

Breath and Blood Tests

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Roadmap



Roadside
Testing



Implied
Consent Testing



Search
Warrants



Exigent
Circumstances



Hospital
Records

Roadside Testing

Basics

- The only roadside chemical test currently permitted is the preliminary breath test (PBT).
- These are also referred to as Alcohol Screening Tests.
- Most common devices used in NC are the ALCO-SENSOR and the INTOXILYZER.
- These devices test a person's breath sample for alcohol roadside, often during an investigation into impaired driving, before arrest.

Roadside Testing

PBT use is governed by G.S. 20-16.3

- The fact that a driver showed a positive or negative result, but not the actual alcohol concentration result, or
- a refusal to submit
- may be used by an officer, is admissible in court, or may also be used by an administrative agency
- in determining if there are reasonable grounds for believing
- the driver committed an implied consent offense, or
- that the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration.

Roadside Testing

Hypothetical

- You are in a PC hearing. The officer testifies that he gave the defendant a PBT.
- The ADA asks “without telling us the number, what was the result?”
- LEO answers “positive”
- Later in their testimony, LEO says they relied on the PBT, SFST’s, and other indicators when determining PC existed
- But – it’s a close case
- So the ADA argues that even though the numerical reading was inadmissible, the officer saw it during their investigation and that helped form the basis of their conclusion that the defendant was impaired.
- Is that permitted?

No - State v. Overocker, 236 N.C. App. 423 (2014)

Roadside Testing

§ 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.

N.C.G.S. 20-4.01(48b) Under the influence of an impairing substance

The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance

Roadside Testing

G.S. 20-16.3(c) A PBT is only valid when it has complied with the DHHS regulations for its use

These are found in DHHS Regulation Chapter 10A, Section .0500.

There are two key steps:

1. LEO must determine that the defendant has removed any substance or object from their mouth.
2. Unless the driver volunteers the information that he has consumed an alcoholic beverage within the previous 15 minutes, the officer shall administer a screening test. If a test made without observing a waiting period results in an alcohol concentration reading of 0.08 or more, the officer shall wait five minutes and administer an additional test. If the results of the additional test show an alcohol concentration reading more than 0.02 under the first reading, the officer shall disregard the first reading.

Roadside Testing

DHHS Regulation Chapter 10A, Section .0500 also requires PBTs to be calibrated and in proper working order.

2021 NC COA Case

- Trooper had no documentation the PBT was properly calibrated although highway patrol policy required written documentation.
- Trooper testified that he alone was assigned the PBT, he was responsible for calibrating it, his district requires calibration twice a month, and that it was properly calibrated. He also testified that it was one of the devices approved by DHHS.
- Admissible?

Yes – State v. Ezzell, 277 N.C. App. 276 (2021).

Roadside Testing

Key Takeaways

- The bar is low for the admissibility of the PBT in pretrial motions.
- The purpose of PBT is to demonstrate the association of alcohol with the observable evidence of the defendant's impairment. Impairment is established through sensory evidence: what the officer sees, hears, and smells.

NHTSA Manual (2023)

- “[PBTs] should rarely be the only factor in deciding to arrest.”
- “PBTs should be used after administering SFSTs.”
- “[A PBT] does not indicate the level of the subject’s impairment”

Roadside Testing

The future of roadside testing is fast approaching.

There has been some investigation and discussion of roadside oral fluid testing for substances other than alcohol.

Pos/Neg results only.

Tests for amphetamines, benzodiazepines, THC, cocaine, fentanyl, methamphetamine, and opiates

“Developments in Roadside Drug Testing”

<https://nccriminallaw.sog.unc.edu/2026/04/01/developments-in-roadside-drug-testing/>

Chemical Analysis - Generally

Chemical Analysis is evidentiary testing (as opposed to confirmatory, preliminary, or screening testing) of a person's bodily substance.

"Compelled intrusion into the body for blood to be analyzed for alcohol content" is a search.

Deep lung breath "implicates similar concerns about bodily integrity"

Testing urine can reveal "a host of private medical facts" and "there are few activities in our society more person or private than the passing of urine."

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (quoting Schmerber v. California, 384 U.S. 757 (1966)).

Chemical Analysis - Generally

The 4th Amendment requires searches to be “reasonable.”

Chemical analysis has only been found to be “reasonable” pursuant to the 4th Amendment in three circumstances:

(Implied) Consent

Search Warrants

Exigent Circumstances

Implied Consent

“Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense.”

Not defined in G.S. 20-4.01

Not even fully defined in G.S. 20-16.2

“Under this section, an "implied-consent offense" is an offense involving impaired driving, a violation of G.S. 20-141.4(a2), or an alcohol-related offense made subject to the procedures of this section.”

These offenses do not necessarily require impairment – but most do.

Examples include violating no-alcohol restriction on a limited driving privilege and transporting an open container of alcohol.

Implied Consent Rights

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.

Chemical Analysis - Breath

Practically speaking, most often obtained by implied consent.

Rules for administration and admissibility are in G.S. 20-139.1

Analysis is only admissible when it has:

1. Been 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 the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.

G.S. 20-139.1(b)

Breath Testing



Advice of Rights



Test

Breath Testing

For intox to be suppressed where law enforcement didn't wait the full thirty minutes, the defense must show that witnesses would have gotten there in time, were turned away, or were not otherwise granted access.

Waiting less than thirty minutes was permissible as there was no evidence "that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes."

State v. Buckner, 34 N.C. App. 447 (1977)

Witnesses turned away or not granted access, leading to suppression:

State v. Myers, 118 N.C. App. 452 (1995)

State v. Hatley, 190 N.C. App. 639 (2008)

State v. Buckheit, 223 N.C. App. 269 (2012)

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.

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).

Search Warrants

Not often used to obtain a breath sample due to the practical challenges of compelling a successful breath sample.

More often used to compel a blood sample over the defendant's objection.

Implied Consent procedures do not apply when executing search warrants for blood.

G.S. 20-139.1(a) - "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."

Obtaining consent is no longer necessary, neither are the incentives built into implied consent testing to encourage willful chemical analysis.

Warrant Application Standard

To issue a search warrant, the magistrate must be able to find probable cause from facts or circumstances shown in the affidavit submitted to him that:

- (1) a crime has been committed;
and
- (2) evidence of the crime may
be in the place to be searched.



Search Warrants

Most often arise when law enforcement obtained a blood sample against your client's objection or while they were unconscious

May also be used to obtain medical records from the hospital that contain evidence of impairment

Review of the search warrant is limited to the "four corners" of the search warrant application

There must be probable cause that (1) a crime was committed, and (2) that the evidence to be obtained is in the place to be searched

Caution: State v. Rogers, ____ N.C. ____, 900 S.E.2d 668 (2025)

Implied consent procedures do not apply to chemical testing obtained by search warrant

Exigent Circumstances

Warrant requirement applies generally to searches that intrude into human body

But warrantless blood draw permissible as officer might reasonably have believed that delay necessary to obtain a warrant threatened the destruction of evidence, given the natural dissipation of alcohol from a person's blood

So, at least in some circumstances, an exigency exception applies

Schmerber v. California, 384 U.S. 757 (1966)

Exigent Circumstances

Natural dissipation of alcohol does not create a per se exigency

If officer can obtain warrant without “significantly undermining” search, must do so

Whether nonconsensual warrantless blood draw is reasonable must be determined case by case on totality of circumstances

May have exigency w/o accident

Warrant procedures relevant

Availability of magistrate relevant

Missouri v. McNeely, 569 U.S. 141 (2013)

Determining Exigency

Exigent circumstances justified warrantless,
nonconsensual blood draw

Blood drawn 1.5 hours after defendant drove
Would have taken an additional 40 minutes to
get warrant

Lone investigating officer would have had to
leave the defendant at hospital

State v. Granger, 235 N.C. App. 157 (2014)

Unconscious Defendants

Statutory Authority

“[I]f the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample”

G.S. 20-16.2(b): Unconscious Person may be tested

Hypothetical

Officer Daniels responds to a single-vehicle crash involving a silver sedan that struck a utility pole. Upon arrival, EMS is already on scene and attending to the driver, Mr. Chris Langston, who is unconscious and being prepared for transport to UNC Medical Center.

Officer Daniels observes:

- The vehicle has extensive front-end damage.

- Open beer cans are visible in the front passenger area.

- A strong odor of alcohol is present inside the vehicle.

- A witness reports seeing the vehicle swerving before the crash and states the driver appeared to be “driving erratically.”

Hypothetical

Mr. Langston is unresponsive and cannot be questioned or perform field sobriety tests. He is transported to the hospital in critical condition.

At the hospital, Officer Daniels requests that medical staff draw Mr. Langston's blood for alcohol testing, citing G.S. 20-16.2(b) and :

- The presence of alcohol containers,
- Erratic driving behavior,
- The seriousness of the crash,
- The driver's unconsciousness and inability to consent or refuse,
- The dissipation of alcohol

No warrant is obtained prior to the blood draw. The sample is taken approximately 45 minutes after the crash.

Unconscious Defendants

Warrantless searches must still satisfy constitutional requirements as well as any statutory rules.

Warrantless withdrawal of blood from unconscious DWI suspect violated Fourth Amendment, notwithstanding G.S. 20-16.2(b).

State v. Romano, 369 N.C. 678 (2017)

Unconscious Defendants

State established exigent circumstances pursuant to *Mitchell*.

Defendant was unconscious at the scene and transported to the hospital for treatment of serious injuries. Officer spent an hour investigating the crash and securing the scene and then went directly to the hospital.

Given the severity of the defendant's injuries, the officer was concerned that the defendant might have to undergo surgery. The officer also was unsure how long it would take to secure a warrant.

State v. Burris, 289 N.C. App. 535, 890 S.E.2d 539 (2023)

Use of Force

Use of force must be reasonable

State v. *Hoque*, 269 N.C.App. 347 (2020)
(reasonable for two officers and two nurses to hold the handcuffed defendant down to draw blood after defendant refused to comply with warrant)

Medical Records

G.S. 8-53 renders confidential information obtained by a health care provider in “attending a patient in a professional character,” that is “necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.”

G.S. 90-21.20B(a1) requires a health care provider providing medical treatment to a person involved in a vehicle crash to disclose certain information to a law enforcement officer. The health care provider must, upon request, disclose the following information to any law enforcement officer investigating the crash:

- the patient’s name,
- the patient’s current location, and
- whether the patient appears to be impaired by alcohol, drugs, or another substance.

The statute further requires that law enforcement officers be provided access to visit and interview a person involved in a vehicle crash.

Medical Records

Medical records may be released pursuant to these authorities either by search warrant or court order.

State v. Smith, 248 N.C. App. 804 (2016) (Medical records establishing his defendant's blood alcohol concentration after he crashed his motorcycle were properly obtained pursuant to a search warrant and properly admitted at trial).

Admissibility must still satisfy hearsay requirements, which may be met with an affidavit from the hospital. If the state proceeds by affidavit, it must give advance notice.

Hospitals often test blood serum rather than whole blood, which requires an expert witness to convert the values.

State v. Mac Cardwell, 133 N.C. App. 496 (1999) (trial court did not abuse its discretion in finding the conversion ratio of 1 to 1.18 utilized by a forensic chemist at the SBI laboratory reliable).

Scenario

At approximately 11:45 p.m. on a Saturday, Officer Button observes Mr. Coulthard's vehicle:

- Drift within its lane twice

- Brake abruptly at a stale green light

- Accelerate slightly over the speed limit

Officer Button initiates a traffic stop. Upon contact, the officer notes:

- Moderate odor of alcohol inside the vehicle

- Mr. Coulthard's eyes appear red and glassy

- Speech is deliberate but coherent

- Mr. Coulthard hands over his license without fumbling

- Mr. Coulthard states he is coming from a friend's house and had "a couple of beers earlier in the evening," but insists he feels fine to drive.

Scenario

Officer Button conducts SFSTs on the shoulder of a two-lane road with passing traffic:

- HGN: 2 of 6 clues (no vertical nystagmus)

- WAT: One missed heel-to-toe step; improper turn; otherwise compliant

- OLS: Puts foot down at second 15-second count, then completes test

Officer Button tells Mr. Coulthard he is “pretty borderline” and asks him to submit to a PBT.

Before administering the PBT:

- Mr. Caldwell removes chewing gum

- Officer does not observe a 15-minute deprivation period

The PBT displays a numerical result, which Officer Bennett views silently.

Officer then says:

- “Alright, that helps clarify things.” In his report, he writes: “PBT supported impairment.”

Scenario – Timeline 1

Mr. Coulthard is arrested for DWI and transported to the jail.

Implied consent rights are read at 12:15 a.m.

Mr. Coulthard is given a phone. He attempts to call his spouse but gets voicemail

At 12:32 a.m., the chemical analyst begins the breath test.

Mr. Caldwell provides two samples: 0.08 / 0.07

During testimony at trial, the analyst states: “I administered the Intoxilyzer EC/IR II and obtained those results.”

Scenario – Timeline 2

Mr. Caldwell is arrested for DWI and transported to the jail.

Implied Consent Rights are not given.

Officer Button asks for test and Coulthard refuses.

Officer Button obtains a search warrant and has his blood drawn that way.

Can you exclude the results for the failure to give implied consent rights?

Are there any other avenues for keeping the blood results out?

Questions?

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