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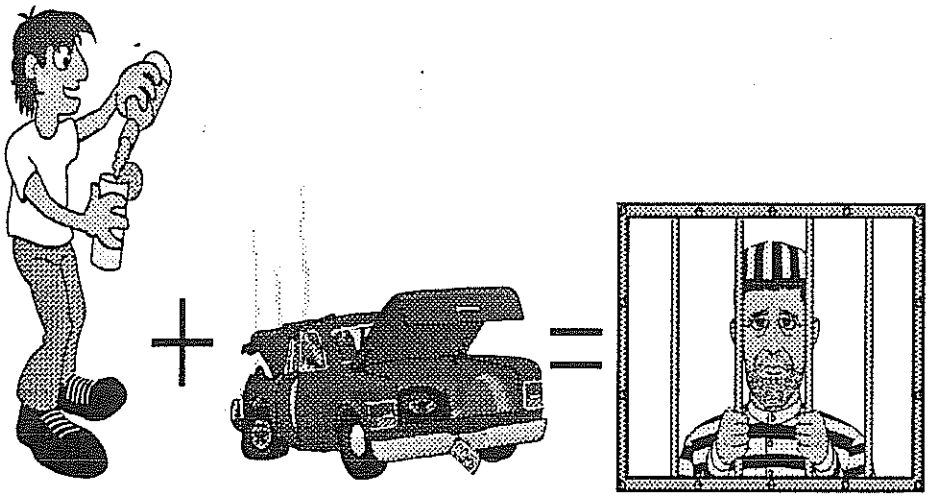

Driving While Impaired Update

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SIGNIFICANT DWI CASES - 1995

A. CONSTITUTIONAL CHALLENGES

State v. Rose, 312 N.C. 441 (1984)

There is no constitutional right to drink and drive. The *per se* provision of N.C.G.S. 20-138.1(a)(2) is constitutional. The term "any relevant time after the driving" is not unconstitutionally vague.

State v. Shuping, 312 N.C. 421 (1984)

The Safe Roads Act created one substantive offense (DWI) but provided two theories of proof--*per se* and impairment. A reading of 0.10 constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI (when *per se* was 0.10).

State v. Howren, 312 N.C. 454 (1984)

No constitutional right to refuse to submit to chemical analysis or have an attorney present prior to submitting to chemical analysis. [It is constitutional for the burden to be on the defendant, as an affirmative defense, to establish the Breathalyzer was not properly maintained.]

State v. Coker, 312 N.C. 432 (1984)

The State is not required to elect between N.C.G.S. 20-138.1(a)(1) and (2). The standard citation is both constitutionally and statutorily sufficient.

State v. Smith, 312 N.C. 361 (1984)

Affidavit provisions of N.C.G.S. 20-139.1(e1) are constitutional.

Henry v. Edmisten and Barbee v. Edmisten, 315 N.C. 474 (1985)

The mandatory ten-day license revocation under N.C.G.S. 20-16.5 is constitutional because of the State's compelling interest in highway safety. Revocation is not added punishment for a criminal act but a finding that a driver is no longer fit to hold and enjoy the driving privilege which the State has granted under its police power.

B. DEFINITIONS

1. Alcohol Concentration - G.S. 20-4.01(0.2)

State v. Jones, 76 N.C. App. 160 (1985)

Officer does not have to testify the 0.11 reading was grams per 100 milliliters of blood or 210 liters of breath for the results to be admissible. The judge defined alcohol concentration in the jury instructions which was sufficient.

State v. Midgett, 78 N.C. App. 387 (1985)

Police officer who was a chemical analyst may testify that results of Intoxilyzer were grams of alcohol per 210 liters of breath as well as 100 milliliters of blood.

2. Driver or Operator - G.S. 20-4.01(7) & (25)

State v. Coker, 312 N.C. 432 (1984)

The words "drive" and "operate" were intended by the Legislature to be synonymous.

State v. Fields, 77 N.C. App. 404 (1985)

Defendant seated in a car on the highway behind the wheel with the engine running. The defendant was charged with DWI and the breath test results were 0.14. The defendant contended the DWI charge should be dismissed because he was not in actual physical control as the vehicle was not in motion. "[O]ne 'drives' . . . if he is in actual physical control of a vehicle which is in motion or has the motor running."

State v. Dula, 77 N.C. App. 473 (1985)

Car lying on its top with the lights on and dust in the air. There were tire marks leading from the road to where the car came to rest. The defendant was the only person in the car. The doors were jammed and windows rolled up. The evidence was clearly sufficient to show defendant was driver.

State v. Mack, 81 N.C. App. 578 (1986)

Defendant asleep in a car which was against a chain link fence with the headlights on, key in the ignition, and the hood still warm. The defendant was aroused after several minutes and had a strong odor of alcohol on his breath. An

empty bottle of liquor was on the front floorboard. The defendant's alcohol concentration was 0.16. The evidence was sufficient to sustain a conviction for DWI.

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

A car was upside down on the road with a person leaving the car. The defendant returned to the car and stated he was driving. A Breathalyzer test given three hours after the accident resulted in a 0.14 reading. The evidence was sufficient to sustain a conviction when taking the physical evidence together with the defendant's corroborative confession.

State v. Mabe, 85 N.C. App. 500 (1987)

Actual physical control found where: defendant was seated behind the wheel with engine running, and when aroused, turned off engine.

State v. Clark, 73 N.C. App. 277 (1985)

Vehicle in ditch with defendant behind wheel; witness had 30 minutes earlier seen an automobile go into ditch with only one person in car; was sufficient to show defendant as driver.

State v. Vance, 98 N.C. App. 105 (1990)

Sufficient evidence that defendant had been driving found when defendant was seen driving 15 minutes before accident; passenger side of vehicle had most damage and passenger was killed.

3. <u>Public Vehicular Area (PVA)</u> -- G.S. 20-4.01(32)

State v. Carawan, 80 N.C. App. 151 (1986)

The grassy area of a park which was usually off limits to cars but was used as a parking area for a special event, is a public vehicular area under N.C.G.S. 20-4.01(32) during the special event.

State v. Mabe, 85 N.C. App. 500 (1987)

A handicap ramp leading from the parking lot to a motel is a public vehicular area because it is part of the parking lot and is generally open and used by the public. The court compared the ramp to sidewalks, which are considered a part of the street set apart for the use of pedestrians.

State v. Snyder, ___ N.C. App. ___, 455 S.E.2d 914, *pet. for disc. review pending*

The parking lot at a bar (private club) may or may not be a PVA; must so charge the jury on this issue.

State v. Bowen, 67 N.C. App. 512 (1984)

Parking lot at condominium, issue of fact if PVA.

State v. Turner, 117 N.C. App. 457 (1994)

Street leading into mobile home park, never dedicated to public use, is a PVA.

C. STOP/ARREST

1. Reasonable Suspicion

State v. Adkerson, 90 N.C. App. 333 (1988)

Headlights darting back and forth; officer follows car for 1/4 mile; vehicle weaving in its lane five or six times and ran off side of road once; sufficient for reasonable suspicion; glassy eyes, moderate odor of alcohol; sufficient for probable cause.

State v. Badgett, 82 N.C.App. 270 (1986)

Officer who knew defendant has a limited driving privilege was justified in approaching defendant and asking to see his limited driving privilege. Once the officer smelled the odor of alcohol on the defendant he was justified in arresting him for driving while license revoked.

State v. Jones, 96 N.C. App. 389 (1989)

Operating 20 m.p.h. **below** posted speed limit on Interstate and weaving within his lane amounts to reasonable suspicion.

State v. O'Rourke, 114 N.C. 435 (1994)

When Trooper saw defendant weaving in his lane of travel five to seven times over a distance of one to three miles, it amounted to reasonable suspicion

State v. Watkins, 337 N.C. 437 (1994)

Anonymous report of suspicious vehicle behind building; at 3:00 a.m. saw vehicle leave area behind building; "continually weaving within lane" but "never crossed center line or go off the road". Held this was reasonable suspicion. (Note: Court of appeals opinion which did not find reasonable suspicion for weaving within a lane was reversed.)

Rock v. Hiatt, 103 N.C App. 578 (1991)

Defendant drove fast out of parking lot at Sheraton Inn in New Bern. Car hit a dip and bounced hard as made wide right turn. Trooper stopped car, driver had strong odor of alcohol, eyes glass and unable to walk without swaying. This amounted to "reasonable grounds" to request implied consent test. "Reasonable grounds" and "probable cause" are treated the same.

State v. White, 311 N.C. 238 (1984)

Officer saw defendant in car and he appeared drunk. Officer followed and defendant initially refused to stop for blue light; stop was valid.

State v. Hudson, 103 N.C. App. 708 (1991)

Illegible 30-day temporary tag justifies stop.

State v. Battle, 109 N.C. 367 (1993)

Disturbance at washerette; officer saw defendant in parked car; defendant had odor of alcohol and performed poorly on physical tests. Officer told defendant not to drive and left. First officer radioed second officer to be on lookout for defendant's vehicle. Second officer saw defendant's vehicle, followed it for a few blocks and observed no bad driving. Second officer stopped car and arrested defendant. Stop was valid--collective knowledge.

2. Roadblock

State v. Johnston, 115 N.C. App. 711 (1994)

Defendant turned into parking lot 200 yards from checking station and did not get out of his car; officer approached and asked for drivers license, and defendant could not produce one; subsequent arrest lawful.

State v. Sanders, 112 N.C. App. 476 (1993)

Highway Patrol Policy of drivers license checking stations is constitutional.

State v. Fenner, 51 N.C. App. 156 (1981)

Defendant's obvious attempt to avoid roadblock is some evidence of impairment.

3. Arrest

State v. White, 84 N.C. App. 111 (1987), *rev. den.* 319 N.C. 409

Security guard saw defendant drive into private lot; officer has probable cause to believe will drive again and will be a danger; officer can arrest for misdemeanor outside presence.

State v. Hudson, 103 N.C. 708 (1991)

If driver fails to produce drivers license, officer can ask driver to step from vehicle.

State v. Golden, 96 N.C. App. 249 (1989)

Arrest by security guard on I-40, citizens detention.

D. CONFESSION

1. Non-Custodial Interrogation

State v. Seagle, 96 N.C. App. 318 (1989)

Car found in ditch; defendant spotted near scene by another officer; talked with them and second officer arrived; defendant admitted driving; *Miranda* not required, because not in custody.

State v. Beasley, 104 N.C. app. 529 (1991)

Asked to sit in car after routine traffic stop non-custodial interrogation; *Miranda* not required.

State v. Washington, 330 N.C. 188 (1991)

Defendant placed in back seat of patrol car while officer searches. Officer returns and questions; more than routine traffic stop. Statement is inadmissible.

State v. Harrell, 96 N.C. App. 426 (1989)

Officer overheard defendant tell person on telephone that he was driving car involved in a collision. Statement admissible.

2. Routine Booking Questions

State v. Mack, 81 N.C. App. 578 (1986)

While asking routine booking questions to impaired driver, he responded: "All I did was fall asleep and ran over there to the fence." Admissible.

3. Waiver

State v. George, 77 N.C.App. 580 (1985)

Defendant contends his statement to police was involuntary because he was too impaired to make an intelligent and voluntary waiver. In this case, defendant claimed to have taken 72 sleeping pills, but there was no evidence he was unconscious of his words.

State v. Hillard, 81 N.C. App. 104 (1986)

Defendant in hospital with head and chest injuries and fractured hip; knowingly waived rights.

4. Public Safety Exceptions

State v. Garcia-Lorenzo, 110 N.C. app. 319 (1993)

Public safety exception to *Miranda*; after collision, defendant asked if alone in car and said "yes"; used to prove defendant was driver.

5. Re-Initiate Questioning

State v. Crawford, 83 N.C. App. 135, *rev. den.* 319 N.C. 106 (1986)

Defendant arrested for DWI and informed of *Miranda* rights; prior to asking questions on AIR; defendant invoked right to remain silent; defendant later began talking to Trooper; after defendant was asked to take Breathalyzer, he refused; Trooper asked why he refused, and defendant said, "I am under the influence of Valium, Demerol, and Percodan for pain." Statement is admissible.

6. Volunteered Statements

State v. Wike, 85 N.C. App. 516 (1987)

Defendant took first test and said, "This g.. d... machine is not right. There's something wrong with this G.D. machine, and I'm, I'm not taking that test" is admissible.

E. CHEMICAL ANALYSIS PROCEDURES

1. Pre-Arrest Test

State v. McGill, 114 N.C. App. 479 (1994)

A person stopped for investigation of DWI has a right to a prearrest test, but the arresting officer has no duty to inform the defendant of this right.

2. Number of Officers

Nicholson v. Killens, 116 N.C. App. 473 (1994), *rev. den.* ___ N.C. ___ (1995)

Two officers required when defendant refuses the chemical analysis, only one officer required if defendant takes test. [The result of this case changed June 5, 1995, by passage of HB 134, 1995 Session Laws, c. 163.]

3. Rights

In re Vallender, 81 N.C.App. 291 (1986)

The 30-minute time limit to contact an attorney and select a witness to view the testing procedure under N.C.G.S. 20-16.2(a)(6) begins when the defendant is advised of his chemical analysis rights under N.C.G.S. 20-16.2(a).

State v. Myers, 455 S.E.2d 492, *rev. den.* ___ N.C. (1995)

Officer's comment to wife of defendant in parking lot that it might not be a good idea that she come into the Intoxilyzer room since she had been drinking violated defendant's right to have a witness to view Intoxilyzer test when no evidence wife would be disruptive.

State v. Bumgardner, 97 N.C. App. 567 (1990)

Officer not required to transport defendant to hospital, only required to provide telephone.

State v. Jones, 106 N.C. App. 214 (1992)

No constitutional requirement to preserve breath sample.

4. Sequential Tests

Talbert v. Hiatt, 95 N.C. App. 380 (1989)

Charging officer's original request that defendant submit to a chemical analysis was sufficient to comply with the provisions of N.C.G.S. 20-16.2(c). No statutory requirement for charging officer to make additional requests before a second sample of breach is obtained.

> The Legislature did not intend to prescribe such precise terminology or to impose 'such a rigid sequence of events as contended by' plaintiff. Such contrived precision is unnecessary for the protection of suspects and is clearly detrimental to the effective enforcement of drunk driving laws." at 383.

State v. White, 84 N.C.App. 111 (1987), *rev. den.* 319 N.C. 409

Defendant's first chemical analysis test result was 0.20. The defendant "puffed" and a reading was not obtained. Defendant was told to submit again and the reading was 0.19. The 0.19 was admissible; the "puff" was not a sample of breath.

State v. White, 84 N.C.App. 111 (1987), *rev. den.* 319 N.C. 409

Body temperature, exercise, humidity and barometric pressure may affect Breathalyzer results. Sequential tests is one way to minimize the effect of these factors.

State v. Lockwood, 78 N.C.App. 205 (1985)

A specific time limit between the first and second test is not required. In this case, the operational procedure requires the reappearance of the words "blow sample" before the second test is given using a Model 2000 Breathalyzer.

5. Time for Administering Test

State v. George, 77 N.C.App. 470(1985)

Three-hour delay between drinking and test goes to weight, not admissibility.

6. Qualifications of Operator

State v. Franks, 87 N.C. App. 265 (1987)

Testimony that operator possessed a "certificate" to operate Breathalyzer insufficient; must include certificate issued by DEHNR and that it was current at the time of the test.

7. Extrapolation

State v. Catoe, 78 N.C. App. 167 (1985)

Can show 0.08 at time of the driving even if chemical analysis results are less than 0.08 at time of the test. Blood test of 0.09, expert said was 0.13 at time of driving two and 1/2 hours earlier. (*Per se* limit was 0.10 when case tried.)

8. Drink After Driving

State v. Ferrell, 75 N.C. App. 156 (1985)

Drinking after driving goes to weight of chemical analysis results--not admissibility.

9. Blood Tests

State v. Drdak, 330 N.C. 587 (1992)

Hospital Records Admissible. Procedure: Subpoena records; have judge declare interest of justice required disclosure despite physician-patient privilege.

State v. Bailey, 76 N.C.App. 610 (1985)

Blood sample taken by medical laboratory technologist. Trooper received sample of blood after obtaining court order. Blood sample remained in Trooper's refrigerator for two weeks then sent to SBI for analysis. The State is required to show compliance with G.S. 20-139.1. Any flaw in procedure or weak spots in the chain of custody relates to the weight to be given the evidence not its admissibility.

State v. Hollingsworth, 77 N.C. App. 36 (1985)

The officer had reasonable grounds to suspect the defendant was drinking before the accident. It was permissible to take a blood sample from the unconscious defendant without advising him of his rights under G.S. 20-16.2.

State v. Garcia-Lorenzo, 110 N.C. App. 319 (1993)

Defendant was conscious and sedated by doctor before officer arrived; could take blood from unconscious person and results admissible.

State v. Gunter, 111 N.C. App. 621 (1993), *rev. den.* ___ N.C. ___

Defendant tried after presentment and indictment; contends not charged the night blood was withdrawn; results admissible.

State v. Miller, 80 N.C.App. 425 (1986)

The results of the hospital blood tests are admissible in evidence if they fall within the business records exception to the hearsay Rule 803(6). The attending doctor and nurse testified that the record was part of routine emergency room procedures. The business record was the attending physician's admission notes. Neither the original laboratory report nor a copy was presented at trial.

[**Beware**: The hospital blood test may be a different procedure than the SBI test. The hospital may use serum rather than whole blood which means the results from the hospital will be approximately 10% higher than if the SBI had performed the analysis. Expert testimony may be necessary to convert the serum test results to whole blood test results. See 10 N.C.A.C. 7B.0212 (reporting blood test results.]

State v. Watts, 72 N.C.App. 661, 325 S.E.2d 505 (1985)

A blood technician at a hospital is a qualified person to draw blood under G.S. 20-139.1(c)

10. Refusal

Talbert v. Hiatt, 95 N.C. App. 380 (1989)

Refused to take dollar bill out of mouth; willful refusal.

Watson v. Hiatt, Comm. of Motor Vehicles, 78 N.C.App. 609 (1985)

Refusal to give third sample is a willful refusal.

McDaniel v. DMV, 96 N.C. App. 495 (1989)

When asked to take chemical analysis, petitioner refused and did not say was waiting on witness. Agreed to take later when witness arrived; was still willful refusal.

State v. O'Rourke, 114 N.C. App. 435 (1994)

Refusal is admissible in DWI trial even if DMV subsequently rescinded the revocation and found no willful refusal; no collateral estoppel.

State v. Barber, 93 N.C. App. 42 (1989), *rev. den.* 328 N.C. 334

Operator was qualified to administer test; defendant pretended to blow; sufficient to show refusal.

F. STATE v. KNOLL

State v. Knoll, 322 N.C. 535 (1988)

Defendant must have bond set and if conditions met, released unless magistrate finds he is a danger to self or others and no sober, responsible adult arrives.

State v. Gilbert, 85 N.C.App. 594 (1987)

The trial court improperly dismissed a DWI because the magistrate failed to comply with N.C.G.S. 15A-511 and 15A-534.2. The defendant suffered no irreparable prejudice to the preparation of his case. There is no indication that the defendant requested or was denied access to anyone during his incarceration after arrest.

State v. Eliason, 100 N.C. App. 313 (1990)

DWI will not be dismissed merely because the magistrate sets a secured bond and defendant cannot post bond.

State v. Ham, 105 N.C. App. 658 (1992)

Conditions of release were $300 bond secured, or $100 if sober, responsible adult appeared, or $100 at 9:00 a.m.; defendant failed to tell friend who had $100 that could appear now with $100, so came at 9:00 a.m. No violation of rights.

State v. Ferguson, 90 N.C. App. 513, *rev. den.* 323 N.C. 367 (1988)

Wife appeared as witness for Breathalyzer; unclear whether test was over; not allowed to see husband for 1 1/2 hours; remanded to determine if this occurred. If so, DWI to be dismissed.

State v. Bumgardner, 97 N.C. App. 567 (1990)

Magistrate's order that defendant not to be released until 11:00 p.m. unless sober, responsible adult appeared was a lawful order.

G. PRETRIAL ISSUES

1. Jurisdiction

State v. Gwyn, 103 N.C. App. 369 (1991)

Officer saw defendant driving in North Carolina, may have arrested in Virginia; not an unconstitutional arrest, and violation of statute was not substantial.

2. Motion to Recuse

State v. Kennedy, 110 N.C. App. 302 (1993)

Fact that wife of judge had been seriously injured by a drunk driver is not grounds for recusal of judge.

3. Motion to Remand

State v. Huntley, 105 N.C. App. 709 (1992), *rev. den.* 331 N.C. 555

Cannot file a motion for appropriate relief in district court after motion to remand granted by superior court.

4. Motion to Suppress - Timeliness

State v. Golden, 96 N.C. App. 249 (1989)

Motion to suppress must be filed in superior court at least twenty days prior to trial; trial in district court is notice; will deny an appeal if failed to object at trial. [See *State v. Seagle*, 96 N.C. App. 318 (1989)].

H. OFFENSES

1. DWI--G.S. 20-138.1

a. Jurisdiction

State v. Gunter, 111 N.C. App. 621 (1993), *rev. den.* ___ N.C. ___

Superior Court has jurisdiction after presentment; can then dismiss DWI in district court.

b. Questions

State v. McDonald, 97 N.C. App. 322 (1990)

"State what the lower of the two readings showed the defendant's alcohol concentration to be" is an improper question.

State v. Ferrell, 75 N.C. App. 156 (1985), *rev. den.* 314 N.C. 333

Cannot ask defendant in superior court about failure to testify in district court.

c. Evidence

State v. Adkerson, 90 N.C. App. 333 (1988)

Officer's opinion of impairment admissible.

Pennsylvania v. Muniz, 496 U.S. 582 (1990)

Video tape of performance tests admissible; answers to routine booking questions admissible even without *Miranda*.

d. Sufficiency of Evidence

In re Martin, 333 N.C. 242 (1993)

Judge may not find defendant guilty of careless and reckless when charged with DWI.

State v. Barber, 93 N.C. App. 42 (1989)

Defendant's car went into sideways skid and hit motorcycle; defendant's breath smelled of alcohol and speech was slurred; eyes red, glassy, watering. Defendant swayed and staggered and refused Breathalyzer. Evidence sufficient to prove DWI.

State v. Beasley, 104 N.C. App. 529 (1991)

Defendant failed to dim headlights, crossed center line, was speeding, smelled of alcohol, had glassy eyes, empty beer cans. Trooper gave opinion. Sufficient evidence.

State v. O'Rourke, 114 N.C. 435 (1994)

Weaving in lane, three glasses of wine, strong odor of alcohol, unsteady on feet, physical test showed some impairment, and refusal was sufficient.

State v. Sigmon, 74 N.C. App. 479 (1985)

A Breathalyzer reading of 0.06 does not create a presumption that the defendant is not impaired. It merely prohibits the jury from considering the 0.10 violation under N.C.G.S. 20-138.1(a)(2).

e. Verdict Sheet

State v. O'Rourke, 114 N.C. App. 442 (1994)

A verdict form which does not specify impairment vs. 0.10 is reversible error when defendant refused Intoxilyzer test.

f. Sentencing

State v. Barber, 93 N.C. App. 42 (1989).

Serious injury to another--cut on right heel, broken leg, blood clot in lungs, compressed vertebra, and $8,000 worth of medical bills.

State v. McGill, 114 N.C. App. 479 (1994)

Attend alcohol anonymous is valid condition of probation.

State v. Weaver, 91 N.C. App. 413 (1988)

No error to find three prior DWIs over seven years old outweigh clean record of more than five years.

State v. Denning, 316 N.C. 523 (1986)

Sentencing factors in G.S. 20-179 are not elements of the offense but are merely one of the several factors relating to punishment. Prior DWI conviction is an appropriate sentencing factor and not an additional element.

State v. Field, 75 N.C.App. 649 (1985)

Serious personal injury to another is an appropriate grossly aggravating factor to be considered in punishment and is not an element of the offense.

State v. Gunter, 111 N.C. 608 (1993), *rev. den.* ___ N.C. ___

Defendant going for assessment the day before sentencing insufficient to establish mitigating circumstances. § 20-179(e)(6).

Blood test result of 0.27 and slurred speech, difficulty standing, and asking about a non-existent woman sufficient to establish gross impairment or alcohol concentration of 0.20 or more.

Hitting telephone pole off roadway without hitting brakes sufficient to show "especially reckless driving".

Photographs of car sufficient to prove property damage in excess of $500.00.

Supervised probation appropriate when judge indicates in open court and marks appropriate form.

State v. Haislip, 79 N.C.App. 656 (1986)

Under G.S. 20-179(o) the defendant has the burden of proving by a preponderance of the evidence that at his prior conviction he was indigent, had no counsel, and did not waive counsel. Statement by counsel that the defendant was indigent and a court file with no waiver of counsel is insufficient.

State v. Harrington, 78 N.C.App. 39 (1985)

Aggravating factor of gross impairment under G.S. 20-179(d)(1) does not require an alcohol concentration of 0.20 or more. A person may be grossly impaired

with a lower alcohol concentration--that determination will depend on the facts of each individual case.

State v. Midgett, 75 N.C. App. 387 (1985)

Can increase punishment in superior court or sentence given in district court.

State v. Lockwood, 78 N.C. App. 205 (1985)

A statement by the District Attorney that the defendant was charged with running a red light on the same citation as the DWI is not evidence of especially reckless driving.

State v. Mack, 81 N.C.App. 578 (1986)

Impaired driving is, in and of itself, "reckless" and "dangerous". There must be evidence of excessive aspects of reckless and dangerous driving to prove "especially" reckless or dangerous driving as an aggravating factor.

State v. Harrington, 78 N.C. App. 39 (1985).

As a condition of probation, the court required defendant not go on the premises of any business or private club licensed by the State for the sale and consumption of alcohol between 8:00 p.m. and 6:00 a.m. The condition imposed was reasonably related to the defendant's rehabilitation and is not unduly oppressive.

g. Limited Driving Privilege

State v. Sigmon, 74 N.C. App. 479 (1985)

The granting or denying of a limited driving privilege pursuant to G.s. 20-179.3(a) is for good cause shown, the decision resting in the sound discretion of the trial court. Defendant has no entitlement to a limited driving privilege.

State v. Bailey, 93 N.C. App. 721 (1989)

Judge's statement that he ***never*** gives LDP shows abuse of discretion when defendant did not receive LDP.

2. HABITUAL DWI-- G.S. 20-138.5

a. Jurisdiction

State v. Priddy, 115 N.C. App. 547 (1994).

The offense of habitual impaired driving is a felony within the original jurisdiction of superior court.

b. Indictment

(i) G.S. 15A-928 applies to this offense. *State v. Jernigan*, 455 S.E.2d 163 (1995). The indictment for habitual impaired driving must allege the offense in one count and the prior convictions in another count or in another indictment.

For example, one count should allege that the defendant unlawfully, willfully, and feloniously did drive a vehicle on a highway or public vehicular area while subject to an impairing substance." Remember to allege the word "feloniously" since the offense is a felony. The second count should allege that the defendant "within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) 1 April 1991 of impaired driving in Durham County District Court; (2) 6 March 1990 of felony death by vehicle in Wake County Superior Court; and (3) 4 January 1989 of impaired driving in Durham County District Court."

(ii) Remember that one may indict the defendant with any transactionally-related misdemeanors (for example, driving while license revoked) without the necessity of trying them in district court when the defendant is indicted with the felony of habitual impaired driving. G.S. 7A-271(a)(3); *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98 (1976); *State v. Fearing*, 304 N.C. 471, 284 S.E.2d 487 (1981). It is unnecessary to charge the misdemeanor offense of impaired driving since it clearly is a lesser-included offense of habitual impaired driving.

(iii) Under G.S. 15A-928, the case before the jury will be tried as though it is simply an impaired driving case. The prosecutor may not refer to the charge of habitual impaired driving unless the defendant denies, as set out in G.S. 15A-928(c)(2), one or more of the prior impaired driving convictions, and they must be proved to the jury.

(iv) *State v. Snyder*, 455 S.E.2d 914 (1995), *pet. for rev. pending.* Indictment of Habitual DWI "on a highway" is fatally defective if evidence shows the DWI was on a PVA.

c. Evidence

(i) Although the three prior convictions of "offenses involving impaired driving" [defined in G.S. 20-4.01(24a)] must occur within seven years of the date of the offense of habitual impaired driving, the convictions do not need to occur consecutive to each other as under the habitual felon law. ***State v. Baldwin***, 117 N.C. App. 713, 453 S.E.2d 193 (1995)(Felony habitual impaired driving indictment was sufficient when it alleged that the defendant had been convicted of impaired driving on 13 November 1989 and twice on 12 December 1989).

(ii) A defendant may not collaterally attack a prior impaired driving conviction on ***Boykin*** grounds in the habitual impaired driving prosecution. ***State v. Stafford***, 114 N.C. App. 101, 440 S.E.2d 846 (1994); ***State v. Muscia***, 115 N.C. App. 498, 445 S.E.2d 86 (1994)(no collateral attack at sentencing); ***Custis v. United States***, 511 U.S. ___, 114 S.Ct. 1732, 128 L. Ed. 2d 517 (1994). However, a defendant may collaterally attack a prior impaired driving conviction on alleged right-to-counsel violations, as provided in G.S. 15A-980.

(iii) A defendant's attorney can stipulate to prior convictions without defendant's specific consent. ***State v. Jernigan***, 455 S.E.2d 163 (1995)

d. Sentencing

Under the Structured Sentencing Act, effective for offenses committed on or after 1 October 1995, habitual impaired driving is a Class G felony. Note, however, that for felony sentencing G.S. 15A-1340.14(b)(5) provides that no points may be assigned for any misdemeanor in Chapter 20 except misdemeanor death by vehicle. Thus, no points are assigned, for example, for prior impaired driving convictions.

e. Habitual Felon

A conviction of habitual impaired driving is a felony conviction that may be used to establish habitual felon status. ***State v. Baldwin***, 117 N.C. App. 713, 453 S.E.2d 193 (1995)(The defendant was indicted for felony habitual impaired driving and as an habitual felon; the court ruled that a prior felony habitual impaired driving conviction was a substantive felony conviction that may constitute a felony conviction to establish habitual felon status).

3. VEHICULAR HOMICIDE

a. Second-Degree Murder

*State v. **McBride***, 109 N.C. App. 64 (1993), *on appeal after remand* 454 S.E.2d 840 (1995).

Defendant convicted of second-degree murder and other traffic offenses, given a life sentence plus four years. Defendant driving while his license permanently revoked in the wrong lane with an alcohol concentration of 0.18. Malice can be inferred from defendant driving impaired after being convicted for impaired driving and having his license permanently revoked. If prior convictions are used to prove malice, they cannot be considered in sentencing. Case remanded for resentencing.

*State v. **Byers***, 105 N.C. App. 377 (1992).

Evidence concerning pending DWI at time of fatality is admissible as evidence of malice.

*State v. **Vance***, 328 N.C. 613 (1991).

Impaired driver in wrong lane of travel collided head on with oncoming pickup truck. The force of impact tore defendant's car in two pieces with front section traveling 170 feet beyond point of impact. Two people died instantly. The driver of pickup truck never regained consciousness and died in hospital fourteen months later. The defendant was taken from the front section of the car and told hospital personnel he had a wreck. Two and one-half hours after collision, defendant's alcohol concentration was 0.104.

Malice shown by impaired driving at high rate of speed in the wrong lane. Defendant sentenced to twenty years imprisonment. Supreme court found year-and-a-day rule obsolete but would not apply to this case. Case remanded for sentencing on involuntary manslaughter.

*State v. **Bradley***, 91 N.C. App. 559 (1988), *rev. den.* 324 N.C. 114 (1989).

Defendant had fight with victim and told her he was going to kill her. Grabbed her hair and threw her into car with victim screaming and kicking. Defendant left at high rate of speed with four-year-old child also in car. Defendant drove car in wrong lane and hit oncoming car, victim died. The defendant's alcohol concentration three hours later was 0.108. Defendant sentenced to twenty years imprisonment. Good discussion of malice in opinion.

State v. Snyder, 311 N.C. 391 (1984).

Defendant spent afternoon drinking at bar until bartender refused to serve him. Defendant was evicted from bar for fighting and sped off in his car. Passed a car at a high rate of speed in "No Passing" zone. Forced motorcycle off the road at high rate of speed. Ran red light at intersection between 60-70 m.p.h. and collided with a vehicle, killing three people. Blood alcohol content was 0.23. Sentenced to twenty years imprisonment.

b. Involuntary Manslaughter

State v. McGill, 314 N.C. 633 (1985).

Defendant found in a ditch beside up-side-down car that had collided with another vehicle, killing the occupants. Half-gallon, opened bottle of whiskey was found in defendant's car. Breathalyzer test two hours later showed alcohol concentration of 0.19. Defendant's license permanently revoked with five prior DWI convictions.

Culpable negligence warranting a manslaughter conviction is shown when the defendant drove while impaired and that conduct was one of the proximate causes of the death of the victim. Proof of proximate cause may involve the violation of an additional safety statute, but it is not an essential element of involuntary manslaughter.

State v. Purdie, 93 N.C. App. 269 (1989).

Evidence through accident reconstruction expert showed defendant was in wrong lane of travel when he collided with another vehicle killing occupant. Two hours after collision, defendant's alcohol concentration measured 0.181.

State v. Williams, 90 N.C. App. 614, *cert. den.* 323 N.C. 369 (1988).

Based on observations of physical evidence and witnesses' statements, officer concluded defendant had collided head-on in wrong lane with vehicle killing both occupants. Defendant was lying unconscious in front of car. Witnesses stated the defendant was intoxicated at time of collision. Officer originally listed defendant as passenger.

Evidence that the defendant was originally listed as a passenger was properly excluded. It raised mere conjecture and suspicion which is too remote to be relevant and is also not consistent with defendant's evidence.

*State v. **Brown***, 87 N.C. App. 13 (1987).

Pedestrian found dead on the road with amber turn light lens near the body. One piece of the lens had a Chrysler insignia on it. Trooper went to Chrysler dealership and found similar lens on Dodge van. An hour and a half later, the Trooper found a Dodge van on the side of the road with a broken headlight.

Defendant admitted driving van at intersection where body was found, but denied hitting anyone. Defendant left van because he was intoxicated and drove home with his wife. Defendant convicted of felony hit and run and involuntary manslaughter.

*State v. **Miller***, 80 N.C. App. 425 (1986) *rev. den.* 317 N.C. 711.

Defendant's car overturned at an exit ramp killing the passenger. Lab tests done on defendant showed alcohol concentration of 0.254. Defendant contended the victim was driving. Defendant convicted of involuntary manslaughter.

*State v. **Hefler***, 310 N.C. 135 (1984).

Defendant admitted drinking beer, smoking marijuana, and taking quaaludes prior to driving. The defendant hit a parked car and left the scene. While continuing to drive, went on wrong side of road and hit pedestrian and left the scene. The victim died fourteen months later.

*State v. **Bailey***, 76 N.C. App. 610 (1985).

Defendant's car swerved into wrong lane, collided with a vehicle and killed both occupants. Empty wine and beer bottle found in defendant's car. Results of blood test showed alcohol concentration of 0.17.

*State v. **Hollingsworth***, 77 N.C. App. 36 (1985).

Defendant attempted to pass car and his bumper hit front of the other car. The defendant lost control of car and it crossed over median becoming airborne, collided with car in opposite lane. Passengers in defendants car died. Defendant's alcohol concentration two hours after collision was 0.19.

The jury should not be instructed that victims were negligent by getting in car with impaired driver. However, the jury should have considered whether car's action in the opposite lane in failing to avoid a collision with the defendant was negligent and the sole proximate cause of the defendant's passengers' death.

State v. Hillard, 81 N.C. App. 104 (1986).

Defendant drove car left of center, forced at least four oncoming cars off the highway, and then struck the victim's car head-on. Hospital and SBI blood tests showed alcohol concentration of 0.0. Blood Valium content was 0.07. Defendant admitted drinking two beers and taking two 10 milligram Valium tablets.

c. **Felony Death By Vehicle**

State v. Williams, 90 N.C. App. 614, *cert. den.* 323 N.C. 369 (1988).

The offense of felony death by vehicle requires the identical essential elements to those required for a conviction of involuntary manslaughter. It is not a lesser included offense of involuntary manslaughter involving impaired driving.

d. **Evidence**

State v. Purdie, 93 N.C. App. 269 (1989)

Accident reconstructionist can give opinion concerning the lane of travel when collision occurred based upon rotation and final resting position of cars, location of debris, and gouge marks in the pavement and contact between cars. May have argument to give opinion as to speed. May overrule *Coley v. Garris*, 87 N.C. App. 493 (1987), *rev. den.* 321 N.C. 742 (1988), where Trooper prohibited from estimating speed based upon physical evidence.

State v. Vance, 328 N.C. 613 (1991)

Year and a day rule abolished.

State v. McBride, 454 S.E.2d 840 (1995)

Driving vehicle recklessly while impaired when driver had previous DWI and license permanently revoked is sufficient for judge at sentencing to determine automobile constituted weapon or device knowingly used by defendant which created great risk of death to more than one person. G.S. 15A-1340.16(d)(8).

e. **Sentencing**

State v. Richardson, 96 N.C. App. 270 (1989)

Cannot punish for both DWI and felony death by vehicle.

f. Restitution

*State v. **Burkhead***, 85 N.C. App. 535 (1987).

Restitution award must be supported by evidence. Pain and suffering can be compensated if there is evidence to support amount.

*State v. **Smith***, 90 N.C. App. 161 (1988), *aff'd per curiam* 323 N.C. 703 (1989), *cert. den.* 109 S. Ct. 2453, *remand appeal* 99 N.C. App. 184 (1990).

The court must consider the defendant's ability to pay restitution when setting amount.

*State v. **Smith, id.***, 99 N.C. App. 184 (1990).

By tying the amount of restitution which may be imposed as a condition of probation to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the measure of recoverable damages applying in the relevant civil action--in this case the measure of damages in a wrongful death action--for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation under N.C.G.S. 15A-1343(d), and the statute of limitations of the civil remedy is not applicable.

I. INSTRUCTIONS

1. Coercion

State v. Cooke, 94 N.C. App. 386 (1989)

Coercion--defendant drove away from party because people chased him; stopped 30 minutes later; may have been fearful at first but not 30 minutes later.

2. Credibility

State v. Cooke, 94 N.C. App. 386 (1989)

Pattern Instructions sufficient on credibility of chemical analyst.

3. Entrapment

State v. Bailey, 93 N.C. App. 721 (1989)

Entrapment **not** shown when defendant said officer spoke with him but failed to instruct him not to drive, which instruction he would have followed.

4. Necessity

State v. Gainey, 84 N.C. App. 107 (1987)

Defense of necessity not available when defendant driving van attempting to push another car off the road.

J. APPEALS

State v. Absher, 329 N.C. 264 (1991)

No right to appeal a guilty plea from superior court to court of appeals.

State v. Barber, 93 N.C. App. 42 (1989)

Court held evidence was sufficient to be submitted to jury when: defendant's car went into sideways skid and hit motorcycle; defendant's breath smelled of alcohol and speech was slurred; eyes red, glassy, watering. Defendant swayed and staggered and refused Breathalyzer.

1. Motion for Appropriate Relief

State v. Morgan, 108 N.C. App. 693 (1993) *rev. den.* 335 N.C. 551.

District court judge could set aside own verdict but could not enter not guilty--only set for new trial.

District court judge can set aside sentence two days later if not supported by the evidence and resentence the defendant.

2. Motion to Dismiss - Procedure

State v. Golden, 96 N.C. App. 249 (1990)

After guilty plea in superior court, no right to appeal motion to dismiss to court of appeals; can petition for writ of certiorari.

State v. Shoff, ___ N.C. App. ___ (16 May 1995)

Defendant has no right to pretrial appeal on double jeopardy grounds, but may file petition for certiorari.

I. RECENT CASES

A. Supreme Court Cases

1. Whren v. United States, 517 U.S. ___, 135 L. Ed. 2d 89 (June 10, 1996)

Facts: Plain-clothes police officers in Washington, DC were patrolling a "high drug area" in an unmarked vehicle and observed a truck driven by co-defendant Brown waiting at a stop sign at an intersection for an unusually long time; the truck then turned suddenly, without signaling, and sped off at an "unreasonable speed". The officers stopped the vehicle, assertedly to warn the driver about the traffic violations, and upon approaching the truck observed plastic bags of crack cocaine in the defendant's (Whren's) hands. Brown and Whren were arrested.

Issue: Should the evidence be suppressed based upon the fact that an officer's stop of the vehicle for a traffic violation was pretextual?

Held: Stopping a vehicle for a traffic violation, when there is probable cause to believe the traffic violation was committed, does not violate the Fourth Amendment, regardless of the officer's motivation for doing so. This case effectively overrules State v. Morocco, 99 N.C. App. 421 (1990), which had ruled that the test to determine whether a stop is pretextual is what a reasonable officer ***would*** do rather than what an officer legally ***could*** do. The supreme court did not discuss whether its ruling would also apply when an officer has only reasonable suspicion for a traffic violation, although that is the likely rule since this case analyzed the Fourth Amendment. This decision does not change Fourth Amendment law that allows an officer to make an investigatory stop of a vehicle based upon reasonable suspicion. See, for example, Alabama v. White, 496 U.S. 325, 110 L. Ed. 2d 301 (1990); United States v. Brigononi-Ponce, 422 U.S. 873, 45 L. Ed. 2d 607 (1975).

2. Robinette v. Ohio, ___ U.S. ___, 135 L. Ed. 2d 188 (1996).

Facts: An Ohio deputy sheriff stopped Robinette for speeding, gave him a verbal warning, and returned his drivers license to him. The deputy then asked whether Robinette was carrying illegal contraband, weapons, or drugs in his car. Robinette answered "No" and consented to a search of the car, which revealed a small amount of marijuana and a pill. He was arrested and later charged with carrying a controlled substance when the pill turn out to be a methamphetamine.

Issue: Does the Fourth Amendment require that a lawfully seized defendant be advised that he is "free to go" before his consent to search will be recognized a voluntary?

Held: The Supreme Court refuses to adopt bright line rules and does not require the officer to tell the defendant he is "free to go" before requesting his consent to a search. The Court looks at all of the circumstances in deciding whether the consent was

voluntary. If the officer told the defendant he was "free to go", this is one factor that would make the consent appear voluntary, but it is not required. There is no "first tell then ask" rule.

B. State Cases

1. DWI Cases

a. State v. Watson, 122 N.C. App. 596 (1996)

Facts: A vehicle which weaves within its lane for fifteen seconds at night is sufficient to establish reasonable suspicion for a stop.

b. State v. Barnes, 123 N.C. 144 (1996)

Facts: A Highway Patrol Sergeant who was acting as a shift supervisor decided to set up a checking station to check licenses and vehicle registrations. He considered the likelihood of detecting people who were violating the motor vehicle laws, the traffic conditions, the traffic volume which would pass through the roadblock, and the convenience of the public. The Patrol officers intended to stop all vehicles that approached the roadblock from either direction to detect drivers license, registration, and other motor vehicle law violations, including impaired driving. The roadblock was established on a road at 12:45 a.m., taking into account there are higher incidents of impaired driving during weekend early morning hours. The Sergeant's unmarked patrol car was parked in the paved median dividing the lanes of the road, and another unmarked patrol car was parked on the shoulder. At least one of the patrol cars had its blue lights activated. Barnes was stopped and asked to show his license. He was subsequently arrested for DWI and attacked the constitutionality of the checking station.

Held: The court held that the Patrol directive and the conduct at this roadblock substantially complied with G.S. 20-16.3A, and the stop was constitutional. See also, State v. Sanders, 112 N.C. App. 477 (1993).

c. State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (11/5/96)

Facts: Trooper was directing traffic with hand signals near the area of a potential hostage situation. Rogers' vehicle approached the intersection and, instead of turning left as the officer directed, the defendant stopped his vehicle in the intersection. The Trooper approached the vehicle and noticed a strong odor of alcohol on the driver's breath. He directed Rogers to drive to the shoulder of the road where he administered a single Alco-Sensor test which revealed a reading of 0.13.

Held: The court upheld the stop, finding reasonable suspicion based upon the strong odor of alcohol on the defendant's breath. The court also found that the strong odor of alcohol was sufficient to establish probable cause of impaired driving. The court could not use the Alco-Sensor reading because the Trooper failed to administer a second test as required by the rules governing the use of Alco-Sensors (15A NCAC 19B.0501-0503), which requires "if a test made without observing a waiting period results in an alcohol concentration reading of 0.08 or more, the officer shall wait five minutes and administer an additional test. If the results of the additional test show an alcohol concentration reading more than 0.02 under the first reading, the officer shall disregard the first reading". 15A NCAC 19B. 0502(b)(2). See also, NCSHP Directive No. G.7.

d. State v. Oliver, 343 N.C. 202 (1996)

Held: Ten-day pretrial revocation is not punishment and the subsequent criminal charge is not barred by the double jeopardy clause.

e. State v. Snyder, 343 N.C. 61 (1996)

Facts: The defendant, who had been convicted of three counts of involuntary manslaughter in 1984, drove to the Lost Dimensions nightclub in Greensboro. After drinking all day, and "messing with the girls", he was told by the management to leave. Apparently, he pulled a knife and the Greensboro Police Department was called. The defendant was stopped for driving his vehicle in the parking lot of the club. The court told the jury that the parking lot of the club was a public vehicular area instead of letting them decide that issue for themselves.

Held: The North Carolina Supreme Court said in this case the judge was correct. The mere fact there is a sign that parking is for members and their guests is not sufficient to make it a jury question. If there is a "No Trespassing" sign or other indication that the parking lot is private, then the issue is one for the jury. [Members should be prepared to testify in detail as to the use of the parking lot by motorist.]

f. State v. Crawford, COA95-1359 (2/4/97)

Facts: At 3:24 a.m., Guilford County Deputy responding to dispatch to check suspicious vehicle parked on road. Deputy found driver's door open and defendant sitting in car with on leg hanging out. Defendant was semi-conscious, his knee and shirt wet from drool, and pants undone. Defendant was alone, had odor of alcohol, refused to get out, and started to put key into ignition. Defendant was arrested for DWI.

Issue: (1) Did the Deputy have probable cause to believe defendant drove while impaired. (2) Can Deputy arrest without a warrant.

Held: (1) There was probable cause since driver was alone, car engine was warm, defendant had the key. (2) Deputy could arrest without warrant since it was likely defendant would drive again if did not arrest. (This was prior to change in law authorizing DWI arrests committed outside presence of officer.)

C. Pending Issues

1. Admissibility of HGN.

Issue: State v. Helms, COA-96-1060, is pending in the North Carolina Court of Appeals which raises the issue of the admissibility of an officer's testimony as to the results of a horizontal gaze nystagmus test. The lower court admitted it and the defendant was convicted. The defendant has now appealed. It is likely the court will rule this evidence to be admissible provided the following evidence is presented in court:

a. the training of the officer
b. whether the officer is certified by an organization.
c. the number of times an officer has used the test in his/her work
d. whether the officer followed the procedures set forth in the officer's training

The officer can then testify that based upon the results of the HGN test, as well as all other observations of the defendant, in the officer's opinion, the defendant was impaired. Some states have allowed officers to testify that based upon the results of the HGN test, the defendant had an alcohol concentration of more than 0.10. It is unclear what the North Carolina Court of Appeals will allow the officers to say.

2. First Degree Murder

Forsyth County District Attorney has filed first degree capital murder charges against two drivers for collisions in which a victim was killed and another was seriously injured. The felony-murder rule was used. The felony was assault with a deadly weapon inflicting serious injury on the injured passenger. The felony was used to raise the second degree murder of the other victim to first degree murder.

II. RECENT CHANGES IN STATUTES

Short Title: Blue Light Bandit

Effective Date: December 1, 1996

Punishment is changed from misdemeanor to a felony. It is now a Class I felony for a person who is not a law enforcement officer to operate a vehicle on a highway or PVA with an operating blue light as defined in G.S. 20-130.1(c). G.S. 14-277(d1)(3).

It is now a Class H felony for a non-law enforcement officer to drive a vehicle equipped with an operating blue light in such a manner as to cause a reasonable person to yield right-of-way or to stop his vehicle in obedience to such blue lights. G.S. 14-277(d1)(4).

Enforcement Notes:

These offenses were misdemeanors prior to the amendment. The amendment did not change the elements of the offense--only the punishment.

Short Title: Digitized Drivers License

Effective Date: June 21, 1996

DMV is issuing new drivers licenses, both CDL and regular, with an encrypted bar code on the back.

Enforcement Notes:

The new licenses will be phased in over the next five years. There is no requirement for a person to obtain a new license. The new licenses are color-coded and have a description on the back of the vehicles which can be driven and the restrictions and endorsements. A new special identification card for non-operators is also being issued.

Short Title: Deleted "L" CDL Endorsement

Effective Date: June 21, 1996

The "L" endorsement was for vehicles longer than twin trailers. Since such vehicles were illegal to operate, the endorsement was repealed.

Short Title: Amber Lights on Vehicles

Effective Date: October 1, 1996

Rural letter carrier and newspaper delivery vehicles must be equipped with and operate "flashing amber lights" at all times the vehicle is being used for delivery of mail or newspaper whether vehicle is attended or unattended.

A violation of this act is an infraction.

Enforcement:

The use of flashers meets the requirements of this statute. The flashers, however, either prevent the brake lights and turn signals from working or no longer flash when the lights or signals are used. Consequently, these two types of delivery vehicles probably need a separate flashing light.

Short Title: Speed Limits

Effective Date: October 1, 1996

It is a Class 2 misdemeanor to drive a vehicle at more than 15 m.p.h over the limit (even if less than 55 m.p.h.) or over 80 m.p.h. (no matter what the posted speed limit).

It is a Class 1 misdemeanor, while attempting to elude arrest, to speed more than 15 m.p.h. over the limit and in excess of 55 m.p.h or in excess of 80 m.p.h. (no matter what the posted limit).

Enforcement Notes:

81 .m.p.h. in a 70 m.p.h. zone is a Class 2 misdemeanor. It will result in a mandatory 30-day revocation for first offense. G.S. 20-16.1. For a second such offense occurring within one year of the first offense the revocation is 60 days. A limited driving privilege is available for the first offense. A one-year discretionary revocation by DMV is also authorized. G.S. 20-16(10a) and 20-19. The non-resident violator compact does not apply to 81 mph in a 70 mph.

Driving in excess of 80 m.p.h. while attempting to elude arrest is a mandatory 1 year revocation without a limited driving privilege but only if the speed is at least 15 m.p.h. over the legal limit. G.S. 20-17(10); 20-19.

Short Title: Restoration of License

Effective Date: January 1, 1996

Upon conviction of DWI, 20-138.1, DWI in a CMV, 20-138.2, [provided the conditions of G.S. 20-17(2) are met] or under age driving after drinking, G.S. 20-138.3, the driver must receive a substance abuse assessment and either complete treatment or ADETS.

A conviction for first offense mandates a one-year revocation. At the end of the year, DMV will not restore the driver's license unless it has received a certificate of completion from the treatment program or ADETS. if no certificate is received, G.S. 20-17.6 provides that the period of revocation is extended until the certificate of completion is received by DMV.

Enforcement Notes:

A limited driving privilege (LDP) is sometimes available for a first conviction. LDP is only valid for one year. At the end of the one year the driver may not use the LDP as authorization to drive. If the certificate of completion has not been received by DMV, the appropriate charge is DWLR.

If the certificate of completion has been received, but the driver has not paid the reinstatement fee or has not obtained a license for any reason (other than being revoked for another offense), the proper charge is NOL.

The DMV computer should indicate that the driver is revoked if the certificate has not been received and eligible for reinstatement if the certificate has been received but the driver has not paid the reinstatement fee or has not bothered to go get a new license.

Short Title: Assault Inflicting Serious Bodily Injury

Effective Date: January 1, 1997

Under new G.S. 14-32.4, a person is guilty of ***assault inflicting serious bodily injury*** if the person:

1. Assaults
2. Another person
   And
3. Inflicts serious bodily injury

Punishment for this offense is a Class F felony. ***Serious Bodily Injury*** is defined as to include, among other things, bodily injury that creates a substantial risk of death, causes serious permanent disfigurement, or results in prolonged hospitalization.

Enforcement notes:

If a deadly weapon is used, then the better statute is assault with a deadly inflicting serious injury (or even serious bodily injury), because the punishment is a Class E felony. G.S. 14-32(b). A motor vehicle collision involving serious injury or serious bodily injury should be charged under G.S. 14-32(b) since a motor vehicle is a deadly weapon. Also, the General Assembly did **not** repeal the misdemeanor of assault ***inflicting serious injury*** under G.S. 14-33(c).

Short Title: <u>Assault on a LEO with a firearm</u>
<u>Assault on a LEO inflicting serious bodily injury</u>

Effective Date: December 1, 1996

The General Assembly passed two new laws making it a felony to:

Assault with a firearm on a law enforcement officer:

1. Assault
2. with a firearm
3. a law enforcement officer

This offense is a Class E felony. G.S. 14-34.5.

Assault on a law enforcement officer inflicting serious bodily injury

1. Assault
2. a law enforcement officer
3. in the performance of the officer's duties
   And
4. Inflicts ***serious bodily injury.***

This offense is a Class F felony. G.S. 14-34.7. There is no definition of ***serious bodily injury***, but the court will probably use the one in G.S. 14-32.4.

Enforcement notes:

If serious bodily injury is inflicted and a deadly weapon is used, G.S. 14-34.5 should be charged since it is a Class E felony and G.S. 14-34.7 is a Class F felony.