-139.1(c1).
    c. If the proceeding is continued, the notice, and the written objection or the lack of written objection remain effective at any subsequent calendaring of the proceeding.
3. **Chain of custody.** Similar notice and demand rules apply to statements regarding chain of custody. G.S. 20-139.1(c3). Note, however, that the State may establish a sufficient chain of custody to support the introduction of the laboratory report without introducing the chain of custody statement. If the State introduces sufficient evidence from which the trial court can conclude that the blood analyzed was the defendant's and it was not materially altered before testing, then the results of an analysis of the blood are admissible, even without testimony from every person who participated in the chain of custody.
    a. *See State v. Campbell*, 311 N.C. 386, 388–89 (1984) ((1) establishing two-pronged test for the admission of real evidence: (a) item must be identified as being the same object involved in the incident and (b) it must be shown that the object has undergone no material change; (2) stating that trial court has discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition; (3) requiring a detailed chain of custody only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered; and (4) stating that "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility").
    b. *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called. . . .'[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody

are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."); *State v. Andrews*, 233 N.C. App. 239 (2014) (unpublished) (finding "ample testimony presented by the two most important links in the chain of custody for the trial court to conclude the blood sample was the same as that taken from defendant and had undergone no material change" and concluding, therefore, that the trial court did not abuse its discretion in admitting the blood test results).

4. **Affidavit of chemical analyst.** In district court, the State may introduce an affidavit of a chemical analyst "without further authentication and without the testimony of the analyst" to prove the following matters:
    a. the defendant's alcohol concentration or the presence or absence of an impairing substance of a person
    b. the time blood, breath or urine was collected
    c. the type of chemical analysis administered and the procedures followed
    d. the type and status of the analyst's DHHS permit
    e. the date the most recent preventative maintenance was performed on the breath testing machine

    To use an affidavit in this way, the State must notify the defendant no later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding at which the affidavit will be introduced that it intends to introduce the affidavit. The State must provide a copy of the affidavit to the defendant. The State may introduce the affidavit without further authentication and without testimony from the analyst if the defendant, after receiving notice of the State's intent and a copy of the affidavit, fails to file a written objection with the court, at least 5 business days before the proceeding at which the affidavit will be used. If the case is continued, the notice and written objection (or lack thereof) remain effective at any subsequent calendaring of that proceeding. G.S. 20-139.1(e2).
5. **Continuance so that analyst may appear.** G.S. 20-139.1(e2), which sets for the rules for providing notice and demand for a chemical analyst's affidavit in district court, requires that the case be continued until the analyst can be present. It also states that the criminal case "shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."

Refusals. Is a person's refusal to submit to a chemical analysis admissible? Yes. G.S. 20-16.2; *State v. Davis*, 142 N.C. App. 81, 88 (2001).

What about a person's refusal to perform field sobriety tests? Yes. G.S. 20-139.1(f).

Other types of testing. G.S. 20-139.1 "does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests." G.S. 20-139.1(a). Thus, a person's alcohol concentration may be proved through the admission of hospital medical records. *See, e.g.*, *State v. Drdak*, 330 N.C. 587, 592 (1992).

7. State the Fourth Amendment restrictions on the testing of a person's breath, blood or urine for evidence of alcohol or drugs.

Fourth Amendment. Testing a person's breath, blood, or urine for alcohol or drugs is a Fourth Amendment search. Such testing must satisfy the Fourth Amendment's reasonableness requirement.

Probable cause + warrant = reasonable search
Exceptions: search incident to arrest, consent, special needs searches, exigent circumstances

Is Fourth Amendment reasonableness requirement satisfied by implied consent testing?
Probable cause? Yes, must have probable cause for implied consent offense.

Warrant or exception to warrant requirement? Breath tests are permissible as search incident to arrest. *Birchfield v. North Dakota*, 579 U.S. 438 (2016). So no warrant is necessary.
Blood tests require a warrant or consent or exigent circumstances.

Is consent to a blood or urine test expressed after being advised of implied consent rights sufficient? Yes, it can be, depending on the totality of the circumstances. *See State v. Romano*, 369 N.C. 678, 692 (2017) (stating that "the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw" under the totality of the circumstances; noting that the State has the burden of proving voluntary consent), *overruled on other grounds*, *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019) (discussed below).

Can an unconscious person consent to testing? G.S. 20-16.2(b) permits a law enforcement officer to withdraw blood from an unconscious defendant without advising the person of his or her implied consent rights or asking for his or her consent. The North Carolina Supreme Court held in *State v. Romano*, 369 N.C. 678 (2017), that G.S. 20-16.2(b) was unconstitutional as applied to the defendant, who was unconscious when his blood was drawn and where the circumstances did not establish an exigency or voluntary consent. A plurality of the United States Supreme Court subsequently held in *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019), that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may "almost always" order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment, based on the exigency exception to the warrant requirement. The plurality did not rule out that in an "unusual case," a defendant could show that his or her blood would not have otherwise been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties.

What are exigent circumstances? They exist when the time it would take to get a warrant would significantly undermine the search. *See, e.g.*, *State v. Granger*, 235 N.C. App. 157 (2014) (the additional 40 minutes required to get a warrant combined with the time necessary for another officer to come to hospital created exigent circumstances that justified warrantless search).

Are the results of a roadside alcohol screening test admissible in a DWI case? The number is inadmissible, but the fact that the test was positive or negative is admissible. G.S. 20-16.3(d).

8. Describe special pretrial release procedures that apply in cases involving impaired driving.

Impaired driving holds. If a magistrate finds by clear and convincing evidence that a person charged with an offense involving impaired driving is impaired to the extent he poses a danger to himself, to

others, or to property, the magistrate must order the person held. G.S. 15A-534.2. The defendant must be released when the first of the following occurs:
(1) the defendant is no longer impaired to the extent he/she poses a danger;
(2) a sober, responsible adult appears who is willing and able to assume responsibility for the defendant until he/she is no longer impaired; or
(3) 24 hours has passed.

9. Identify the remedy for a violation of pretrial release procedures in impaired driving cases.

Right to secure witnesses for one's defense. North Carolina's appellate courts have held that if the State violates a defendant's statutory right to pretrial release in an impaired driving case by impermissibly holding the defendant and the defendant is, during the crucial time period following his or her arrest, denied access to all witnesses, the defendant may be entitled to dismissal of the charges. *See State v. Knoll*, 322 N.C. 535 (1988); *State v. Ham*, 105 N.C. App. 658 (1992).

Similarly, if a defendant charged with an impaired driving offense is denied access to witnesses, even though lawfully detained, the defendant may be entitled to dismissal of the charges based on a flagrant violation of his or her constitutional rights. G.S. 15A-954(a)(4); *State v. Hill*, 277 N.C. 547 (1971).

Implied Consent Offense Notice. A magistrate must inform a defendant who is unable to make bond of the established procedures to have others appear at the jail to observe the defendant or administer an additional chemical analysis. G.S. 38.4(a)(4).

The established procedures vary from county to county. They are approved by the chief district court judge, DHHS, the district attorney, and the sheriff. The magistrate must certify on form AOC-CR-271, Implied Consent Offense Notice, that he or she has informed the defendant of the procedures to access others while in jail and that he or she has required the defendant to list all persons the defendant wishes to contact and their telephone numbers.

10. Describe the rules governing motions to suppress and motions to dismiss in implied consent cases.

Pretrial requirement. In an implied consent case, motions to suppress evidence or dismiss charges must be made before trial. G.S. 20-38.6. There are two exceptions: motions to dismiss for insufficient evidence and motions based on facts not previously known.

The State must be given reasonable time to procure witnesses or evidence and conduct research. G.S. 20-38.6(b).

Rulings. The judge must summarily grant a motion to suppress if the State stipulates that the evidence will not be offered. G.S. 20-38.6(c). The judge must summarily deny a motion to suppress if the defendant failed to make the motion pretrial when the facts were known to the defendant. G.S. 20-38.6(d).

Preliminary indication. If the motion is not determined summarily, the judge must make the determination after a hearing and finding of facts. The judge must set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied.

State has right to appeal. If the judge preliminarily indicates that the motion should be granted, the judge many not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal. G.S. 20-38.6(f).

Review in superior court. If State disputes findings of fact, superior court considers the matter de novo. G.S. 20-38.7(a). The superior court remands the matter to district court with instructions to grant or deny motion.

11. State the requirements for dismissing or reducing charges in an implied consent case.

G.S. 20-138.4 requires a prosecutor to enter detailed facts in the record of any case subject to the implied consent law (which includes offenses other than impaired driving, such as driving after consuming by a person under 21) or involving driving while license revoked for impaired driving explaining orally and in open court and in writing the reasons for his action if he or she takes any of the following actions:

- enters a voluntary dismissal;
- accepts a plea of guilty or no contest to a lesser-included offense;
- substitutes another charge, by statement of charges or otherwise, if the substitute charge carries a lesser mandatory minimum punishment or is not a case subject to the implied consent law; or
- otherwise takes a discretionary action that effectively dismisses or reduces the original charge in a case subject to the implied consent law.

General explanations such as interests of justice or insufficient evidence are not deemed sufficiently detailed.

The written explanation must be signed by the prosecutor taking the action on form AOC-CR-339 and must contain the following information:

1. The alcohol concentration or the fact that the driver refused.
2. A list of all prior convictions of implied-consent offenses or driving while license revoked.
3. Whether the driver had a valid driver's license or privilege to drive in North Carolina, as indicated by DMV records.
4. A statement that a check of the AOC database revealed whether any other charges against the defendant were pending.
5. The elements that the prosecutor believes in good faith can be proved, and a list of those elements that the prosecutor cannot prove and why.
6. The name and agency of the charging officer and whether the officer is available.
7. Any reason why the charges are dismissed.

A copy of AOC-CR-339 must be sent to the head of the law enforcement agency that employed the charging officer, to the district attorney who employs the prosecutor, and must be filed in the court file. The AOC must record this data and make it available upon request.

12. State the duties of the prosecutor at sentencing.

Before a sentencing hearing for an offense sentenced under G.S. 20-179 in district court, the prosecutor must make all feasible efforts to obtain the defendant's full record of traffic convictions and must present this record to the judge for consideration at sentencing. G.S. 20-179(a)(2). Upon the defendant's request, the prosecutor must provide to the defendant or his or her attorney a copy of the defendant's record of traffic convictions at a reasonable time before introducing the record into evidence. *Id.* The prosecutor must present all other appropriate grossly aggravating and aggravating factors of which the prosecutor is aware. *Id.* The prosecutor must present evidence of the resulting alcohol concentration from any valid chemical analysis of the defendant. *Id.*