Courtroom Realities

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RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(4) engage in conduct intended to disrupt a tribunal, including:

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal;

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[10] As professionals, lawyers are expected to avoid disruptive, undignified, discourteous, and abusive behavior. Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel.

2

[9] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants**. A lawyer may stand firm against abuse by a judge but should avoid reciprocation;** the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

3

"The only evidence of driving is the defendant's statement."

Not Guilty

New Prosecutors 4

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"As previously explained, the rule 'guard[s] against the possibility that a defendant will be convicted of a crime that has not been committed.' Id. at 151, 749. Significantly, however, 'a confession identifying who committed the crime is not subject to the corpus delicti rule.'" **State v. Ballard**, 781 S.E.2d 75, 78 (2015), **State v Sawyers**, 2017 N.C. App. LEXIS 1091 (2017).

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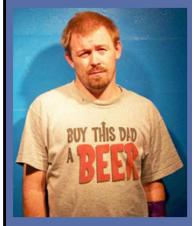
"The defendant didn't intend to get impaired."

Not Guilty

New Prosecutors 6

6



NCGS 20-138.1 (b) Defense Precluded. --The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

7

Intent

- General intent crimes only require the intent to do an act. **State v. Oakman**, 191 NC App 796 (2008)
- Voluntary intoxication does not apply to general intent crimes. **State v. Harris**, 171 NC App 127 (2005)

8

PJI 305.10

Voluntary Intoxication, Liquor or Drugs - In General

- You may find there is evidence which tends to show that the defendant was [intoxicated] [drugged] at the time of the acts alleged in this case. Generally, [voluntary intoxication] [a voluntary drugged condition] is not a legal excuse for crime.
- However, if you find that the defendant was [intoxicated] [drugged], you should consider whether this condition affected the defendant's ability to formulate the specific intent which is required for conviction of (*name crime*). In order for you to find the defendant guilty of (*name crime*), you must find beyond a reasonable doubt that the defendant had the specific intent required to commit this crime.

9

State v. Hill, 31 NC App 733, cert den. 272 NC 267 (1977)

- Defendant argues he innocently took cough syrup and did not have the intent to consume alcohol.
- "The legislature may deem certain acts, although not ordinarily criminal in themselves, harmful to public safety, health, morals and the general welfare, and by virtue of its police power may absolutely prohibit them, either expressly or impliedly by omitting all references to such terms as 'knowingly', 'wilfully', 'intentionally' and the like. Such statutes are in the nature of police regulations, and it is well established that the legislature may for the protection of all the people, punish their violation without regard to the question of guilty knowledge. . . ."

10

PJI 302.10

Automatism or Unconsciousness

- **Footnote 1**: This instruction is not applicable to those cases in which the crime charged can be committed recklessly or negligently and the defendant, knowing of his tendency to black out, put himself in a position where a manifestation of this tendency would be especially dangerous, such as driving an automobile alone.
- **Footnote 4**: *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975), held that unconsciousness is an affirmative defense which must be proved to the jury's satisfaction. *State v. Boone*, and *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866 (1994) 307 N.C. 198, 297 S.E.2d 585 (1982), *State v. Williams*, 296 N.C. 693, 252 S.E.2d 739 (1979), held that **an instruction on unconsciousness need not be given if it results from voluntary consumption of intoxicating liquor or drugs.**

11

State v Clovis, 217 NC App 520 (2011)

"Here, even though defendant testified that it was not his intention to drink alcohol in excess on the night in question, there was no evidence that his consumption of alcohol was involuntary. Further, despite the possible side effect of Alprazolam, defendant testified that his ingestion of the anxiety drug was also voluntary. Therefore, the defense of automatism was not available to defendant… Therefore, the trial court did not err in denying defendant's requested jury instruction as to automatism or unconsciousness as the evidence, even viewed in the light most favorable to the defendant, see Oliver, 334 N.C. at 520, 434 S.E.2d at 205, did not support that instruction." See Morgan, 359 N.C. at 169, 604 S.E.2d at 909.

12

But watch out: State v Swartz, 2019 NC App LEXIS 1034 (2019)

Defendant drove recklessly, entered a residential area and hit several mailboxes and trashcans before coming to a stop after a trashcan lodged underneath her truck. She said she got lost after driving to doctor's office.

Blood test showed presence of alprazolam (Xanax)

Prior to trial gave notice of affirmative defenses of Involuntary Intoxication and Automatism Defenses

Def had health issues and daughter-in-law gave her 12 pills each day

- Daughter-in-law said she would testify that she gave Xanax to Def without Def's knowledge
- ADA requested the court inform daughter-in-law of felonies she was admitting to committing –voir dire hearing held
- Daughter-in-law said she would still testify but later asserted 5th Amendment
- Def wanted to introduce hearsay statements because witness unavailable – Rule 804(b)(3)
- Trial Court refused **but Court of Appeals reversed – hearsay should be admitted and was prejudicial error**
- New trial ordered and trial court is to consider if jury instructions on involuntary intoxication and automatism are warranted in light of the admissible testimony

13

"It's just an eight. I'll give the defendant the benefit of the doubt."

Not Guilty

14

State v. Narron, 193 NC App 76 (2008)

- Proof of a 0.08 is prima facie evidence of guilt.
- The fact finder can only reject the evidence where there is proof it is wrong.
- Once a valid analysis is properly admitted, violation of the *per se* law is shown.

15

State v. Arrington, 215 NC App 161 (2011)

"To prove guilt, the State need only show that defendant had an alcohol concentration of .08 or more while driving a vehicle on a State highway."

16

PJI 270.20A: Driving While Impaired

b. Had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath or per 100 milliliters of blood. A relevant time is any time after the driving that the driver still has in the body alcohol consumed before or during the driving. **The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.**

17

PJI 270.20A: Driving While Impaired: Final Mandate

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant drove a vehicle on a highway, street, or public vehicular area in this state and that when doing so the defendant had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.08 or more in the defendant's blood,

it would be your duty to return a verdict of guilty.

18

Benefit of the Doubt/ Margin of Error

- **State v. Shuping**, 312 NC 421 (1984) [0.10 illegal limit]
- Any purported "margin of error" benefits the defendant
- AND REMEMBER: the actual test number is not "rounded up". A 0.08 can actually be 0.089!

19

Shuping

"Defendant contends, based on this testimony, that there is a 0.01 'margin of error' in the breathalyzer instrument. Therefore, it is contended defendant's BAC could have been 0.09, since her breathalyzer reading was 0.10 and the breathalyzer 'varies up and down by 0.01.' Basically, defendant argues that the 0.01 instrumental margin of tolerance allowed during simulator testing equates to a 0.01 'margin of error' during actual testing of the defendant's breath. **This is simply not the case**."

20

Shuping

"The 0.01 deviation allowance below the expected reading of 0.10 during simulation procedures is a safeguard to insure that when the actual test is subsequently run, any possible error during actual testing is in favor of defendant. Stated differently, when the machine yields a 0.10 during simulation testing, the machine is operating accurately. **A subsequent reading of the defendant's breath will then render a reading that is reliable**."

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Shuping

"Furthermore, when the machine yields a 0.09 during simulation testing, within the allowable margin of tolerance, that means it is testing on the low side. Thus, when a subsequent test is actually conducted on defendant, the reading from the machine is lower than the actual BAC. Thus, when defendant in this case blew a 0.10 after the machine had yielded a 0.09 during the simulation test, her actual BAC could have been a 0.11 rather than a 0.10. Consequently, **any 'error,' if error there be, was fully in favor of defendant."**

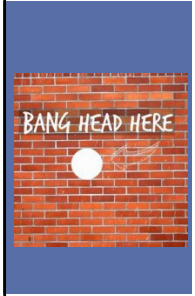
22

"Your honor I know it's midtrial but I want to suppress the arrest."

"No problem Mr. Defense Attorney. You go right ahead."

No PC for arrest. Not guilty.

23



NCGS 20-38.6 (a) The defendant may move to suppress evidence or dismiss charges **only prior to trial**, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

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State v Hargis, 2011 NC App LEXIS 1211 (2011)

- The defendant did not make a pretrial motion to suppress but objected to admission of the [Intoxilyzer] result at trial because he was denied his right to a witness.
- The Court of Appeals said that the defendant's failure to make a pretrial motion to suppress resulted in a waiver of a right to object to the admission of the test result.

25

State v Presley, 2011 NC App LEXIS 1683 (2011)

- Defendant arrested for DWI and released on bond. Officer sees defendant driving later that night. Defendant arrested for DWI and DWLR.
- The State failed to present evidence of the 30 day pretrial revocation at trial so DWLR case dismissed. Defendant claims stop was unconstitutional once the DWLR charge was dismissed.
- The Court of Appeals said that the defendant waived her right to challenge the stop by failing to make a pretrial motion to suppress.

26

State v. Bowens, 2010 NC App LEXIS 1674 (2010)

- Defendant should not be arraigned prior to pre-trial hearing.
- However, if the argument is made that the D did enter a plea, the rule in North Carolina is that in non-jury trials, jeopardy attaches when the court begins to hear evidence or testimony (*see* ***State v. Brunson,*** 327 NC 344 (1990)); but when the court is 'presented' with evidence or testimony for its consideration of a pretrial motion on a question of law, jeopardy has not yet attached to the proceeding.

27

"The video footage has been erased! It might have shown something different than the testimony!"

Case Dismissed

28

- Defendant must show materiality: that there is a reasonable probability of a different result had the material been disclosed. ***State v. Berry***, 356 NC 490 (2002).
- Failure to produce apparently or obviously exculpatory material is only one aspect of Brady. To establish a Brady violation, defendant must show the evidence was favorable, material, and would have affected the outcome of the trial. See ***State v. Alston***, 307 NC 321, 337 (1983).

29

Brady

Potentially exculpatory evidence is not covered by Brady. The Constitution only requires the State to produce "material" evidence. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in a constitutional sense." ***United States v. Agurs***, 427 US 97, 109-10 (1976).

30

Brady

Even if there is a failure to produce Brady evidence, dismissal of the criminal charge is not required unless the defendant shows that the violation resulted in "irreparable prejudice" to the preparation of the defendant's case and there is no other remedy except dismissal. G.S. § 15A-954(a)(4). The question is whether in the absence of the suppressed evidence a defendant receives a fair trial, "understood as a trial resulting in a verdict worthy of confidence." ***Kyles v. Whitley***, 514 US at 434.

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State v. Dumas, 2010 NC App LEXIS 1070 (2010)

- "The absence of any indication as to what the contents of the surveillance video were means that the surveillance video was, at most, potentially, rather than actually, exculpatory."
- "Since Defendants have not alleged, much less proven, that the surveillance video was destroyed by anyone acting on behalf of or at the behest of the State or that the destruction of the surveillance video resulted from any bad faith on the part of the State, we cannot conclude that the State violated Defendants' due process rights."
- See also, **St. v Taylor**, 2019 N.C. App. LEXIS 963

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"You can't use the hospital records. That violates HIPAA!"

Records Inadmissible

33

NCGS 90-21.20B:

(a1) Notwithstanding any other provision of law, if a person is involved in a vehicle crash:

(1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.

(2) Law enforcement officers shall be provided access to visit and interview the person upon request, except when the health care provider requests temporary privacy for medical reasons.

(3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

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HIPPA Exception

"The Privacy Rule is balanced to protect an individual's privacy while allowing important law enforcement functions to continue. The Rule permits covered entities to disclose protected health information (PHI) to law enforcement officials, without the individual's written authorization, under specific circumstances summarized below. For a complete understanding of the conditions and requirements for these disclosures, please review the exact regulatory text at the citations provided. Disclosures for law enforcement purposes are permitted as follows:

- To comply with a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena."
- Source: US Dept. of Health and Human Services

35

Cases

- **State v. Altman**, 2019 NC App LEXIS 169 (2019)
- **State v. Smith**, 248 NC App 804 (2016)
- But see: **State v. Scott**, 2020 NC App LEXIS 69 (2020): crash alone not sufficient basis for search warrant

36

"I realize they blew a 0.09 but you didn't prove appreciable impairment"

Not Guilty

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" [I]t is not necessary for the State to prove that defendant was appreciably impaired, uncooperative, or driving in an unsafe manner in order to prove that defendant is guilty of a violation of N.C. Gen. Stat. § 20-138.1(a2)." **State v. Arrington**, 215 NC App 161 (2011)

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"I know he was driving a school bus and impaired. But he is 70 years old and has a clean record. And it was OTC meds."

Not Guilty

New Prosecutors 39

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Discuss

40

RECOMMENDATION FOR MEDICAL/DRIVER EXAMINATION

41

"You don't have a 'number' since the defendant was on drugs. I need a 'number'".

Not Guilty

42

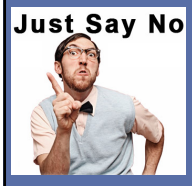
- Crime Lab was unable to determine the precise quantities of the drugs present in Defendant's blood; and was not able to accurately determine from the test results whether Defendant would have been impaired at the time of the 22 July 2015 accident. Trooper did not charge at time of crash and Defendant testified brakes failed.
- "It is undisputed that Defendant ingested both drugs on the day of the accident and that they were still present in his blood after the crash. Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired."
- **State v. Shelton**, 824 SE 2d 136 (2019)

43

"The defendant refused all tests."

Not Guilty

44



- NCGS §20-139.1(f): Refusal to take breath test, blood test, or SFSTs admissible.
- NCGS §20-16.3(d): Refusal to take alco-sensor test admissible.
- A refusal to submit to Intoximeter or blood test is evidence of guilt. **State v. Gregory**, 154 NC App 718 (2002)
- Refusal to submit to chemical analysis is substantive evidence of guilt. **State v. Allen**, 164 NC App 665 (2004)
- **Question: what about refusal to submit to DRE evaluation?**

45

Refusals

- Refusal need not be willful to be admissible. **State v. Pyatt**, 125 NC App 147 (1997)
- State is NOT estopped by finding in administrative hearing. **State v. O'Rourke**, 114 NC App 435 (1994)

46

PJI: 270-20A

If the evidence tends to show that [a chemical test known as a(n) [intoxilizer] [breathalyzer] [blood test] [urine test] was offered to the defendant by a law enforcement officer and that the defendant refused to take the test] (or) [the defendant refused to perform a field sobriety test at the request of an officer], **you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance** at the time the defendant (allegedly) drove a motor vehicle.

47

"The car has a push button start and they were just listening to the radio. That's not 'driving'".

Not Guilty

48

Good dog but bad driver.

NCGS 20-4.01

- **(7) Driver. --** The operator of a vehicle, as defined in subdivision (25). The terms "driver" and "operator" and their cognates are synonymous.
- **(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.

49

Close By Analogy

"[T]he State's evidence showed that the defendant sat behind the wheel of the car in the driver's seat and started the engine…Defendant's purpose for taking actual physical control of the car and starting the engine is irrelevant." **State v. Fields**, 77 NC App 404 (1985).

Circumstantial Evidence – car got to the location someway

State v Crawford, 125 NC App 279 (1997) car parked, engine off, driver semi-conscious, engine warm, driver had key – no passenger.

50

Closer By Geography

- **Va. Code Ann. § 46.2-100**: *Operator"* or *"driver"* means every person who either (i) drives or is in actual physical control of a motor vehicle on a highway or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle.
- "Manipulating the electrical equipment was one step between the "off" position and the point at which the motive power would be activated. While Nelson's action in turning the key to the "on" or "accessory" position of the ignition did not alone activate the motive power, it was an action taken "in sequence" up to the point of activation, making him the operator of the vehicle within the meaning of [driving while impaired]." **Nelson v. Commonwealth**, 281 Va. 212 (2011)

51

"The State can't convict on child abuse AND use it as a gross aggravator."

Level Five

52

- If the other charge is NOT a lesser included offense or an element, the punishment is authorized.
- Also applies to DWLR
- See Shea Dennings' blog https://nccriminallaw.sog.unc.edu/double-punishment-but-no-double-jeopardy/.

53

- More than one child in the car?
- 20-179(c)(1) refers to prior DWI convictions and explicitly states each conviction constitutes a separate grossly aggravating factor.
- 20-179(c)(4) [children in the car] does not.
- Therefore, the number of children probably does not matter: it counts as one gross aggravator and automatic Level One:
  - 20-179(c): "The judge must impose the Level One punishment under subsection (g) of this section if it is determined that the grossly aggravating factor in subdivision (4) of this subsection applies"

54

"The defendant was given an Intox test on a 0.04 restriction and blew a 0.08. But he hadn't been arrested for DWI."

TEST INVALID Not Guilty

55

- NCGS 20-16.2 (a1): Meaning of Terms. -- 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. A person is "charged" with an offense if the person is arrested for it or if criminal process for the offense has been issued.
- 20-19(c3): In addition, the person seeking restoration of a license **must agree to submit to a chemical analysis in accordance with G.S. 20-16.2** at the request of a law enforcement officer who has reasonable grounds to believe the person is operating a motor vehicle on a highway or public vehicular area in violation of the restriction specified in this subsection. The person must also agree that, when requested by a law enforcement officer, the person will agree to be transported by the law enforcement officer to the place where chemical analysis is to be administered.

56

Other Competent Evidence

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

57

Dismiss? Suppress?

NCGS 15A-954. Motion to dismiss - Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

****

(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.

58

Dismiss? Suppress?

15A-974. Exclusion or suppression of unlawfully obtained evidence.

(a) Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is **required by the Constitution** of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions **of this Chapter**. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future **violations of this Chapter**.

Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.

59

Was there a constitutional violation?

- LEO stops driver for speeding 65mph in 55mph and finds open container of alcohol beverage and driver has been drinking. LEO investigates and arrests driver for DWI, open container and speeding.
- Defense moves to suppress based upon a lack of Probable Cause for the arrest of for DWI.
- Remember if there is **PC for any crime**, then no constitutional violation. **Davenpeck v Alford**, 543 U.S. 146 (2004) – PC open container
- PC for infraction?: **Virginia v. Moore**, 553 U.S. 164 (2008) arrest when state law only allows a citation to be issued did **NOT violate the Fourth Amendment** and evidence seized based upon a search incident to the arrest should not be suppressed.
- **Utah v. Strieff**, 2016 U.S. LEXIS 3926 - Attenuation Doctrine – do not suppress evidence discovered **after valid arrest** even when the original stop was unconstitutional

60

No bad driving, no slurred speech, no refusal, not unsteady on their feet…

Ruling: NO PC

61

- **State v Parisi,** 2019 N.C. LEXIS 797 (8-16-19)
- Checking Station - moderate odor of alcohol; admitted drank 3 beers earlier- no open containers but beer in car;
- 6-6 clues HGN;
- WAT test: missed the fourth and fifth steps and the third and fourth steps while returning – **1 clue** ;
- OLS: **2 clues** -used his arms for balance and swayed;
- LEO opinion defendant impaired
- No alco-sensor; no ECIR II or refusal; defendant did not "slur his speech, did not drive unlawfully or 'bad[ly,]' or appear 'unsteady' on his feet"
- **Held**: PC to arrest for DWI.

62

"Everyone crosses a line sometimes. This is normal driving, judge."

No reasonable suspicion

63

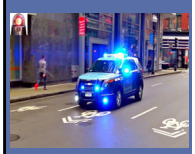
Even the smallest violation is RS State v. Sutton, 2018 NC App LEXIS 555

- "What a difference a few inches can make in cases dealing with traffic stops"
- "Weaving plus," such as weaving repeatedly within a lane, weaving and barely crossing a fog line, weaving in the wee hours of the morning, weaving near a bar, weaving while driving under the speed limit, and many other factors – is still the rule
- "But there is a "bright line" rule in some traffic stop cases. Here, the bright line is a double yellow line down the center of the road. Where a vehicle actually crosses over the double yellow lines in the center of a road, even once, and even without endangering any other drivers, the driver has committed a traffic violation of N.C. Gen. Stat. § 20-146 (2017)"

64

You turned on your blue lights: game over. That was the stop and the end of RAS

65



California v Hodari D., 499 US 621 (1991): RAS continues until the driver succumbs to the officer's authority.

66

State v. Mahatha, 2019 NC App LEXIS 717 (9-3-19)

- Felony speeding to elude arrest and possession of gun by felon, habitual felon, attempted robbery, etc
- Argued unconstitutional stop because based upon tip & seized when blue light and siren activated
- **Court said: consider everything until actually stop –** observed speeding 90-100 mph, reckless driving, etc.
- New trial granted- failed to waive right to counsel in accord with law – told defendant could face up to 231 months when could face 666 months (55.5 years) plus 170 days
- *ADAs: Be familiar with GS 15A-1242 [defendant electing to represent self]*

67

Not A Seizure

- State v. Turnage, 259 N.C. App. 719, 726(2018), Van stops in middle of road, LEO pulls behind van and activates blue light, van drive off 15 seconds later. "the mere activation of the vehicle's blue lights did not constitute a seizure as [the] [d]efendant did not yield to the show of authority."
- State v. Nunez, 274 N.C. App. 89 (2020), wherein an officer responded to a call of a disabled vehicle in the middle of a public vehicular area and not parked in a parking space. The Court held that this did not constitute a seizure, noting that (1) the act of turning on the blue lights behind a car in the middle of a public vehicular area in and of itself is not enough to constitute a seizure; and (2) the officer took no action that caused the defendant's vehicle to stop moving nor did the officer otherwise impede the movement of the defendant's vehicle in any way. Id. at 93.

68

But: State v. Eagle, 2022 N.C. App. LEXIS 711(10-18-22)

- Deputy Belk observed a white sedan traveling on Dairyland Road and pull into the driveway of the Maple View Agriculture Center located at 3501 Dairyland Road at approximately 3:19am.
- The Maple View Agriculture Center was not open at 3:19am and there was a closed gate locking all traffic from driving towards the building.
- The white sedan stopped in the driveway at the closed gate.
- Deputy Belk observed the vehicle pull into the driveway and waited to see if the white sedan would turn around.
- The white sedan continued to sit parked in front of the closed gate.
- Deputy Belk pulled behind the white sedan, stopping approximately ten feet behind the white sedan and activated the blue lights on her vehicle.
- This is a seizure

69

Encounter or Seizure?

- State v. Brooks, 337 N.C. 132 (1994) (defendant was seated in a parked, open-door vehicle in a public parking lot and approached by an officer on foot – **not a seizure**);
- State *v.* Isenhour, 194 N.C. App. 539 (2008) (defendant was seated in a parked vehicle in a public parking lot and officers approached the car on foot **not a seizure**);
- State v. Williams, 201 N.C. App. 566 (2009)(As the officer followed the car and ran the license plate in the officer's computer, the car pulled into a driveway. *The officer then pulled his* vehicle to the curb on the other side of the street from the driveway and approached the driver on foot –**not a seizure**);
- State v. Wilson, 250 N.C. App. 781 aff'd *per curiam*, 370 N.C. 389 (2017)(Officer parked & waived to the defendant driving his truck – **not a seizure**).
- State v Steele, 2021 N.C. App. LEXIS 165(Officer in car & waives to driver in a car who stops **is a seizure**

70

"The blood report was not served on the defendant within 15 days."

Suppressed

71

NCGS 20-139.1 (c1) Admissibility. -- The results of a chemical analysis of blood or urine reported by the North Carolina State Crime Laboratory, the Charlotte, North Carolina, Police Department Laboratory, or any other laboratory approved for chemical analysis by the Department of Health and Human Services (DHHS), are admissible as evidence in all administrative hearings, and in any court, without further authentication and without the testimony of the analyst.

if:

(1) The State notifies 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 would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to 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 would be used that the defendant objects to the introduction of the report into evidence.

72

Keep Reading!

NCGS 20-139.1(e) Recording Results of Chemical Analysis of Breath. – A person charged with an implied-consent offense who has not received, prior to a trial, a copy of the chemical analysis results the State intends to offer into evidence may request in writing a copy of the results. **The failure to provide a copy prior to any trial shall be grounds for a continuance of the case but shall not be grounds to suppress the results of the chemical analysis or to dismiss the criminal charges.**

73

Bottom Line:

Evidence is admissible but must have chemical analyst/ toxicologist

74

"The defendant's license shows revoked for a civil revocation for DWI. It is still revoked for failure to pay the civil fee, but that's just a no operator's license."

Not a Gross Aggravator

75

- Under NCGS 20-28(a2) the actual charge is punished as a NOL.
- HOWEVER: the grossly aggravating factor in NCGS 20-179(c)(2) of DWLR for DWI still applies. It is still a NCGS 20-16.5/ NCGS 20-28(a1) revocation.

76

"HGN is voodoo."

No PC for Arrest

77

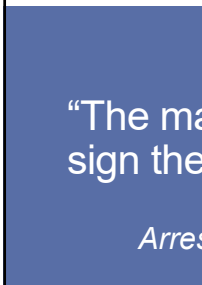
- "Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State…With the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." **State v. Godwin**, 369 NC 605 (2017)
- "At the heart of this case is whether the recently amended Rule 702(a)1 requires the State to lay a proper foundation regarding the reliability of an HGN test before an officer or other qualified expert is allowed to testify about the results of the particular test; **we hold it does not**." **State v. Younts**, 254 N.C. App. 581 (2017)

78

"The magistrate didn't sign the citation."

Arrest Suppressed

79



- **State v. Martin**, 46 NC App 514 (1979) Defendant was tried and convicted in District Court on a citation and appealed to Superior Court.
- The Superior Court judge ruled the citation insufficient because it had not been signed by a magistrate and ordered the State to prepare a misdemeanor statement of charges.
- Defendant was tried and convicted in Superior Court and appealed, arguing trial in Superior Court would have to be on indictment or information.
- Court held, based on NCGS §15A-922(e), misdemeanor statement was appropriate, since determinative factor was how the charge was *initiated* as opposed to how it *arrived*.

80

Misdemeanor Statement of Charges

- Supersedes all previous pleadings.
- Can substitute for a citation, criminal summons, warrant for arrest, or magistrate's order: can charge same offense or different or additional offenses.
- Generally, defendant gets three days after service to prepare.
- If it does not change the nature of the charge, it may be filed:
  - In DC at or after arraignment
  - In SC upon trial de novo

81

When Can You File a Misdemeanor Statement? St. v Capps, 374 NC 621 (2020)

- At any time prior to arraignment in District Court, charging the same offenses as a citation, summons, warrant, or magistrate's order, or additional or different charges. NCGS §15A-922(d).
- After arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and **(2) the trial court rules that the pleading is in fact insufficient.** This applies in District and Superior Court, but the nature of the charges must be the same. NCGS §15A-922(e).
- Prior to or after final judgment, misdemeanor statement may be amended when the amendment does not change the nature of the offense charged. NCGS §15A-922(f).

82

Magistrate's Order

- **NCGS 15A- 511(c)(3)**
- Look for other court papers with Magistrate signature
- Can only dismiss is there was no PC – not that magistrate failed to sign – not a constitutional violation

83

"Defendant's motion to suppress allowed."

No Reason Given

84

NCGS 20-38.6(f) The judge **shall set forth in writing** the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal.

If State is going to appeal, volunteer to draft it for the judge

85

Ethics in District Court

- **2009 Formal Ethics Opinion 15** - Dismissal of DWI Charge by Prosecutor When Insufficient Evidence Due to Suppression Order (Adopted: January 15, 2010)
- Opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop and not submit case to judge to find not guilty
- The Court can sua sponte dismiss a case if the State does not appeal or dismiss the case after a motion to suppress the evidence based upon an unconstitutional stop is granted. State v. Loftis, 792 S.E.2d 886 (2016)

86

I didn't know the defendant had prior DWIs but the defense attorney did.

Sorry. Level Five.

87

- On **appeal** to Superior Court, **NCGS 20-179 (a1**) says you must give notice "no later than 10 days prior to trial"
- Continue the case or you cannot use
- **State v. Hughes**, 2019 NC App LEXIS 334 (2019), **State v. Geisslercrain**, 233 NC App 186 (2014)

88

But the Limited Driving Privilege…

- 98 Formal Ethics Opinion 5: DISCLOSURE OF CLIENT'S PRIOR DRIVING RECORD (Adopted: April 16, 1998)
- Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court and, further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the prior driving record.

89

"Your Honor: The defense attorney and I have an agreement as to the sentence…"

Be careful!

90

NCGS 20-179(a)(2): Before the hearing the prosecutor shall:

1. Make all feasible efforts to secure the defendant's full record of traffic convictions, and shall present to the judge that record for consideration in the hearing. . . .

2. Present all other appropriate grossly aggravating and aggravating factors of which the prosecutor is aware. . . .

3. In every instance in which a valid chemical analysis is made of the defendant, the prosecutor shall present evidence of the resulting alcohol concentration.

91

NCGS 20-179

(f2) Limit on Consolidation of Judgments. -- Except as provided in subsection (f1) of this section, in each charge of impaired driving for which there is a conviction the judge shall determine if the sentencing factors described in subsections (c), (d) and (e) of this section are applicable unless the impaired driving charge is consolidated with a charge carrying a greater punishment. **Two or more impaired driving charges may not be consolidated for judgment.**

92

These Are OK

- Prosecutors may offer to stipulate to mitigating factors (as long as they believe in good faith that mitigating factors are supported by a factual basis)
- Prosecutors may agree to minimum sentences (particularly useful in grossly aggravated cases)
- Prosecutors may agree to dismiss other charges in connection to a plea agreement (whether or not those offenses are related) and may include other implied consent offenses (Plead to DWI dismiss Driving After Consuming or vice versa)

93

State v. Heggs, 2021 NC App LEXIS 565 (2021)

There must be evidence to support aggravating factors, even if the defendant, the State and the judge are willing to stipulate to them

94

It's Not Just the Law…

- **2003 FORMAL ETHICS OPINION 5 (**Adopted: July 25, 2003)
- RPC 152 states that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court. (See Rule 3.3(b) of the Revised Rules of Professional Conduct (2003))
- Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

95

Ethics

- Is it ethical for a prosecutor and defense attorney to agree to have a case continued to a court date when a defense friendly judge will more likely to suppress evidence because the defendant was stopped at a checking station?
- What if defendant agrees to plead guilty if the evidence is not suppressed?
- Is it ethical for the prosecutor and defendant to agree to continue the case to another date that is not the arresting officer's court date:
  - If the Defendant will plead guilty at this new court date?
  - If the case will be disposed other than by trial at the new court date?

96

"You didn't get a complete recitation of the 'opinion question'"

Not Guilty

97

"We must not put form over substance; we must not return to strict legalism and require magic words chanted in precise sequence to make an act right." **State v. Jernigan**, 118 NC App 240 (1995)

State v. Ezzell, 2021 N.C. App. LEXIS 193 "omission of appreciably in his subsequent answer was a mere slip of the tongue."

98

"That *$*@)***#@ Judge would not give us a continuance & the defense attorney is a jerk

I will show them!!!!!

99

In Re Entzminger, 2019 NC App LEXIS 653 (8-6-19)

- DWI case is Superior Court – Def in military and returned from Hawaii
- Chemical Analyst not available (A/C of 0.12) and told State on Monday
- Judge refused State's motion for continuance on Wednesday
- ADA dismissed DWI upon plea to open container
- **On CR-339 ADA wrote, in part**:
- *"This 2014 case was set in superior court. The analyst was unavailable due to training with the Huntersville Police Department (North Carolina). The State made a motion to continue which was denied. Oddly enough, the judge indicated the DWI case should have been set further up in calendar because defendant was from Hawaii. All defendants simply need to move out of state after being charged with a crime if that is the case. . . .[The State] could have proved all the elements but a superior court judge denied the motion to continue for lack of an analyst to show the .12."*

100

Superior Court judges cannot revoke a drivers license but can revoke a law license

- Judge entered an order for ADA to show cause why he should not be held in contempt or disciplined. The order alleged Respondent:
  - (1) showed "a disregard for the dignity of the Court";
  - (2) "demonstrated undignified and discourteous conduct";
  - (3) "[m]isled the Court by making statements he knew or should have known to be false"; and,
  - (4) "[a]cted to create a false record."
- ADA said did not intend to insult judge only defense attorney
- After hearing additional evidence concerning sanctions, the trial court suspended ADA's license to practice law for two years. ADA was provided the opportunity to request a stay of the suspension after six months had elapsed and after compliance with various requirements.

101

Court of Appeals said:

- Competent evidence in the record supports the challenged findings of fact that ADA had made false statements of material fact regarding when he had learned of the Chem Analyst's unavailability, which misled the trial court, and that ADA had refused to acknowledge the wrongful nature of his conduct and his apology to the Court was "unavailing." (ineffective)
- Remanded for consideration of amount of discipline due to conclusion that ADA lied when he said he believed felonies on the docket was **not** supported by the evidence.

102

Prosecutor: based on your findings, was the defendant impaired?

Toxicologist: I don't know.

103

Why won't you answer the question??

- A toxicologist can tell you how the BODY works on the DRUG
- A DRE can tell you how the DRUG works on the body
- "A toxicologist should not opine as to a specific individual's degree of impairment based solely on a quantitative result."
- "A toxicologist should not opine as to the effects of a drug or combination of drugs on a specific individual without context of a given case. This does not preclude a toxicologist from addressing general effects of drugs at varying concentrations."

104

Judge: "if you do not have any training in detection of impaired drivers, you cannot arrest a person for DWI."

105

- "[A] lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation." **State v. Rich**, 351 NC 386, 398, 527 SE2d 299, 306 (2000) (citing **State v. Lindley**, 286 NC 255, 258, 210 SE2d 207, 209 (1974)).
- From **State v. Streckfuss**, 171 NC App 81 (2005)

106

"The officer has been trained in HGN but not trained to do it with the defendant seated. HGN suppressed."

MOTION TO SUPPRESS No PC for arrest.

107

State v Ezzell, 2021 NC App LEXIS 193 (2021)

- The Rules of Evidence do NOT apply to Motions to Suppress Hearings as stated in Rule 104(a) and Rule 1101(a) of the Rules of Evidence
- The judge has discretion to determine the admission of testimony and what weight to give it and in doing so is to be "guided by the principles underlying the rules of evidence."

108

Motion to Suppress – No bad driving only odor of alcohol

NO PC TO ARREST

New Prosecutors 109

109

State v Ezzell, 2021 NC App LEXIS 193 (2021)

- Trooper stopped vehicle for expired registration tag – no bad driving
- The odor of alcohol, two positive results and the HGN test were sufficient to establish PC to arrest.
- REMEMBER THE DRIVER MUST BE IMPAIRED – THE DRIVING NEED NOT BE IMPAIRED

New Prosecutors 110

110

Defendant was impaired and fled all the way to his garage. The officer forced the door open and ultimately arrested him for DWI.

Holding: good stop every time.

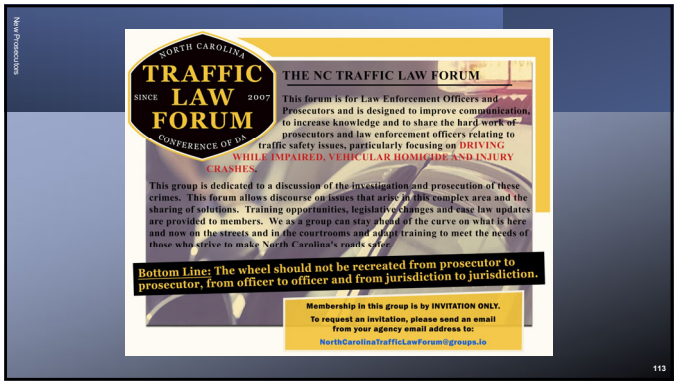
New Prosecutors 111

111

Lange v. California 141 S Ct 2011 (2021)

- Maybe…
- Under the Fourth Amendment, the exigencies arising from a misdemeanant's flight had to be assessed by evaluating the totality of the circumstances to determine if there was an emergency, and when the nature of the crime, the nature of the flight, and the surrounding facts did not present an exigency, officers had to respect the sanctity of the home and obtain a warrant.

112



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