DWI Update: May 2020 Edition

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My colleagues and I usually spend the waning weeks of May slogging through months of appellate opinions, determining which cases merit discussion at upcoming summer conferences. This year, of course, there are no live summer conferences.

Yet we are still slogging. We are delivering a virtual criminal case update for district court judges this week and will be offering similar on-line instruction to other court officials and advocates in the weeks to come.

In the seven months since the fall conferences, our appellate courts have addressed a number of significant — and, in some instances, novel — issues related to the investigation and prosecution of impaired driving offenses. Even though you can find summaries of all recent appellate decisions here on the blog, I thought readers might appreciate a post aggregating recent DWI-specific holdings.

Destruction of evidence. When the State destroys or fails to preserve material, exculpatory evidence, it violates a defendant's right to due process. *State v. Taylor*, 362 N.C. 514 (2008); *see also* NC Defender Manual Vol. 1, Pretrial (2d ed. 2013), at 7. Thus, when the State destroyed a poster displayed in the district attorney's office that displayed two pictures of the defendant, the first with the caption "Before he sued the D.A.'s office," and the second, depicting the defendant with injuries and captioned, "After he sued the D.A.'s office," dismissal of assault charges based on a due process violation was proper. *State v. Williams*, 362 N.C. 628 (2008). When, on the other hand, the State destroys or fails to preserve evidence that is only *potentially useful* to the defendant, the defendant must demonstrate that the State acted in bad faith to establish a constitutional violation. *Taylor*, 362 N.C. at 525. I speculated here about how this two-part analysis might apply to the destruction of dash-cam video in an impaired driving case. The court in *State v. Taylor*, ___, N.C. App. ___, 836 S.E.2d 658 (2019) (same last name, entirely different case), addressed that issue head-on.

State v. Taylor, ___, N.C. App. ___, 836 S.E.2d 658 (2019). The defendant in Taylor was charged with misdemeanor impaired driving in November 2016, and was indicted for habitual impaired driving in December 2017. The defendant's attorney requested disclosure of video footage from the vehicle of the highway patrol trooper who stopped the defendant. The State informed the attorney that the footage had been purged from the highway patrol's system. Video of such stops is maintained only for 90 days absent a specific request from the district attorney's office. The defendant thereafter moved to dismiss the charges, and the trial court granted the motion, concluding that the footage was material and exculpatory and that the State's failure to provide it flagrantly violated the defendant's constitutional rights and caused irreparable prejudice to the defense. The State appealed, and the court of appeals, over a dissent, vacated the trial court's order and remanded for a determination of bad faith. The appellate court reasoned that the dash camera footage was only potentially useful to the defendant since there was no record of what it may have shown. Thus, the defendant was required to establish bad faith on the part of the State to show a constitutional violation. A dissenting judge would have reversed the trial court's order on the basis that the evidence presented could not

support a finding of bad faith. The dissent noted that the defendant cross-examined the trooper, and the trooper's testimony tended to show that he simply misunderstood the patrol's video preservation policy.

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (2020). The defendant in *Hoque*moved to suppress evidence of the withdrawal of his blood pursuant to a search warrant based in part on the officers' failure to record the event on their body-worn cameras as required by agency policy. The trial court denied the motion and the defendant appealed, arguing that the failure to record the encounter pursuant to departmental policy denied him due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The court of appeals rejected the defendant's argument on two grounds. First, the court held that there was no *Brady* violation because the State did not fail to disclose the body-camera video. The evidence was not suppressed; it never existed. Second, the court concluded that the defendant could not show that video footage of the blood draw would have been favorable to him. Instead, it may have corroborated the officers' testimony. In addition, the court noted that the violation of departmental policy did not on these facts amount to a denial of defendant's due process rights.

Use of force to withdraw blood. An officer who has (1) probable cause to believe a person has committed an offense involving impaired driving, (2) a clear indication that the blood sample will provide evidence of the defendant's impairment, and (3) either a search warrant or exigent circumstances, may compel a person to submit to a forced extraction of blood. *Schmerber v. California*, 384 U.S. 757 (1966). To satisfy the Fourth Amendment, the forced extraction itself must be performed in a reasonable manner. *SeeSchmerber*, 384 U.S. at 771; *see also Graham v. Connor*, 490 U.S. 386 (1989) (claims that a law enforcement officer has used excessive force in the course of an arrest or other seizure should be analyzed under the Fourth Amendment's reasonableness standard). *Schmerber* determined that the extraction of the defendant's blood "by a physician in a hospital environment according to accepted medical practices," was a reasonable search. *Id.* at 771. But because the petitioner in *Schmerber* did not forcibly resist the blood draw, the case did not address the degree of force that may be used to obtain a blood sample.

And until this year, North Carolina's appellate courts likewise had not addressed the extent of the force that may be utilized in association with a lawfully compelled blood draw. That changed in *State v. Hoque*, ___ N.C. App. ___, 837 S.E.2d 464 (2020).

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (2020). The defendant in *Hoque*actively resisted officers' attempts to gather evidence of impaired driving, beginning with his refusal to provide a roadside breath test. After he was arrested and advised of his implied consent rights, he refused to sign the rights form. He then refused to blow into the Intoximeter. A search warrant for the withdrawal of defendant's blood was issued, and he was taken to a hospital emergency room for that procedure. There, the defendant told a hospital nurse that she did not have permission to take his blood. Hospital staff told the arresting officer that the defendant would need to be held down for the blood draw. Two officers handcuffed the defendant and put him on his stomach. Two nurses helped the two officers hold the defendant down, and his blood was withdrawn. The defendant moved to suppress the results of the blood test on the basis that his blood was drawn by excessive and unreasonable force. The trial court denied the motion, and the defendant appealed. The court of appeals found no error.

The trial court relied on *United States v. Bullock*, 71 F.3d 171 (5th Cir. 1995) in evaluating whether the State used excessive force. In *Bullock*, the FBI obtained a search

warrant to obtain samples of the defendant's blood and hair for DNA and other analysis. The defendant refused to comply, and a seven-member team subdued him and obtained the samples. The defendant was cuffed and shackled between two cots. A towel was placed on his face because he was spitting on agents. A nurse took blood from his hand and plucked 20 hair samples from his scalp. The *Bullock* court concluded that the use of force was caused by the defendant's refusal to comply with a lawful warrant and was reasonable. The court explained that a defendant cannot resist a lawful warrant and be rewarded with the exclusion of the evidence.

The court of appeals in *Hoque* noted that the officers had a valid warrant and that the defendant's blood was drawn by medical personnel in a hospital – methodology deemed reasonable in *Schmerber*. As for the use of force, the *Hoque* court was persuaded by the reasoning in *Bullock* and concluded that the use of force was caused by the defendant's refusal to comply with a lawful warrant and was reasonable.

Court orders for medical records in DWI cases. I wrote about this issue in detail in January so I'll keep it brief here. G.S. 8-53 provides that a resident or presiding judge may at or prior to trial compel disclosure of confidential medical information "if in his opinion disclosure is necessary to a proper administration of justice." Another statute, G.S. 90-21.20B, requires a health care provider to disclose medical information related to a person involved in a vehicle crash as specified in a search warrant or an order issued by a judicial official. The court of appeals in *State v. Scott*, __ N.C. App. ___, 838 S.E.2d 676 (Jan. 21, 2020), determined that the district court failed to satisfy either provision in ordering that medical records be disclosed and samples of defendant's blood obtained by a hospital be provided.

State v. Scott, __ N.C. App. ___, 838 S.E.2d 676 (Jan. 21, 2020). The defendant in *Scott* was involved in a fatal crash in Elon. He was speeding when he crashed into a car turning left across his lane of travel. The driver of the other car was pronounced dead at the scene. The defendant was "in and out of consciousness" after the crash and was transported by ambulance to a Greensboro hospital.

An officer spoke to the defendant later in the day that the accident occurred. He did not detect signs that the defendant was impaired. In his accident report, he determined that the other vehicle was in the defendant's travel lane at the time of the crash. Five days after the crash, an assistant district attorney petitioned a district court judge for an order directing the hospital to turn over the defendant's medical records and any blood it had withdrawn from the defendant. The hospital turned over three vials of defendant's blood, which were analyzed by the State Crime Lab, revealing a blood alcohol concentration (BAC) of .22. The defendant was subsequently indicted for second degree murder.

The defendant moved to suppress the BAC evidence on the basis that it was seized in violation of the Fourth Amendment. The trial court denied the motion, and the defendant was convicted at trial of second degree murder. He appealed, arguing that the trial court erred by denying his motion to suppress.

The court of appeals determined that the district court improperly ordered that the medical records be disclosed and the blood be provided. The district court's order was based on nothing more than a bare allegation that a fatality had occurred. The State did not submit an affidavit or other evidence demonstrating reasonable suspicion that a crime had been committed and that the records and evidence sought were likely to bear on the investigation of that crime.

The court further determined that the superior court erred in denying the defendant's motion to suppress. The district court's order did not comport with G.S. 8-53 and the disclosure of the evidence was not proper under G.S. 90-21.20B(a1), which requires a valid court order or search warrant.

There was a dissent in *Scott*. Though the majority found error, they found it was not prejudicial. A dissenting judge agreed that the order for medical records was improper, but thought the error was prejudicial. Thus, the state supreme court will have an opportunity to review these issues.

Other impaired driving cases also raise interesting issues.

***State v. Nazzal*,** __ N.C. App. ___, ___ S.E.2d ___ (March 3, 2020). The court of appeals in *State v. Nazzal* held that the State presented insufficient evidence of impairment in an impaired driving prosecution arising from a fatal crash. Applying *State v. Eldred*, 259 N.C. App. 345 (2018) (discussed here), the court concluded that evidence regarding the nature of the crash, the defendant's flight from the scene, the defendant's gross understatement of the collision's severity, and a trooper's opinion based on his passive observation of the defendant five hours after the crash did not provide substantial evidence that the defendant was impaired at the time of the crash.

State v. Diaz-Tomas, __ N.C. App. ___, ___ S.E.2d ___ (April 21, 2020), temp. stay granted, ___ N.C. ___, 840 S.E.2d 221 (April 21, 2020). The holding of this case is all about procedure, but the issues that led to those procedural questions are pure motor-vehicle. The defendant failed to appear on impaired driving charges. An order was issued for his arrest, and his driving privileges were revoked. The State dismissed the charges with leave to reinstate. Nearly four years after the initial charges, the defendant asked that the charges be reinstated. The State refused to place the charges on the calendar unless the defendant pled guilty and waived his right to appeal. The defendant attempted to obtain an order directing the reinstatement of charges. The court of appeals did not reach the merits of whether the State can refuse to reinstate charges given the requirement in G.S. 20-24.1 that a defendant must be afforded an opportunity for a trial or hearing within a reasonable time of the defendant's appearance. The supreme court will review the case, so stay tuned to see if it addresses that issue.

Hope to see you soon. I am used to seeing many of you in person this time of year. I miss you all. I hope that we can connect virtually to talk about these cases and the other legal issues that are on your mind. In the meantime, take good care.