The DWI Year in Review, Part II

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Whether there was probable cause to arrest the driver is a hotly litigated issue in cases involving impaired driving. Unfortunately, there aren't all that many appellate opinions addressing the hard calls in this area. Instead, many resemble *State v. Tappe*, 139 N.C. App. 33, 38 (2000), which found probable cause based on "defendant's vehicle crossing the center line, defendant's glassy, watery eyes, and the strong odor of alcohol on defendant's breath." It is difficult to imagine a court ruling otherwise. A few years ago, the court of appeals decided a tougher issue in Steinkrause v. Tatum, 201 N.C. App. 289 (2009), aff'd, 364 N.C. 419 (2010) (per curiam), concluding that the "fact and severity" of the defendant's one-car accident coupled with a law enforcement officer's observation that she smelled of alcohol provided probable cause to believe she was driving while impaired. This past year, the court issued two significant published opinions on probable cause for impaired driving—State v. Overocker, __ N.C. App. __, 762 S.E.2d 921 (Sept. 16, 2014), and State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014),— as well as opinions in State v. Veal, __ N.C. App. __, 760 S.E.2d 43 (July 1, 2014), and State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015), better defining the threshold for reasonable suspicion of DWI.

Got probable cause?

No. We already knew that the odor of alcohol wasn't sufficient to establish probable cause. State v. Overocker establishes that, in fact, significantly more indicia of impairment is required. *Overocker* held that a light odor of alcohol about the defendant's person, the defendant's consumption of three alcoholic drinks in a four-hour period, and his involvement in a car accident that was not his fault were *not sufficient* to provide probable cause to believe the defendant was driving while impaired.

Yes. If Overocker is the yin, State v. Townsend is the yang. Townsend was stopped at a checkpoint and argued that because he did not "exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability," the officer lacked probable cause to arrest him. Nah, said the court, noting that Townsend had bloodshot eyes, emitted an odor of alcohol, exhibited clues on three field sobriety tests, and gave positive results on two alco-sensor tests. This was sufficient to constitute probable cause. A comparison of the facts and outcomes in *Overocker* and *Townsend* emphasizes the significance of the defendants' performance of field sobriety tests. Overocker did them well. Townsend did not. And that made all the difference.

Got Reasonable Suspicion?

Yes. In State v. Veal, __ N.C. App. __, 760 S.E.2d 43 (2014), an officer was dispatched to a gas station after a gas station employee called to report that a very intoxicated person was trying to leave the premises in a green Chevy truck. The employee described the person as an elderly white male in a white hat. The officer drove into the gas station parking lot and saw the defendant driving a green truck. The officer walked up to the defendant and asked to speak with him. He smelled an odor of alcohol coming from the defendant and saw an unopened can of beer in the truck. He also noticed that the

defendant's speech was slurred. The court of appeals held that the officer's observations during this voluntary encounter with the defendant, along with the information from the caller's tip, established reasonable suspicion for the stop.

And yes. In State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (March 17, 2015), the court determined that an officer had reasonable suspicion to stop the defendant for impaired driving after he saw him, at 2:37 a.m., in an area near several bars and with heavy pedestrian traffic, swerve his vehicle to the right of the street, crossing the white line marking the outside lane of travel, and almost hit the curb. The court evaluated this case under the weaving-plus line of cases, but I think it could have made things much easier by relying on its earlier ruling in State v. Foy, 208 N.C. App. 562 (2010), that crossing a fog line and swerving inside the lane provide reasonable suspicion for driving while impaired.

Finally, though unrelated to probable cause or reasonable suspicion, there are two additional impaired driving cases from the past year that strike me as important to practitioners in this area.

What *isn't* a PVA? In State v. Ricks, ___ N.C. App. ___, 764 S.E.2d 692 (Nov. 18, 2014), the court finally identified a place that is ***not*** a public vehicular area even under the expansive definition adopted by the General Assembly in 2006. The *Ricks* court held that a dirt driveway that cut through a vacant lot and was mostly used by people who were walking or riding bicycles was not a public vehicular area as it was not similar in nature to the exemplary public vehicular areas set forth in G.S. 20-4.01(32).

Unconstitutional presumption. In State v. Roberts, ___ N.C. App. ___, 767 S.E.2d 543 (Dec. 2, 2014), the appellate court dodged the issue of whether G.S. 20-179(d)(1) creates an unconstitutional mandatory presumption as it provides, for purposes of determining whether a defendant's DWI sentence is aggravated by the fact that he had an alcohol concentration of 0.15 or more, that "the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." The appellate court could dodge because the trial court shielded the defendant from the objected-to language.

The trial court in *Roberts* instead instructed the jury that "'when a defendant denies the existence of an aggravating factor, he is not required to prove that the aggravating factor does not exist. It is presumed that the aggravating factor does not exist. The State must prove to you beyond a reasonable doubt that the aggravating factor exists." *Id.* at ___; 767 S.E.2d at 549. The court then stated that "although 'the testing procedures and test results are admissible … you are the sole judges of the credibility and weight to be given to any evidence, and you must determine the importance of this evidence in light of all other believable evidence.'" *Id*. Finally, the court told the jury to "'consider the following question: Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor? The defendant had an alcohol concentration of .15 or more at the time of the offense or within a relevant time of the driving involved in this offense.'" *Id.* My guess is that this is not the last we'll hear of this issue.