

DWI Law Overview

New Misdemeanor Defenders

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Shea Riggsbee Denning
denning@sog.unc.edu
(919) 843-5120

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DWI Law Overview

- Elements of DWI
- Police Processing Duties
- Sentencing
- Motions Procedures

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Elements of Impaired Driving: G.S. 20-138.1

1. Drives
2. A vehicle
3. On a street, highway, or public vehicular area
4. (a) while under the influence of an impairing substance *or*
(b) after consuming a sufficient quantity of alcohol that he has an alcohol concentration of .08 or more at any relevant time after the driving *or*
(c) With any amount of a Schedule I controlled substance or its metabolites in his blood or urine

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1. Drives





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2. A vehicle

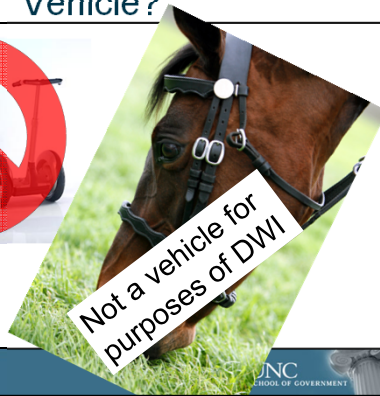


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Vehicle?



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Vehicle?



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Vehicle?



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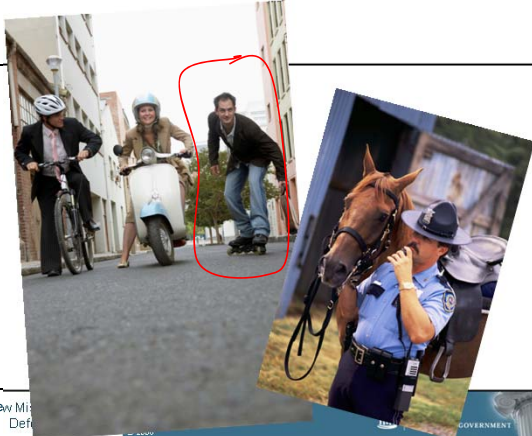
Vehicle?



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Motor Vehicle

Vehicles

— [machines that are person-propelled or pulled]

— Mopeds

Motor Vehicles

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3. On a street, highway, or public vehicular area



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Street, highway or public vehicular area?



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Street, highway or public vehicular area?



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Street, highway or public vehicular area?



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4. While Impaired

1. Under influence of impairing substance,
OR
2. .08 at any relevant time after driving,
OR
3. Any amount of Schedule I controlled
substance in blood or urine

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Under influence of impairing substance

- Physical or mental faculties appreciably impaired by
 - Alcohol
 - Controlled substance
 - Drug
 - Psychoactive substance



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.08 at any relevant time after driving



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Schedule I controlled substance in blood/ urine

- Chapter 90: Heroin, LSD, MDMA . . .



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Police Processing Duties



Implied Consent Offenses

- Impaired driving under G.S. 20-138.1
- Impaired driving in a commercial vehicle under G.S. 20-138.2
- Habitual impaired driving under G.S. 20-138.5
- Death by vehicle or serious injury by vehicle under G.S. 20-141.4, when based on impaired driving or substantially similar offense under previous law
- First- or second-degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18, when based on impaired driving
- Driving by a person less than 21 after consuming--G.S. 20-138.3
- Violating no-alcohol condition of limited privilege under G.S. 20-179.3
- Impaired instruction under G.S. 20-12.1
- Operating comm. motor vehicle after consuming alcohol --G.S. 20-138.2A
- Operating school bus, school activity bus, or child care vehicle after consuming alcohol under G.S. 20-138.2B
- Transporting open container of alcoholic beverage under G.S. 20-138.7(a)
- Driving in violation of ignition interlock restriction under G.S. 20-17.8(f).

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Chemical Analysis



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Willful Refusal



A large, 3D, red block with the word "NO" in white, tilted over a pocket watch. The pocket watch is brass and shows the time as approximately 10:10. The background is white.

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[illegible][illegible]

Problems



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Reduction or Dismissal of Implied-Consent Charges (G.S. 20-138.4)

- Prosecutor must enter detailed facts in the record of any case *subject to the implied-consent law or involving driving while license revoked for impaired driving* explaining orally and in open court and in writing the reasons for his action if he
 - (1) Enters a voluntary dismissal; or
 - (2) Accepts a plea of guilty or no contest to a lesser included offense; or
 - (3) Substitutes another charge, by statement of charges or otherwise, if the substitute charge carries a lesser mandatory minimum punishment or is not a case subject to the implied consent law; or
 - (4) Otherwise takes a discretionary action that effectively dismisses or reduces the original charge in a case subject to the implied-consent law

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G.S. 20-179 governs sentencing for:

1. G.S. 20-138.1 (impaired driving)
2. G.S. 20-138.2 (impaired driving in a commercial vehicle)
3. 2nd or subseq. conviction of G.S. 20-138.2A (operating commercial vehicle after consuming)
4. 2nd or subseq. conviction of G.S. 20-138.2B (operating school bus, school activity bus, or child care vehicle after consuming)

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Special Rules

1. Judge must hold sentencing hearing
2. Judge must make written findings of aggravating and mitigating factors.
3. State must prove aggravating factor beyond a reasonable doubt
4. Defendant must prove by a preponderance that mitigating factor exists
5. Prosecutor must
 - present defendant's record of traffic convictions
 - present all grossly aggravating and aggravating factors of which he is aware
 - present evidence of the AC from valid chemical analysis
6. No PJC's
7. Aiders and Abettors punished at Level 5
8. May not consolidate DWIs for judgment
9. For any suspended sentence, defendant must obtain substance abuse assessment and the education or treatment required by 20-17.6
10. Judge may not give credit for first 24 hours in jail pending trial

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What about Chapter 15A?

- SSA does not apply to impaired driving under G.S. 20-138.1 (G.S. 15A-1340.10)
- Persons convicted of impaired driving under G.S. 20-138.1 may be placed on probation (G.S. 15A-1341(a))
- A defendant convicted of impaired driving under G.S. 20-138.1 may also be sentenced to special probation
 - Total of all periods of confinement imposed as special probation may not exceed $\frac{1}{4}$ the maximum penalty allowed by law (G.S. 15A-1351(a))

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Grossly Aggravating Factors (G.S. 20-179)

1. Certain prior convictions for an offense involving impaired driving
2. DWLR if revocation was impaired driving revocation
3. Serious Injury
4. Child under 16 in the vehicle

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1. Prior conviction of impaired driving offense

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2. DWLR for impaired driving revocation

- Conduct has to be sufficient to establish offense of DWLR
 - Must be on street or highway
 - In a *motor vehicle*

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3. Serious Injury

- Serious injury to another person caused by the defendant's impaired driving at the time of the offense

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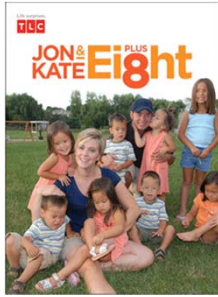
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4. Child under 16



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Sentencing Problems



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Motions Procedures for Implied Consent Cases in District Court


- G.S. 20-38.6
 - D may move to suppress or dismiss only prior to trial
 - Exceptions:
 - Motions to dismiss for insufficient evidence
 - Motions based on discovery during trial of facts not previously known
 - Hearing required
 - Ruling for D Must be a Preliminary Determination that State May Appeal
- G.S. 20-38.7
 - Disputed facts, hearing de novo

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State v. Fowler: Procedural Pointers	
<ol style="list-style-type: none"> 1. In ruling on an appeal from a preliminary determination, the sup. ct. must remand the matter to d. ct. w/ instructions to finally grant or deny a motion to suppress or to dismiss. 2. Neither the state nor the defendant may appeal from the superior court's remand order. 3. The state may not appeal a district court's dismissal of charges based insufficient evidence. 4. The state may not appeal to superior court a district court's ruling on a <i>motion to suppress</i> that is entered after jeopardy has attached (which, in district court, is when the first witness is sworn). 5. A district court must enter a final judgment, rather than a preliminary determination, in ruling on a motion to suppress or dismiss after jeopardy has attached. 	
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No appeals of final orders suppressing evidence, but what about final orders dismissing charges?	
<ol style="list-style-type: none"> 1. The state may appeal to superior court a district court's final judgment dismissing charges if the appeal does not violate Double Jeopardy. G.S. 15A-1432(a). <ul style="list-style-type: none"> • If the superior court reverses a district court's dismissal of charges it must reinstate the charges and remand the matter to district court. The defendant may appeal this order to the appellate division. G.S. 15A-1432(d). 2. If the superior court affirms a district court's final judgment dismissing charges, the state may appeal to the appellate division. G.S. 15A-1432(e). 	
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Sentencing for Impaired Driving: G.S. 20-179

Level	Factors	Minimum Sentence	Maximum Sentence	If Suspended, ¹ Special Probation Requiring:	Maximum Fine
1	2+ GA Factors	30 days	24 months	Active term of at least 30 days	\$4,000
2	1 GA Factor	7 days	12 months	Active term of at least 7 days	\$2,000
3	Agg. > Mitigating	72 hours	6 months	Active term of at least 72 hours -- And/or at least 72 hours community service	\$1,000
4	Agg. = Mitigating	48 hours	120 days	48 hours active -- And/or 48 hours community service	\$500
5	Mitig. > Agg.	24 hours	60 days	24 hours active -- And/or 24 hours community service	\$200

¹ For any suspended sentence, defendant must obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a driver's license and as a condition of probation.

DWI SENTENCING — G.S. 20-179.²

Grossly Aggravating Factors *(if 1, Level 2. If 2 or more, Level 1):*

- (1) A prior conviction for an offense involving impaired driving if:
 - a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
 - b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
 - c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

Each prior conviction is a separate grossly aggravating factor.

- (2) DWLR at the time of the offense under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).
- (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (4) Driving by the defendant while a child under the age of 16 years was in the vehicle at the time of the offense.

Aggravating Factors:

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving.
 - (2) Especially reckless or dangerous driving.
 - (3) Negligent driving that led to a reportable accident.
 - (4) DWLR.
 - (5a) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, within five years of the date of the offense.
 - (5b) One/more prior conviction of an offense involving impaired driving more than seven years before the date of the current offense.
 - (6) Conviction under G.S. 20-141.5 of speeding to flee/elude.
 - (7) Conviction under G.S. 20-141 of speeding at least 30 mph over limit.
 - (8) Passing a stopped school bus in violation of G.S. 20-217.
 - (9) Any other factor that aggravates the seriousness of the offense.
- Except for (5a) and (5b), conduct must occur during same transaction as impaired driving offense.

Mitigating Factors to Be Weighed:

- (1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
 - (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
 - (3) Safe and lawful driving (except for the DWI).
 - (4) A safe driving record (no four-point traffic convictions or for which the person's license is subject to revocation within five years).
 - (5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.
 - (6) Voluntary submission for assessment after charge and, if recommended, voluntary participation in the recommended treatment.
 - (6a) Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption as proven by a continuous alcohol monitoring system of a type approved by Dep't of Correction.
 - (7) Any other factor that mitigates the seriousness of the offense.
- Except for factors in (4), (6), (6a), and (7), the conduct must occur in the same transaction as the impaired driving offense.

A>M, Level 3; A=M, Level 4; M>A, Level 5

² Based on materials originally prepared by Judge Ripley Rand; Reviewed and updated by Shea Denning

DWI SENTENCING IN DISTRICT COURT— G.S. 20-179.

Prepared by Shea Denning, School of Government

Based on materials originally prepared by Judge Ripley Rand

Applies to convictions of:

- G.S. 20-138.1 (impaired driving)
- G.S. 20-138.2 (impaired driving in a commercial vehicle)
- Second or subsequent conviction of G.S. 20-138.2A (operating a commercial vehicle after consuming)
- Second or subsequent conviction of G.S. 20-138.2B (operating school bus, school activity bus, or child care vehicle after consuming)

The judge must hold a sentencing hearing to determine if there are aggravating or mitigating factors that affect the sentence.

The state must prove *beyond a reasonable doubt* that an aggravating factor exists. The defendant must prove *by a preponderance of the evidence* that a mitigating factor exists.

Before the hearing, the prosecutor must make all feasible efforts to secure the defendant's full record of traffic convictions, and must present to the judge that record for consideration in the hearing.

The judge must first determine whether there are any grossly aggravating factors in the case based upon the evidence presented at trial and in the hearing.

Grossly Aggravating Factors (if 1 GAF, Level 2 DWI. If 2 GAFs or more, Level 1 DWI):

- (1) A prior conviction for ***an offense involving impaired driving***¹ if:
 - a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
 - b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
 - c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

Each prior conviction is a separate grossly aggravating factor. G.S. 20-179(c)(1).

- (2) DWLR at the time of the offense under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).²
- (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (4) Driving by the defendant while a child under the age of 16 years was in the vehicle at the time of the offense.

¹ An ***offense involving impaired driving*** is defined in G.S. 20-4.01(24a) as any of the following offenses:

- Impaired driving under G.S. 20-138.1
- Habitual impaired driving under G.S. 20-138.5
- Impaired driving in commercial vehicle under G.S. 20-138.2
- Any offense under G.S. 20-141.4 (felony and misdemeanor death by vehicle and serious injury by vehicle) based on impaired driving
- 1st or 2nd degree murder under G.S. 14-17 based on impaired driving
- Involuntary manslaughter under G.S. 14-18 based on impaired driving
- Substantially similar offenses committed in another state or jurisdiction

² An ***“impaired driving license revocation”*** is defined by G.S. 20-28.2(a) as a revocation made under any of the following statutes:

- G.S. 20-13.2: consuming alcohol/drugs or willful refusal by driver under 21
- G.S. 20-16(a)(8b): military driving while impaired
- G.S. 20-16.2: refused chemical test
- G.S. 20-16.5: pretrial civil license revocation
- G.S. 20-17(a)(2): impaired driving or commercial impaired driving
- G.S. 20-138.5: habitual impaired driving
- G.S. 20-17(a)(12): transporting open container
- G.S. 20-17.2: court order not to operate (repealed effective December 1, 2006)
- G.S. 20-16(a)(7): impaired driving out of state resulting in N.C. revocation
- G.S. 20-17(a)(1): manslaughter or 2nd degree murder involving impaired driving
- G.S. 20-17(a)(3): felony involving use of motor vehicle, involving impaired driving
- G.S. 20-17(a)(9): felony or misdemeanor death or serious injury by vehicle involving impaired driving
- G.S. 20-17(a)(11): assault with motor vehicle involving impaired driving
- G.S. 20-28.2(a)(3): The laws of another state and the offense for which the person’s license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed under any of the above statutes

Aggravating Factors:

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving.
- (2) Especially reckless or dangerous driving.
- (3) Negligent driving that led to a reportable accident.
- (4) DWLR.
- (5a) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, within 5 years of the date of the offense.
- (5b) One/more prior conviction of an *offense involving impaired driving* more than seven years before the date of the current offense.
- (6) Conviction under G.S. 20-141.5 of speeding to flee/elude.
- (7) Conviction under G.S. 20-141 of speeding at least 30 mph over limit.
- (8) Passing a stopped school bus in violation of G.S. 20-217.
- (9) Any other factor that aggravates the seriousness of the offense.

Except for (5a) and (5b), conduct must occur during same transaction as impaired driving offense.

Mitigating Factors:

- (1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
- (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
- (3) Safe and lawful driving (except for the DWI).
- (4) A safe driving record (no four-point traffic convictions or for which the person's license is subject to revocation within five years).
- (5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.
- (6) Voluntary submission for assessment after charge and, if recommended, voluntary participation in the recommended treatment.
- (6a) Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption as proven by a continuous alcohol monitoring system of a type approved by Dep't of Correction.
- (7) Any other factor that mitigates the seriousness of the offense.

Except for factors in (4), (6), (6a), and (7), the conduct must occur in the same transaction as the impaired driving offense.

- Aggravating > Mitigating, Level 3
- Aggravating = Mitigating, Level 4
- Mitigating > Aggravating, Level 5

The judge must note in the judgment the factors found. G.S. 20-179(f).

DWI PUNISHMENT

*(For **any suspended sentence**, defendant must obtain substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a driver's license and as a condition of probation.)*

Level One

Imprisonment – min 30 days, max 24 months. If suspended, special probation requiring active term of at least 30 days

Fine – up to \$4,000

May impose continuous alcohol monitoring for minimum of 30 days to maximum of 60 days as condition of probation. Total cost to defendant for continuous alcohol monitoring system may not exceed \$1,000. If court finds defendant should not be required to pay cost of monitoring, must not impose this condition unless local government agrees to pay.

Level Two

Imprisonment – min 7 days, max 12 months. If suspended, special probation requiring active term of at least 7 days

Fine – up to \$2,000

May impose continuous alcohol monitoring for minimum of 30 days to maximum of 60 days as condition of probation. Total cost to defendant for continuous alcohol monitoring system may not exceed \$1,000. If court finds defendant should not be required to pay cost of monitoring, must not impose this condition unless local government agrees to pay.

Level Three

Imprisonment – min 72 hours, max 6 months. If suspended, (1) special probation active term of at least 72 hours and/or (2) at least 72 hours community service within 90 days.

Fine – up to \$1,000

Level Four

Imprisonment – min 48 hours, max 120 days. If suspended, (1) special probation active term of 48 hours and/or (2) 48 hours community service within 60 days.

Fine – up to \$500

Level Five

Imprisonment – min 24 hours, max 60 days. If suspended, (1) special probation active term of 24 hours and/or (2) 24 hours community service within 30 days.

Fine – up to \$200

Credit for Inpatient Treatment – Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient.

- Defendant pays unless judge orders State to pay.
- The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility.
- The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced.

Method of Serving Sentence

- With respect to the minimum or specific term of imprisonment imposed as a condition of special probation under this section, the judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial. G.S. 20-179(p).
- Judge may order a term of imprisonment to be served on weekends, even if the sentence cannot be served in consecutive sequence. But if the defendant must serve 48 hours or more, defendant must serve 48 continuous hours to receive credit. G.S. 20-179(s).
- Credit for jail time is given hour for hour for time actually served. G.S. 20-179(s)(1).
- If defendant appears at jail to serve time with alcohol or a controlled substance remaining in his body, the defendant must be refused entrance and be reported back to court (unless the substance was lawfully obtained and taken in therapeutically appropriate amounts). G.S. 20-179(s)(2).
 - If defendant is reported back to court, the court must hold a hearing. The court must order the defendant to serve jail time immediately and not on weekends if the court determines that at the time of the entrance to the jail the defendant had alcohol or a controlled substance in his body (unless the substance was lawfully obtained and taken in therapeutically appropriate amounts). G.S. 20-179(s)(3).



What's *Knoll* Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals Under *Knoll*

Shea Riggsbee Denning

Introduction

In addition to enacting the pretrial motions and appeals procedures for implied consent cases recently upheld by the North Carolina Court of Appeals in *State v. Fowler*¹ and *State v. Palmer*,² the Motor Vehicle Driver Protection Act of 2006, S.L. 2006-53, created statutory provisions designed to, in the words of the task force recommending the changes, “avoid a dismissal under *Knoll*.”³ The *Knoll* reference is to the North Carolina Supreme Court’s opinion in *State v. Knoll*⁴ ordering that charges of impaired driving against defendants in three separate cases be dismissed. The court had found in each case that the magistrate committed substantial statutory violations related to the setting of conditions of pretrial release that prejudiced the defendant’s ability to gain access to witnesses. Though *Knoll* is most widely recognized for its outcome—the dismissal of charges in three impaired driving cases—the *Knoll* court’s holding actually *increased* the showing required from certain defendants to warrant dismissal of impaired driving charges. Before *Knoll*, to obtain dismissal of the charges a defendant charged with impaired driving had only to demonstrate that he or she was denied access to witnesses during the time in which such witnesses might provide testimony as to his or her lack of intoxication; prejudice from such a denial was presumed. *Knoll* requires that to establish a basis for dismissal of charges a defendant charged with impaired driving based upon driving with an alcohol concentration that equals or exceeds the per se limit in Section 20-138.1(a)(2) of the North Carolina General Statutes (hereinafter G.S.) must not only demonstrate a substantial statutory violation of the defendant’s right to pretrial release, but also prove that he or she was prejudiced by the violation.

Shea Riggsbee Denning is a School of Government faculty member specializing in motor vehicle law.

1. ___ N.C. App. ___, 676 S.E.2d 523 (2009).
2. ___ N.C. App. ___, 676 S.E.2d 559 (2009).
3. Governor’s Task Force on Driving While Impaired, *Final Report to Governor Michael F. Easley* (January 14, 2005) (hereinafter Task Force Report), 22.
4. 322 N.C. 535, 369 S.E.2d 558 (1988).

To view the entire bulletin, visit

www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0907.pdf



Motions Procedures in Implied Consent Cases after *State v. Fowler* and *State v. Palmer*

Shea Riggsbee Denning

The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-53, enacted significant changes to procedures governing the adjudication in district court of implied consent offenses committed on or after December 1, 2006. The genesis of the legislation was a 2005 report issued by the Governor's Task Force on Driving While Impaired, which made numerous recommendations for improving "North Carolina's DWI system."¹ One recommendation was that "District Court trial procedure . . . be formalized for DWI and related offenses" through the enactment of legislation requiring that motions to suppress and motions to dismiss evidence in implied consent cases litigated in district court be filed before trial.² The report further recommended the enactment of statutory provisions permitting the State to appeal to superior court any pretrial district court order suppressing evidence or dismissing charges. These recommendations were based upon the following observations noted in the report:

- Currently in Superior Court, motions to suppress are accompanied by an affidavit and are required before the trial. There is no such law in District Court, which is where the majority of DWI cases are tried. Also, the State is not allowed to appeal orders of suppressions to the Superior Court.
- Defense attorneys are allowed to argue to any motion without prior notice to the District Attorney (DA), and the DA does not have an opportunity to prepare a response to the motion as allowed in Superior Court.
- Many DWI cases are resolved when the court rules on these motions to dismiss or suppress.
- The proceedings of District Court should be modified to require:
 1. Motions to suppress and dismiss evidence (such as Intoxilyzer results) must be made in writing and filed seven days prior to the trial.
 2. There are no statutes defining when evidence can be suppressed or dismissed as there is in Superior Court. District Court procedure should be modeled to more closely resemble Superior Court.
 3. District Court judges make written findings of fact and conclusions of law when evidence is suppressed or cases are dismissed.

Shea Riggsbee Denning is a School of Government faculty member specializing in motor vehicle law.

1. Governor's Task Force on Driving While Impaired, *Final Report to Governor Michael F. Easley* (January 14, 2005), 7.

2. *Id.* at 24, 62–63.

To view the entire bulletin, visit

www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf



Motor Vehicle Checkpoints

Jeffrey B. Welty

Introduction

The purpose of this bulletin is to summarize and clarify the rules regarding checkpoints used to enforce the state's motor vehicle laws. It is intended for use by judges, lawyers, and law enforcement officers. Except incidentally, it does not address other types of checkpoints, such as immigration checkpoints¹ or checkpoints designed to gather information about a recently committed crime.²

The United States Supreme Court upheld sobriety checkpoints against a Fourth Amendment challenge in *Michigan Department of State Police v. Sitz*.³ Motor vehicle checkpoints have been widely employed by law enforcement agencies since that time. In North Carolina, they are expressly authorized and regulated by Section 20-16.3A of the North Carolina General Statutes (hereinafter G.S.). But questions remain regarding when, where, and how checkpoints may be conducted. This bulletin employs a question-and-answer format to address some of these issues.

Establishing a Checkpoint

1. Are motor vehicle checkpoints permitted?

Yes, in appropriate circumstances. As noted above, the United States Supreme Court has held that sobriety checkpoints do not violate the Fourth Amendment. The General Statutes go further and allow checkpoints to be used "to determine compliance with the provisions of" Chapter 20.⁴ In other words, the statute allows checkpoints to be used to detect violations of any

Jeffrey B. Welty is a School of Government faculty member specializing in criminal law and procedure. He can be reached at 919.843.8474 or at welty@sog.unc.edu.

1. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 453 (1976) (authorizing permanent immigration checkpoints near national borders).

2. See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004) (authorizing such checkpoints under certain circumstances).

3. 496 U.S. 444 (1990). The Court had previously suggested in *dicta* that motor vehicle checkpoints were permissible. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

4. G.S. 20-16.3A(a).

To view the entire bulletin, visit:
www.sog.unc.edu/pubs/electronicversions/pdfs/aojb1004.pdf



Magistrate Procedures for Ordering Civil License Revocations and the Seizure and Impoundment of Motor Vehicles

Shea Riggsbee Denning

I. Introduction

Several recent issues in this series have focused on the procedures magistrates should follow in conducting initial appearances. The procedures involving criminal cases generally are described in detail in *Administration of Justice Bulletin* No. 2009/08 (“Criminal Procedure for Magistrates”). Criminal cases involving implied consent laws, such as a charge of suspicion of impaired driving or an alcohol-related offense, may require magistrates to carry out several additional processes during the initial appearance. For example, magistrates may be required to revoke the defendant’s driver’s license, order that a vehicle driven by the defendant be seized and impounded, consider whether the defendant should be detained because his or her impairment poses a danger to others, and inform the defendant of the procedure for having witnesses appear at the jail to observe his or her condition or perform additional chemical analyses. The applicability of these procedures depends on the existence of factors specific to each.

The procedures for detaining impaired drivers and for informing defendants of their right to secure witnesses and to obtain further chemical analyses are described in *Administration of Justice Bulletin* No. 2009/07 (“What’s *Knoll* got to do with It? Procedures in Implied Consent Cases to Prevent Dismissals under *Knoll*”). This bulletin focuses on the aforementioned procedures governing civil license revocation and the seizure and impoundment of motor vehicles. This discussion is flanked at the beginning by a review of police processing procedures in implied consent cases and at the end by two appendixes. Appendix A contains Administrative Office of the Courts (AOC) forms referenced in the discussion, and Appendix B presents flowcharts illustrating the processes for ordering the revocation of a civil license and the seizure of motor vehicles.

Shea Riggsbee Denning is a School of Government faculty member specializing in motor vehicle law.

To view the entire bulletin, visit:

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NORTH CAROLINA CRIMINAL LAW BLOG POSTS

by School of Government faculty member Shea Denning

Proving That Blood Was Drawn by a Qualified Person

Thursday, August 26, 2010

Earlier posts ([here](#), [here](#), and [here](#)) discuss the statutory and constitutional requirements for obtaining a sample of a defendant's blood for analysis in an implied-consent case. This post likewise addresses blood draws in such cases but addresses two narrower issues. First, must the State establish that the blood was drawn by a qualified person before the results of such an analysis may be admitted into evidence? Second, does the confrontation clause of the Sixth Amendment bar testimony from a law enforcement officer regarding the blood-extractor's qualifications?

The provisions of [G.S. 20-139.1](#) governing the withdrawal of blood for chemical analysis and the admission of the results of such a chemical analysis were among those amended by the [Motor Vehicle Driver Protection Act of 2006](#), effective for offenses committed on or after December 1, 2006. Before these amendments, G.S. 20-139.1(c) specified that "[w]hen a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample." This subsection further provided that "[e]vidence regarding the qualifications of the person who withdrew the blood sample may be provided at trial by testimony of the charging officer or by an affidavit of the person who withdrew the blood sample and shall be sufficient to constitute prima facie evidence regarding the person's qualifications."

While current G.S. 20-139.1(c) still refers to the withdrawal of blood by a "qualified person," the reworded subsection *directs* qualified persons to withdraw blood rather than explicitly *restricting* bloodletting to those who are qualified. And the provisions governing proof of a person's qualifications were removed entirely in 2006. Instead, new G.S. 20-139.1(c4) provides that blood test results are admissible to prove a person's alcohol concentration or the presence of an impairing substance if: (1) a law enforcement officer or chemical analyst requested the blood sample; and (2) a chemical analysis was performed by a chemical analyst with the appropriate DHHS permit.

Thus, notwithstanding the requirement that blood be drawn by a qualified person, it appears that the State is no longer required to establish that the blood was withdrawn by a qualified person before the results of a blood analysis may be introduced at trial. Nevertheless, the State still may attempt to demonstrate at trial that a qualified person drew the defendant's blood, given that its failure to do so may affect the weight afforded to the results by the finder of fact.

Frequently, such proof is offered through testimony of a law enforcement officer who may explain how he or she selected the allegedly qualified person and the basis for his or her view that the person was qualified. In [State v. Hinchman, 192 N.C. 657 \(2008\)](#), the court of appeals determined that the State met its burden under previous G.S. 20-139.1(c) to prove the blood was drawn by a qualified person by eliciting testimony from the officer who requested the blood sample that the person who withdrew the blood was working in the "blood lab" at the hospital—a restricted-access area—and was wearing a "lab tech I uniform—which was pink pants and a white shirt and her name tag." The court rejected the defendant's argument that the State was statutorily required to establish the lab technician's qualifications through live testimony from the technician. The defendant also argued that the officer's testimony about the technician's qualifications violated his Sixth Amendment right to confront

witnesses, but the court declined to consider that argument as it was not properly assigned as error on appeal. But what of the argument? Are the qualifications of a person who draws blood testimonial statements?

Remember that the confrontation clause provides that in all criminal prosecutions the accused shall enjoy the right to confront witnesses against him. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court interpreted the clause to bar the introduction of testimonial hearsay statements by a witness who is not subject to cross examination at trial unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness. *Crawford* defined the term “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51. (For a detailed discussion of *Crawford* and its progeny, see Jessica Smith, Understanding the New Confrontation Clause Analysis: *Crawford*, Davis, and Melendez-Diaz, Administration of Justice Bulletin 2010/02 (April 2010) (available [here](#))).

Does the law enforcement officer’s testimony in *Hinchman* about the lab technician implicate the confrontation clause or require application of the *Crawford* test? No. The law enforcement officer testified as to his observations regarding where the technician worked and what she was wearing rather than to someone else’s out-of-court statements. Thus, there is no hearsay and no confrontation clause problem. See, e.g., *Deeds v. State*, ___ So.3d ___, 2009 WL 4350783 (Miss. 2009) (rejecting defendant’s argument in DWI trial that his confrontation clause rights were violated by the introduction of blood test results because the nurse who withdrew his blood did not testify at trial; concluding that neither the procedure used to draw the defendant’s blood nor the blood itself were statements or “nonverbal conduct intended as an assertion” and that unidentified nurse was not a witness against defendant).

Suppose, however, that a law enforcement officer in an implied consent case asks a hospital nurse to draw blood and, in the nurse’s office, sees affixed to the wall a diploma conferring upon the nurse a degree in nursing and a Board of Nursing license. May the officer testify about those observations without violating a defendant’s confrontation rights? Yes.

Now the officer’s testimony arguably relays hearsay consisting of statements contained in official documents created by another entity that are offered to prove the nurse was qualified. Yet these statements by the university and the nursing board are not testimonial under *Crawford*. They were created for administration of the entities’ affairs and not for the purpose of establishing this nurse’s qualifications at trial. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539-40 (2009) (distinguishing affidavits reporting the results of forensic analysis that were prepared for use at trial from nontestimonial business and public records). So there is no confrontation clause bar to their admission.

Thanks to my colleague Jessica Smith, expert in all things *Crawford*, for her assistance with this post.

The Authority of Campus Police

Wednesday, August 25, 2010

Last week, the court of appeals decided [State v. Yencer](#), ruling, in effect, that Davidson College may not operate its own police department. The ruling calls into serious question the authority of several other private universities' police departments, meaning that it is of interest not only in Davidson, but also Durham (the website of the Duke police force is [here](#)), Winston-Salem (the website of the Wake Forest police department is [here](#)), and perhaps at many smaller universities (for example, Meredith College in Raleigh has a police department, as you can see [here](#)).

The defendant in *Yencer* was arrested for DWI by a Davidson College officer. She argued that Davidson is a religious institution and that the state therefore cannot delegate police powers to it without violating the Establishment Clause of the First Amendment. Davidson's police force operates under [Chapter 74G of the General Statutes](#), the Campus Police Act, which allows a "private, nonprofit institution of higher education," even if "originally established by or affiliated with [a] religious denomination[]" to operate a police department with the approval of the Attorney General's office.

The trial court denied the defendant's motion, but the court of appeals reversed, applying the excessive entanglement test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and relying on prior cases involving Campbell and Pfeiffer Universities. The court found that the delegation of police powers to Davidson was impermissible given its affiliation with the Presbyterian Church: its statement of purpose says that it is "committed" to the "Christian tradition;" 24 of its 44 trustees, and its president, must be Presbyterian; and students must take a class in religion. Interestingly, the panel noted that if it were "starting afresh" without precedent, it might find that Davidson is not a religious institution for Establishment Clause purposes, and it "urged" the state supreme court to review the case. (More on that below.)

My admittedly inexpert impression is that the day-to-day role of religion is quite different at Davidson than it is at, for example, Campbell. My sense is that Davidson is more like Duke: a school with strong historical ties to a church, but that feels secular in its daily operation. So, I started thinking, if Davidson is too religious to have a police force, is Duke? Is Wake Forest? And, as noted above, there may be a number of other colleges facing the same issue.

Let's start with Duke. Its [mission statement](#) is completely secular, but Article I of the university's [bylaws](#) reads as follows:

The aims of Duke University . . . are to assert a faith in the eternal union of knowledge and religion set forth in the teachings and character of Jesus Christ, the Son of God; to advance learning in all lines of truth; to defend scholarship against all false notions and ideals; to develop a Christian love of freedom and truth; to promote a sincere spirit of tolerance; to discourage all partisan and sectarian strife; and to render the largest permanent service to the individual, the state, the nation, and the church. Unto these ends shall the affairs of this University always be administered.

The bylaws also provide that 24 of the 36 trustees are elected by the Methodist Church, and the school's official seal contains the motto "eruditio et religio." On the other hand, I don't see in Duke's [curriculum requirements](#) any obligation for students to take classes in religion. (Current or former Duke undergraduates, correct me if I'm wrong.)

Turning to Wake, its [mission statement](#) is nearly as secular as Duke's, though it refers to the school's "rich religious heritage." But its [statement of purpose](#) has a different tone, reading in part:

Wake Forest is proud of its Baptist and Christian heritage. For more than a century and a half, it has provided the University an indispensable basis for its mission and purpose, enabling Wake Forest to educate thousands of ministers and lay people for enlightened leadership in their churches and communities. Far from being exclusive and parochial, this religious tradition gives the University roots that ensure its lasting identity and branches that provide a supportive environment for a wide variety of faiths. The Baptist insistence on both the separation of church and state and local autonomy has helped to protect the University from interference and domination by outside interests, whether these be commercial, governmental, or ecclesiastical. The Baptist stress upon an uncoerced conscience in matters of religious belief has been translated into a concern for academic freedom. The Baptist emphasis upon revealed truth enables a strong religious critique of human reason, even as the claims of revelation are put under the scrutiny of reason. The character of intellectual life at Wake Forest encourages open and frank dialogue and provides assurance that the University will be ecumenical and not provincial in scope, and that it must encompass perspectives other than the Christian. Wake Forest thus seeks to maintain and invigorate what is noblest in its religious heritage.

(For those who can't get enough statements, Wake also has a [vision statement](#), which is secular. I'm sure it's working on a value statement and a statement of principles, but they must not be ready yet.) [This history](#) of the school notes that its founding "and the formation of the Baptist State Convention were closely interwoven," and describes the very tight relationship between the church and the university in the early years of the latter. I wasn't able easily to determine how Wake's trustees are selected. The school's [curriculum requirements](#) do not appear to mandate that students take any courses in religion.

Where does this leave us? I don't think that the information above conclusively establishes that *Yencer* applies to Duke and Wake, but I do think that there's a very serious argument to be made on that issue. And of course, I'm not the only one who has thought of this. According to [this article](#), Durham defense lawyers are already planning to challenge the authority of Duke's police, and I assume that lawyers in Winston-Salem are hatching similar plans with respect to Wake Forest. Those plans may be affected by further developments in *Yencer*, however. [According to Davidson](#), the Attorney General's office is planning seek a stay and further review. I won't hazard a guess about the final outcome of the case. This precise issue doesn't seem to have come up very often around the country — a few minutes of research turned up only one case outside of North Carolina that's directly on point: *Myers v. State*, 714 N.E.2d 276 (Ind. Ct. App. 1999) (no Establishment Clause problem with allowing Valparaiso University, which has Lutheran ties, to operate a police force). It should be interesting to see whether, and how, the state supreme court deals with this question.

State v. Simmons: New Trial Granted on DWI Charges Based on State's Improper Reference to State v. Narron

Thursday, July 22, 2010

The court of appeals in [State v. Simmons](#), ___ N.C. App. ___ (July 20, 2010), decided this week, awarded a new trial to a defendant convicted of impaired driving, finding that the prosecutor made improper and prejudicial remarks in his closing argument. The court found a substantial likelihood that these comments led the jury to believe that it was compelled to return a guilty verdict based on the results of the chemical analysis—a 0.11 in Simmons' case.

The prosecutor's improper remarks were references to trial proceedings in [State v. Narron, 193 N.C. App. 76 \(2008\)](#), a case in which the court of appeals upheld [G.S. 20-138.1](#) as constitutional and rejected the defendant's argument that the provision in subdivision (a)(2) that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" constitutes a mandatory presumption that violates the due process requirement that the State prove every essential element of the crime. *Narron* explained that rather than creating an impermissible evidentiary or factual presumption the objected-to provision simply states the standard for prima facie evidence of a defendant's alcohol concentration. Put another way, this provision authorizes, but does not compel, a jury to find that the results of a chemical analysis accurately reflect a defendant's alcohol concentration.

And while *Narron* noted there was no reason for the trial court to call to the jury's attention that the chemical analysis was the basis for the trial court's determination that the State had presented prima facie proof of the element, the appellate court found that the defendant was not prejudiced by the trial court's instruction to the jury that "[t]he results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration."

Fast-forward to *Simmons*. Apparently the prosecutor in *Simmons* also prosecuted the defendant in *Narron*. After advising the court and defense counsel that he planned, in his closing argument, to "cite" and "read[] some language from" *Narron*, the prosecutor proceeded to describe the facts in *Narron* to the jury. The gist of his argument was that in *Narron*, the evidence of impairment primarily consisted of chemical analysis results and that "a Pitt County jury just as yourself found that defendant guilty with a .08."

Defense counsel objected to this argument, but the trial judge overruled the objection on the basis that "you were told this was what he was going to argue." For obvious reasons—the prosecutor's injection of his personal experience, his argument based on matters outside the record, and the implication that the jury should convict the defendant because the facts were similar to another case in which a defendant was convicted—the appellate court found the State's argument improper and the trial court's overruling of the defendant's objection an abuse of discretion.

What is noteworthy is that the *Simmons* court found the error so grave as to warrant a new trial. Here's the irony. *Simmons* holds that the State's references to *Narron*—a case in which the court of appeals held that a jury is not compelled to find a defendant guilty based upon a chemical analysis result of .08 or more—likely caused the *Simmons* jury to believe it was compelled to find the defendant guilty. The trial court's instructions to the *Narron* jury that "[t]he results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration" strike me as more likely to have caused the jury to believe that it was compelled to accept those results than does the State's improper

intimation in *Simmons* that because the *Narron* jury returned a verdict of guilty based solely on a chemical analysis result, it should do the same. But that's not the way the appellate court saw it and *Simmons* presumably will be retried. If he is, I'm guessing there'll be no mention of *Narron* in closing arguments.

Are the Effects of a Prescription Drug the Proper Subject of Judicial Notice?

Thursday, July 8, 2010

Suppose that David Defendant is charged with driving while impaired based upon an incident on in which he drove his car off the road and crashed into a tree. The arresting officer testifies at trial that Defendant was unsteady on his feet at the scene of the accident and that she saw no signs of a head injury. Defendant was arrested and consented to withdrawal of a blood sample for analysis. The State notified Defendant on [AOC-CR-344](#) of its intent to introduce as evidence at trial without the testimony of the chemical analyst an SBI laboratory report reporting the results of an analysis of his blood. Defendant did not object to introduction of the report. At trial, the State introduced the report, which states that analysis of Defendant's blood "confirmed the presence of the following substance: carisoprodol."

The district court judge presiding over the case has heard testimony regarding impairment from carisoprodol in previous cases. She knows that this is the generic name for the drug marketed as Soma. She has heard testimony in previous trials that this drug can cause drowsiness, dizziness and vertigo. The State, however, offers no evidence in Defendant's trial to connect carisoprodol with the behavior observed by the arresting officer at the scene of the crash. At the close of the State's evidence, Defendant moves to dismiss the state's case for insufficiency of the evidence, arguing that the State has not shown a link between Defendant's balance issues and the drug detected in his blood.

May the judge take judicial notice of the effect of the drug based on what she has learned in other trials? I don't think so. Here's why.

[N.C. R. Evid. 201](#) governs the taking of judicial notice. The rule provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

There are no North Carolina cases addressing the propriety of taking judicial notice of the side effects of drugs. Several cases from other states indicate, however, that this generally is not a proper subject for judicial notice. See *White v. State*, 316 N.E.2d 699 (Ind. App. 1974) (noting that judicial notice generally is restricted to matters of common public knowledge and that the chemistry of drugs such as Methadone Hydrochloride does not qualify as a matter commonly known); *Commonwealth v. Hartman*, 534 N.E.2d 1170, 1175 n.9 (Mass. 1989) (finding symptoms of insulin shock as described in medical dictionary not a proper subject for judicial notice); *Commonwealth v. Johnson*, 794 N.E.2d 1214 (Mass. App. Ct. 2003) (holding in case in which State asked the defendant to read several passages from a "pill book" purchased at a CVS pharmacy describing the effects of Oxycontin and Diazepam and in which the book itself was admitted as evidence that pill book was not appropriate subject for judicial notice); *Commonwealth v. Cassidy*, 521 A.2d 59 (Pa. Commw. Ct. 1987) (holding that the side effects of a

prescription drug and the causes and effects of relaxation of the arteries are not matters of common knowledge and therefore not proper objects of judicial notice).

That said, the impairing effects of certain drugs in widespread use, such as marijuana, may be within the common knowledge of the average juror (a role filled by the district court judge in criminal trials in district court) and thus may be considered in evaluating the State's evidence. See, e.g., *State v. Clark*, 801 A.2d 718 (Conn. 2002) (defendant's failure to elicit testimony from an eyewitness about the effects of the marijuana on his perception did not preclude the jury from considering the effects marijuana may have had on the witness's observations). It seems doubtful that the impairing effects of a drug such as carisoprodol would qualify as within the common knowledge of the average juror. Thus, it would not be proper for the judge to rely upon information about the effects of carisoprodol gleaned from another trial or any source other than evidence presented at this defendant's trial.

Suppose the judge doesn't take judicial notice of the effects of carisoprodol. Defendant moves to dismiss the charges at the close of the state's evidence based upon insufficiency of the evidence. Alerted to the potential deficiency in its proof, the State moves to admit the Physicians' Desk Reference (PDR) and asks that the judge take judicial notice of carisoprodol's effects as listed in the PDR. Defendant objects to the introduction of the report and the taking of judicial notice and renews his motion to dismiss. Must the case be dismissed for insufficiency of the evidence? Is it too late to consider the State's request that the court take judicial notice? May the court take judicial notice of the effects listed in the PDR? Is the work admissible under a hearsay exception? For those who can't stand the suspense, my answers are no on all counts. My thoughts follow.

The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and defendant's being the perpetrator. [State v. Hernandez, 188 N.C. App. 193, 196 \(2008\)](#). Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion. *Id.* The court reviews the evidence in the light most favorable to the State, giving every reasonable inference arising from that evidence to the State, and resolving all contradictions in favor of the State. *Id.* at 196-97.

In [State v. Cousins, No. COA01-796, 2002 WL 1902614, 152 N.C. App. 478 \(August 20, 2002\)](#) (unpublished), the court determined that the trial court properly denied the defendant's motion to dismiss impaired driving charges for insufficiency of the evidence where evidence established that defendant drove his truck through a red light and crashed into another truck, staggered at the scene, looked dazed, was incoherent, performed poorly on field sobriety tests, refused to submit to a blood test and admitted to taking the painkiller Lortab. The court rejected the defendant's argument that the State was required to produce expert testimony regarding the impairing effects of Lortab and whether the defendant's condition was consistent with ingestion of Lortab.

In this case, the State has presented evidence that Defendant crashed, was unsteady on his feet and had carisoprodol in his blood. This sort of evidence strikes me as enough—construed in the light most favorable to the State—to withstand the motion to dismiss.

And it's not too late to take judicial notice, which, pursuant to Rule 201(f), "may be taken at any stage of the proceeding." But I don't think the State's proffer of the PDR renders the effects of carisoprodol a proper subject of judicial notice. While a court can consult a reference work such as the PDR to identify a drug based its brand name or generic name, see, e.g., *Commonwealth v. Greco*, 921 N.E.2d 1001 (Mass. App. Ct. 2010) (finding that trial court did not err in taking judicial notice based on the PDR that

Seroquel is the brand name for the generic drug quetiapine; noting that “[w]hile this is not a matter of common knowledge, it is readily ascertainable from the PDR”), or to determine the capsule size by which a drug is administered, see, e.g., *State v. Kennedy*, 771 P.2d 281 (Or. App. 1989), it is doubtful whether a court can rely on such a reference to establish the side effects of certain drugs. See, e.g., *State v. Kennedy*, 771 P.2d 281 (Or. App. 1989) (court properly refused defendant’s request in impaired driving case to take judicial notice of the behavioral effects produced by toxicity of serum lithium levels as outlined in PDR as the “PDR is not a resource that is beyond question regarding generalizations pertaining to [such effects]”). But see *Ohio v. Stratton*, 1978 WL 215764, (Ohio App. 3 Dist. March 10, 1978) (unpublished) (holding that trial court could take judicial notice of qualities and effects of Quaalude as described in PDR).

Moreover, without an expert on the witness stand, the only conceivable hearsay exception is [Rule 803\(17\)](#) and it strikes me as a bit of a reach to characterize the PDR as akin to market reports, tabulations and published compilations of the nature contemplated by the rule. Cf. *Ratner v. General Motors Corp.*, 574 A.2d 541, 546 (N.J. Super. 1990) (declining to address the “troublesome issues” of whether PDR evidence qualifies for a hearsay exception or is a proper subject of judicial notice, but nonetheless holding that evidence “of the cornucopia of possible side effects listed in the PDR did not have a tendency to prove any material fact” and thus was improperly admitted in products liability action where there was no evidence plaintiff suffered from listed side effects).

Chime in if you agree, disagree or have insight about how this plays out in practice.

Expert Testimony Regarding Impairment

Wednesday, June 9, 2010

[Rule 702\(a1\)](#) was enacted in [2006 \(effective for hearings held August 21, 2006 or later\)](#) to render admissible two types of expert testimony on the issue of impairment: (1) testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test; and (2) testimony from a certified Drug Recognition Expert (DRE) regarding whether a person is under the influence of an impairing substance. For both types of expert testimony, the rule specifies that testimony is admissible solely on the issue of impairment and not on the issue of a specific alcohol concentration level. Expertise in HGN and drug recognition and classification are premised upon standardized curricula developed by the National Highway Transportation Safety Administration.

HGN is one of three components of the Standardized Field Sobriety Test battery. The others are the Walk-and-Turn and the One-Leg Stand tests. The latter tests measure behavior that a lay person without specialized training would commonly associate with intoxication such as lack of balance and coordination. The HGN test, in contrast, evaluates the eye’s ability to smoothly follow a moving stimulus and the jerking of the eye (termed “nystagmus”) as it moves to the far side of a person’s vision. Specialized, or scientific, knowledge is required to correlate this type of eye movement with intoxication. Thus, before enactment of Rule 702(a1)(1), the state supreme court held in *State v. Helms*, 348 N.C. 578 (1998), that testimony from a police officer regarding the results of an HGN test performed by the defendant was inadmissible without the introduction of foundational evidence establishing that the HGN test was scientifically reliable. The scientific reliability of HGN testing has been hotly debated among law enforcement and legal advocates, and research supports both the views of HGN proponents

and its detractors. Compare Steven J. Rubenzer and Scott B. Stevenson, [Horizontal Gaze Nystagmus: A Review of Vision Science and Application Issues](#), Journal of Forensic Sciences (March 2010) (reviewing prosecution and defense claims about HGN and concluding that “[w]hile the sobriety testing literature provides circumstantial evidence of HGN’s validity when BAC is used as a criterion, the eye movement literature raises serious questions about its use as a roadside sobriety test”) with Marcelline Burns, [The Robustness of the Horizontal Gaze Nystagmus Test](#), National Highway Transportation Safety Administration (September 2007) (concluding that “HGN as used by law enforcement is a robust procedure” and finding “no basis for concluding that the validity of HGN is compromised by minor procedural variations”).

Indeed, Rule 702(a1)(1) was proposed by the Governor’s Task Force on Driving While Impaired, which opined that HGN testimony was “among the most effective sobriety tests” and would “enhance accurate assessment of DWI offenders,” but that “[b]ecause of *State v. Helms* (1998), most judges will not admit this testimony.”

The adoption of Rule 702(a1)(1) up-ended the Helms analysis by “obviating the need for the state to prove that the HGN testing method is sufficiently reliable.” See [State v. Smart](#), ___ N.C. App. ___, 674 S.E.2d 684 (2009). Under the current rule, an officer trained in administering the test may testify about the defendant’s performance without being qualified as an expert on the scientific principles underlying the HGN test or whether there is a causal connection between alcohol use and distinct and sustained nystagmus. Doubtless, experts will continue to debate the reliability of HGN, but their arguments in criminal cases now will be aimed at the finder of fact rather than the gatekeeper jurist.

A similar provision likewise proposed by the Governor’s Task Force on Driving While Impaired—Rule 702(a1)(2)—permits a certified Drug Recognition Expert (DRE) to testify regarding whether a person was under the influence of an impairing substance and the category of the substance. DREs are trained to administer a 12-step protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment. The DRE certification and evaluation process is described in detail [here](#).

There are no published appellate cases in North Carolina applying Rule 702(a1)(2) or defining the permissible scope of DRE testimony, though two unpublished cases reveal the sort of testimony the State may attempt to proffer through a DRE. In [State v. Wright](#), No. COA09-1062 (N.C. App. May 18, 2010) (unpublished op.), a DRE officer testified that the defendant was impaired by Ambien, a central nervous system depressant available only by prescription. The defendant did not object to this testimony at trial, but argued on appeal that the DRE’s opinion was improperly admitted because it was inconsistent with the results of the analysis of her blood, which revealed the presence of a central nervous system stimulant rather than a depressant, and because the officer was not qualified to testify about the effect of prescription drugs on the human body. The court held that the officer was properly tendered as an expert and the testimony was proper, but that even if the testimony was improper, it did not amount to plain error.

In [State v. Blinderman](#), COA08-824 (N.C. App. June 2, 2009) (unpublished op.), the defendant likewise failed to object at trial but argued on appeal that the trial court should have excluded testimony from a DRE regarding the effects of prescription drugs on the body as well as other confusing and erroneous testimony. Notwithstanding the erroneous nature of the testimony and the fact that the DRE never personally examined the defendant as required by DRE protocol, the court found no plain error.

Interestingly, the Supreme Court of Kentucky recently reversed a defendant's convictions for second-degree manslaughter and second-degree assault based on improper testimony from a DRE who did not observe the defendant but instead based his opinion solely on his review of ambulance report. See *Burton v. Kentucky*, 300 S.W.3d 126 (Ky. 2009). The Burton court held that the DRE's testimony "improperly invited the jury to speculate that Burton could have been under the influence of LSD, ecstasy, and methamphetamine—all illicit substances of which there was no evidence."

Because DRE testimony can be a critical to the state's case in prosecutions where a chemical analysis fails to detect an impairing substance or is inconclusive regarding the time of its ingestion, it seems likely that our appellate courts will be called upon in future cases to more clearly define what sorts of opinion testimony may accompany DRE testimony regarding a person's impairment.

As always, we'd love to hear from you regarding how these issues are playing out in the trial court trenches.

The \$600 Lab Fee

Monday, May 24, 2010

I've heard a few recurrent questions recently regarding the imposition upon a defendant's conviction of a \$600 fee for support of the State Bureau of Investigation or for law enforcement purposes of a local government unit that operates a crime laboratory.

First, is such a fee discretionary?

Second, does it apply if the SBI laboratory report is not introduced at trial?

Third, is there a fee that applies if the defendant fails to waive his confrontation rights and requires a laboratory analyst to testify at trial?

The answer to the first two questions is yes. The answer to question three is no.

The \$600 fee is really a court cost authorized by G.S. 7A-304(a)(7) and (8), which state that the district court judge "shall," upon conviction, order payment of \$600 in certain cases for the services of the SBI lab or a local government crime lab that performs equivalent work.

The fee applies when the laboratories have performed DNA analysis of the crime or tests of the defendant's bodily fluid for the presence of alcohol or a controlled substance as part of the investigation leading to the defendant's condition. Despite use of the mandatory "shall," the provisions go on to allow the court to "waive or reduce the amount of the payment upon a just cause to grant such a waiver or reduction."

With the exception of the amount of the fee – which increased from \$300 to \$600 for [offenses committed on or after September 1, 2009](#) – these statutory provisions have existed in their current form for several years. G.S. 7A-304(a)(7), which applies to SBI lab services, was enacted in [2002](#), and G.S. 7A-304(a)(8), the provision applicable to local crime labs, was enacted in [2005](#).

One reason why the fees may have been the focus of recent attention is the notion that they might not apply if a report of the laboratory analysis is not introduced in evidence at trial. The Supreme Court's June 2009 opinion in *Melendez-Diaz v. Massachusetts*, discussed in [this post](#), holding that that forensic laboratory reports are testimonial, rendering the affiants witnesses who are subject to the defendant's right of confrontation under the Sixth Amendment, requires that the State produce a live witness to testify about the analysis, rather than simply introducing an affidavit. As a result, in some cases in which a laboratory analysis is performed, the resulting report is not admitted at trial due to the analyst's absence from the proceeding. Some have questioned whether the \$600 fee may properly be imposed in such a case upon the defendant's conviction. Given that the statute requires only that the state demonstrate that the laboratory performed work as part of the investigation that led to the conviction, it is my view that the fee may properly be imposed in such a case, regardless of whether the analysis comprised part of the evidence at trial.

A related question is the third one posed at the outset of this post. As I've said, I don't think the applicability of the fee in G.S. 7A-304(a)(7), and (8) hinges on whether the lab report is introduced at trial. Likewise, the fee may be imposed regardless of whether the analyst is subpoenaed for trial. Finally, there is no separate fee triggered by the subpoenaing of the analyst; the fee is triggered by a laboratory analysis, not by testimony.

Thanks to my colleague Jim Drennan for his input regarding this post and to you folks for raising the questions. Are there other questions circulating regarding the imposition of this fee? If so, please pass them along.

2100 to 1

Wednesday, March 24, 2010

No, those aren't the odds that I'll finish first in the NCAA tournament pool that I'll neither confirm nor deny entering. Well, actually, they might be. I thought picking Texas to go to the finals might be a stroke of genius. Not so much.

Instead, 2100 to 1 is the average ratio that the concentration of alcohol in an individual's blood bears to that in the person's breath. In North Carolina, a person's alcohol concentration for purposes of an impaired driving offense may be stated either as grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. [G.S. 20-4.01\(1b\)](#). It is immaterial that this calculation is based only on an average blood to breath ratio and that it thus may overstate (in the case of an individual with a lower blood to breath ratio) or understate (in the case of an individual with a higher ratio) the person's blood alcohol concentration. See *State v. Cothran*, 120 N.C. App. 633, 635, 463 S.E.2d 423, 424 (1995). In *Cothran*, the defendant sought to introduce testimony from a chemist that the defendant's blood to breath ratio was 1722 to 1, resulting in a breath test result 18 percent higher than his alcohol concentration. The appellate court upheld the trial court's exclusion of this testimony, explaining that the legislature adopted a breath alcohol concentration per se offense as an alternative method of committing the offense of impaired driving. Thus, the relationship of a defendant's breath alcohol concentration to his or her blood alcohol concentration is irrelevant.

The legislature's endorsement of the breath testing standard unquestionably is based on its acceptance of the scientific validity of breath testing, which is designed to measure the concentration of alcohol in deep lung breath. [Michael Hlastala](#), a professor at the University of Washington, recently published [this article](#) questioning the accuracy of breath testing on the basis that alcohol's exchange with airway tissue makes it impossible for a person to deliver air containing deep lung alcohol concentration to his or her mouth. The article is new, but Hlastala developed the theory years ago. Both Arizona and Vermont have rejected challenges based on Hlastala's theory to breath test results. See *State v. Esser*, 70 P.3d 449 (Ariz. 2003); *State v. Wells*, 779 A.2d 680 (Vt. 2001). And though Hlastala states that exhaled alcohol concentration never reaches the level deep lung concentration (thereby resulting in a lower breath alcohol concentration reading than would be obtained from a sample of deep lung breath), he concludes that the interaction of alcohol with the airways results in a breath test that is fairer for some subjects than others. He reports that variations in breath alcohol concentration result from the volume of air delivered to the instrument as well as changes in breath patterns, noting variations that decrease breath alcohol concentration by as much as 11 percent (hyperventilation) and increase it by as much as 16 percent (a 30-second breath hold). He recommends reconsideration of current breath testing protocols to recognize the limitations of accuracy of breath testing and further proposes decreasing the importance of threshold levels for penalties. The latter proposal strikes me as a pretty far swing on the BAC pendulum and pretty unlikely to happen (though, as noted above, my wagering skills are suspect). As to the protocol suggestion, some, though not all, of Hlastala's concerns already are addressed by the requirement in [G.S. 20-139.1\(b3\)](#) that breath test results not differ by more than 0.02, and that only the lower of the two alcohol concentrations can be used to prove a particular alcohol concentration. In addition, North Carolina's [approval](#) only of certain breath testing instruments listed on the National Highway Traffic Safety Administration's [Conforming Products List](#) ensures that the devices have been evaluated for performance and accuracy. Moreover, approved instruments in North Carolina are subjected to further evaluation by the Forensic Tests for Alcohol Branch of the Department of Health and Human Services.

.08 at Any Relevant Time after the Driving

Monday, March 15, 2010

Every state and the District of Columbia prohibits driving with an alcohol concentration of 0.08 or more though state laws vary regarding whether to establish a violation of the per se impaired driving law an alcohol concentration of .08 or more must exist at the time of driving (see, for example, Ala Code § 32-5A-191; Ark . Code Ann. § 5-65-103; Cal. Veh. Code § 23152(b); Fla. Stat. § 316.193; Iowa Code § 321J.2; Ind. Code § 9-30-6-15; Va. Code Ann. § 18.2-266) or, instead, at the time of testing (see, for example, Ariz. Rev. St. Ann. § 28-1381; D.C. Code § 50-2201.05). Some of the states that base the per se offense on the time of driving presume, subject to rebuttal by the defendant, that a 0.08 result from a chemical test performed within a designated time period after the driving establishes that the person drove with an alcohol concentration of 0.08. Some states have a hybrid system, prohibiting driving with a 0.08 alcohol concentration at the time of driving or within a specified time period after driving (see, for example, Colo. Rev. Stat. § 42-4-1301; Ga. Code Ann. § 40-6-391).

These distinctions in the time of measurement can be significant given that a person's alcohol concentration, which depends upon the rate at which alcohol is absorbed into the bloodstream and at which it is eliminated from the body, changes over time. Alcohol absorption rates vary depending upon

many individual factors including [gender](#), whether a person has had [gastric bypass surgery](#), whether a person [consumes food](#) with alcohol, whether a person is a [heavy or light drinker](#), the [concentration of the alcohol](#) in the beverage, and even whether the beverage is [mixed with regular or diet soda](#). On an empty stomach, alcohol concentration [peaks about an hour after consumption](#), depending on the amount drunk. Alcohol is removed from the blood at a rate of about 15mg per 100ml per hour, though this rate likewise [varies](#).

In a state that measures its per se impaired driving violations based on a person's alcohol concentration at the time of driving, a defendant might successfully argue that he or she consumed a large quantity of an alcoholic beverage just before being stopped by police and that the alcohol had not been absorbed into his or her body at the time of the driving. Termed the "big gulp," or delayed absorption, defense, this argument gave rise to 2004 amendments to Alaska's impaired driving laws, which now provide that a person is guilty of impaired driving if a chemical test conducted within four hours of driving that detects an alcohol concentration of at least 0.08, regardless of the person's alcohol concentration at the time of driving. See *Valentine v. State*, 215 P.3d 319 (Alaska 2009).

North Carolina neither requires the state to prove a defendant's alcohol concentration at the time of driving nor sets a specific hourly limit in which a chemical analysis must be performed. Instead, [G.S. 20-138.1\(a\)\(2\)](#) provides that a person commits the offense of impaired driving by driving after having consumed sufficient alcohol that he or she has, ***at any relevant time after the driving***, an alcohol concentration of 0.08 or more. A relevant time after driving is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving." [G.S. 20-40.1\(33a\)](#). As the state supreme court explained in *State v. Rose*, 312 N.C. 441 (1984), "[a] person whose blood-alcohol concentration, as a result of alcohol consumed before or during driving, was at some time after driving 0.10 or greater must have had some amount of alcohol in his system at the time he drove. The legislature has decreed that this amount, whatever it might have been, is enough to constitute an offense." Thus, the big gulp defense is no defense at all to a charge of impaired driving based upon an alcohol concentration of 0.08 or more in North Carolina.

To prove impaired driving based upon a per se alcohol concentration, the state of course must demonstrate that at least 0.08 of the defendant's alcohol concentration was based on alcohol consumed before or during the driving, which can be a tricky matter when there is evidence that the defendant consumed alcohol after driving. In *State v. Ferrell*, 75 N.C. App. 156 (1985), the court rejected the defendant's argument that breath test results were inadmissible given defendant's admission that he drank several big swallows from a Jack Daniels bottle given to him by the person who picked him up after the accident where defendant also admitted that he had consumed three beers before the accident. The court, however, granted the defendant a new trial based on the prosecutor's improper questioning of the defendant regarding his failure to testify in district court as part of the State's effort to establish that the defendant fabricated his post-accident drinking after learning that it was a defense to the impaired driving charge. In a more recent case, [State v. Mumford](#), ___ N.C. App. ___ (No. COA 09-300, January 5, 2010), the court likewise held that the State's evidence was sufficient for a reasonable juror to conclude that defendant was impaired at the time of the incident where a breath test administered three hours after accident revealed a BAC of 0.09 and defendant admitted to drinking one 32-ounce beer, having a few swallows of another beer, and drinking a shot of liquor in the hours before the accident, despite the defendant's contention that his alcohol concentration resulted from his drinking of part of a beer after the accident.

Loyal readers, what do you think? Does North Carolina's relevant time after driving metric reflect legislative ingenuity or something less laudable?

State v. Fletcher and Warrantless Blood Draws

Wednesday, January 20, 2010

I've blogged [before](#) about [G.S. 20-139.1\(d1\)](#). When a DWI arrestee refuses to submit to a test for alcohol, that section allows "any law enforcement officer with probable cause" to "compel the [arrestee, without a search warrant] to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order . . . would result in the dissipation" of alcohol in the arrestee's system."

I argued in my prior post that in a routine refusal case, an officer should get a search warrant rather than rely on G.S. 20-139.1(d1), which should be used only when circumstances suggest that obtaining a warrant would be unusually time-consuming. Yesterday, the court of appeals decided [State v. Fletcher](#), which confirms my basic point, but also suggests that the courts are willing to allow warrantless blood draws under circumstances that really aren't *that* unusual.

The defendant in *Fletcher* stopped at a checkpoint and exhibited several signs of impairment. He was arrested and taken to an Intoximeter. Compressing the facts a bit, he refused to provide a sample, and the arresting officer took him to the emergency room for a warrantless blood draw, the results of which confirmed his impairment. He moved to suppress the results, arguing that there was nothing unusual about the case that justified a warrantless blood draw, but the trial court denied his motion and the court of appeals affirmed.

The appellate court noted that G.S. 20-139.1(b1) is essentially a statutory codification of the exigent circumstances exception to the search warrant requirement, as applied in the context of blood draws. And it found sufficient exigency in the following facts: (1) the magistrate's office was 12 miles away; (2) it was often very busy on weekend evenings, meaning that a search warrant application might not be considered immediately; (3) and the emergency room was likewise often very busy on weekend evenings. The officer estimated the total delay associated with going to the magistrate's office, procuring a warrant, and executing it to be two to three hours. It looks like the trial prosecutor did an excellent job of presenting evidence supporting each aspect of the delay.

Two things stand out about *Fletcher*. First, the facts here are not extremely unusual. At least for officers who regularly use Intoximeters that aren't adjacent to a magistrate's office, all three of the factors present in *Fletcher* will often be present. So although obtaining a warrant when possible remains advisable, it appears that the court has adopted an expansive view of exigent circumstances in this context. Second, the court specifically rejected the idea that the admissibility of retrograde extrapolation testimony undercuts the exigency, an argument I considered in my earlier post. All in all, it's an important case, and one that most officers will like.

IMPAIRED DRIVING AND RELATED OFFENSES

I. Impaired Driving

Statute **§20-138.1. Impaired driving.**

(a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

(b) Defense Precluded.—The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) Defense Allowed.—Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

(c) Pleading.—In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.

(d) Sentencing Hearing and Punishment.—Impaired driving as defined in this section is a misdemeanor. Upon conviction of a defendant of impaired driving, the presiding judge shall hold a sentencing hearing and impose punishment in accordance with G.S. 20-179.

(e) Exception.—Notwithstanding the definition of "vehicle" pursuant to G.S. 20-4.01(49), for purposes of this section the word "vehicle" does not include a horse.

Elements

A person guilty of this offense

- (1) drives
- (2) a vehicle
- (3) on a street, highway, or public vehicular area
- (4) (a) while under the influence of an impairing substance or
- (b) after consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after the driving or
- (c) with any amount of a Schedule I controlled substance or its metabolites in his or her blood or urine.

Punishment

This offense is a misdemeanor [G.S. 20-138.1(d)] to which the structured sentencing laws do not apply. It has five different levels of punishment; the level depends on the presence of and weight assigned to certain specified aggravating and mitigating factors found by the court. Punishment for each level, set forth in G.S. 20-179, is as follows:

Level One: Minimum imprisonment of 30 days, maximum imprisonment of 2 years, and a maximum fine of \$4,000 [G.S. 20-179(g)]. The term of imprisonment may be suspended in specified circumstances [G.S. 20-179(g)].

Level Two: Minimum imprisonment of 7 days, maximum imprisonment of 1 year, and a maximum fine of \$2,000 [G.S. 20-179(h)]. The term of imprisonment may be suspended in specified circumstances [G.S. 20-179(h)].

Level Three: Minimum imprisonment of 72 hours, maximum imprisonment of 6 months, and a maximum fine of \$1,000 [G.S. 20-179(i)]. The original sentence may be suspended on the condition that the defendant meet at least one of these conditions: at least 72 hours of community service or imprisonment for at least 72 hours [G.S. 20-179(i)].

Level Four: Minimum imprisonment of 48 hours, maximum imprisonment of 120 days, and a maximum fine of \$500. The original sentence may be suspended on the condition that the defendant meet at least one of these conditions: at least 48 hours of community service or imprisonment for 48 hours [G.S. 20-179(j)].

Level Five: Minimum imprisonment of 24 hours, maximum imprisonment of 60 days, and a maximum fine of \$200. The original sentence may be suspended on the condition that the defendant meet at least one of these conditions: at least 24 hours of community service or imprisonment for 24 hours [G.S. 20-179(k)].

For each of the above levels of punishment, special probation may be imposed in which a person serves a term of imprisonment equal to that level's minimum imprisonment period. Also, under G.S. 20-179(k1), inpatient treatment may substitute for jail time if the treatment occurred after the commission of the offense for which the defendant is being sentenced. If a defendant is placed on probation in any of the levels, the sentencing judge must impose a requirement that the defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 for license restoration [G.S. 20-179(g)-(k)].

In 2006 the General Assembly amended G.S. 20-179 (S.L. 2006-253, sec. 23) to conform the statute to the requirements of the United States Supreme Court's decision in *Blakely v. Washington* (542 U.S. 296). The new law requires, among other things, notice and a jury trial on certain aggravating factors that determine the sentencing level under G.S. 20-179. For more information about *Blakely*, see Chapter 4, "Punishment under Structured Sentencing."

Notes

Institute of Government publication on impaired driving. For an extensive discussion of this offense and other impaired driving offenses, see Ben F. Loeb Jr. and James C. Drennan, *Motor Vehicle Law and the Law of Impaired Driving in North Carolina* (UNC Institute of Government, 2000 ed.), pp. 77-152.

Element (1). See the note on Element (1) under "I. Driving While License Revoked."

Element (2). G.S. 20-4.01(49) defines "vehicle" as "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks." However, bicycles are considered to be vehicles [G.S. 20-4.01(49)]. Certain devices used as transportation by a person with a mobility impairment are excluded [G.S. 20-4.01(49)]. Mopeds are vehicles but not motor vehicles [G.S. 20-4.01(21a), (23), and (27d1)]. Horses are not vehicles for purposes of the impaired driving offense only [G.S. 20-138.1(e)].

A motorized scooter having two wheels approximately 6 to 8 inches in diameter arranged in tandem is a vehicle for purposes of the impaired driving law (175 N.C. App. 119).

Element (3). See the note on Element (3) under "I. Driving While License Revoked." G.S. 20-4.01(32) defines "public vehicular area" as any area within the state that falls in one or more of the following four categories. The first category includes areas used by the public for vehicular traffic at any time [G.S. 20-4.01(32)(a)]. Examples include a drive, driveway, road, roadway, street, alley, or parking lot on the grounds of (1) any public or private hospital, college, university, school, orphanage, church, or any institution, park or other facility maintained and supported by

the state or its subdivisions; (2) any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed; or (3) property owned by the United States and subject to the state's jurisdiction [G.S. 20-4.01(32)(a)]. The second category includes beach areas used by the public for vehicular traffic [G.S. 20-4.01(32)(b)]. The third category of included property is a road used by vehicular traffic within or leading to a subdivision, whether or not the subdivision roads have been offered for dedication to the public [G.S. 20-4.01(32)(c)]. The fourth category of included property is any portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4 [G.S. 20-4.01(32)(d)].

A privately owned mobile home park in which the streets are marked and open for the use of residents and visitors is a public vehicular area (117 N.C. App. 457). A private nightclub's parking lot was a public vehicular area because the lot could generally be used as a thoroughfare by the general public to access the club or an adjacent motel (343 N.C. 61).

Element (4) generally. Elements (4)(a) through (c) are alternate ways of establishing impairment; put another way, all that is required for conviction is proof of either Element (4)(a), (4)(b), or (4)(c).

Element (4)(a). G.S. 20-4.01(14a) defines "impairing substance" as including "[a]lcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." G.S. 20-4.01(48b) defines "under the influence of an impairing substance" to mean "[t]he state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance."

There was sufficient evidence to support an impaired driving conviction when the defendant's alcohol concentration was 0.07, she admitted consuming alcohol before driving, an open half-filled bottle of vodka was found in the passenger area of her vehicle, an officer smelled alcohol when he approached her vehicle, and an officer testified that he thought the defendant's faculties were appreciably impaired (174 N.C. App. 790). There was also sufficient evidence when the defendant was driving faster than 60 miles per hour and his vehicle had no motor vehicle tags, he did not immediately stop for the officer, and when he did stop, he blocked an intersection; upon stopping, the defendant started toward the officer's vehicle; the officer smelled a strong odor of alcohol and observed an open container of beer in the vehicle; and the defendant's coat appeared to be wet from beer waste, his speech was slurred, and he refused to take the Alco-Sensor test and Intoxilyzer test (356 N.C. 591). Finally, there was sufficient evidence to support a conviction when the responding officer testified that, in his opinion, the defendant was impaired; the officer smelled a strong odor of alcohol about the defendant, the defendant drove across the centerline, was sleepy, and had difficulty walking and speaking clearly; and the defendant refused to take the Intoxilyzer test (164 N.C. App. 665).

Element (4)(b). "Alcohol" is "any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol" [G.S. 20-4.01(1a)]. "Alcohol concentration" is "[t]he concentration of alcohol in a person, expressed either as grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath" [G.S. 20-4.01(1b)]. G.S. 20-4.01(33a) defines "relevant time after the driving" as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving."

The practical effect of these definitions is that the State proves this element if it shows that the defendant had an alcohol concentration of 0.08 or more when the chemical analysis was made, as long as the alcohol was in the defendant's body when the driving stopped. The alcohol concentration at the time of the driving is not relevant for this element.

Even if a defendant's blood alcohol concentration at a relevant time after driving is less than 0.08, the defendant may still be convicted of impaired driving under Element (4)(a), an alternative way to establish impairment. For example, when a law enforcement officer's testimony includes observations supporting a finding of impairment, such as the quality of the defendant's driving, the odor of alcohol about the defendant's person, and the defendant's poor performance on sobriety tests, a defendant may still be convicted of this offense [74 N.C. App. 479; 104 N.C. App. 529; see also the note on Element (4)(a) above].

The results of a chemical analysis are sufficient evidence to prove a person's alcohol concentration [G.S. 20-138.1(a)(2)].

Element (4)(c). For a list of Schedule I controlled substances, see G.S. 90-89, reproduced under "Sale or Delivery of a Controlled Substance" in Chapter 27, "Drug Offenses."

Pretrial license revocation or license seizure does not bar prosecution. Neither imposition of a 30-day pretrial license revocation under G.S. 20-16.5 (145 N.C. App. 324) nor seizure of the defendant's out-of-state driver's license in conjunction with a pretrial revocation (171 N.C. App. 81) constitutes punishment under the Double Jeopardy Clause and thus neither bars a later prosecution for impaired driving.

License revocations. A person convicted of this offense will have his or her license revoked for at least one year [G.S. 20-17(2) and 20-19(c1)]. For most first offenders who submit to a substance abuse assessment, a judge may issue a limited driving privilege (G.S. 20-179.3). However, a limited driving privilege may not authorize a person to drive a commercial vehicle.

Defenses. The fact that a person is legally entitled to use alcohol or a drug is not a defense [G.S. 20-138.1(b)].

Forfeiture of motor vehicle. A motor vehicle is subject to forfeiture if it is driven by a person who is committing the offense of impaired driving or habitual impaired driving and the person's license was revoked as a result of a prior impaired driver's license revocation. See G.S. 20-28.2 through 20-28.9 and Ben F. Loeb Jr. and James C. Drennan, *Motor Vehicle Law and the Law of Impaired Driving in North Carolina* (UNC Institute of Government, 2000 ed.), pp. 137-49.

Prayer for judgment continued is not authorized sentence. A judge is not authorized to enter a prayer for judgment continued (PJC) for the offense of impaired driving; the judge must enter a sentence pursuant to G.S. 20-179 (348 N.C. 677).

Aiders and abettors. Aiders and abettors to impaired driving are punished at Level Five [G.S. 20-179(f1); see "Punishment," above, for a description of Level Five punishment].

Limit on consolidation of judgments. Impaired driving convictions may not be consolidated with each other for judgment [G.S. 20-179(f2)].

Reckless driving not a lesser-included offense. Reckless driving is not a lesser-included offense of impaired driving (351 N.C. 601).

CHAPTER 28

MOTOR VEHICLE OFFENSES

(PAGE 625)

DRIVING WHILE LICENSE REVOKED OR DISQUALIFIED (PAGE 627)

I. Driving While License Revoked (page 629)

Notes (page 629)

Element (4) (page 630). In a case in which the 2006 amendments to G.S. 20-48 did not apply, adequate proof of notice was made when the State introduced a signed certificate of a Division of Motor Vehicles employee; the certificate stated that the employee deposited notice of the suspension in the mail in a postage-paid envelope addressed to the defendant's address on record with the division (184 N.C. App. 140). The State's evidence that it sent numerous notices to the defendant created a "prima facie presumption of receipt," even though those letters were not sent to the defendant's address shown on Division of Motor Vehicles records; since the defendant presented no evidence, the presumption was not rebutted (___ N.C. App. ___, 656 S.E.2d 322).

IMPAIRED DRIVING AND RELATED OFFENSES (PAGE 634)

I. Impaired Driving (page 634)

Punishment (page 634). Legislation enacted in 2007 added new subsection (h1) to G.S. 20-179. Effective December 1, 2007, the new subsection provides that for Level One and Two punishments, a judge may impose, as a probation condition, that the defendant abstain from alcohol consumption for a minimum of 30 days to a maximum of 60 days, as verified by a continuous alcohol monitoring system (S.L. 2007-165).

Notes (page 635)

Element (1) (page 635). The evidence was sufficient to establish that the defendant was driving the vehicle when there was blood on the driver's side airbag and blood on the defendant but no blood on the passenger side; the

driver's seat was pushed too far back for the only other person involved to drive; and the other person suffered from a fabric burn that was consistent with a passenger-side seatbelt injury (___ N.C. App. ___, 655 S.E.2d 426).

Element (3) (page 635). Legislation enacted in 2007 amended the definition of "public vehicular area" in G.S. 20-4.01(32) (S.L. 2007-455). The amendment, which is effective December 1, 2007, pertains to the third category of areas discussed in the note. Thus the second to last sentence of the first paragraph of this note should be deleted and replaced with the following: The third category of included property is a road used by vehicular traffic within or leading to a gated or nongated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public [G.S. 20-4.01(32)(c)].

Pretrial license revocation or license seizure does not bar prosecution (page 637). For another case holding that a license revocation does not bar an impaired driving prosecution, see ___ N.C. App. ___, 666 S.E.2d 199).

Element (4)(a) (page 636). The evidence was sufficient when the defendant drank at a party, drove 92 m.p.h. in a 45 m.p.h. zone, ran off the road, and an officer testified that the defendant's eyes were red and glassy and that he had trouble maintaining his balance when walking (___ N.C. App. ___, 658 S.E.2d 73).

V. Habitual Impaired Driving (page 643)

Notes (page 643)

Constitutionality (new note). The habitual impaired driving statute does not violate double jeopardy, even when prior convictions used to support one habitual impaired driving conviction later are used to support a second such conviction (146 N.C. App. 381; 187 N.C. App. 190). *Blakely v. Washington* does not change this holding (181 N.C. App. 557).

VI. Driving by a Person under 21 Years of Age after Consuming Alcohol or Drugs (page 644)

Punishment (page 645). The conflict as to punishment discussed in this note was resolved by 2007 legislation, and it is now clear that the punishment for this offense is as provided in G.S. 20-138.3 (S.L. 2007-493, sec. 20).

Related Offenses Not in This Chapter (page 646)

Delete the first offense listed and replace it with the following:
Selling alcohol to underage person [G.S. 18B-302(a)]
Giving alcohol to underage person [G.S. 18B-302(a1)]
Purchase, Possession, or Consumption of Alcohol by Underage Person [G.S. 18B-302(b)]