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June 10, 2013

Frequently Asked Questions in DWI Cases
With Answers
District Court Judges' 2013 Summer Conference

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WARNING:

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PRETRIAL MOTIONS

1. Does weaving within a single lane of traffic, without more, provide reasonable suspicion to support a traffic stop?

   A. Yes
   B. No
   C. It depends on the degree of the weaving.

ANSWER: C.

DISCUSSION:

While moderate weaving within a single lane is insufficient to provide reasonable suspicion for a stop, State v. Fields, 195 N.C. App. 740 (2009) (officer's observation of defendant's car swerving to right side of traffic line on three occasions over the course of one and a half miles was insufficient to provide reasonable suspicion that defendant was driving while impaired); State v. Kochuk, 741 S.E.2d 347 (N.C. App. 2012) (officer's observation of defendant's vehicle crossing into next lane for three or four seconds and drifting over to fog line where its wheels were riding on top of fog line twice for three to four seconds was insufficient to provide reasonable suspicion for stop based on failure to maintain lane control), our courts have held that extensive weaving (State v. Fields, 723 S.E.2d 777 (N.C. App. 2012)) and constant and continual weaving at 11 p.m. on a Friday night (State v. Otto, 726 S.E.2d 82 (N.C. 2012)), are enough to provide reasonable suspicion.

Note that G.S. 20-146(d)(1) requires that a vehicle "be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Thus, weaving across traffic lanes is a traffic violation that provides a lawful basis for a stop. *See, e.g.*, State v. Simmons, 205 N.C. App. 509, 525 (2010) (defendant's weaving across and outside the lanes of travel and at one point actually running off the road provided reasonable suspicion for stop); *but see Kochuk*, 741 S.E.2d 347 (officer's observation of defendant's vehicle crossing into next lane for three or four seconds and drifting over to fog line where its wheels were riding on top of fog line twice for three to four seconds was insufficient to provide reasonable suspicion for stop based on failure to maintain lane control).

See Jeff Welty, Traffic Stops, *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

2. May a law enforcement officer rely upon another officer's statements in determining whether probable cause exists to believe the defendant has committed an implied consent offense?

   A. Yes
   B. No

ANSWER: A.

DISCUSSION:

A law enforcement officer can use information he gained from other officers in determining probable cause. *See, e.g.*, Steinkrause v. Tatum, 201 N.C. App. 289, 293-94, *aff'd*, 364 N.C. 419 (2010) ("Regarding the smell of alcohol, an arresting officer is permitted to base his determination of reasonable grounds on information given by one known to him to be reasonably reliable. . . . In this case, an officer on the scene smelled an odor of alcohol about the Petitioner. That the arresting officer did not himself make the same observation does not diminish its weight, since a probable cause determination may be based upon the hearsay of a reliable witness. . . . The smell of alcohol could therefore contribute to the officer's determination of probable cause, and supports the trial court's determination that Petitioner was arrested based upon reasonable grounds.")

3. May a medical provider who refuses to withdraw a defendant's blood in an implied consent case upon the request of a law enforcement officer be charged with resist, delay, obstruct or some other crime?

   A. Yes
   B. No
   C. Unclear

ANSWER: C.

DISCUSSION:

Before enactment of the Motor Vehicle Driver Protection Act of 2006, S.L. 2006-253, medical providers and other qualified persons were authorized, but not obligated to, withdraw blood from a defendant charged with an implied-consent offense upon the request of the charging law enforcement officer. *See* G.S. 20-139.1(c) (2005). Those procedures were amended in 2006 to ***require*** medical providers and other qualified persons to withdraw blood in implied-consent cases pursuant to an officer's request. First, S.L. 2006-253 amended G.S. 20-139.1(c) to provide that "when a blood . . . test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample . . . and no further authorization or approval is required." This provision applies when an officer seeks the withdrawal of blood from a consenting defendant or from a defendant who is unconscious or otherwise in a condition that renders him or her incapable of refusal. It arguably also applies to circumstances in which an officer requests that blood be withdrawn pursuant to a search warrant since the blood ordered seized in a warrant is "specified" as the type of bodily fluid sought in the officer's application for the warrant.

S.L. 2006-253 also enacted G.S. 20-139.1(d1) and (d2), which (1) authorize the warrantless withdrawal of blood following a defendant's refusal to be tested, and (2) prescribe procedures for compelled warrantless blood draws, respectively. G.S. 20-139.1(d2) provides that "when a blood . . . sample is requested under subsection (d1) of this section by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood . . . and no further authorization or approval is required."

Both G.S. 20-139.1(c) and G.S. 20-139.1(d2) provide that "[i]f the person withdrawing the blood . . . requests written confirmation of the [] officer's request for the withdrawal of blood . . . the officer shall furnish it before blood is withdrawn . . ." An exception to both mandatory-withdrawal provisions allows a medical provider to refuse to draw blood "if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected." An officer may request written justification for a medical provider's refusal to withdraw blood. If the officer does so, the medical provider must provide the written justification at the time of the refusal.

It is thus clear that G.S. 20-139.1(c) and (d1) obligate medical providers to withdraw blood upon an officer's request. (As noted above, there may be some debate about whether this obligation applies to requests to withdraw blood pursuant to a search warrant. Yet the notion that medical providers are required to withdraw blood upon a law enforcement officer's request but are not so obligated in response to a search warrant issued by a judicial official defies rational explanation.) What is less clear is whether a medical provider's failure to comply amounts to a crime. The most likely potential criminal charge is resisting, delaying or obstructing an officer in violation of G.S. 14-223.

Significantly, no statutory provision specifies that a medical provider's noncompliance with the directive in G.S. 20-139.1 is a crime, an omission that supports the proposition that the legislature did not intend that a third-party medical provider who fails to withdraw blood upon an officer's request be subject to criminal sanctions. Furthermore, a medical provider's refusal to draw blood is inaction that differs from the affirmative acts normally considered to amount to resisting, delaying or obstructing an officer in violation of G.S. 14-223. *Compare* Roberts v. Swain, 126 N.C. App. 712, 724 (1997) (person's refusal to provide social security number insufficient to establish probable cause for the charge of resisting arrest) *with* State v. Cornell, 729 S.E.2d 703, 706 (N.C. App. 2012) (defendant's stepping between officers and suspected gang members while officers were attempting to prevent conflict at a public festival and in telling officers not to talk to gang members and refusing to step away constituted sufficient evidence of obstructing and delaying officers in the performance of their duties). It is unclear whether this sort of refusal to assist an officer, even in light of the statutory duty, amounts to resisting, obstructing, or delaying an officer.

On the other hand, one might argue that because the statutory directive in G.S. 20-139.1 exists to facilitate a law enforcement officer's investigation of impairment-related crime, a medical provider's failure to comply with the directive amounts to obstructing an officer under G.S. 14-223. *Cf.* Janet Mason, Reporting Child Abuse and Neglect in North Carolina 53 (2d. ed. 2003), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/rca/ch10.pdf (analyzing arguments for and against the prosecution of failure to report child abuse or neglect as required in G.S. 7B-301 as general misdemeanor offense).

4. What is the statutory standard for issuing an order under G.S. 8-53 compelling the disclosure of medical records for a defendant charged with DWI?

   A. If there is probable cause to believe the medical records may contain evidence relevant to the prosecution
   B. If disclosure is necessary to a proper administration of justice
   C. If disclosure is necessary to a proper administration of justice and there was no opportunity to obtain a breath or blood sample under the implied consent laws

ANSWER: B.

DISCUSSION:

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

5. Must the judge recuse herself if she presided at a pretrial suppression hearing in an impaired driving case and heard evidence of the defendant's BAC, which she suppressed?

   A. Yes
   B. No
   C. There is no requirement that the judge recuse herself, but that is the best practice

ANSWER: B.

DISCUSSION:

Trial courts are presumed to disregard incompetent evidence when rendering their decisions. *See generally* State v. Allen, 322 N.C. 176, 185 (1988) ("The presumption in non-jury trials is that the court disregards incompetent evidence in making its decision.").

G.S. 15A-1223 and Canon 3 of the Code of Judicial Conduct control the disqualification of a judge presiding over a criminal trial when partiality is claimed. *See* State v. Kennedy, 110 N.C. App. 302, 304 (1993).

G.S. 15A-1223 provides:

> (a) A judge on his own motion may disqualify himself from presiding over a criminal trial or other criminal proceeding.
> (b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
> (1) Prejudiced against the moving party or in favor of the adverse party; or
> (2) Repealed by Laws 1983, (Reg. Sess., 1984), c. 1037, § 6, eff. July 1, 1984.
> (3) Closely related to the defendant by blood or marriage; or
> (4) For any other reason unable to perform the duties required of him in an impartial manner.
> (c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.
> (d) A motion to disqualify a judge must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time. Good cause includes the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial.
> (e) A judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case.

Canon 3 of the Code of Judicial Conduct provides, in relevant part:

> **C. Disqualification.**
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
> (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
> (b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding,

or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

The burden is on the party moving for recusal to demonstrate objectively that grounds for disqualification exist. *See* Kennedy, 110 N.C. App. at 305. The moving party meets this burden by producing "substantial evidence that there exists such a personal bias, prejudice or interest on the part

of the judge that he would be unable to rule impartially," or "showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially." *Id.* (internal quotations omitted). The bias, prejudice or interest that requires a trial judge to be recused from a trial refers to the judge's personal disposition or mental attitude, favorable or unfavorable, toward a party to the action. *Id.*

Compare State v. White, 129 N.C. App. 52, 55 (1998), *aff'd in part*, 350 N.C. 302 (1999) ("[T]he Code of Judicial Conduct does not require a judge to recuse himself in a probation revocation hearing when the judge has obtained knowledge of the facts of the case from previous judicial proceedings.") *with* State v. Monserrate, 125 N.C. App. 22, 32-33 (1997) (noting that while it is the better practice to allow a different judge to rule on the validity of a search warrant issued by that judge, neither the Code of Judicial Conduct nor any other statute requires a judge to recuse himself from a suppression hearing involving the validity of a search warrant the judge issued).

6. May a defendant establish a speedy trial violation in a DWI case based solely on a 12-month delay in receiving the toxicology report from the state crime lab?

   A. Yes
   B. No
   C. Unclear, but probably yes
   D. Unclear, but probably no

ANSWER: D.

DISCUSSION:

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.

In considering the reason for the delay, *Barker* assigned different weights to different reasons: A deliberate attempt by the State to delay trial in order to hamper the defense weighs heavily against the government. More neutral reasons, such as "negligence or overcrowded courts" weigh less heavily against the government, but nevertheless must be considered "as the ultimate responsibility for such circumstances . . . rest[s] with the government rather than with the defendant." *Id.* at 531. A valid reason, such as a missing witness, justifies appropriate delay. North Carolina's appellate courts have required a defendant to offer prima facie evidence that the delay was caused by the neglect or willfulness of the prosecution, see *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (stating that the constitution does not outlaw good-faith delays that are reasonably necessary for the State to

prepare and present its case). Only after the defendant has met this burden must the State offer evidence explaining the reasons for the delay. *Id.*

Thus, a question central to determining whether a defendant's right to speedy trial has been violated by the delay of trial to obtain toxicology results is whether routine delays for purposes of forensic testing may be attributed to the neglect of the prosecution or, instead, whether such delays are neutral factors. In State v. Dorton, 172 N.C. App. 759 (2005), the appellate court did not disturb the trial court's determination that delay caused by a backlog in testing at the State Bureau of Investigation was "not attributable to the District Attorney's office." *Id.* at 765 (The delay in Dorton was nearly a year, but had several causes). The *Dorton* court rejected the defendant's contention to the contrary, noting that the defendant's burden was to show prosecutorial neglect or willfulness. Similarly, the court of appeals for Maryland in Glover v. State, 792 A.2d 1160, 1169 (Md. 2002) considered delay resulting from an eight month wait for DNA test results "a valid justification in these circumstances," given that "DNA evidence is highly technical, often requiring courts to allow more time for completion of the tests and review, by both parties, of the results." The court cautioned, however, that the State has a duty to ensure "that critical discovery materials, such as DNA evidence, are properly monitored and accounted for, and not simply collecting dust in state or federal crime labs."

In State v. Sheppard, __ N.C. App. ___, 2013 WL 601101 (February 19, 2013) (unpublished), the court of appeals affirmed the trial court's determination that the defendant's right to a speedy trial was violated by a fourteen month delay in her trial on impaired driving charges. Seven months of the delay occurred before the State received the toxicology results. The trial court in *Sheppard* weighed that portion of the delay "'more neutrally,'" given that the State "'should be given a reasonable amount of time to prepare its case.'" In contrast, the trial court weighed the seven months that elapsed after the lab report was filed more heavily in the balance against the State.

Courts from other jurisdictions have weighed delays associated with laboratory testing against the State in the *Barker* balancing test, but not heavily. *See, e.g.*, Ben v. State, 95 So. 3d 1236, 1243, 1247 (Miss. 2012) (noting, with respect to thirteen month delay attributable to state crime lab, court's reluctance "to weigh heavily against the State investigative delay caused by an instrumentality of the State, such as the state crime lab," and citing relevant authority); State v. Magnusen, 646 So.2d 1275, 1281 (Miss. 1994) (concluding, with respect to a five-month delay for serology reports from the state crime lab, that "the official neglect of an understaffed and overworked crime lab gives this portion of the delay to the defendant but barely"); State v. Tortolito, 950 P.2d 811, 815 (N.M. 1997) (weighing eleven month delay attributable to the DNA testing against the State, but not heavily, where DNA and other evidence requiring scientific analysis was tested in its normal order of priority in the State's crime lab and testing was prolonged in part by the small size of the DNA samples collected from the crime scene); *see also* Vanlier v. Carroll, 535 F. Supp. 2d 467, 479-80 (D. Del. 2008), *aff'd*, 384 F. App'x 155 (3d Cir. 2010) (determining that State should not be held accountable for typical amount of time needed to conduct DNA test, which court calculated as two months, and holding that remaining ten months of DNA testing period should be weighed against the State, but not heavily, given facts of case).

Thus, it seems unlikely that a defendant can establish a speedy trial violation in a misdemeanor impaired driving case based solely on nearly year-long delays in toxicology reports. Yet, even if crime lab delays approaching a year weigh only slightly or not at all against the State, other factors, such as prejudice to the defendant may tip the balance in the defendant's favor. And while delays of a year or less may be

considered as neutral or weighing only slightly in the defendant's favor, at some point the delays may become so long that the factor may weigh more heavily against the State.

7. Who bears the burden of proof when the defendant files a motion to dismiss pursuant to State v. Knoll alleging a substantial statutory violation of his right to pretrial release that prejudiced him?

   A. The State
   B. The defendant
   C. The State must prove that it followed the proper procedures governing pre-trial release and the defendant must establish prejudice resulting from any violation.

ANSWER: B.

DISCUSSION:

When the defendant seeks dismissal of charges pursuant to State v. Knoll based upon a statutory violation of his/her right to pretrial release that results in prejudice to the defendant, the defendant bears the burden of proof. State v. Knoll, 322 N.C. 535, 545 (1988) (determining that "each of the defendants in these cases made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief").

Likewise, if the defendant moves for dismissal pursuant to G.S. 15A-954(a)(4) for a flagrant violation of his or her constitutional rights related to the denial of access to witnesses, the defendant bears the burden of showing the flagrant constitutional violation. *See* State v. Williams, 362 N.C. 628, 634 (2008); State v. Allen, 731 S.E.2d 510, 519-20 (N.C. App. 2012).

TRIAL

8. Under the corpus delicti rule, the State in a DWI case must offer proof independent of the defendant's confession to establish each element of the crime.

   A. True
   B. False

ANSWER: B.

DISCUSSION:

The term "corpus delicti" literally means "body of the crime." State v. Smith, 362 N.C. 583, 589 (2008). In law, "the *corpus delicti* of an offense refers to the fact of the specific loss or injury sustained: in homicide, the dead body; in larceny, the missing property; and in arson, the burnt residence" see *Smith*, 362 N.C. at 589-90 (internal quotations omitted) as well as the proof that this injury or harm was caused by someone's criminal activity, see State v. Parker, 315 N.C. 222, 231 (1985).
The rule of *corpus delicti* traditionally required evidence independent of a defendant's extrajudicial confession to establish the *corpus delicti* of a crime. *See* Jessica Smith, Corpus Delicti, North Carolina

Criminal Law (Nov. 21, 2011), *available at* http://nccriminallaw.sog.unc.edu/?p=3074. The basic formulation of the traditional rule, as applied in North Carolina, is that there must be corroborative evidence, independent of the defendant's confession, that tends to prove the commission of the crime charged. *See* Parker, 315 N.C. at 229. This formulation does not require independent proof of every element of the crime. *Id.* at 232 (stating that "[p]lainly, independent evidence of the *corpus delicti,* defined as it is in this jurisdiction to include proof of injury or loss and proof of criminal agency, does not equate with independent evidence as to each essential element of the offense charged and noting that "[a]pplying the more traditional definition of *corpus delicti,* the requirement for corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by the defendant's confession").

The rule has evolved in North Carolina to permit the State, in noncapital cases, to establish a defendant's guilt based on a sufficiently corroborated confession, even absent independent proof of the *corpus delicti*. *See id.* at 236. In noncapital cases, such as impaired driving, a defendant's confession may establish his guilt if supported by substantial independent evidence tending to establish the trustworthiness of the confession, including facts that the defendant had the opportunity to commit the crime. *Id.* When there is no independent proof of the crime, strong corroboration of essential facts and circumstances in the confession is required. *Id.* Nevertheless, it is rare for the State in an impaired driving case to rely solely on the defendant's confession. Instead, the State typically relies on the defendant's statements as proof of some element of the crime (for example, driving) and produces independent evidence of the *corpus delicti*—as well as the remaining statutory elements.
North Carolina's appellate courts have applied the *corpus delicti* rule in the following impaired driving cases, concluding in each that the State's evidence was sufficient to survive the defendant's motion to dismiss.

- **State v. Trexler, 316 N.C. 528, 533 (1986).**

The trial court did not err by denying defendant's motion to dismiss on the basis that the State had failed to prove the *corpus delicti* of impaired driving. The defendant admitted that he wrecked his car a short time after drinking, that he left the scene and returned a short time later. The following independent evidence established the *corpus delicti*: (1) an overturned automobile was lying in the middle of the road and a single person was seen leaving the automobile; (2) when the defendant returned to the scene, he appeared to be impaired as a result of using alcohol; (3) the defendant later blew 0.14 on a breathalyzer; and (4) the wreck was otherwise unexplained.

- **State v. Highsmith, 173 N.C. App. 600 (2005).**

The *corpus delicti* rule was not violated where defendant's admission that he had taken a pain medication called Floricet was corroborated by expert testimony about the effects of this medication and by testimony from law enforcement officer about defendant's behavior.

- **State v. Cruz, 173 N.C. App. 689 (2005).**

The State sufficiently corroborated the essential facts of defendant's confession that he was driving in a case in which, "[a]bsent defendant's confession, the circumstantial evidence of defendant's driving would likely not be enough to support a conviction." Several officers and witnesses testified to

defendant's drinking and impairment. A car similar to the defendant's was seen traveling down the road near an accident involving another car and turning down a side street, just as defendant confessed to doing. The State also corroborated other aspects of the defendant's confession. The court concluded that under either the traditional or trustworthiness approach to the *corpus delicti* rule, the State offered corroborating evidence that when considered with defendant's statements is sufficient to survive defendant's motion to dismiss.

- **State v. Foye, ___ N.C. App. ___, 725 S.E.2d 73 (2012).**

The State presented sufficient evidence that the defendant drove while impaired, and the State's reliance on the defendant's admission that he had been driving after leaving a club did not violate the rule of *corpus delicti*. In addition to the defendant's admission that he drove the vehicle that an officer discovered in a ditch, the State introduced evidence that the vehicle was registered to the defendant, the defendant was found walking on a road near the scene of the accident, the defendant had injuries consistent with someone that had been in a wreck, and the defendant was impaired based on the results of a blood test administered approximately two and a half hours after the accident.

- **State v. Morvay, 731 S.E.2d 276 (N.C. App. August 21, 2012) (unpublished).**

The State presented sufficient evidence that the defendant was the driver of the vehicle. Strong corroboration of defendant's confession was not required by *corpus delicti* rule where the State presented substantial independent evidence that the defendant was the driver. The State's evidence showed that (1) the defendant was at the scene of the accident and was the only person located near the vehicle; (2) the driver's side door was open and the defendant was placed on a gurney touching the driver's side of the vehicle.

See also In re A.N.C., ___ N.C. App. ___ (February 5, 2013) (holding that evidence was sufficient to support a determination that the juvenile operated a motor vehicle without being properly licensed to do so where the juvenile admitted driving the wrecked vehicle, which was registered to his mother, and when the officer arrived, the hood was still warm and the only other people near the vehicle were the juvenile and his friends).

The court's determination in these cases that the State's evidence was sufficient to survive a motion to dismiss and that it comported with the rule of *corpus delicti* is not particularly surprising, given the independent evidence in each that the offense occurred. The State acquires substantial, independent evidence in most impaired driving investigations. Thus, while the defendant's confession may be important in establishing a single element of the crime, it rarely is the sole evidence of the *corpus delicti*.

9. May blood test results recorded in a defendant's hospital records be introduced at a criminal trial on DWI charges through an affidavit from the hospital's custodian of records? (Assume that the defendant objects on the grounds of hearsay and the Confrontation Clause and that he does not object to the reliability of the testing methods used by the hospital laboratory.)

   A. Yes, so long as the affidavit satisfies the hearsay exception for business records
   B. Yes, but only if the State establishes that the records were created for treatment purposes
   C. Yes, if the State establishes both A and B
   D. No, never

ANSWER: C.

DISCUSSION:

Hearsay exception.

N.C. R. Evid. 803(6) sets forth a hearsay exception for business records. The exception applies to "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The term "business" "includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

Hospital records may qualify under this exception for business records. *See* State v. Woods, 126 N.C. App. 581, 590 (1997) (rejecting defendant's argument that foundation for admission of medical records be established by a medical expert and stating that Rule 803(6) permits use of a record custodian's testimony to establish a foundation for admission of medical records); *cf.* State v. Galloway, 145 N.C. App. 555, 565-56 (2001) (noting that "[t]he simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial" and finding that trial court did not abuse its discretion in excluding physician's statements because the sources on which he based his opinion were not reliable and he was not qualified to render psychiatric opinion).

While a custodian of records normally must authenticate business records and testify to the facts providing the hearsay exception, N.C. R. Civ. P. 45 permits a custodian of hospital records that are the subject of a subpoena to tender along with the records an affidavit "testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business." Rule 45 further provides that "[a]ny original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication." *See also* G.S. 90-21.20B (requiring a health care provider to disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official and providing that "[a] certified copy

of identifiable health information, if relevant, shall be admissible in any hearing or trial without further authentication").

It is not entirely clear whether the State may rely on such an affidavit in a criminal trial. In State v Woods, the court noted that "[t]he State offered the challenged medical records by presenting written affidavits/certifications from the custodian of the records" and the defendant did not contend "the custodian should have been present to testify at trial." 126 N.C. App. at 589. Indeed, the defendant's attorney stated: "'I'm not asking they produce the librarian.'" Id. Thus, the court concluded that it "need not address whether the affidavits/certifications were sufficient under N.C.R.Evid. 803(6), in lieu of the custodian's in-court testimony,.'" *Id.*

Confrontation Clause

Medical records created for treatment purposes are one type of nontestimonial business record.

The two cases Melendez-Diaz v. Massachusetts, 577 U.S. 305 (2009), cites as "involv[ing] medical reports created for treatment purposes which would not be testimonial under our decision today," are cases in which hospital records reporting a defendant's blood alcohol concentration were introduced into evidence. *Id.* at 312 & n.2. (citing Baber v. State*,* 775 So.2d 258, 258–259 (Fla.2000); State v. Garlick*,* 313 Md. 209, 223–225, 545 A.2d 27, 34–35 (1988)).

In State v. Barber, 77 So.2d 258 (Fla. 2000) (a pre-*Crawford* case), the Supreme Court of Florida held that a hospital record of a blood test made for medical purposes, maintained by the hospital as a business record, was admissible pursuant to the business records exception to the hearsay rule. The court emphasized, however, that the defendant must be "given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence." In *Barber*, the parties agreed that the records were prepared for purposes of medical treatment.

In State v. Garlick (also pre-*Crawford* case), 545 A.2d 27 (Md. 1988), the Court of Appeals of Maryland explained that once it is clear that the hospital record was made in the regular course of business and that the recorded transactions are "'pathologically germane to treatment'", the record is admissible as an exception to the hearsay rule. In *Garlick*, the emergency room physician testified that the toxicological screen of the defendant's blood was germane to treatment; thus the test results were admissible without producing the technician who performed the analysis. Under these circumstances, Garlick held, in the pre-*Crawford* context, that the constitutional right of confrontation was not offended.

It is somewhat unclear whether the State can establish that the medical records were created for treatment purposes by reference to the records themselves or whether testimony from a live witness (in addition to the custodian of records) is required.

The North Carolina Court of Appeals' unpublished decision in State v. Wood, __ N.C. App. __, 736 S.E.2d 649 (2013) (unpublished op.), indicates that the State may be able to make this showing from the record itself. In *Wood*, the defendant argued that the admission of hospital records related to his emergency room treatment after he allegedly drove while impaired violated his right to confront witnesses against him. The court of appeals disagreed, noting that medical reports created for treatment-related

purposes are not testimonial statements for Confrontation Clause purposes. The court held that even though hospital personnel may have been aware that the defendant was under investigation for impaired driving and may have seen the defendant speaking to a police officer, "neither of those facts transforms records created for the purpose of providing Defendant with medical care into documents for the purpose of establishing or proving some fact at trial." The court went on to note that business records were admissible pursuant to Rule 803(6)—the business records exception to the hearsay rule—and to find "after carefully reviewing the records in question" that these records qualified for admission under the business records exception. *See also* Commonwealth v. Irene, 970 N.E.2d 291, 305 (Mass. 2012) *cert. denied*, 133 S. Ct. 487, 184 L. Ed. 2d 306 (U.S. 2012) (stating, in dicta, that "where statements contained in hospital medical records demonstrate, on their face, that they were included for the purpose of medical treatment, that evident purpose renders the statements . . . nontestimonial").

In other cases, courts have based their determinations on whether medical records were created for treatment purposes on testimony from the treating physician. In Commonwealth v. Dyer, 934 N.E.2d 293 (Mass. App. Ct. 2010), the court relied upon testimony from the treating physician that based upon hospital trauma protocol, information of possible alcohol involvement, and her own clinical observations of a patient, she would order blood work as the normal course of treatment for a trauma patient in the circumstance presented by the defendant's case. The doctor also testified that not only were no police present during the treatment of the defendant, but she would refuse to conduct any medical test or procedure if requested or ordered by a police officer because her role is limited to offering medical care to her patients. The court concluded that the physician "utilized the blood alcohol content test results exclusively for her medical evaluation and treatment of the defendant" and that the records were admissible without testimony from the analyst responsible for processing the hospital blood sample. *Id.* at 299.

In Commonwealth v. Sheldon, 667 N.E.2d 1153, 1155-56 (Mass. 1996), the court determined that blood alcohol results contained in the defendant's medical records were not admissible under a hearsay exception for recorded information that relates to medical diagnosis or treatment. The treating physician testified that the hospital had no set protocol regarding blood alcohol tests and that he suggested the blood test in an effort to prove that the defendant was not intoxicated.

10. May the State prove impairment under the 0.08 theory in a DWI case without introducing the test record ticket into evidence?

    A. Yes
    B. No

ANSWER: A.

DISCUSSION:

Yes. The officer may testify about the result. The result is not hearsay, as the intoxilyzer is a machine, not a person. Thus, results that it issues are not statements of a declarant. *See* Stevenson v. State, 920 S.W.2d 342, 343 (Tex. App. 1996) (citing relevant authority). Such machines self-generate data. *Id.* The information reflected on the read-out and print-out is the result of the machine's internal operations as distinguished from "feedback of computer-stored data, which would be hearsay." *Id.*; *see also* People v.

Dinardo, 801 N.W.2d 73, 78-80 (Mich. App. 2010) (determining that breath testing ticket was not testimonial hearsay within the meaning of *Crawford* as "the DataMaster ticket at issue in this case was generated entirely by a machine without the input of any human analyst" and no "expert interpretation [was] required for the DataMaster test results to be understood.")

There also is no original evidence problem as the contents of a writing are not in question. The officer can testify as to what he or she saw on the digital read-out of the intoximeter. *Cf.* State v. Mills, 39 N.C. App. 47, 50 (1978) (determining that "[t]he time at which the breathalyzer test was given was a fact which had an existence independent of the words on the record" and "[t]he knowledge of the officers concerning this fact arose from their personal observations and experiences rather than from the writing"); *see also* Chevalier v. Director of Revenue, 928 S.W.2d 388, 394-95 (Mo. Ct. App. 1996) (concluding that it was a "misapplication of the best evidence rule" to invoke the rule to preclude testimony concerning breath test results because the print out of the results was illegible).

11. Are the results of all breath tests that were administered to the defendant admissible in an implied consent case?

    A. Yes, if the results from any two consecutively collected breath samples do not differ from each other by more than 0.02
    B. No, only the two consecutively collected breath samples that do not differ from each other by more than 0.02 may be introduced
    C. No, only the lower of two consecutively collected breath samples that do not differ from each other by more than 0.02 may be introduced.

ANSWER: A.

DISCUSSION:

G.S. 20-139.1(b3) (applicable to offenses committed on or after December 1, 2006) provides that both results are admissible if they were consecutive and did not differ by more than 0.02. *See* G.S. 20-139.1(b3) (providing that "[t]he results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration").

12. Donna Defendant provides a breath sample at 6:05 a.m. that registers a .09. Her next sample, at 6:10 a.m. is insufficient to register any result. Her next breath sample, at 6:16 a.m., is 0.08. Are the 0.09 and 0.08 sequential breath samples under G.S. 20-139.1(b3)?

    A. Yes
    B. No
    C. Unclear

ANSWER: A.

DISCUSSION:

State v. Cathcart, ___ N.C. App. ___ (May 21, 2013), held that two breath tests reporting alcohol concentrations within .02 of one another, that were eleven minutes apart and were separated by an intervening insufficient sample result, were sequential for purposes of G.S. 20-139.1(b3).

State v. Shockley, 201 N.C. App. 431 (2009) held that alcohol concentration readings from two of four attempted breath samples collected within 18 minutes of one another met the "consecutively administered tests" requirement for admissibility of a chemical analysis pursuant to former G.S. 20-139.1(b3). (As amended in 2006, the provision now requires "at least duplicate sequential breath samples.") The chemical analyst's decision to observe a second fifteen minute observation period did not prevent the breath samples from being sequential.
State v. White, 84 N.C. App. 111 (1987), held that breath tests separated by eleven minutes and two insufficient breath samples were, notwithstanding the intervening attempts, "consecutively administered tests" under G.S. 20-139.1. "To hold otherwise," noted the court, "would allow an accused to thwart the testing process by deliberately giving insufficient breath samples."

13. The defendant in an implied consent case alleges that the compelled withdrawal of her blood violated the Fourth Amendment. She also alleges that the provisions of G.S. 20-139.1(d1) are unconstitutional as applied to her case. (*G.S. 20-139.1(d1) provides that "any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine."*). What remedy or remedies is/are proper if the court finds that the Fourth Amendment was violated and that G.S. 20-139.1 is unconstitutional as applied to the defendant?

    A. Suppression of the blood test results
    B. Dismissal of the underlying implied consent charges
    C. Suppression and/or dismissal

ANSWER: A.

DISCUSSION:

The court in State v. Wilson, __ N.C. App. ___ (Jan. 5, 2013), held that the trial court had no authority to dismiss DWI charges based upon its determination that G.S. 20-139.1 was unconstitutional as applied to the defendant. The trial court dismissed the charges pursuant to G.S. 15A-954(a)(1), which requires dismissal if "[t]he statute alleged to have been violated is unconstitutional on its face or as applied to the defendant." The court of appeals explained that this provision "plainly concerns the statute under which a defendant is charged." For dismissal of DWI charges to be warranted under G.S. 15A-954(a)(1), a court must conclude that the DWI statute itself—G.S. 20-138.1—is unconstitutional. The trial court in *Wilson* made no such findings with respect to G.S. 20-138.1, and its conclusion that G.S. 20-139.1 was unconstitutional as applied was no proxy. Thus, the court of appeals held that the trial court erred in dismissing the charges under G.S. 15A-954(a)(1).

The defendant's motion to dismiss in *Wilson* asserted another basis for dismissal, namely that his constitutional rights had been flagrantly violated, resulting in such irreparable prejudice to the preparation of his case that there was no remedy but to dismiss the prosecution, grounds that require

dismissal under G.S. 15A-954(a)(4). Yet, the appellate court noted that the defendant's motion failed to describe the irreparable prejudice that resulted from the violation, the trial court made no finding of irreparable prejudice, and the defendant did not argue on appeal that he was irreparably prejudiced. Because the appellate court identified no irreparable prejudice, it concluded that G.S. 15A-954(a)(4) did not apply to Wilson's case.

Accordingly, the court of appeals concluded that there were no statutory grounds for dismissing the DWI charges; thus, the trial court erred in granting the defendant's motion to dismiss. The appellate court characterized the appropriate argument based on the constitutional violations alleged in *Wilson* as one for suppression of the evidence and declared that suppression was the only available remedy if a constitutional violation was found. The court noted that in Wilson's case, suppression was required in light of the State's stipulation that it would not introduce the challenged evidence at trial. *See* G.S. 15A-977(b)(2).

Wilson is a reminder that the remedies of suppression and dismissal aren't interchangeable. While suppression of evidence may be a proper remedy when evidence is obtained in violation of the defendant's constitutional rights, a constitutional violation by itself does not provide a basis for dismissal of charges. *Wilson* also provides a helpful backdrop for considering the remedies for alleged statutory violations, particularly in DWI cases. Though our courts have sanctioned the suppression of chemical analysis results obtained in violation of statutory procedures, dismissal of charges for such statutory violations is not authorized. Indeed, the only context in which dismissal of DWI charges for statutory violations is authorized is when a defendant demonstrates prejudice resulting from a violation of statutory rights related to pretrial release. *See* State v. Knoll, 322 N.C. 535 (1988).

14. May a defendant be convicted of impaired driving if the State fails to ask the officer whether he formed an opinion as to the defendant's impairment?

    A. Yes
    B. No

ANSWER: A.

DISCUSSION:

The following exchange is typical in a DWI case.

Prosecutor: Did you form an opinion, satisfactory to yourself, that the defendant had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental or physical faculties or both?
Officer: Yes, I did.
Prosecutor: What was that opinion?
Officer: It was my opinion that the defendant had consumed a sufficient quantity of an impairing substance so that his mental and physical faculties were both appreciably impaired.
Prosecutor: Did you have an opinion as to what the impairing substance was?
Officer: I believed it to be some type of alcohol.

This line of questioning is as proper as it is prevalent. North Carolina's courts have long held that a lay witness who has personally observed a person may express an opinion as to whether the person was impaired by an impairing substance. *See* State v. Lindley, 286 N.C. 255 (1974). Though officers frequently base such opinions in part upon their training and experience regarding the physical manifestations of having consumed alcohol or some other impairing substance in addition to their personal observations, courts have considered such opinions to be those of a lay rather than an expert witness. *See id.*

Perhaps because the question is so common, defendants sometimes argue that the State's evidence is insufficient as matter of law if an officer does not testify as to his opinion that the defendant was "appreciably impaired," by an "impairing substance." Such opinion testimony is not, however, essential to proving the elements of impaired driving.

Certainly the State must prove that the defendant was impaired. The State may establish this element by proving that the defendant (1) was under the influence of an impairing substance, (2) consumed sufficient alcohol that he or she had, at any relevant time after the driving, an alcohol concentration of 0.08 or more, or (3) had any amount of a Schedule I controlled substance or its metabolites in his or her blood or urine. *See* G.S. 20-138.1(a)(1), (2), (3). Chemical testing can establish impairment for purposes of the .08 and Schedule I controlled substances theory, and fact testimony from witnesses can establish that a defendant was "under the influence," or, in other words, "appreciably impaired," by an impairing substance. Thus, an officer's testimony regarding his or her observations, which might include faulty driving, an odor of alcohol, red, glassy, eyes, poor performance on field sobriety tests, and slurred speech, among other observations, often is legally sufficient, without the opinion based on those perceptions, to prove impairment.

So, while the officer's opinion often will be helpful to the jury or finder-of-fact, see State v. Adkerson, 90 N.C. App. 333, 338 (1988), it is not essential to the State's case.

15. When, if ever, may the State introduce the numerical results of an alcohol screening test?

    A. Any time during any proceeding, pretrial or trial, for an implied consent offense
    B. Only during pretrial proceedings for an implied consent offense
    C. Any time during pretrial or trial proceedings for the offense of driving by a person under 21 after consuming alcohol or drugs
    D. Any time during pretrial or trial proceedings for the offense of driving while impaired

ANSWER: C.

DISCUSSION:

G.S. 20-16.3(d) provides:

> The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:

> (1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and
> (2) 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. Negative results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol.

Subsection (b2) of G.S. 20-138.3 (Driving by person less than 21 years old after consuming alcohol or drugs) provides:

> Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

16. May a judge accept a plea of guilty from a defendant, with the district attorney's acquiescence, before the defendant's blood sample has been analyzed by the state crime lab?

    A. Yes
    B. No
    C. The judge may do so, but it is not a good idea

ANSWER: A.

DISCUSSION:

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.

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June 10, 2013

LICENSE REVOCATIONS/LIMITED PRIVILEGES

17. Defendant Dan was convicted of impaired driving on January 4, 2012. His license was revoked for one year. Dan has not yet completed the treatment ordered in his substance abuse assessment. Dan is charged with driving while impaired on March 1, 2013 after he was pulled over in his car while driving on the interstate. He pleads guilty on June 1, 2013. Does the grossly aggravating factor for driving while license revoked for an impaired driving revocation (G.S. 20-179(c)(2)) apply at sentencing?

    A. Yes
    B. No

ANSWER: A.

DISCUSSION:

Questions frequently arise regarding whether a defendant's license is revoked for an impaired driving revocation when the time period set forth for the original revocation pursuant to G.S. 20-19(c1) (one year) or (d) (four years) had expired at the time of the current offense but the defendant's driver's license has not been restored. Whether the grossly aggravating factor in G.S. 20-179(c)(2) applies depends on whether the revocation remains in effect or, instead, whether the defendant simply is deemed unlicensed. If the defendant failed to obtain a certificate of completion for receiving a substance abuse assessment and completing the recommended training or treatment, the revocation period is extended until NC DMV receives the certificate of completion. See G.S. 20-17.6(b). If the revocation period was extended for this reason at the time the person committed the instant offense, then his or her license was revoked for an impaired driving revocation. *See* State v. Coffey, 189 N.C. App. 382, 386 (2008) (concluding in an impaired driving case in which the defendant's earlier conviction-based impaired driving revocation was extended under G.S. 20-17.6 that "there was overwhelming and uncontroverted evidence that at the time of the offense, defendant was driving while his license was revoked and that such revocation was an impaired driving revocation").

The grossly aggravating factor thus applies if the defendant met the other requirements for the offense of driving while license revoked under G.S. 20-28(a) by having driven a motor vehicle on a street or highway knowing that his or her license was revoked. If, however, the defendant had obtained a certificate of completion but simply failed to seek restoration of his or her license, which requires proof of insurance and payment of a $100 restoration fee, then the defendant's license was not revoked at the time of the driving. In such a circumstance, the grossly aggravating factor does not apply.

An "indefinite" end date for a driver's license suspension for a conviction of impaired driving under G.S. 20-138.1 noted on a defendant's driving record, accompanied by an asterisk beside the offense of conviction, reflects that the term of revocation applicable under G.S. 20-19 has expired but NC DMV has not received a certificate of completion; thus the revocation continues to be in effect.

18. What is the basis for the indefinite license revocation reflected in the driving record entry below?

10-25-10	INDEF	SUSP: 1 OFFENSE OF DRIVING WHILE IMPAIRED
6-25-10	10-25-10	CONV: *(625) DRIVING WHILE IMPAIRED
		COURT: CLEVELAND COUNTY COURT
		COURT: AOC #: 10CR 12345

A. A revocation under G.S. 20-24.1 for failure to appear in for a motor vehicle offense.
B. A revocation under G.S. 20-24.1 for failure to pay a fine, penalty or court costs ordered by the court upon conviction of a motor vehicle offense.
C. A one-year revocation under G.S. 20-17(a)(2) for conviction of DWI that is extended by G.S. 20-17.6(b) (revocation period extended until DMV receives certificate of completion of substance abuse assessment and education/treatment).
D. It is not possible, without additional information, to determine the reason for the revocation.

ANSWER: C.

DISCUSSION:

This entry reflects an indefinite revocation resulting from a conviction for DWI. The initial period of revocation was one year. The asterisk beside the conviction indicates that DMV has not yet received the certificate of completion reflecting that the person completed his or her substance abuse assessment or treatment. Thus, when the one-year revocation period expired, the revocation did not end, as it otherwise would have, but instead continued pursuant to the provisions of G.S. 20-17.6(b).

19. Is a person convicted of DWI for an offense that occurred when he was less than 21 years old eligible for a limited driving privilege?

A. Yes
B. No

ANSWER: B.

DISCUSSION:

NC DMV has the exclusive power to issue, suspend, or revoke a persons' driver's license. *See* Joyner v. Garrett, 279 N.C. 226 (1971); Smith v. Walsh, 34 N.C. App. 287 (1977). The General Statutes confer upon the courts the authority to issue limited driving privileges—judgments that authorize a person with a revoked driver's license to drive for certain essential purposes. To be eligible for a limited driving privilege, a person must satisfy eligibility requirements defined by statute and demonstrate good cause for the issuance of the privilege.

When a person is convicted of impaired driving, DMV must revoke the person's license pursuant to G.S. 20-17(a)(2). If the person was under 21 at the time of the offense, DMV also must revoke the person's license pursuant to G.S. 20-13.2(b). If the person was convicted of driving after consuming while under

age 21 in violation of G.S. 20-138.3, the person's license is revoked pursuant to G.S. 20-13.2(a). Revocations under G.S. 20-13.2 endure for one year and run concurrently with any other revocations.

(*Note: G.S. 20-13.2 is somewhat misleadingly captioned "Grounds for revoking provisional license," though its license revocation provisions apply to persons under 21, rather than exclusively to provisional license-holders, all of whom are under 18. The incongruous reference resulted from the General Assembly's failure to amend the title of G.S. 20-13.2, which formerly applied to only to provisional licensees, when it raised from 18 to 21 the age below which a person is prohibited from driving after consuming. See S.L. 1995-506.*)

Judges are authorized by G.S. 20-179.3 to grant a limited driving privilege for a person whose license is revoked "solely under G.S. 20-17(a)(2) or as a result of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1." If the person's license is revoked under any other statute, however, a limited driving privilege awarded pursuant to G.S. 20-179.3 is invalid. G.S. 20-179.3(e). Whether convicted of driving after consuming or not, a person convicted of impaired driving for an offense that occurred when she was under 21 is revoked under G.S. 20-13.2 in addition to G.S. 20-17(a)(2).

While a person whose license is revoked *solely* for conviction of driving by a person under 21 after consuming alcohol or drugs in violation of G.S. 138.3 is eligible for a limited driving privilege if the person is 18, 19, or 20 years old on the date of the offense, has not previously been convicted of a violation of G.S. 20-138.3, and meets other eligibility requirements set forth in G.S. 20-179.3, see G.S. 20-138.3(d), a person convicted of impaired driving based upon the same conduct is ineligible for a limited driving privilege because his or her license also will be revoked pursuant to G.S. 20-17(a)(2).

Other than G.S. 20-138.3(d), there is no limited privilege that authorizes driving during a period of revocation imposed pursuant to G.S. 20-13.2. Indeed, G.S. 20-138.3(d) provides that "G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of [driving by a person under 21 after consuming] and of driving while impaired as a result of the same transaction." As previously noted, G.S. 20-179.3 in turn authorizes a privilege only when a person is revoked solely under G.S. 20-17(a)(2).

What happens if a court issues a limited driving privilege not authorized by law? Copies of all limited driving privileges that are issued must be sent to DMV. G.S. 20-179.3(k). Upon receiving a privilege that is invalid on its face, DMV must immediately notify the court and the holder of the privilege that it considers the privilege void and that DMV records will not indicate that the holder has a limited driving privilege. G.S. 20-179.3(k).

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June 10, 2013

APPEAL

20. Must a defendant have the consent of the prosecutor and the superior court to withdraw an appeal from a DWI conviction before the appeal is calendared in superior court?

    A. Yes
    B. No
    C. Unclear

ANSWER: C.

DISCUSSION:

In addition to providing that convictions for implied consent offenses are vacated upon giving notice of appeal, G.S. 20-38.7(c) provides that cases "shall only be remanded back to district court with the consent of the prosecutor and the superior court." This language calls into question whether a defendant who appeals from a district court conviction for an implied consent offense may withdraw the appeal before the case is transferred to superior court without the consent of the prosecutor or the court as a defendant may for other types of district court convictions. The next sentence of G.S. 20-38.7(c) implies that consent may not be necessary in this circumstance as it requires that a new sentencing hearing be held "[w]hen an appeal is withdrawn or a case is remanded back to district court." G.S. 20-38.7(c) (emphasis added). If a defendant is permitted to withdraw an appeal from a conviction of a covered offense without consent pursuant to G.S. 15A-1431, remand is automatic, though the remand is for resentencing, whereas in structured sentencing cases remand is for execution of the judgment. *See* G.S. 15A-1431(g). Once an implied consent case appealed to superior court is transferred to that court, it is clear that the prosecutor and the superior court must consent to the remand. *See* G.S. 15A-1431(h) (permitting a defendant to withdraw an appeal after the calendaring of the case for trial de novo in superior court only by consent of the court).