What We Know (And What We Don't) About Drug-Impaired Driving

December 6, 2017 by Shea Denning

Print

Ask someone to identify an emerging area of interest related to motor vehicle law and chances are the person will mention drugged driving. Indeed, the U.S. Office of National Drug Control Policy in 2010 set a goal of reducing the prevalence of drug-impaired driving by 10 percent by 2015. People who work in the field frequently cite anecdotal evidence supporting the notion that driving while impaired by drugs is becoming more common. Are they right? Are more people these days driving while impaired by drugs?

I thought the National Highway Traffic Safety Administration (NHTSA) might have an answer. Turns out NHTSA released a report earlier this year estimating the prevalence of alcohol and drug use by drivers and how that prevalence has changed over time. The report was based on data collected from a national roadside survey (NRS) conducted between June 2013 and March 2014. That data was compared to information collected in a 2007 NRS.

Before I reveal the results, I want to say a bit about how the researchers got them.

Survey methodology.

Researchers collected data from more than 11,000 drivers at five locations in 60 sites across the United States (four of them in North Carolina) in one two-hour Friday daytime session and four two-hour nighttime sessions.

Here is how the survey worked: Randomly-selected drivers were guided off the roadway into the research location, which usually was an empty parking lot. Research bays were demarcated by traffic cones, and each driver was directed to drive in to a specific bay. A data collector explained to the driver the purpose of the study, told the driver that that it was voluntary and anonymous, and asked for consent to continue. Drivers were offered financial incentives for completing additional parts of the survey. A driver who declined to participate was asked to provide an anonymous breath sample before the driver left the location. Drivers who were not willing to do that drove on. Nearly 80 percent of drivers participated in the survey.

- Opioids and their metabolites were the second most prevalent drug, detected in 5.5 percent of daytime drivers and 4.7 percent of nighttime drivers.
- During the daytime, the next most frequently encountered drug class was antidepressants (3.5 percent) followed by benzodiazepines (2.6 percent)
- The third most prevalent types of drugs among nighttime drivers were cocaine and amphetamines/stimulants (2.2 percent).

The comparison.

The results of the 2013-14 NRS were compared to the 2007 NRS.

- Nighttime drug-positive driving increased from 16.3 percent in 2007 to 20.1 percent in 2013-14.
- The prevalence of THC-positive drivers increased from 8.7 percent to 12.7 percent (an increase of 46 percent).

The limitations.

The authors of the NHTSA report note that the presence of drugs does not equate to drug impairment. They explain that the study's purpose was to estimate drug prevalence, not to determine whether drugs affect driving performance or have an impact on crash risk. In fact, the authors noted, some prescribed medications may actually improve the driving of certain individuals. Questions about impairment and crash risk must be determined (and, the authors note, are currently being examined) in other studies.

A 2016 NHTSA-sponsored Drug and Alcohol Crash Risk Study examined the risks associated with drug- and alcohol-positive driving. The study used data from crash-involved and non-crash-involved drivers over a 20-month period in Virginia Beach, Virginia. The study confirmed previous research indicating alcohol is a greater contributor to crash risk than drugs. And when age, gender, race/ethnicity, and alcohol consumption were accounted for, the researchers found no significant contribution of drugs to crash risk.

A July 2017 NHTSA report to the U.S. Congress on marijuana-impaired driving noted that while "ethyl alcohol is a relatively simple drug whose absorption, distribution, and elimination from the body along with the behavioral and cognitive effects are fairly well documented," the "absorption, distribution and elimination from the body of marijuana (and many other drugs), along with the behavioral and cognitive effects is very different." In addition, the report stated that less is known about the impairing effects of marijuana use than alcohol consumption on driving-related skills. There have been fewer studies of marijuana's effects on driving, and research methods have not been consistent. The studies that exist consistently determine that the level of THC in the blood and the degree of a person's impairment do not appear to be closely related.

The bottom line.

North Carolina Criminal Law

A UNC School of Government Blog

A Look Around the Country at the Admissibility of Evidence in Drugged Driving Cases

Posted on Dec. 12, 2017, 3:04 pm by Shea Denning

Last week I wrote about studies examining the prevalence of driving with drugs in one's system. Research has shown that an increasing number of drivers have detectable drugs in their symptoms. What we don't yet know is how many of those drivers are impaired by drugs and whether the incidence of drug-impaired driving is increasing.

We do know, of course, that drug-impaired driving is dangerous. Policy-makers in North Carolina and elsewhere have attempted to combat the problem by enacting zero-drug-tolerance laws and provisions that prohibit driving with a threshold of a drug or its metabolites in one's body. And law enforcement officers across the country have created detection protocols that are geared specifically toward the drug-impaired driver rather than a driver impaired by alcohol.

Notwithstanding these measures, drug-impaired driving continues to be prosecuted in North Carolina and other states under statutory schemes and law enforcement protocol that were primarily written and developed to deter, detect and punish alcohol-impaired driving.

Courts across the country are increasingly being required to consider how those schemes and that protocol apply to drug-impaired driving prosecutions. This post will summarize recent court rulings on the admissibility in drugged driving prosecutions of (1) evidence regarding a defendant's performance on field sobriety tests, (2) testimony about the effects of certain drugs, and (3) lay opinion testimony about the person's impairment. It will also review recent opinions regarding the quantum of proof necessary to establish drug-impaired driving. It will conclude with a case that demonstrates why drugged driving is a matter of serious concern.

Field Sobriety Tests. In *Commonwealth v. Gerhardt*, 81 N.E.3d 751 (Mass. 2017), a case in which the defendant was alleged to have been driving while impaired by marijuana, the Supreme Court of Massachusetts significantly limited the scope of permissible testimony from an officer about the defendant's performance on field

sobriety tests. The *Gerhardt* court determined that these limitations were required because standardized field sobriety tests—the walk and turn, one-leg stand, and horizontal gaze nystagmus tests—were developed to detect alcohol impairment. Unsatisfactory performance on these tests, the court noted, has been strongly correlated with a blood alcohol concentration of at least 0.08.

By contrast, the court said there is "no scientific agreement on whether, and, if so, to what extent, these types of tests are indicative of marijuana intoxication." *Id.* at 766. The court explained that the research on the efficacy of field sobriety tests to measure marijuana content "has produced highly disparate results." *Id*.

> *"Some studies have shown no correlation between inadequate performance on FSTs and the consumption of marijuana; other studies have shown some correlation with certain FSTs, but not with others; and yet other studies have shown a correlation with all of the most frequently used FSTs. In addition, other research indicates that less frequently used FSTs in the context of alcohol consumption may be better measures of marijuana intoxication."*

Id.

Based on this lack of scientific consensus, the *Gerhardt* court held that a law enforcement officer could not testify that a person's performance on one or more field sobriety tests established that the person was under the influence of marijuana. Nor could an officer testify that a person passed or failed any test. Such testimony would, the court said, improperly imply that field sobriety tests are definitive tests of marijuana use or impairment.

The *Gerhardt* court held that an officer *may* testify about his or her observations of the defendant during certain field sobriety tests, which the officer should refer to as "roadside assessments" rather than tests to avoid suggesting "that they function as scientific validation of a defendant's sobriety or intoxication." Id. at 760. The court said that observations regarding a driver's balance, coordination, mental acuity and other skills required to safely operate a motor vehicle are relevant facts to which an officer may testify.

In *People v. Kavanaugh*, 72 N.E.3d 394 (Ill. App. 2016), the Appellate Court of Illinois held that the trial court in the petitioner's license suspension hearing properly refused to consider an officer's testimony that the defendant's left eye demonstrated a lack of convergence in a roadside test. The officer testified that based on his experience, a lack of convergence in a person's eyes when a stimulus is placed close to the person's face indicates that the person has THC (tetrahydrocannibol, the primary psychoactive substance in marijuana) in his or her system. The officer acknowledged, however, that

some people's eyes simply lack convergence. The appellate court held that the State failed to adequately demonstrate a scientific basis for the convergence test. Instead, the officer simply described the test and said he had learned to perform it at a training course. This was an insufficient foundation.

The effects of certain drugs. The *Gerhardt* court held that a police officer may testify to the physical characteristics that he observes of a driver suspected of drug-impaired driving such as bloodshot eyes, drowsiness, and lack of coordination. An officer may not, however, offer an opinion that these characteristics mean that the driver is under the influence of marijuana. 81 N.E.3d at 762.

In *People v. Ciborowski*, 55 N.E.3d 259 (Ill. App. 2016), the Appellate Court of Illinois held that the trial court did not abuse its discretion by permitting a law enforcement officer trained as a drug recognition expert to testify about the effects of the prescription drugs detected in the defendant's urine. The court of appeals noted that the trial court did not allow the officer to testify as to whether the defendant, whom he did not personally examine, was impaired by the substances he identified. On cross-examination, the officer admitted that the two drugs, citalopram and quetiapine, can have different effects on different people. He further testified that, just because an individual has a particular drug in their system, it does not necessarily mean that the person is under the influence of that drug. The appellate court deemed the officer's testimony to be relevant to the issue of whether the arresting officer had probable cause to arrest defendant.

The Ciborowski court also favorably recited testimony from the arresting officer that the court said supported his determination that the defendant had driven while impaired. The officer had been trained in the police academy in drug detection. In his work in the gang unit he had seen hundreds of people under the influence of drugs ranging "from illegal drugs 'such as cocaine and crack [where] you get erratic, irrational behavior' to 'the other end of the spectrum such as anti-depressants and sleeping aids, [where] you get people that are tired and sleepy.'" 55 N.E.3d at 277. The officer further testified that Ambien, one of the drugs the defendant said he had taken, was a sleeping drug, and that the defendant's inability to keep his eyes open and his sleepy state were consistent with the effects of Ambien.

Lay opinion testimony regarding impairment. As mentioned in the previous section, the *Gerhardt* court held that neither a police officer nor any other lay witness could offer an opinion as to whether a driver was impaired by marijuana as the "effects of marijuana may vary greatly from one individual to another, and those effects are as yet not commonly known." *Id.* at 754. The court cautioned the State that "a prosecutor who elicits from a police officer his or her special training or expertise in ascertaining whether a person is intoxicated risks transforming the police officer from a lay witness to an expert witness on this issue, and the admissibility of any opinion proffered on this issue

may then be subject to the different standard applied to expert witnesses." *Id.* at 762 n.22 (2017) (internal citations omitted).

The Superior Court of Pennsylvania in *Commonwealth v. Gause*, 164 A.3d 532 (PA Super. 2017) held that an officer who was not qualified as an expert could not testify that eyelid and body tremors were indicative of the driver's impairment by marijuana. The *Gause* court acknowledged that expert testimony is not required to prove impairment in a drug-impaired driving case when there is other independent evidence of impairment. *Gause* was not, however, such a case. Gause was stopped for a taillight violation. Once the officer activated her lights, he properly signaled and pulled to the curb. He provided his license, registration, and proof of insurance without fumbling. There was no evidence that an odor of marijuana emanated from his person or from his vehicle, no testimony that his eyes were bloodshot, and no physical evidence of recent marijuana usage. Furthermore, Gause did not admit that he had recently smoked marijuana, and there was no eyewitness testimony to establish that he had done so. Thus, expert testimony was required to connect the body and eyelid tremors the officer observed to marijuana impairment.

The *Gause* court differientiated eyelid tremors from physical symptoms like staggering, stumbling, glassy or bloodshot eyes, and slurred speech, which are ordinary indications that a person has ingested a controlled substance. Eyelid tremors, in contrast, are something only a person with specialized training would associate with ingestion of a controlled substance. Moreover, as the law enforcement officer in *Gause* admitted on cross examination, there are many causes of eye tremors other than the ingestion of marijuana.

Sufficiency of the evidence. The *Gerhardt* court held that since FSTs cannot be treated as scientific tests of marijuana impairment, poor performance on FSTs alone is not sufficient to support a finding that a person was impaired by marijuana. The court said that the jury must be so instructed and drafted a model jury instruction for this purpose.

The court in *Kavanaugh* held that the following facts were sufficient to provide probable cause to believe the defendant was driving while impaired by cannabis: The defendant said she failed to check her blind spot before changing lanes, causing another vehicle to go into the ditch. A law enforcement officer smelled a strong odor of burnt cannabis in the defendant's car and located a pipe, grinder, and cannabis under her front passenger seat. Based on this evidence, the court concluded that a reasonably cautious person would have believed that the defendant was driving under the influence of cannabis.

Likewise in *Ciborowski*, the appellate court found that the facts known to the officer provided probable cause to believe the defendant was driving while impaired by a drug. The defendant was in a crash. There was no indication that he was impaired by alcohol. He admitted to taking prescribed medication. He had slurred speech. He was mush-

mouthed. He was sleepy. He changed his story of what happened in the accident and gave different explanations of where he was going. When the officer asked for his insurance card, the defendant provided his AARP card. The defendant was unkempt, appeared confused, had dilated pupils and had a hard time keeping his eyes open. He also performed poorly on field sobriety tests.

The Supreme Court of Alaska in *McCord v. State*, 390 P.3d 1184 (Alaska 2017), determined that the State's evidence of impaired driving was sufficient to survive the defendant's motion for judgment of acquittal. The defendant argued that the State failed to introduce any evidence that the concentration of clonazepam, a controlled substance found in her blood, was capable of impairing her capacity to drive safely. The court disagreed. A forensic toxicologist testified that clonazepam affected central nervous system in ways similar to alcohol. She further stated that the defendant's levels were in the therapeutic range, and that therapeutic levels of clonazepam are sufficient to cause impairment. Finally, she testified that the symptoms the law enforcement officers observed were consistent with side effects from benzodiazepines such as clonazepam. Thus, the court concluded, the State's evidence was sufficient to survive the defendant's motion.

Why the concern? If the risks of drug-impaired driving are not self-evident, the facts in *Commonwealth v. Packer*, 168 A.3d 161 (Penn. 2017), illustrate them clearly. There, the Pennsylvania Supreme Court found that the evidence regarding the defendant's inhaling of difluoroethane (DFE) provided the malice necessary to support charges of murder and aggravated assault. The State's evidence showed that the defendant, who had a history of losing consciousness immediately after huffing DFE, inhaled the substance before and during driving. She became "zombified" and unresponsive, drove into oncoming traffic, and crashed head-on into the car driven by a man who braked extensively and steered away in an attempt to avoid the collision. The man died within minutes of the crash. The airbag module recovered from the defendant's car indicated that the defendant did not brake before the crash and took no evasive measures to avoid the victim's car.

Despite this level of impairment, no one who spoke with the defendant at the scene could tell she was impaired. She asked several questions of responders that aroused suspicion—Am I going to jail? Will the police be able to detect duster in my blood?—and she consented to a request by law enforcement officers for a blood draw at the hospital. Testing of her blood revealed DFE.

At trial, an expert toxicologist testified that the level of DFE in the defendant's system was on the low side of the detectable range. The toxicologist testified that DFE has a half-life of 23 minutes, and that peak effects and peak concentrations are reached within minutes after inhaling the substance.Those effects frequently are resolved by the time emergency responders arrive.

In holding that the defendant acted with malice, the court stated that there is a significant difference between deciding to drive while intoxicated and deciding to drive with knowledge that there is a strong likelihood of becoming unconscious. The latter, said the court, is akin to the decision to play Russian roulette:

> *"[I]n both instances, the defendant is 'virtually guaranteeing some manner of accident' will occur through the 'intentional doing of an uncalled–for act in callous disregard of its likely harmful effects on others.'"*

Id. at 172.

Category: Crimes and Elements, Motor Vehicles | Tags: Ciborowski, drug-impaired driving, drugged driving, DWI, field sobriety tests, FSTs, Gause, Gerhardt, Kavanaugh, McCord, Packer

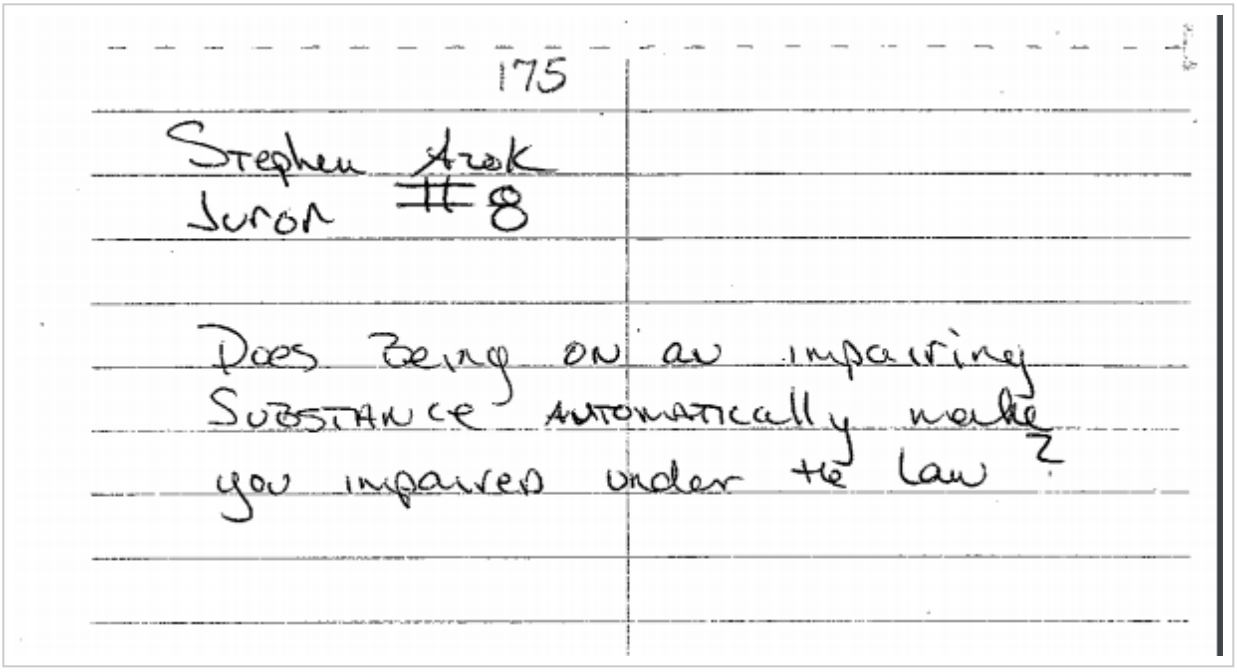
North Carolina Criminal Law

A UNC School of Government Blog

State v. Shelton Refines Sufficiency Analysis in Drugged Driving Case

Posted on Feb. 6, 2019, 2:41 pm by Shea Denning

The court of appeals decided State v. Shelton, ___ N.C. App. ___ (2019) yesterday, determining that the evidence of the defendant's impairment was sufficient when he took impairing drugs hours before crashing his vehicle into a pedestrian after his brakes failed. Two aspects of the case are of particular interest: (1) the court's evaluation of the sufficiency of the evidence in a case where no one opined that the defendant was impaired; and (2) how the State obtained evidence that drugs remained in the defendant's system in the first place.


175

Stephen Arok
Juror #8

Does being on an impairing substance automatically make you impaired under the law?

— *Jury question from State v. Shelton*

The morning of. When he awoke at 6:30 a.m. on July 22, 2015, Brian Shelton took his prescription oxycodone. He then drove his pickup truck from his home in Sneads Ferry to his job in Surf City. At 11 a.m., Shelton took tramadol, another drug that he had been prescribed. Both drugs had been prescribed with labels warning of their potential to

cause drowsiness and dizziness and advising that care be taken when operating a vehicle.

The crash. As Shelton was driving home from work at 5:10 p.m., the sports utility vehicle (SUV) in front of him slowed to make a left turn. Shelton applied his brakes, but they failed. Shelton swerved to the right to avoid hitting the SUV and ran off the road. As he did so, he struck and killed Rhonda Anderson who had been standing near a group of mailboxes about three feet from the side of the road. The force of the impact caused Anderson's body to fly nearly 20 yards through the air before hitting the ground. Shelton's truck also hit the rear of the turning car, ripping off Shelton's driver's side mirror.

Shelton was apparently unaware that his truck had struck Anderson. He did realize, however, that he had been in a crash, and he also knew that he was driving with a revoked license. He left the scene and drove home, using the emergency brakes on his truck to bring it to a stop in his driveway.

The initial charges. A highway patrol trooper tracked Shelton down at his home at 6:45 p.m. Shelton spoke to the officer and wrote a written statement. He also submitted to a portable breath test that registered a 0.00. Later that evening, another trooper interviewed Shelton and informed him that he had struck and killed Anderson. The trooper cited Shelton for several offenses arising out of the accident, including misdemeanor death by vehicle and felony hit and run, but did not charge him with driving while impaired. Another trooper obtained a search warrant for Shelton's blood, which he executed around 11 p.m. the evening of the crash. (More on that later.)

The blood test. The State Crime Lab analyzed Shelton's blood and confirmed the presence of oxycodone and tramadol. The laboratory analyst determined that these drugs were present in at least the amount of 25 nanograms per milliliter– the lab's detection limits – but did not determine the precise amounts of these substances or whether Shelton was impaired by them at the time of the crash.

The indictment. Shelton subsequently was indicted for second degree murder, felony death by vehicle, felony hit and run, driving while license revoked and several additional misdemeanor vehicle offenses.

The trial. An expert pharmacologist called by Shelton testified that he would not expect to see impairment from a person who had 25 nanograms per milliliter of both substances in his bloodstream and that people who frequently take oxycodone and tramadol develop "'a great deal of tolerance'" to the drugs. Slip op. at 8. Shelton moved to dismiss at the close of the State's evidence and again at the close of all the evidence. The trial court denied the motions.

The verdict. The jury acquitted Shelton of second degree murder, but convicted him of involuntary manslaughter, felony death by vehicle, felony hit and run, driving while license revoked, misdemeanor death by vehicle, and driving with improper brakes. The trial court arrested judgment on the involuntary manslaughter and misdemeanor death by vehicle convictions. The judge sentenced Shelton to 73 to 100 months imprisonment for felony death by vehicle and to a consecutive sentence of 17 to 30 months for the remaining convictions.

The appeal. Shelton appealed, arguing in part that the trial court erred by denying his motion to dismiss the charge of felony death by vehicle.

Felony death by vehicle. A person commits the offense of felony death by vehicle if he drives while impaired and proximately causes the death of another person. Thus, there were two significant issues at Shelton's trial: First, was he impaired? Second, if so, was that impairment the proximate cause of Anderson's death?

Impairment. Shelton argued that there was no substantial evidence that he was impaired by oxycodone and/or tramadol at the time of the crash. He pointed out that the officers who met with him after the accident did not charge him with driving while impaired. The appellate court disagreed with Shelton's assessment of the evidence, concluding that reasonable jurors could find that Shelton was impaired based on evidence that he consumed impairing drugs the day of the crash, evidence that those drugs were detected in Shelton's blood after the crash and evidence regarding Shelton's "lack of awareness of the circumstances around him and his conduct before and after the collision." Slip op. at 12-13. The court noted that Shelton did not see Anderson standing on the side of the road whereas three eyewitnesses to the crash testified that they did see her before she was hit. Shelton also was unaware that he had struck Anderson, despite the force of the impact. And Shelton drove away from the scene in a vehicle that he knew lacked operable brakes.

Proximate cause. For Shelton to be convicted of felony death by vehicle, his impaired driving must have proximately caused Anderson's death. To be the proximate cause of death, an act must have directly caused a death that was reasonably foreseeable under the circumstances. *See State v. Pierce*, 216 N.C. App. 377, 383 (2011).

Shelton argued that Anderson's death was caused by the malfunctioning brakes on his truck and not by his alleged impaired driving. The appellate court reasoned that the two causes were not incompatible and that the faulty brakes did not preclude Shelton's impaired driving from being a proximate cause. The court explained that the jury could have concluded that a non-impaired driver would have swerved left, as witnesses testified that there was no oncoming traffic, rather than swerving toward the side of the road where Anderson was standing.

Strict liability? Shelton argued that upholding his conviction for felony death by vehicle would create a strict liability standard for people who have consumed prescription drugs and are then involved in a crash caused by their negligent driving. Applied to different facts, some of the language in the court's opinion supports such a concern. For example, the court states that "[t]he fact that a motorist has consumed impairing substances 'when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [G.S. 20-138.1].'" Slip op. at 12 (quoting *State v. Norton*, 213 N.C. App. 75, 79 (2011)). But elsewhere in the opinion, the court expresses a more nuanced view, stating that impairment may be shown through evidence that a defendant has "(1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired." Slip op. at 17. "[T]he circumstances of every case are different," the court explained, "and not every accident involving a driver who has ingested prescription drugs will raise an inference that the driver was appreciably impaired." Slip op. at 18.

What is missing. As I read *Shelton*, I wondered what the State asserted in the search warrant application for Shelton's blood, given that the officers do not appear to have gathered evidence during their interactions with Shelton that suggested he was impaired. Shelton did not challenge the issuance of the search warrant on appeal, but the search warrant and the application therefor are contained in the record on appeal. As it turns out, the warrant was issued based on the following one-sentence statement: "[T]he defendant was involved in a motor vehicle collision where a violation of G.S. 20-141.4(a)(2) occurred." (Record on Appeal at 11).

How could a search warrant issue based on a one-sentence statement that the defendant was involved in a collision where the offense of misdemeanor death by vehicle occurred?

G.S. 20-141.4(a)(2) sets forth the crime of misdemeanor death by vehicle, which is (1) unintentionally causing the death of another person, (2) while violating a State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic —other than impaired driving under G.S. 20-138.1—where (3) commission of the offense is the proximate cause of the death.

Despite the fact that the offense by definition does not involve impaired driving, it was defined as an implied consent offense by S.L. 2011-119. That legislative change authorized the implied consent testing of a person charged with misdemeanor death by vehicle. See G.S. 20-139.1(b5).

Thus, relying on the statutes alone and ignoring potential constitutional concerns about a scheme that calls for chemical testing without probable cause to believe that the person has committed an alcohol or drug-related offense, the officers could have asked

Shelton to submit to a blood test. Had they done so and Shelton refused, G.S. 20-139.1(b)(5) provides that "a law enforcement officer ***with probable cause to believe that the offense involved impaired driving or was an alcohol-related offense*** made subject to the procedures of G.S. 20-16.2 shall seek a warrant to obtain a blood sample." (emphasis added). There is no statutory authorization (nor could there constitutionally be) for the issuance of a warrant to draw a defendant's blood based simply on the commission of the offense of misdemeanor death by vehicle.

The warrant appears to me to have been improperly issued, but, again, that issue was not raised before the court.

Category: Crimes and Elements, Motor Vehicles, Search and Seizure | Tags: 20-141.4, drugged driving, DWI, felony death by vehicle, impairment, implied consent, misdemeanor death by vehicle, proximate cause, search warrant, state v. shelton