Questions for DWI Panelists

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Shea Denning, School of Government
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PRETRIAL

1. **How do you handle motions to continue in DWI cases?** Are a certain number of continuances granted as a matter of course? Do you have a local policy on continuances? How do you document which party made a motion to continue and whether it was opposed? Do you have a process of setting cases for "last," and, if so, what happens if the parties are not able to proceed to trial on that date?

Relevant Legal Principles.

Trial courts normally exercise discretion in determining whether to grant a motion to continue. However, a district court ruling on a motion to continue by the State in an impaired driving case in order to secure the presence of a chemical analyst must consider G.S. 20-139.1(e2), which plainly states that "[t]he case shall be continued until the analyst can be present." This subsection goes on to provide that "[t]he 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." This latter statement is a curious directive, given that trial courts do not have the authority to dismiss a criminal case due to a witness's failure to appear. *Cf.* State v. Joe, ___ N.C. ___, 723 S.E.2d 339 (2012) (concluding that trial court lacked authority to dismiss case on its own motion; noting that a trial court may grant a defendant's motion to dismiss under G.S. 15A–954 or G.S. 15A–1227 or the State may dismiss pursuant to G.S. 15A–931); G.S. 15A-954 (setting forth grounds for dismissal in criminal proceedings, none of which relate to the absence of evidence); G.S. 15A-1227 (providing that a motion for dismissal for insufficiency of the evidence may be made upon close of the State's evidence and at subsequent junctures). Perhaps this latter provision of G.S. 20-139.1(e2) indicates that the district court may deny the State's motion to continue if the analyst willfully fails to appear pursuant to a court order, but, in other circumstances, must grant the State's motion.

See Shea Denning, Continuing DWI Cases So the Analyst Can Appear, North Carolina Criminal Law (March 4, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4130.

2. **When do you issue an order under G.S. 8-53 compelling the disclosure of medical records for a defendant charged with DWI?** Does the answer depend upon whether the State sought to obtain a sample of the defendant's blood pursuant to implied consent procedures? Does the answer depend on whether the State has received a report analyzing the blood?

Relevant Legal Principles.

G.S. 8-53 provides that "[a]ny resident or presiding judge in the district, either at the trial or prior thereto . . . may, subject to G.S. 8-53.6, compel disclosure [of confidential information contained in medical records] if in his opinion disclosure is necessary to a proper administration of justice." The statute further provides that "[i]f the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."

A related provision, G.S. 90-21.20B, requires a health care provider providing medical treatment to a person involved in a vehicle crash to, "upon request, disclose to any law enforcement officer investigating the crash" the person's "name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance."

See also State v. Drdak, 330 N.C. 587, 591-92 (1992) (rejecting defendant's argument in misdemeanor impaired driving prosecution that disclosure of medical records under G.S. 8-53 "should only be allowed in more serious cases such as involuntary manslaughter" and adhering to "previous rulings that it is a matter in the trial judge's discretion whether to allow disclosure pursuant to the statute"); State v. Westbrook, 175 N.C. App. 128, 133 (2005) (noting that G.S. 8-53 "affords the trial judge wide discretion in determining what is necessary for a proper administration of justice" and finding no error in trial court's order for disclosure); State v. Bryant, 5 N.C. App. 21 (1969) (finding, in a manslaughter case arising from defendant's alleged impaired driving, no violation of G.S. 8-53 when judge permitted doctor to testify regarding results of a blood alcohol test administered in the hospital).

See Jeff Welty, Obtaining Medical Records under G.S. 8-53, North Carolina Criminal Law (August 25 2009), *available at* http://nccriminallaw.sog.unc.edu/?p=656

3. Have you allowed a defendant to move to suppress or dismiss evidence during trial based on discovery of facts not previously known? If so, what were the circumstances?

Relevant Legal Principles.

G.S. 20-38.6(a) provides: "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."

G.S. 20-38.7 does not afford the State the right of appeal from a district court's preliminary determination granting a motion to suppress or to dismiss after jeopardy has attached. State v. Fowler, 197 N.C. App. 1 (2009).

4. Suppose you are inclined to grant a defendant's motion to suppress evidence or dismiss charges. Who prepares the preliminary determination? In what time frame?

Relevant Legal Principles.

G.S. 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."

5. **How do you weigh State Crime Lab delays when considering motions to dismiss for failure to afford the defendant a speedy trial?** How long are the delays in your district?

Relevant Legal Principles.

A court considering a defendant's motion to dismiss on speedy trial must assess four factors: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) prejudice to the defendant. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972). The length of the delay is a triggering mechanism. When the delay reaches a threshold that is presumptively prejudicial, the court must inquire into the other factors. Given that delays approaching one year are considered to trigger this threshold for purposes of felony charges, see Doggett v. United States, 505 U.S. 647, 671 (1992), and "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge," see *Barker*, 407 U.S. at 531, the postponement of misdemeanor impaired driving trials for periods approaching a year to allow time for laboratory toxicology testing easily triggers examination of the remaining three factors.

See Shea Denning, State crime lab backlogs and the right to speedy trial, North Carolina Criminal Law (March 25, 2013), available at http://nccriminallaw.sog.unc.edu/?p=4165.

6. **Do defense attorneys in your district issue subpoenas for the production of documents and other objects in misdemeanor DWI cases?** If so, have you presided over motions to quash such subpoenas? What is your view of a defendant's ability to obtain documentary evidence before trial in district court pursuant to G.S. 15A-802?

Relevant Legal Principles.

G.S. 15A-802. Subpoena for the production of documentary evidence.

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by subpoena which must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1, except that subdivision (2) of subsection (b) of the rule does not apply to subpoenas issued under this section.

See also Shea Denning, State v. Marino Finds No Error in Denying Defendant Source Code, North Carolina Criminal Law (August 21, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4426.

TRIAL

1. **If the prosecutor and defendant agree, do you accept a defendant's plea of guilty to DWI charges in blood draw cases in which the State Crime Lab has not yet analyzed the defendant's blood?** Are these pleas entered pursuant to written plea agreements? Does the State promise to notify the State Crime Lab that the case has been disposed of and to instruct it not to test the blood? If so, and there is no written plea agreement, how do you document the promise?

Relevant Legal Principles.

May a judge accept such a plea knowing that the blood has not yet been tested? Yes.
G.S. 20-139.1(e2) requires that an implied consent case in district court "be continued until the analyst can be present." For this requirement to apply, however, the State must seek a continuance. Moreover, G.S. 20-139.1(e2) primarily addresses circumstances in which a chemical analyst's affidavit may be admitted into evidence under G.S. 20-139.1(e1). The continuance requirement thus applies in circumstances in which the analysis already has been performed. The statute does not require continuance so that an analysis *may be* performed.

May a district attorney agree not to seek a continuance and call such a case for arraignment and trial in order for the defendant to plead guilty? Yes.
An alcohol concentration of 0.15 or more is an aggravating factor in an impaired driving case sentenced under G.S. 20-179. The prosecutor is required to present all aggravating factors of which he is aware and also is required "[i]n every instance in which a valid chemical analysis is made of the defendant" to "present evidence of the resulting alcohol concentration." G.S. 20-179(a)(2). Here, however, no chemical analysis has yet been performed. Thus, these statutory requirements are not implicated.

How does a district attorney prevent the blood from being tested in such cases?
The district attorney submits a "Case Disposition Notice" notifying the state crime lab that the case has been disposed of and that the analysis does not need to be completed.

What if the blood is tested after the defendant's guilty plea?
This might occur if the prosecutor doesn't submit a notification that the analysis does not need to be performed or if the blood is tested before the request is received. In such circumstances, a defendant who pleads guilty to avoid ignition interlock may not receive the benefit she expected. Upon completing its analysis, the state crime lab will submit the chemical analyst's affidavit directly to DMV as well as to the clerk and the district attorney. If the affidavit reflects an alcohol concentration of 0.15 or more, DMV will impose ignition interlock pursuant to G.S. 20-17.8, which requires that "the results of a chemical analysis, as shown by an affidavit or affidavits executed pursuant to G.S. 20-16.2(c1)" be used by DMV to determine a person's alcohol concentration.

2. **Have certified Drug Recognition Experts testified as experts in DWI trials over which you have presided?** What was the nature of their testimony?

Relevant Legal Principles.

N.C. Evid. R. 702(a1)(2) permits a certified Drug Recognition Expert (DRE) to testify regarding whether a person was under the influence of an impairing substance and the category of the substance. DREs are trained to administer a 12-step protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment.

SENTENCING

1. **When, if ever, do you order that a term of special probation be served as an inpatient at a facility for the treatment of alcoholism or substance abuse?**

Relevant Legal Principles.

G.S. 20-179(k1) provides, in relevant part: "Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. The defendant shall bear the expense of any treatment unless the trial judge orders that the costs be absorbed by the State. The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility. . . ."

2. **What factors are most important to you in determining whether to sentence a person at DWI Level 1 or Level A1 to active time or probation?**

Relevant Legal Principles.

Level A1:

- Minimum: 12 months; Maximum: 36 months
- If suspended: Special probation requiring imprisonment for at least 120 days and at least 120 days continuous alcohol monitoring

Level 1:

- Minimum: 30 days; Maximum: 24 months
- If suspended: Special probation requiring imprisonment for at least 30 days or imprisonment for at least 10 days and at least 120 days continuous alcohol monitoring

3. **Have you ever imposed continuous alcohol monitoring as a condition of pretrial release or probation in a DWI case?** Why? If you have not imposed continuous alcohol monitoring, why not?

Relevant Legal Principles.

G.S. 15A-534(a) provides in relevant part: "The judicial official may include as a condition of pretrial release that the defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety, and that any violation of this condition be reported by the monitoring provider to the district attorney."

G.S. 20-179(k2): "The judge may order that as a condition of special probation for any level of offense under G.S. 20-179 the defendant abstain from alcohol consumption, as verified by a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety."

G.S. 20-179(k3): "The court, in the sentencing order, may authorize probation officers to require defendants to submit to continuous alcohol monitoring for assessment purposes if the defendant has been required to abstain from alcohol consumption during the term of probation and the probation officer believes the defendant is consuming alcohol. The defendant shall bear the costs of the continuous alcohol monitoring system if the use of the system has been authorized by a judge in accordance with this subsection."

G.S. 20-179.3(k4): "Notwithstanding the provisions of subsections (g), (h), (k2), and (k3) of this section, if the court finds, upon good cause shown, that the defendant should not be required to pay the costs of the continuous alcohol monitoring system, the court shall not impose the use of a continuous alcohol monitoring system unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system."

4. **When you have discretion, (second or subsequent conviction and sentence of more than 90 and less than 180 days), how do you select the place of confinement for an active DWI sentence?**

Relevant Legal Principles.

The rules governing the place of confinement for a person sentenced for a violation of Chapter 20 differ slightly from those setting forth the place of confinement for a person sentenced for other criminal offenses. The starting point for determining the place of confinement for a person sentenced to a term of imprisonment for a Chapter 20 offense is G.S. 20-176(c1), which provides:

> Notwithstanding any other provision of law, no person convicted of a misdemeanor for the violation of any provision of this Chapter except G.S. 20-28(a) and (b), G.S. 20-141(j), G.S. 20-141.3(b) and (c), G.S. 20-141.4, or a second or subsequent conviction of G.S. 20-138.1 shall be imprisoned in the State

> prison system unless the person previously has been imprisoned in a local confinement facility, as defined by G.S. 153A-217(5), for a violation of this Chapter.

Thus, the rule generally applicable to sentences for Chapter 20 offenses is that terms of imprisonment for active sentences, regardless of length, are served in local confinement facilities rather than in the custody of the Division of Adult Correction. This rule does not apply to a defendant who previously has been imprisoned in a local confinement facility for a Chapter 20 offense. The general rule also does not apply to convictions for certain offenses, among them a second or subsequent conviction of driving while impaired in violation of G.S. 20-138.1. None of the other offenses sentenced under G.S. 20-179 are excepted from the generally applicable rule.

When an exception to the general rule of local confinement in G.S. 20-176(c) applies, G.S. 15A-1352, which governs the appropriate place of confinement for criminal offenses generally, establishes the framework for where a term of imprisonment may or must be served. G.S. 15A-1352(a) provides that a sentence of 90 days or less imposed for a misdemeanor offense must be served in a facility other than one maintained by the Division of Adult Correction (DAC). If the sentence imposed, or, in the case of multiple offenses, the sentences imposed, require confinement for more than 180 days, the commitment must be to the custody of the DAC.

A person sentenced to confinement of more than 90 days and up to 180 days for a misdemeanor offense other than "an impaired driving offense under G.S. 20-138.1" or "for nonpayment of a fine under Article 84" of Chapter 15A must be committed to the Statewide Misdemeanant Confinement Program established by G.S. 148-32.1. Under this program, the North Carolina Sheriffs' Association identifies space in local confinement facilities that is available for housing misdemeanants serving periods of confinement of more than 90 and up to 180 days, "except for those serving a sentence for an impaired driving offense." The references to "an impaired driving offense under G.S. 20-138.1" and the term "impaired driving offense" likely encompass all offenses sentenced under G.S. 20-179.

Because a person sentenced for an offense sentenced under G.S. 20-179 may not be committed to the Statewide Misdemeanant Confinement Program, a judge has discretion (assuming that an exception to the local confinement rule of G.S. 20-176(c1) applies) to order that a defendant sentenced to a period of confinement of more than 90 and up to 180 days for such an offense be committed to a local confinement facility or a DAC facility.

The rules stated above apply to the place of confinement for active sentences. G.S. 15A-1351(a) governs the incidents of special probation for criminal offenses generally and "impaired driving under G.S. 20-138.1" specifically, providing that noncontinuous periods of imprisonment under special probation may only be served in designated local confinement or treatment facilities. A person imprisoned for continuous periods as a condition of special probation may be confined in a DAC or local confinement facility.